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VOL. I.

Vakil High Court
SRINAGAR (Kashmir)

BY

V. V. CHITALE, B.A., LL.B.

AND

R. NARAYANASWAMI IYER, B.A., B.L.

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ACCORD AND SATISFACTION.

See also CONTRACT ACT, S. 62.

———*Plea of — Extinguishment of prior rights.*

Where there is accord and satisfaction by a substituted agreement, the antecedent rights of the parties *inter se* are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure and the rights of all the parties are fully represented by it. (*Lord Moulton.*) SAMINATHAN CHETTY *v.* PALANIAPPA CHETTY. **18 C. W. N. 617 = (1914) A.C. 618 = 26 I. C. 228 = 41 I. A. 142 (P.C.)**

ACCOUNTS.

See (1) CO-SHARER.
(2) COURT FEES ACT.
(3) CONTRACT ACT, Ss. 213, 253 to 258.
(4) EVIDENCE ACT, Ss. 34, 114, etc.
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ACCOUNTS.

Cause of action.
Liability.
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Mortgagor and Mortgagee.
Principal and Agent.
Settled.
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Cause of action.

———*Cause of action—Limitation.*

Where there are dealings between two parties which give rise to a continuous account so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided. (*Jenkins, C. J. and Woodroffe, J.*) KEDAR NATH MITTER *v.* DINOBANDHU SAHA. **42 Cal. 1043 = 31 I. C. 626 = 19 C. W. N. 724.**

———*Cause of action—Splitting of—Test.*

If the items in an account are so connected together that it appears the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid, shall be united with another and form one continuous demand the whole together forms but one cause of action and cannot be divided.

It is a question of fact, to be determined on the merits of each case, whether there was an intention to keep only one account for all the dealings. (*Kemp, A. J. C.*) FIRM OF LILARAM MADHAVDAS *v.* FIRM OF HUSSEINBHOY KARIMJI AND SONS. **67 I. C. 44 = 15 S. L. R. 207 = 1922 S. 15.**

Liability.

———*Liability to render—Agent of guardian of minor—Liability of agent to minor.*

ACCOUNTS—Liability.

An agent appointed by a guardian of a minor is not liable to account to the minor for acts done by him as agent, the principle regarding trustees *de son tort* not being applicable to him. (*Abdur Rahim, O. C. J. and Ayling, J.*) RAMANATHAN CHETTIAR *v.* MUTHIAH CHETTY.
43 Mad. 429=38 M. L. J. 247=11 L. W. 405=56 I. C. 358=(1920) M. W. N. 270=27 M. L. T. 242.

Limitation.

See LIMITATION ACT, ARTS. 85, 88 AND 89.

Mortgagor and Mortgagee.

See (1) C. P. CODE, O. 34, RR. 2—8.
(2) T. P. ACT, SS. 72 AND 76.

Principal and Agent.

See also (1) CONTRACT ACT, S. 213.
(2) LIM. ACT, ARTS. 89 AND 90.

———*Principal and agent—Whole accounts to be taken.*

Although an agent must render accounts to his principal of all his dealings in the various transactions carried on by him as agent on behalf of the principal, yet, unless there is a special contract in that behalf, the principal is not entitled to select capriciously a single transaction and obtain the fruits thereof without an adjustment of the rights and liabilities of the parties in relation to their transactions. (*Mookerjee and Holmwood, JJ.*) GODHAN RAM BHAKAT *v.* JAHARMALL.
40 Cal. 335=17 C.W.N. 67=16 I.C. 583=17 C. L. J. 636.

———*Principal and agent—Suit for sums due.*

A suit for money found due from an agent on an account being taken, and a suit for rendering an account are really identical. 32 Cal. 719, Rel. (*Saharfuddin and Coxe, JJ.*) JHAPAJHANESSA BIBEE *v.* BAMA SUNDARI CHAUDHURANI.
16 C. W. N. 1042=16 I.C. 414=16 C.L.J. 288.

———*Principal and agent—Suit for accounts—Mode of proving items in dispute.*

In proving accounts, the best mode is to call upon the defendant to show what items he disputes and then ask the plff. to prove them. (*Chevis, J.*) TULSIRAM *v.* KARMCHAND.
36 P.L.R. 1912=13 I.C. 955=25 P.W.R. 1912.

Settled.

———*Settled, Reopening of.*

A person, who, has executed a second account and a promissory note to pay the dues under the previous account, he having first examined the previous account and acknowledged its correctness, cannot be allowed to question the settlement and reopen the accounts. (*Ryves and Gokul Prasad, JJ.*) BENAYAK PRASAD PANDE *v.* BISHUN DATT PATHAK. L. R. 3 A. 308.

———*Settled, Re-opening of—Fraud—Error.*

Accounts settled between parties may be re-opened on the ground of substantial error or fraud. If the errors are sufficient in number and importance whether caused by fraud or mistake or where the parties occupy a fiduciary relation *e.g.*, trustee, agent, guardian, etc., it is easier to re-open the account. (*Mears, C. J. and Bannerji, J.*) BHAGWAN BAKSH SINGH *v.* JOSHE DAMODARJI.
42 A. 230=59 I. C. 20=18 A. L. J. 100.

ACCOUNTS—Settled.

———*Re-opening of—Some fraudulent entries—Proof of—Re-opening of whole accounts.*

If in a settled account a single fraudulent entry is shown in the case of persons occupying the position of principal and agent or trustee and *cestui que trust*, the Court will actually re-open an account extending over a great number of years. (*Walsh and Stuart, JJ.*) PURAN MAL *v.* FORD AND MACDONALD CO. LTD. 41 All. 635=52 I.C. 373=17 A.L.J. 805.

———*Settled—Reopening of—Fraud.*

In a suit the plaintiff prayed that the defendant No. 1 might be ordered to render correct accounts of the profits of certain property and that upon the taking of those accounts, the document should be held to be valid only for the amount that should be found due on taking the accounts. The document itself and the circumstances of the case do not suggest fraud but that a certain debt was fraudulently entered as consideration :

Held, that the plaintiff alleged no fraud entitling him to go into evidence to reopen the accounts which were settled at the time the mortgage was executed. (*Richards, C.J. and Banerji, J.*) RAMJI *v.* KOMAN DAS. 35 I.C. 603 (All.)

———*Settled—Re-opening of—When allowed.*

Where accounts are impeached on the ground of fraud, two or three instances of particular items, which can be taken as false and fraudulent, must be brought to the notice of the Court before it can be called upon to order the accounts to be re-opened from the first. But before the defendant could ask the Court to re-open the account, he is bound to allege fraud. (*Macleod, C. J. and Coyajee, J.*) SANKAL CHAND *v.* CHIMANLAL.
70 I.C. 839=1923 Bom. 16 (1.)

———*Settled—Re-opening of—Reasons.*

An account once taken in the presence of the parties interested and acquiesced in by them will not be lightly reopened. (*Mookerjee and Panton, JJ.*) PULIN BEHARI ROY *v.* MAHENDRA CHANDRA GHOSAL. 67 I.C. 10=34 C.L.J. 405.

———*Settled—Suit on—Other accounts.*

An action for the balance of a settled account would not be restrained merely because there were other unsettled accounts between the parties. (*Mookerjee and Roe, JJ.*) RAMNATH GAGOI *v.* PITAMBAR DEB. 43 Cal. 733=22 C.L.J. 339=31 I.C.430=21 C.W.N. 632.

———*Settled—Suit for excess commission retained by.*

A suit for the recovery of the excess commission retained by an administrator *pendente lite* is not so much a case of opening a settled account as of enforcing a claim against fiduciary agent. (*Jenkins, C. J. and Woodroffe, J.*) OSMOND BEEBY *v.* KHITISH CHANDRA.
41 Cal. 771=26 I.C. 284=18 C.W.N. 631.

———*Settled—Re-opening of—Trustee and* Cestui-que-trust.

Some objection in substance or some error in the account must be shown to re-open an account settled between a trustee and *Cestui-que-trust*. (*Holmwood and Chapman, JJ.*) BEJOY KRISHNA MAJUMDAR *v.* DWARIKA KRISHNA MAJUMDAR.
25 I. C. 218 (C).

ACCOUNTS—Settled.

———*Settled— Re-opening of—Principal and agent—Claim against surety.*

As between a principal and an agent, settled accounts will not be re-opened unless fraud or undue influence is established. In a suit by the principal against the surety, the surety is not bound by an admission of the debtor as to the sum due. He is not even concluded by a judgment or award against the principal; he is entitled to have the accounts taken in his presence. (*Mookerjee and Beachcroft, JJ.*) KALANAND SINGH *v.* SRI PRASAD DAS. 17 C. W. N. 1060= 19 I. C. 901=19 C. L. J. 152.

———*Settled—Re-opening of.*

An account which has been settled and acquiesed in, cannot be re-opened unless fraud is proved though the accounts may be wrong and final settlement had not been made. (*Mookerjee and Teunon, JJ.*) GOKUL KRISHNA DAS *v.* SHASHI MUKHI DASI. 15 C.L.J 204=13 I.C. 23= 16 C. W. N. 299.

———*Settled—Re-opening of.*

Only on specific allegations of fraud or mistake a settled account can be re-opened. (*Le Rossignol, J.*) RADHA KISHEN *v.* TIRATH RAM. 1 Lah. L. J. 220.

———*Settled—If bar to suit.*

Where in a suit for recovery of money from the deft. it is found that the plff. had, after a settlement of accounts, admitted his liability to pay the deft. a certain sum of money. *Held*, that as there was no settlement by compromise by the parties but only an ascertainment of the exact balance upon an examination of the accounts, the plff. was not barred from showing that there were errors in the accounts, but in view of the admission of the plff. the onus lies on him to show that the accounts were not properly examined. 5 M.I. A. 372; 32 B. 353, Dist. (*Shah Din and Chevis, JJ.*) KHAZAN CHAND *v.* COMMITTEE OF THE NOTIFIED AREA, SANGLA HILL. 62 P.L.R. 1918= 46 I.C. 545=133 P.W.R. 1918.

———*Settled—Re-opening of—Defence to a suit.*

If circumstances are proved which would entitle an obligee to go behind a settled account, he would be equally entitled to plead in defence to a suit based on an obligation alleged to flow from any such settled account, that the consideration based on that account has never been received. The mere fact that a mortgage has been taken by way of security for that obligation does not disentitle the deft. from raising the plea. (*Sadasiva Iyer and Phillips, JJ.*) ZEMINDAR OF KARVETNAGAR *v.* SUBBARAYA PILLAI.
(1918) M. W. N. 146=43 I.C. 871=7 L. W. 36.

———*Settled—Re-opening of.*

The Court will re-open a settled account where the account has been shown to be erroneous to a considerable extent in amount as well as in the number of items and also where a fiduciary relation exists though a less considerable extent of error is shown or one or more fraudulent errors or omissions are shown. (*Abdur Rahim, O.C.J. and Phillips, J.*) RAMASWAMI AIYER *v.* GNANAMANI NACHIAR. 31 M.L.J. 851=
(1917) M.W.N. 121=37 I.C. 984=5 L.W. 279.

ACCOUNTS—Suit for.

———*Settled—Suit on the original transaction.*

Where accounts were taken between a mortgagor and a mortgagee and it was agreed that a certain portion of the property should be sold for the amount due to the plaintiffs: *Held*, that a suit was not maintainable on the mortgages and the only course open to the plaintiffs was to sue for the specific performance of the contract to sell. (*Sankaran Nair and Oldfield, JJ.*) ELICHI USSACK *v.* RAMASWAMI IYER.
29 I.C. 982=28 M.L.J. 662.

———*Settled—Re-opening of—Grounds for.*

Where the creditors and a servant of a debtor drew up a settlement of accounts in the absence of the debtor and the debtor in return signed the settlement without scrutiny the debtor could not be bound by the settlement. A Court will not hold a party liable to a settlement which has been obtained from him under improper circumstances and it will allow him to surcharge and falsify it especially when the intention of the parties was merely to ascertain the state of accounts and not to accept a lump sum in settlement of their differences. 5 M.I.A. 372, Rel. (*Wallis, C.J. and Coutts Trotter, J.*) KRUPASINDHU SAHU *v.* RAJA OF KALLIKOTA. 29 I.C. 718 (M.)

———*Settled, Re-opening of—Mistake can be proved.*

A person is always entitled to prove if he can that there was a mistake in the accounts and that he signed them as correct by mistake. (*Batten, J. C.*) SETH BHOJRAJ *v.* PANDA SHANKARNATH. 71 I.C. 45 (2)=1922 Nag. 265.

———*Settled—Re-opening of—Error.*

A settled account cannot be re-opened without specifically charging at least one definite and important error and supporting it with evidence confirming it. 9 Ch. D. 529 Rel. (*Drake-Brockman, J. C. and Findlay, A.J.C.*) PADAM RAJ *v.* GOPIKISAN. 56 I C. 129. (N.)

———*Settled—Re-opening of—Error—Onus.*

Where an account has been settled up to a certain date, it lies on the party to re-open that account to aver some specific error in the account and to prove it. (*Fox, C.J. and Hartnoll, J.*) EBRAHIM AHMED MEHTER *v.* ABDUL HUQ.
8 L.B.R. 149=27 I.C. 879=8 Bur. L.T. 116.

Stated—What is.

———*Stated—What is.*

'An account stated' is one where several cross items are set off one against the other and the balance is struck off in favour of one of the parties. In such cases, a new promise by the other party to pay the balance is implied, and hence a statement of account need not be made within the period of limitation for recovery of several cross-items. (*Jwala Prasad, J.*) SURAJ PRASAD *v.* BONEKE. 56 I.C. 379.= 1 P. L. T. 190=5 P. L. J. 371.= 2 U. P. L. R. 105. (P.)

Suit for.

———*Suit for—Partnership—Mode of taking—Omission to produce—Effect of.*

ACCOUNTS—Suit for.

It is obligatory on each partner to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives. The occasion in certain cases arises after the preliminary decree is made. At that stage each partner should be served with the notice contemplated by S. 66 of the Evidence Act to produce such accounts and papers as may be in his custody. If he omits so to produce an adverse inference would be drawn against him. Besides secondary evidence will become admissible and the person withholding the document will not be able to use the original document as evidence at a later stage without the consent of the other party or the order of court. (*Mookerjee and Panton, JJ.*) PULIN BEHARI ROY *v.* MAHENDRA CHANDRA GHOSAL.

67 I. C. 10=34 C. L. J. 405.

———*Suit for—Papers necessary for preparing account with Plaintiff and not produced—Suit not maintainable.*

Where after the Naib of a Zemindar was removed from his office the Zemindar sued him for rendition of accounts for a certain period and it was proved that the papers necessary for furnishing the account were with the plaintiff and the latter would not produce the same. The suit was *held* as not maintainable. (*Richardson and Shamsul Huda, JJ.*) JATINDRA NATH DUTTA *v.* SURESH CHANDRA ROY. 24 C. W. N. 922= 59 I. C. 181.

———*Suit for—Non-production of accounts—Effect of.*

In a suit for accounts non-production of accounts by the party having the custody of them justifies the presumption under S. 114 (*g*) of the Evidence Act that they are withheld because they are unfavourable. If the plff. withholds the accounts, though claiming accounts, his suit is liable to be dismissed. If it is the deft. who withholds them, the Court will proceed on the evidence of plffs. making every presumption against deft. If deft. has contumaciously refused or omitted to comply with the order for production, the Court may enforce obedience by imprisonment or attachment of property or both. 13 C. W. N. 696, 19 W. R. 14 Ref. (*Mookerjee and Panton, JJ.*) DEBENDRA *v.* NARENDRA.

24 C. W. N. 110=54 I. C. 636=30 C. L. J. 417.

———*Suit for—Plaintiff must produce accounts.*

In a suit by a manager or agent against his employer for settlement of accounts, the plaintiff must produce all accounts and documents admitted or proved to be with him. Refusal to do so will lead to dismissal of suit. (*Shadi Lal, C. J. and Wilberforce, J.*) MOHAN LAL *v.* NORTH WESTERN RAILWAY CO-OPERATIVE STORES ASSN-LTD. 5 Lah. L. J. 19.

———*Suit for—With-holding of accounts by plff. —Loss of account books not proved.*

A plff., who has the accounts with him cannot ask a Court to take the accounts, whilst he withholds the evidence which is in his power, 13 C. W. N. 696 Foll. In the absence of the evidence of the loss of the account books secondary evidence of their contents is not admissible.

ACCRETION.

(*Shadi Lal and Dundas, JJ.*) THAKUR DAS *v.* JANARDAN.

56 I. C. 940=1 Lah. L. J. 242.

———*Suit for—Commissioner—Court—Respective functions of.*

The questions as to whether settled accounts can be re-opened and whether accounts included in another suit by plaintiff are not to be included in a suit for accounts are legal questions which must be decided by the Court and not by the Commissioner. (*Le Rossignol, J.*) RADHA KISHEN *v.* TIRATH RAM. 1 Lah. L. J. 220.

———*Suit for—Valuation—Appeal—Jurisdiction.*

The value of a suit for accounts both for original trial and for appeal is the value stated in the plaint by the plff. and the court trying such suit does not lose its jurisdiction because the amount found due on enquiry exceeds the jurisdiction of the court. (*Batten and Stanyon, A. J. C.*) ALPHERTS v. ARJUNDAS.

20 I. C. 928=9 N. L. R. 112.

———*Suit for—Procedure—Determination of defendant's liability—Filing of accounts.*

In a suit for accounts by a principal against his agent or a beneficiary against a trustee where the defendant disputes his liability to account, that issue must first be determined before an account is taken. In a suit for accounts the court should, in the first instance, follow the procedure of calling upon the defendant to file his accounts. (*Miller, C. J., and Mullick, J.*) RAI BAHADUR HARIHAR PRASAD SINGH *v.* MAHARAJA KESHO PRASAD SINGH. 3 Pat. L. T. 638= 71 I. C. 911=1922 P. 598.

Suit on.

———*Suit on—Acknowledgment—Suit on basis of—If lies.*

A suit for a sum of money due upon account stated between the parties and for money lent can be based on a mere acknowledgment. 3. A.L.J. 800, foll. 23 A. 502, not foll. (*Richards, C.J. and Banerjee, J.*) KALLU *v.* BHAGIRATH LAL.

40 I. C. 58 (A).

———*Suit on—Balance struck.*

In a suit on accounts, plff. must prove his dues on the accounts, and the deft. is not absolutely prohibited from going behind a balance struck by him. The legal value of such a striking of balance as evidence depends on the facts of each case. (*Chevis, J.*) BUDH RAM *v.* RALLI RAM.

37 I. C. 300=103 P. W. R. 1916.

Suit—Small Cause.

See PROV. SMALL C. C. ACT, SCH. II, ARTS. 30 AND 31.

Trustee.

See (1) C. P. CODE, S. 92.
(2) TRUSTS ACT, SS. 55—69.

ACCRETION.

See (1) BENGAL ALLUVIAN AND DILUVIAN REGULATION, XI OF 1825.
(2) HINDU LAW.
(3) LANDLORD AND TENANT.
(4) LAND TENURES.
(5) T.P. ACT, SS. 63, 72 AND 108.

ACCRUAL—Of cause of action.

See (1) C. P. CODE, O. 2, R. 2.
(2) LIMITATION.

Of right.

See LIMITATION ACT.

ACCUMULATION.

See T. P. ACT, S. 18.

ACCUSED—Effect.

See ACCUSED—CONSENT—EFFECT.

Person.

See ACCUSED.

ACKNOWLEDGMENT.

See (1) ACCOUNTS.
(2) CONTRACT ACT, S. 25.
(3) LIMITATION ACT, S. 19.
(4) MAHOMEDAN LAW—LEGITIMACY.

ACQUIESCENCE.

See also (1) EVIDENCE ACT, S. 115.
(2) EJECTMENT.
(3) LANDLORD AND TENANT.

———*Principle of Ejectment—Bar by acquiescence.*

The principle of acquiescence is that a person who acts in a fraudulent way to set up his legal rights cannot set up those rights. Where a landlord sued to eject the defts., and to demolish the house and the landlord had kept quiet while the house was built the landlord's claim was barred by acquiescence. (*Lindsay, J.*) MAHOMED HAFIZULLAH KHAN *v.* CHITRUKHAN.
36 I. C. 1001 (A).

———*Essentials of.*

Two things are required to raise the equity of acquiescence :—(1) the person spending the money supposed himself to be building on his own land, (2) the real owner at the time of expenditure knows the land belongs to him and not to the person expending the money in the belief that he is the owner. (*Batchelor and Rao, JJ.*) RANCHHOD LAL *v.* SECRETARY OF STATE. 35 Bom. 182=9 I. C. 765=13 Bom. L. R. 92.

———*Quiescence—Estoppel.*

Mere standing by when one's rights are infringed without in any manner inducing the wrongdoer to believe that his act are assented to, is mere quiescence and not acquiescence which (latter) alone can bring the doctrine of estoppel. (*Mookerjee and Newbould, JJ.*) JAHARADDI *v.* DEBNATH. 33 I. C. 762=20 C. W. N 657.

———*What amounts to.*

Acquiescence in an act while it is in progress may amount to consent but not mere inaction after the act has been completed. (*Chatterjee and Mullick, JJ.*) SHYAM LAL *v.* RAMESWARI BASU.
33 I. C. 273=23 C. L. J. 82.

ACQUISITION.

———*Waiver—Delay in suing.*

Mere delay in suing is no proof of acquiescence or waiver by the plffs. of their rights. (*Johnstone, C. J. and Chevis, J.*) GUJAR SINGH *v.* MEHER SINGH. '97 P. W. R. 1916=34 I. C. 168=57 P. L. R. 1917.

———*Applicability of doctrine—Position of the parties—Government.*

The position of the Government differs from that of a private owner and a period of abstinence from suit which would be excessive in a private owner is not excessive in the case of Government and would not create an equity in the private owner. The government has the option of making the deft., remove the materials of his building on paying compensation for the value of the buildings. (*Reid and Robertson, JJ.*) RAHMATULLAH KHAN *v.* SECRETARY OF STATE.
63 P. R. 1913=113 P. L. R. 1913=18 I. C. 799=112 P. W. R. 1913.

———*Knowledge of right essential.*

To raise a plea of estoppel by acquiescence it must be proved that the party sought to be estopped was aware of his right and with such knowledge acquiesced in their invasion by the opposite party. (*Abdur Rahim, Sadasiva Iyer and Napier, JJ.*) RAMANATHAN CHETTY *v.* RANGANATHAN CHETTY. 40 Mad. 1134=33 M. L. J. 252=6 L. W. 300=22 M. L. T. 173=43 I. C. 138=(1917) M. W. N. 757.

———*Elements necessary to constitute—Lessor and lessee—Trees.*

For a defence of acquiescence to be successful it is necessary that the deft. should have acted in good faith believing that he had a valid lease and was entitled to plant the trees and that the plaintiffs knowing that he was under this mistaken belief should have abstained from doing anything to prevent his spending money in planting the trees. 21 A. 496 P. C. ; 53 I. C. 683, Ref. (*Daniels, A. J. C.*) JAGANNATH *v.* DIN MAHOMED.
8 O. L. J. 474=65 I. C. 705.

———*Essential elements of—Assertion of right—Knowledge.*

Where acquiescence is pleaded in bar of a claim it must be shown that the person acquiescing was aware of the matter in which he acquiesced and of the effect of such acquiescence. (*Miller, C. J. and Adami, J.*) BHONU LAL CHAUDHURI *v.* W. A. VINCENT. 3 Pat. L. T. 653=65 I. C. 882=1922 P. 619.

———*Delay—Whether amounts to.*

Mere delay in suing does not amount to a proof of acquiescence. (*Chevis, J.*) KEHR SINGH *v.* ASA SINGH. 60 I. C. 519=3 U. P. L. R. (Lah.) 24.

ACQUIRED PROPERTY.

See HINDU LAW—JOINT FAMILY.

ACQUISITION.

See HINDU LAW—JOINT FAMILY.

By Government.

See LAND ACQUISITION ACT.

Of Easement.

See EASEMENTS ACT, SS. 47 AND 15.

ACT—Done in Official Capacity.

See TORT.

Of Bankruptcy.

See INSOLVENCY.

Of God.

See (1) CARRIERS.
(2) CARRIERS ACT.
(3) RAILWAYS ACT, ETC.
(4) TORT.

Of Insolvency.

See INSOLVENCY ACT.

Of State.

See also C. P. CODE, S. 9.

———*Cession of territory—Rights enforceable against new sovereign—Antecedent right—Value of.*

Annexation of territory is an Act of State and any obligation assumed under a treaty either to the ceding sovereign or to individuals is not one which Municipal Courts are authorized to enforce. After a cession of territory to the British Crown by the Native Rulers, the only enforceable rights in respect of the land ceded are those subsequently confirmed by the Crown by express or implied agreement or by legislation. An agreement by the Crown to confer rights which existed before the cession may be inferred from evidence that the Crown recognized those rights and expressly or impliedly elected to be bound by them. It is only for that purpose that the consideration of the existence, nature or extent, of the ante-cession rights become relevant subjects for inquiry. It is irrelevant in all other respects. 7 M. I. A. 476; (1899) A. C. 572, Ref. (*Lord Atkinson*). SECRETARY OF STATE *v.* BAI RAJ BAI. 39 Bom. 625=19 C. W. N. 1087=13 A. L. J. 953=(1915) M. W. N. 563=29 M. L. J. 242=18 M.L.T. 179=2 L. W. 731=17 Bom. L. R. 730=23 C. L. J. 1=30 I. C. 303=11 I. C. 948=42 I. A. 229 (P. C.) [O. A. 13 Bom. L. R 609.]

———*Jurisdiction of Municipal Court.*

An Act of State cannot be controlled or interfered with by the Municipal Courts but the Courts must decide whether a particular act is in truth an Act of State or not. A guarantee given by the Secretary of State for the due performance of a decree obtained by one private individual against another is not an Act of State. (*Mookerjee and Teunon, JJ*) SRINIBAS PRASAD SINGH *v.* KESHO PRASAD SINGH. 38 Cal. 754=15 C. W. N. 475=9 I. C. 862=13 C. L. J. 365.

ACTION—For damages.

See DAMAGES.

Form of.

See (1) C. P. CODE.
(2) PLEADINGS.
(3) PRACTICE.

Framed in Tort.

See (1) C. P. CODE.
(2) PLEADINGS.
(3) PRACTICE.
(4) TORT.

On Contract.

See CONTRACT.

ACTIONABLE CLAIM.

See (1) ASSIGNMENT.
(2) NEGOTIABLE INSTRUMENTS ACT.
(3) PROMISSORY NOTE.
(4) T. P. ACT, SS. 6 (*e*), 130 TO 137.

ACTIONABLE WRONG.

See TORT.

ACTIO PERSONALIS, ETC.

See (1) C. P. CODE, O. 22, R. I.
(2) MAXIMS.
(3) PROBATE AND ADMINISTRATION ACT.

ACTS—Imperial (CIVIL).

XXV of 1838 *See* Wills Act.
XXIX of 1839 *See* Dower Act.
XXXII of 1839 *See* Interest Act.
XIX of 1841 *See* Succession to Property Protection Act.
XXIV of 1841 *See* Illusory Appointments and Infants' Property Act.
V of 1843 *See* Slavery Act.
I of 1846 *See* Legal Practitioners' Act.
XVIII of 1850 *See* Judicial Officers Protection Act.
XXI of 1850 *See* Caste Disabilities Removal Act.
XXXVII of 1850 *See* Public Servants' Inquiries Act.
VIII of 1851 *See* Tolls Act.
XXX of 1852 *See* Naturalization Act.
II of 1853 *See* Landholders' Public Charges and Duties Act.
XX of 1853 *See* Legal Practitioners Act.
XXXI of 1854 *See* Conveyance of Land Act.
XI of 1855 *See* Mesne Profits and Improvements Act.
XII of 1855 *See* Legal Representatives' Suits Act.
XIII of 1855 *See* Fatal Accidents Act.
XXIII of 1855 *See* Mortgaged Estates Administration Act.
XXVIII of 1855 *See* Usury Laws Repeal Act.
IX of 1856 *See* Bills of Lading Act.
XV of 1856 *See* Hindu Widows' Re-marriage Act.
XXI of 1860 *See* Societies Registration Act.
XX of 1863 *See* Religious Endowments Act.
XXIII of 1863 *See* Waste Lands Claim Act.
XV of 1864 *See* Tolls Act.
1865 *See* Letters Patent.
III of 1865 *See* Carriers Act.
X of 1865 *See* Succession Act.
XV of 1865 *See* Parsee Marriage and Divorce Act.
XXI of 1865 *See* Parsee Intestate Succession Act.
1866 Letters Patent, Allahabad.
XXV of 1866 *See* Unclaimed Deposits Act.
XXVII of 1866 *See* Trustees Act.
XXVIII of 1866 *See* Trustees' and Mortgagees' Powers Act.
IV of 1869 *See* Divorce Act.
V of 1870 *See* Unclaimed Deposits Act.
VII of 1870 *See* Court-Fees Act.
XXI of 1870 *See* Hindu Wills Act.
XXIII of 1871 *See* Pensions Act.
I of 1872 *See* Evidence Act.
III of 1872 *See* Special Marriage Act.
IX of 1872 *See* Contract Act.
XV of 1872 *See* Christian Marriage Act.

ACTS—Imperial—(Civil).

X of 1873 *See* Oaths Act.
III of 1874 *See* Married Women's Property Act.
XIV of 1874 *See* Scheduled Districts Act.
IX of 1875 *See* Majority Act.
XVIII of 1875 *See* Law Reports Act.
IX of 1876 *See* Native Coinage Act.
I of 1877 *See* Specific Relief Act.
VI of 1878 *See* Treasure Trove Act.
VII of 1878 *See* Forest Act.
XVIII of 1879 *See* Legal Practitioners Act.
I of 1880 *See* Religious Societies Act.
XII of 1880 *See* Kazis Act.
V of 1881 *See* Probate and Administration Act.
XVI of 1881 *See* Negotiable Instruments Act.
II of 1882 *See* Trusts Act.
IV of 1882 *See* Transfer of Property Act.
V of 1882 *See* Easements Act.
VII of 1882 *See* Powers-of-Attorney Act.
XV of 1882 *See* Presidency Small Cause Courts Act.
XIX of 1883 *See* Land Improvement Loans Act.
XII of 1884 *See* Agriculturists Loans Act.
XVIII of 1885 *See* Land Acquisition Mines Act.
VI of 1886 *See* Births, Deaths and Marriages Registration Act.
XIII of 1886 *See* Securities Act.
VII of 1887 *See* Suits Valuation Act.
IX of 1887 *See* Provincial Small Cause Courts Act.
VIII of 1888 *See* Tolls Act.
VII of 1889 *See* Succession Certificate Act.
I of 1890 *See* Revenue Recovery Act.
VI of 1890 *See* Charitable Endowments Act.
VIII of 1890 *See* Guardians and Wards Act.
IX of 1890 *See* Railways Act.
XVIII of 1891 *See* Bankers' Books Evidence Act.
II of 1892 *See* Marriage Validation Act.
IV of 1893 *See* Partition Act.
I of 1894 *See* Land Acquisition Act.
XV of 1895 *See* Crown Grants Act.
IX of 1897 *See* Provident Funds Act.
X of 1897 *See* General Clauses Act.
II of 1899 *See* Stamp Act.
IX of 1899 *See* Arbitration Act.
VII of 1901 *See* Administration of Estates of Native Christians Act.
XIV of 1903 *See* Foreign Marriage Act.
VII of 1904 *See* Ancient Monuments Preservation Act.
VIII of 1904 *See* Universities Act.
III of 1906 *See* Coinage Act.
III of 1907 *See* Provincial Insolvency Act.
V of 1908 *See* Code of Civil Procedure.
IX of 1908 *See* Limitation Act.
XVI of 1908 *See* Registration Act.
VII of 1909 *See* The Anand Marriage Act.
III of 1909 *See* Presidency Towns Insolvency Act.
II of 1910 *See* Paper Currency Act.
VII of 1910 *See* Court Fees Amendment Act.
VII of 1910 *See* Patents and Designs Act.
IX of 1911 *See* Births, Deaths and Marriages Registration (Amendment) Act.
II of 1912 *See* Co-operative Societies Act.
IV of 1912 *See* Lunacy Act.
V of 1912 *See* Provident Insurance Societies Act.
VI of 1912 *See* Indian Life Assurance Companies Act.
II of 1913 *See* Official Trustees Act.
III of 1913 *See* The Administrator-General Act.
VI of 1913 *See* Mussalman Wakf Validating Act.
VII of 1913 *See* Companies Act.
III of 1914 *See* Copyright Act.
IX of 1914 *See* Local Authorities Loans Act.
St. 5 and 6 Geo. V. Ch. 61 (1915) (Government of India).
1916 (Letters Patent, Patna).
IV of 1918 *See* Carriage (Amendment) Act.
VII of 1918 *See* Income-Tax Act.
X of 1918 *See* Usurious Loans Act.
VII of 1919 *See* Income-Tax and Amendment Act.
1919 *See* Letters Patent, Lahore.
XVI of 1919 *See* Naturalisation Act.
V of 1920 *See* Provincial Insolvency Act.

ACTS—Local.

See under Bengal, Bombay, Burma, Calcutta, Central Provinces, Madras, Punjab and United Provinces.

ADDITIONAL JUDGE.

See C. P. Code, S. 24.

ADDITION OF PARTIES.

See (1) C. P. Code, O. 1, R. 10.
(2) Limitation Act, S. 22.

ADEN SETTLEMENT REGULATION (1900) RULE 12—*Appeal.*

It is doubtful whether Rule 12 of the rules for assessment and collection of taxes made under the Regulation has the effect of rendering the decision of the Judge of the Resident's Court in a rating appeal and if it is so whether it creates a jurisdiction which having been withheld by the legislature, is *ultra vires.* (*Scott, C. J.* and *Heaton, J.*) Abdul Bhai Lalji *v.* Executive Committee, Aden. **40 Bom. 446=34 I. C. 141=18 Bom. L. R. 296.**

ADEQUACY OF CONSIDERATION.

See (1) Contract.
(2) Contract Act.

ADHLAPI TENURE.

See Land Tenure.

AD-INTERIM INJUNCTION.

See C. P. Code, O. 39.

ADJOURNMENT.

See (1) C. P. Code, O. 17, R. 1.
(2) Practice.

ADJUDICATION.

See (1) Prov. Insolv. Act.
(2) Pres. Towns Insolv. Act.

ADJUSTMENT—Decree.

See C. P. Code, O. 21, R. 2, and O. 34.

Suits.

See (1) C. P. Code, O. 23, R. 3.
(2) Compromise-Decree.
(3) Family Arrangement.

ADMINISTRATION.

See also Probate and Administration Act.

———*Account—Suit against administrator as heir.*

Where an administrator is sued along with another as heirs for a valid debt and payment is made by him it would equally follow that the

ADMINISTRATION—Bond.

money paid in settlement would be coming out of the estate of the deceased. (*Macleod, C. J. and Coyajee, J.*) JAMASJI *v.* JAMSETJI.
70 I. C. 754=1922 Bom. 341.

———*Bond—Second assignment, while first assignment is in force.*

A District Judge cannot assign an administration bond again, while the first assignment is in force. (*Coxe and Imam, JJ.*) KALIMUDDIN *v.* MAHURAI. 39 Cal. 563=16 C.W.N. 662=13 I.C. 690=15 C.L.J. 332.

———*Bond—Surety—Liability of.*

It is not open to the sureties on the faith of whose bond the estate was ordered to be administered to dispute the validity of the bond. (*Kumaraswami Sastri, J.*) RAMANATHAM CHETTY *v.* RAGAMMAL. 27 I.C. 849=17 M.L.T. 61.

———*Decree on mortgage from co-heir is not executable till administration—When realisable.*

The mortgagee from one of the heirs of the deceased obtained a decree on his mortgage against his mortgagor's share in the estate after the debts had been paid off. *Held*, he cannot apply in execution of his decree till the administration is over and the debts have been paid off. (*Miller, C. J. and Kulwant Sahay, JJ.*) FIRM OF SHYAM LAL GOKUL CHAND *v.* JAMIL AHMAD.
74 I.C. 487=1924 P. 110.

———*District Judge—Jurisdiction—Release of a share.*

Pending the administration of the estate the District Judge has jurisdiction to direct the share of one of the heirs who gives an undertaking to be responsible for his share of debts, to be made over to him. Such an order of the District Judge merely operates as an order of discharge of the Receiver so far as that share is concerned. (*Coutts and Das, JJ.*) MT. DULHIN SONA KOER *v.* SAIYED SHAH MAHMUDDUL HAQUE. 1 P. 667=69 I. C. 684=4 P. L. T. 209=1922 P. 585.

———*Suit for — Powers of Administrator—Decision whether the property is of the deceased.*

Where in an enquiry about the assets of the estate of the deceased, any property in the possession of a person party to the suit are claimed to be so, the person appointed by the Court, to take steps for the proper administration of the estate, can decide whether the estate in possession of the person forms the assets or not. (*Macleod, C. J. and Shah, J.*) MOTIBHAI *v.* NATHUBHAI.
45 Bom. 1053=62 I. C. 24=23 Bom. L. R. 444.

———*Suit—Essentials.*

A suit for administration will lie whether by a creditor or administrator where the executors do not admit that they hold sufficient assets to meet all claims. (*Beaman, J.*) HASANALLI *v.* SOPATLAL PARBHUDAS. 37 Bom. 211=17 I. C. 17=14 Bom. L. R. 782.

———*Suit for—Filing within 6 months from grant of probate—Good ground must be shown.*

A suit for administration can be instituted before the expiry of the period of six months from the grant of probate as otherwise an estate

ADMINISTRATION—Suit for.

might be irreparably wasted but there must be some good ground for bringing it before the period of 6 months. (*Woodroffe and Cuming, JJ.*) J. N. GHOSE *v.* B. B. DASI. 70 I. C. 638=1922 Cal. 302.

———*Suit for—Rights of deft.—Nature of suit.*

In an administration suit if one creditor sues on behalf of himself and the others for administration of the estate of the debtor, the deft. may at any time before judgment, have the action dismissed on payment of the plff.'s debt and all the costs of the action. *Pemberton* v. *Topham*, 1 Beav. 316; *Holden* v. *Kuneston*, 2 Beav. 204; *Monton* v. *Roe*. 14 Sim. 353, ref.

An administration suit is a suit for an account and application of the debtor's estate for the satisfaction of the claims of all creditors. The Court assumes the administration and settlement of the estate and passes the decree for the benefit of all creditors. Creditors other than the plff. may come in under the decree and prove their debts, and obtain satisfaction of their demands equally with the plff. and they are treated in such case as parties to the suit. If they decline to come in, they will not get the benefit of the decree but from necessity they will be considered bound by the acts done under Court's authority. The plff. cannot be asked to ascertain in advance all the creditors of his debtor and their dues and value his suit accordingly as that is the fundamental point for determination in the suit and cannot be decided by the plff. before trial. (*Mookerjee and Cuming, JJ.*) SASI BHUSAN BOSE *v.* MAHARAJA SIR MANINDRA CHANDRA NANDI.
44 Cal. 890=24 C.L.J. 448=38 I. C. 835=21 C.W.N. 310.

———*Suit for—Annuitant legatee—Legacy paid into Court—Power of Court to dismiss suit.*

A suit for the administration of the testator's estate by an annuitant legatee may, at the discretion of the Court, be dismissed if the executor pays into Court, the amount of legacy and proper security for payment of the annuity. 48 W. R. 150, dist. (*White, C. J., and Oldfield, J.*) ATHULUR MALAKONDIAH *v.* THATHA LAKSHMINARASIMHULU.
1 L.W. 372=23 I.C. 134=26 M.L.J. 312.

———*Suit—Party charged with duties—Security from.*

In an administration suit with an alternative relief for partition of the estate of the deceased, a party charged with the duty of attending to the funeral ceremonies of the deceased should be called upon to give security for the due performance thereof and the expenditure therefor. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) SURAIYA RADER *v.* QUDASIA BEGAM. 24 I.C. 643=10 L.J. 281.

———*Suit—Allowances pendente lite—Administration—Power of Court to sanction.*

Where the administration of an estate is carried on under the supervision of the Court it has power, in a proper case, to grant an allowance, to any of the parties who will eventually be entitled to a share in the property. That power ought, however, to be exercised with proper discretion having regard to the claims that are likely to be made upon the estate. The Court ought not to

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grant to any of the beneficiaries, properties by way of an allowance unless it is satisfied that the assets will be sufficient to satisfy the creditors. (*Miller, C. J. and Mullick, J.*) SHEIKH FAZLUR RAHMAN *v.* SHEIKH KALI MUZZAFFAR.

48 I.C. 533 (Pat).

———*Suit for—Properties situate outside British India—Form of decree.*

One of the incidents of an administration suit is the partition of the estate and, where necessary, the sale thereof under the orders of the Court. Such suits cannot be filed in places other than the place where the property is situate except where the property is situate within the jurisdiction of different courts in British India, in which case the plff. is at liberty to choose his forum. Where however, a person in whose hands, are properties situate outside British India claims a share in the administration suit, the court can rightly place the condition that on his obtaining such share he will account for that portion of the estate in his hands. (*Maung Kin and Higginbotham, JJ.*) AYESHA BEE *v.* GULAM HUSAIN. 66 I.C. 530= 11. L.B.R. 188.

———*Suit for.*

In an administration suit a decree was passed declaring shares of the heirs. A subsequent suit for distribution of shares is maintainable. (*Maung Kin, J.*) MAUNG POTHIN *v.* KOTHA YE.

64 I. C. 813=11 L. B. R. 60.

———*Suit—Form of decree—Share of inheritance—C. P. Code, App. D, Nos. 17 and 20.*

Even if a suit for a share of inheritance is not brought in the form of an administration suit, the trial Court should so treat it and after trial of the matters involved should pass a decree on the lines of the model decrees Nos. 17 and 20 in App D. of the Code. (*Maung Kin, J.*) MA SHWE *v.* MA HLA SHIN. 41 I. C. 579 (Bur.).

———*Suit—Decree—Execution.*

A decree in an administration suit cannot be executed by directing the Collector to partition the estate. The proper form is indicated in Form No. 17 App. D. Sch. I, C. P. C. (*Fox C. J. and Parlett, J.*) MAUNG PO WIN *v.* MA TIN.

8 L. B. R. 338= 36 I. C. 385=10 Bur. L. T. 206.

———*Will—Bequests to charity—Sanction of Advocate General—Not necessary.*

Where a will makes a bequest to charity, an administration suit without sanction of Advocate-General is not bad. (*Wallis, C.J. and Kumaraswamy Sastry, J.*) ANNAVARAPU NACHARAMMA *v.* MALLADI VENKATAPPAYYA.

79 I.C. 903= 31 M.L.T. 63 (H.C.)=16 L. W. 922.

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———*Distribution for marriage—Reasonable expenses.*

Where the administrator without the authority of the court allowed 1/3 of the estate for the marriage of a girl although the direction of the testator was that all reasonable expenses should be paid out of the estate; *Held*: what was meant was that reasonable expenses should be paid; and 1/3 of the estate was unreasonable. (*Macleod, C.J. and Coyajee, J.*) JAMASJI *v.* JAMSETJI.

70 I.C. 754=1922 Bom. 341.

ADMINISTRATOR.

———Pendente lite—*Commission, right to.*

The Administrator *pendente lite* if he once takes commission on the whole property, cannot again charge it on the sale proceeds of a part of the property.

The sale proceeds of securities whether endorsed or not, pledged to a Bank for a debt are not assets of a deceased that come into the hands of the deceased because the securities pass a legal and not merely an equitable interest and the Banker is holder for value and the administrator is not entitled to a commission. (*Jenkins, C.J., and Woodroffe, J.*) OSMOND BEEBY *v.* KHITISH CHANDRA.

41 Cal. 771=26 I.C. 284=18 C.W.N. 631.

———Pendente lite—*Passing of accounts does not discharge administration so as to bar suit against him.*

The mere fact that the administrator *pendente lite* may have been discharged from further acting as administrator *pendente lite* on passing the accounts in the testamentary jurisdiction does not operate as a discharge so as to constitute a bar to a suit brought in the general jurisdiction of the Court. (*Jenkins, C.J. and Woodroffe, J.*) CHOWDHURY *v.* OSMOND BEEBY.

16 C. W. N. 516=14 I. C. 4=39 C. 587.

———*Accounts—Passed in presence of parties—Re-opening of.*

Once the accounts of an administrator have been properly passed by the Court in the presence of the parties, he ought not to be called upon to account over again unless there is an allegation that the order of the court in passing those accounts was obtained by fraud or by the suppression of any material fact.

The fact of the discharge of an administration from further acting as such on passing the accounts in the testamentary jurisdiction, does not bar a suit against him brought in the general jurisdiction for investigating the accounts and for refund of certain sums retained by him. (*Harington, J.*) KHITISH CHANDRA ACHARYA CHOWDHURY *v.* OSMOND BEEBEE.

11 I. C. 182=15 C. W. N. 832.

———De son tort—*Liability to account.*

An administrator *de son tort* of properties is not responsible as an agent to render an account of the properties but only to refund the moneys which he has received on behalf of the estate. (*Ayling and Seshagiri Aiyar, JJ.*) ALLA PICHAI ROWTHAN *v.* PAPATHIAMMAL.

51 I. C. 748=36 M. L. J. 184.

———*Appointment of public officer—Improper.*

In the absence of a statute authorising such an appointment, a public officer and his successors in office should not be asked to undertake the duties of an administrator, outside their official duties. (*Mittra, A. J. C.*) SITABAI *v.* BAPU ANNA. 48 I. C. 964 (N).

———*Grant of letters—Executor.*

If an executor appointed by the testator, has dealt with certain properties belonging to the testator and B, has, subsequently, obtained Letters of Admn, the latter will be confined to

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the properties other than those dealt with by the executor. (*Hartnoll, O. C. J., and Ormand, J.*) MAUNG LU MAUNG *v.* MAUNG PE.

17 I. C. 868=5 Bur. L. T. 255.

ADMINISTRATOR GENERAL.

———*Transfer of business—Handing over of keys.*

The mere handing over of the keys of the business premises to the Administrator-General implies a transfer of the estate. (*Sankaran Nair, J.*) TANIKACHALA MUDALIAR *v.* ALAMELU AMMAL. 25 I. C. 153=16 M. L. T. 26.

ADMINISTRATOR-GENERAL'S ACT (II OF 1874).

———Ss. 17 to 20—*Probate and Administration Act* (*V of* 1881), *S.* 90—*Succession Act* (*X of* 1865, *S.* 179.

An Administrator-General taking out Letters of Administration to the estate of a Hindu dying intestate can deal with it as if it were his own, because the whole estate vests in him completely. An administration cannot be treated as closed until every act necessary for its completion has been done and where, to realise his commission he sells an item which had been previously sold by the son of the deceased on attaining majority. *Held*, that the sale by the son was a nullity as the property still vested in the Administrator-General. (*Sankaran Nair and Spencer, JJ.*). ALWAR CHETTY *v.* CHIDAMBARA MUDALI.

38 Mad. 1134=16 M. L. T. 231=
(1914) M. W. N. 642=26 I. C. 792=
27 M. L. J. 400.

———Ss. 28, 34 and 35—*Presidency Towns Insolvency Act* (*III of* 1909)—*Applicability.*

There is no provision of law by which an insolvent's estate in respect of which Letters of Administration have been granted to the Administrator-General, can be administered under that Law; an Administrator-General in such cases can claim no higher than the deceased himself and he has not the rights of either the trustee or Official Assignee in insolvency. (*White, C.J. and Oldfield, J.*) NAVAJEE *v.* ADMINISTRATOR GENERAL OF MADRAS.

22 I. C. 566=38 Mad. 500.

———Ss. 36 and 40—*Certificate issued by Administrator General—Claims covered by certificate, if may be considered as barred.*

Although the Limitation Act nowhere provided that time should cease to run upon a claim being filed or a certificate being issued by the Administrator-General, yet claims covered by such a certificate containing a memorandum that all debts will be paid as soon as possible, are not barred. (*Chaudhuri, J.*) *In the Goods of* THOMAS LECKIE. 22 I. C. 262 (C.)

———S. 52—*Commission—Administration commenced before Act of* 1913—*Value of assets is to be taken at the date of their distribution.*

For the purpose of arriving at the amount of commission payable to the Administrator-General in the administration of an intestate estate in cases where the administration commenced before April 1914, the value of the assets is to be taken at the date of their distribution. (*Sir Walter Schwabe, C. J. and Coutts Trotter, J.*) THE ADMINISTRATOR GENERAL, MADRAS *v.* RAMIAH.

(1922) M. W. N. 571=43 M. L. J. 347=
16 L. W. 711=74 I. C. 182=1922 Mad. 491.

ADMINISTRATOR-GENERAL'S ACT, (III OF 1913).

———S. 11—*'Succession'—Meaning of.*

"Succession" in Sec. 11 should not be read as meaning intestate succession only. (*Rankin, J.*) *In the Goods of* PASUPATHI MUKERJEE.

56 I. C. 431=24 C. W. N. 326.

———S. 11—*Order for possession of assets.*

Though an Administrator-General is appointed executor of a will, he can obtain an order to take possession of the assets before applying for probate. (*Rankin, J.*) *In the Goods of* PASUPATHI MUKERJEE.

56 I. C. 431=24 C. W. N. 326.

ADMIRALTY—*See* SHIPPING.

ADMIRALTY COURT ACT (1861).

———Ss. 5 and 35 (Act of 1840) S. 6—*Interpretation Act, 1889, S. 18* (2) *claim for necessaries supplied to ship—Suit* in rem—*Jurisdiction.*

Claim for necessaries can be enforced in a Colonial Court of Admiralty by a suit *in rem* and such a suit can presumably be instituted in any Admiralty Court within whose jurisdiction the ship happens to be at the time when the suit is instituted. Before there can be an action *in rem* there must be a personal liability on the part of the owner. (*Heald and May Oung, JJ.*) THE OWNER OF THE STEAMSHIP *v.* BIRD & CO.

1 R. 78=1923 R. 163.

ADMIRALTY JURISDICTION.

———*Bombay High Court—Service on ship—Writ of summons—Warrant of arrest.*

It is not essential under the Admiralty Rules of the Bombay High Court to issue a writ of summons in addition to issuing a warrant of arrest. (*Marten, J.*) FREEMAN *v.* S. S. "CALANDA."

24 Bom. L. R. 1167=
76 I. C. 433=1923 B. 51.

ADMISSIBILITY.

See (1) EVIDENCE.
(2) EVIDENCE ACT.

ADMISSIONS.

See (1) EVIDENCE ACT, SS. 19 TO 21 AND S. 115.
(2) LEGAL PRACTITIONER.

ADNA AND ALA MALIK.

See CUSTOM-PUNJAB.

ADOPTION.

See HINDU LAW—ADOPTION.

ADULTERATION.

See MUNICIPAL ACTS.

ADULTERY.

See (1) DIVORCE ACT.
(2) HINDU LAW.
(3) HUSBAND AND WIFE.
(4) RESTITUTION OF CONJUGAL RIGHTS.

AD VALOREM FEE.

See (1) COURT FEES ACT.
(2) STAMP ACT.

ADVANCEMENT.

See also (1) BENAMI.
(2) TRUSTS ACT, S. 82.

———*Doctrine of—Personal law.*

Though the principle of advancement as applied in Courts of Chancery in England does not apply in India, it should be so applied where the transaction takes place between two persons born in India of British parents and living in British India. (*Lord Atkinson*) KERWICK *v.* KERWICK. 39 M. L. J. 296=(1920) M. W. N. 738=28 M. L. T. 194=32 C. L. J. 490=47 I. A. 275=57 I. C. 834=13 L. W. 455=2 U. P. L. R. (P. C.) 153=48 Cal. 260=23 Bom. L. R. 730=1 Bur. L. J. 4. (P. C.)

———*Principle of—Applicability to India.*

The English principle of advancement is not applicable to India. 4. W. R. 46 P. C., Foll. (*Parlett and Twomey, JJ.*) ABDUL RAHMAN KHAN LANDIE *v.* MA KYE. 26 I. C. 102=8 Bur. L. T. 87.

ADVERSE POSSESSION.

Acquisition of Title.
Animus Possidendi.
Burden of proof.
Co-heirs.
Community.
Co-mortgagors.
Constructive.
Co-owner.
Co-parcener.
Co-sharer.
Co-tenants.
Debutter Property.
Donor and Donee.
Easement.
Elements of
Enjoyment.
Essentials of
Evidence.
Ex-Proprietary Tenancy
Extent of Right.
Ferry.
Forest Land.
Hereditary Office.
Hindu Family.
Interruption of
Joint Property.
Landlord and Tenant.
Lessor and Lessee.
License.
Lien Holder.
Limitation.
Limited Interest.
Limited owner.
Mines.
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ADVERSE POSSESSION—Acquisition of title.

Mortgagor and Mortgagee.
Municipality.
Nankar Allowance.
Nature of.
Neighbours.
Permissive.
Plea of.
Possession.
Presumption.
Proof of.
Purchaser.
Receiver.
Religious Endowment.
Religious Office.
Service Tenure.
Submerged Land.
Tacking of.
Test of.
Trust and Trustee.
Under Proprietary Rights.
Vacant site.
Waste Land.

Acquisition of Title.

———*Acquisition of title.*

Where a decree declares that a person has a certain title to a property but in all documents and proceedings subsequent to such decree, the person is regarded as having a different title in respect of that property, such better title recognised for a long time cannot be overthrown even in spite of the decree. (*Lord Buckmaster.*) PIRTHIPAL SINGH *v.* GANESH DIN SINGH. 44 M. L. J. 29=25 O.C. 396=9 O.L. J. 649=37 C. L. J. 219=32 M. L. T. (P. C.) 109=L. R. 4 P. C. 7=18 L. W. 41=9 O. & A. L. R. 541=71 I. C. 641=50 I. A. 210 P. C.=1922 P. C. 383.

———*Acquisition of title—Khoti lands—Title defective—Effect of long possession.*

The occupancy rights in some *khoti* lands were sold in execution of the decree obtained by a *khoti* sharer and the property sold in auction. Some time after, the purchaser surrendered the lands to the decree-holder-sharer, who remained in possession thereafter for 15 years and was then dispossessed by a person who claimed to be the occupancy tenant. *Held*, though it is assumed the auction sale was in contravention of the Khoti Settlement Act, S. 9 which made the tenure inalienable the decree-holder had obtained title by adverse possession after the surrender to him. (*Fawcett and Coyajee, JJ.*) ATMARAM BHILA BHATKAR v. BALAJI RAGHUNATH JOSHI. 25 Bom. L, R. 1032=77 I. C. 307=1924 Bom. 178.

———*Acquisition of title—Invalid sale.*

A sale of a limited interest such as lease for a long term being invalid, the transferee does not acquire any better title than the transferor. (*Shah, C. J. and Crump, J.*) CHATURBHAI LALLUBHAI v. MOTIBHAI BAPUJI. 24 Bom. L. R. 1315=1923. B. 146.

———*Acquisition of title—Voidable transfer.*

Adverse possession does not begin under a transfer which is voidable. (*Scott, C. J., and Beaman, J.*) SHANKERBHAI KASHIBHAI v. RAI SINGI JASWAT SINGI. 42 I. C. 908=19 Bom. L. R. 855.

ADVERSE POSSESSION—Acquisition of title.

———*Acquisition of title—Nature of.*

Adverse possession against a person afflicts only the interest of a person entitled to demand possession at the time of the commencement of the adverse possession. (*Sanderson, C. J. and Mookerjee, J.*) PRIYA SAKHI DEBI v. BIRESHWAR SAMANTA. 44 Cal. 425 = 21 C. W. N. 177 = 37 I. C. 277 = 27 C. L. J. 212.

———*Acquisition of title—Knowledge of owner necessary.*

A plea of adverse possession would not avail unless such possession is brought to the knowledege of the person against whom title is sought to be acquired. (*Mookerjee and Beachcroft, JJ.*) SRI SRI RADHA MADHAL NARAN *v.* MILAN MAHATO. 21 I. C. 204 = 18 C. L. J. 23.

———*Acquisition of title—Unlawful poossession.*

A sold in 1884 a certain land together with a share in the village *Shamilat*, to B, who by instituting a suit obtained possession of the same in 1890 and mortgaged it to C in 1898. In the same year A's sons brought a suit for recovery of possession on the ground that the sale was void for want of necessity and consideration and on payment of a sum in 1903 they got the possession of the land as well as *Shamilat* land which was not in fact included in their decree but was held in possession along with the other land by C the mortgagee. In 1907 B brought a redemption suit against the mortgagee for *Shamilat* land and made the sons of A, defts. in the suit. *Held* that:

(1) As A's sons had taken an unlawful possession of the *Shamilat land* they were in the position of a trespasser.

(2) That B had a right to sue within twelve years of dispossession for the recovery of the land on the strength of his former possession.

(3) That A's sons were required to have title to the *Shamilat* land and unless they proved it, the plaintiff could claim possession without having to prove his title to the land, even though he had no such title. (*Shah Din and Scott Smith, JJ.*) PARAS RAM v. NATHUMAL. 19 P. R. 1913 = 19 I. C. 222 = 212 P. L. R. 1913.

———*Acquisition of title—Interruption of adverse possession—What constitutes.*

Where a person has acquired title to certain property by adverse possession he is entitled to eject any person seeking to retain possession of it against his will. The mere fact that a person against whom prescription is running comes and stays as a guest now and then with the person in adverse possession will not constitute an interruption of the adverse possession. (*Coutts Trotter and Ramesam, JJ.*) AMMAKANNUAMMAL *v.* NARAYANASWAMI MUDALIAR. 17 L. W. 629 = 72 I. C. 635 = 1923 Mad. 633.

———*Acquisition of title—Ignorance of true owner.*

If the true owner having the opportunity to acquaint himself with all the facts and law and not being led into any error by the fraud of the opposite party see the latter enjoying land openly claiming it as owner, limitation against the former is not postponed till the ignorance

ADVERSE POSSESSION—Animus Possidendi.

on his part which led him into thinking that the land really belonged to the latter is removed. (*Sadasiva Aiyar and Burn, JJ.*) THE SECRETARY OF STATE FOR INDIA *v.* VENKATANARSIMHA NAIDU 27 M. L. T. 147 = (1920) M. W. N. 209 = 58 I. C. 689 = 11 L. W. 256.

———*Acquisition of title—Proof of.*

A claim of title by adverse possession raises a mixed question of law and fact and should, therefore, be raised in the Court of first instance so that the opposite party may plead to the claim and evidence may be adduced thereon A person who seeks to establish such a claim has to show that his possession was adequate in continuity, publicity and in extent to extinguish the title of the true owner. (*Drake Brockman, J. C.*) PRAHLAD SINGH *v.* ABDUL AZIZ KHAN. 47 I.C. 892 (N.)

———*Acquisition of title—Nature of rights acquired by possessor who owns continuous land.*

If a person acquires by adverse possession any land adjoining that already in his possession he gets the same rights in respect of the former as he has in respect of the latter (*Lindsay, J. C.*) SHEO NARAYAN SINGH *v.* BISAI SINGH. 34 I.C. 416 = 3 O.L.J. 170.

Animus Possidendi.

———*Invalid gift—Want of registration.*

A gift deed though it cannot affect immoveable property as being unregistered is admissible to show possession as absolute owner and therefore adverse to all. (*Viscount Cave.*) VARADA PILLAI *v.* JIVARATHNAMMAL. (1919) M. W.N. 724 = 10 L.W. 679 = 24 C.W.N. 346 = 38 M.L.J. 313 = 18 A.L.J. 274 = 53 I.C. 901 = 46 I.A. 285 = 43 Mad. 244 = 27 M.L.T 6 = 22 Bom. L.R. 444 (P. C.)

[O.A. 19 M. L. T. 52 = (1916) 1 M. W. N. 17 = 32 I. C. 111 = 3 L. W. 1.]

———*Mortgagor and mortgagee.*

Possession to be adverse must be by a person who does not acknowledge the other's rights but denies them. There must be an express or implied repudiation of the rights of the true owner and an open assertion by the person in possession of a claim of right to hold the property on his own behalf. (*Richards, C. J. and Banerji, J.*) ASAD ALI *v.* ANAND SARUP. 27 I. C. 35 = 12 A.L.J. 1233.

———*Female heir—If adverse to rightful owner.*

Possession of property by a female not entitled to the properties for over 12 years is adverse to the rightful owner and becomes her shridhan. (*Bannerji, J.*) MAGHLI *v.* LADLI. 13 I.C. 644 (A.)

———*Agricultural village—Site in abadi.*

The question of adverse possession depends upon the circumstances of each case; in a case where an inn-keeper in an agricultural village has been using his house for purposes other than those of an ordinary agricultural village, paying no rent for the use of the site in *Abadi* his possession of the site is adverse to that of the Zamindar. (*Richards, C. J., Banerji and Chamier, JJ.*) INCHA RAM *v.* BANDE ALI KHAN. 33 All. 757 = 11 I.C. 52 = 8 A.L.J. 877.

———*Intention to acquire absolute estate.*

Where there is no intention to hold adversely in order to acquire an absolute estate there can be no adverse possession. There can be no

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circumstances in which a person can set out consciously to acquire a limited estate within a larger estate by adverse possession, the natural legal consequences of which would be to confer full ownership on him. (*Beaman and Macleod, JJ.*) PIR SAB KASIM SAB ITAGI *v.* GURAPA BASAPPA KADIGI. 38 Bom. 227=24 I.C. 716= 16 Bom. L.R. 111.

———*Person in possession not rightful heir.*

The possession of a person who is not the rightful heir of properties belonging to a deceased person is adverse to the rightful owner. (*Fletcher and Richardson, JJ.*) MUKUNDA CHUCKERBUTTY *v.* MANMOHINI DEBI. 26 I. C. 903=19 C. W. N. 472.

———*Consent of owner—Effect of.*

The mere fact of consent or acquiescence does not prevent possession being adverse. The test is whether the person setting up adverse possession held for himself. (*Jenkins, C.J., Holmwood and Chapman, JJ.*) DWARKA NATH CHOWDHURY *v.* SHASHTI KINKAR BANERJEE. 18 I. C. 869=17 C. W. N. 595.

———*Temporary acts of user does not confer title.*

In the case of a vacant site which is not of any use to the owner, mere storage of bricks and wood and tethering cattle would not be considered objectionable by the proprietors of the lands and such user would not amount to an assertion of ownership, so as to confer title by adverse possession. 16 Bom. 338, Ref. to. (*Broadway, J.*) CHANDAN. *v.* BAHADUR. 4 Lah. L. J. 168=68 I. C. 263= 4 U. P. L. R. (L.) 106=35 P. W. R. (1922)= 62 P. L. R. (1922)=1922 Lah. 82.

———*Mother and son—Residential house.*

The possession of a small residential house by a widow against the will of her sons in exercise of her right of residence is not adverse to the sons. (*Scott-Smith and Shadi Lal, JJ.*) CHUHAR BAI *v.* RAMANAND. 48 I. C. 114= 113 P. W. R. 1918.

———*Joint ownership.*

The status of joint ownership with rights of survivorship cannot be acquired by prescription. (*Ayling and Odgers, JJ.*) RAJAMBAL AMMAL *v.* SHANMUGA MUDALIAR. (1922) M. W. N. 481= 70 I. C. 653=1923 Mad. 11.

———*Person not deriving any benefit—Effect of possession.*

There can be no adverse possession of any legal interest in land by a person who has been found to have no title and not derived any benefit whatever during the period of the alleged adverse possession. (*Sadasiva Iyer and Hannay, JJ.*) LAKSHMINARAYANA IYER *v.* ULAGAMMAL. 26 I.C. 528=28 M.L.J. 256.

———*Possession referable to a lawful title.*

Possession referable to a lawful title cannot be treated as that of a trespasser. (*Sadasiva Aiyar and Napier, JJ.*) PONNUSWAMY IYER *v.* PERMAYE. 26 I.C. 346=16 M.L.T. 530.

ADVERSE POSSESSION—Animus Possidendi.

———*Referable to a lawful title.*

Possession that can be referred to a lawful title is not adverse. (*Ayling and Tyabji, JJ.*) MUTHU KRISHNA IYENGAR *v.* SANKARA NARAYANA IYER. 16 M.L.T. 196=1 L.W. 699= (1914) M.W.N. 708=25 I.C. 573=27 M.L.J. 600.

———*Occupation for more than 30 years—Storing hay racks.*

The occupation of a *gramanathan* or village site belonging to the Government by storing hay racks will not be adverse possession as against the Government, even if the occupation be for more than 30 years; but acts of ownership such as transfer, etc., showing *animus possidendi* will constitute adverse possession and the onus will then lie on the Government to prove their title, 21 C. 397; 16 B. 338; 21 M. 53; 33 M. 362; 33 M. 173; 14 I.C. 168, foll. (*Miller and Sadasiva Aiyar, JJ.*) PUTLOOR BOYANNA *v.* GOLUSU ASETHU. 24 I. C. 735=16 M.L.T. 48.

———*Based on real or pretended title—Nature of title acquired.*

Acquisition of title by prescription is based on the nature of the *animus possidendi*, whether that *animus* is grounded on a real or pretended title, and the title cannot be higher than what could be acquired if the pretence or falsehood were true. (*Sadasiva Iyer and Spencer, JJ.*) MEETHALE VITTIL RAMAN *v.* PUTHULATH AMBU. 24 I.C. 95 (M.)

———*Relationship.*

The act of adverse possession must be scrutinised in the light of relationship existing between the parties claiming adversely to each other. (*White, C. J. and Oldfield, J.*) THANGAVELU CHETTY *v.* MANGATHAYE AMMAL. 21 I. C. 21=(1913) M. W. N. 674.

———*Ferry.*

The act of the District Magistrate in maintaining a ferry over the property of the plffs. did not constitute adverse possession to bring into operation the rule of 12 years' limitation as there was no intention to dispossess the latter. (*Das and Adami, JJ.*) PARDIP SINGH *v.* THE SECRETARY OF STATE FOR INDIA. 5 Pat. L. J. 500=57 I. C. 516= 1 Pat. L. T. 395=2 U. P. L. R. (Pat.) 181= 1920 P. H. C. C. 297.

———*Hindu family—Possession of male members.*

The possession of the male members of the 'propositus' family where the daughter was entitled to the property of her father governed by Dayabhaga School must be presumed to be on behalf of the daughter. No adverse possession could be presumed until ouster was proved. (*Chamier, C. J. and Mullick, J.*) JAGU MANDAL *v.* MADHAB MANDAL. 41 I. C. 39 (P).

———*Mahomedan widow in possession partly as heir and partly in lieu of dower—If and when becomes adverse against their heirs.*

A Mahomedan widow who gets possession of her husband's property partly as his heir and partly for her unpaid dower with a liability to account to the other heirs for receipt of profits of the estate begins to exercise a possession adverse to that of the other heirs only when they

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do not make any claim from her for an account as to the profits, etc., and consequently she gets herself recorded in the Record of Rights as the tenant of the holding. The recording of her name in the Record of Rights amounts to an assertion of hostile title by her against the other heirs and her possession becomes adverse from that time. 31 C. 970; 32 C. 296. Dist. (*Atkinson, J.*) MUTSADDI v. HABIB MIAN. 39 I. C. 579 (P).

Burden of Proof.

———*Burden of proof—Acquisition by prescriptive title.*

A person claiming a title by prescription must prove possession for the full period. Proof of possession for a shorter period does not shift the *onus* on to the original owner to show that possession became adverse within the statutory period. (*Lord Shaw.*) SECRETARY OF STATE *v.* CHELIKANI RAMA RAO. 39 Mad. 617= 31 M.L.J. 324=20 C.W.N. 1311= (1916) 2 M.W.N. 224=14 A.L.J. 1114= 20 M.L.T. 435=4 L.W. 486= 18 Bom. L.R. 1007=25 C.L.J. 69= 35 I.C. 902=43 I.A. 192. (P. C.)

[Reversing O.A. 33 Mad. 1=20 M.L.J. 66= 5 I.C. 882=7 M.L.T. 128.]

———*Burden of Proof.*

Where the suit is resisted on the ground of acquisition of title by prescription it is not for the plff. to prove his title within 12 years. The burden of proof is on the defendant to prove his adverse proprietary title. (*Gokul Prasad, J.*) RAGHA MAL *v.* ABDUS SATTAR. 74 I.C. 879=1923 All. 565.

———*Burden of proof.*

The onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. (*Macleod, C. J. and Fawcett, J.*) VASTA BALWANT *v.* SECRETARY OF STATE. 45 Bom. 789= 61 I.C. 440=23 Bom. L.R. 238.

———*Burden of proof.*

When a title by adverse possession is set up, the person who sets it up must allege and establish such title. (*Mookerjee, A. C. J. and Fletcher, J.*) BEPIN BEHARI SAHA *v.* CHARU CHANDRA GHOSE. 60 I.C. 753=35 C.L.J. 192.

———*Burden of proof—Possession referable to lawful origin.*

Where possession can be referred to a lawful origin the presumption is that it was acquired lawfully and the burden is on the party asserting adverse possession to prove his case. (*Daniels and Lyle, A. J. Cs.*) KUAR NAGESHAR SAHAI *v.* SHIAM BAHADUR. 9 O.L.J. 262= 1922 Oudh 231.

Co-heirs.

———*Co-heirs—Mahomedan Law.*

The possession of property by a brother is deemed to be possession by sisters also unless the brother repudiates the claims of sisters. (*Banerji, J.*) HAIDAR KHAN *v.* CHAND KHAN. 50 I. C. 691 (A.)

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———*Co-heirs—Exclusion—Knowledge.*

Plff. claimed her share of the properties left by her father, who died 37 years before suit from her co-heir who had been all along in exclusive possession of the same to the knowledge of the plff. *Held*, that the possession of the brother was adverse to plff. even though it was not shown that there was any demand by plff. which was refused by the brother. (*Newbould and Panton, JJ.*) CHAND BIBI *v.* LAL MAHAMED. 48 I. C. 692. (C.)

———*Co-heirs—Service inam lands—Divided members.*

The sole possession of inam lands by one member is not in itself adverse to the other members divided or undivided and does not deprive them of any interest they might possess. 46 Cal. 362 (P. C.) does not overrule 30 Mad. 434. (*Ayling and Odgers, JJ.*) DEVULAPALLI VENKATA SUBBA RAO *v.* KOLLURI SATYANARAYANAMURTHI. 44 Mad. 179=12 L.W. 642=(1920) M.W.N. 754= 28 M L.T. 448=60 I.C. 27=40 M.L.J. 31.

———*Co-heirs—Ouster—Knowledge.*

Since the defendants take the property as tenants-in-common being heirs of deceased Muhammadan they are deemed to be in possession of the property on behalf of themselves and the plaintiff and when they want to show that the right of the plaintiff (one of the heirs) is barred it lies on them to show that the character of their possession was changed so far the plaintiff was concerned, six years before they brought the suit. (1912) A.C. 230, foll. (*Sankaran Nair and Oldfield, JJ.*) MARIAN BEEVIAMMAL *v.* KADIR MEERA SAHIB TARAGAN. 29 I. C. 275 (M).

———*Co-heirs—Possession of—Whether adverse.*

Where one of several heirs takes possession of an inheritance, his possession is not adverse to his co-heirs. 20 M. L. J. 288, foll. (*Sadasiva Iyer and Napier, JJ.*) PONNUSAWMY IYER *v.* PERMAYE. 26 I. C. 346=16 M. L T. 530.

———*Co-heirs—Permissive possession—Mahomedan widow of Shiah sect.*

The possession of properties by a Mahomedan widow of the Shiah sect on the strength of a family custom, though objected to by the heirs of her husband at the mutation proceedings is not adverse to the heirs but is in a sense permissive. (*Piggot, J. C.*) NANDI *v.* BAQUAR HUSSAIN. 18 I. C. 367 (Oudh.)

———*Co-heirs—Presumption.*

One co-heir remaining in possession even for over 12 years is presumed to remain on behalf of all co-heirs and the onus is on the deft. in possession to prove adverse possession. (*Chevis, J.*) MANGAL SINGH *v.* SHANKARI. 50 I. C. 746 (Pat.).

———*Co-heirs—Gift by one of her share to another.*

A deed of gift by a Hindu widow in respect of her share in her husband's estate in favour of her co-widow who is the heir-at-law, does not constitute adverse possession on the part of the co-widow as against the reversioners of her husband, when there is no proof of notice of an

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assertion by her of a title other than by inheritance. (*Chapman and Roe, JJ.*) SASIMAN *v.* SIBNARAIN. 39 I. C. 755=1 Pat. L. W. 375.

Community.

———*Community—Joint owners of* Takia-i-Khist Faroshan—*Suit by person not in possession for declaration of title and for accounts, if maintainable—Presumption of possession by all—Extinction of right.*

A joint owner not in possession of what is known as *Takia-i-Khist Faroshan* (which is by custom the joint property of a brotherhood of Kashmir merchants of Lahore) is entitled to maintain a suit for a declaration that he is the joint owner of the same and for accounts from the other joint owners in possession, in such cases he has the presumption of joint ownership in his favour which may be rebutted only by clear and unequivocal evidence of express and continuous denial for more than 12 years by the co-sharers in possession, of the right of user of the plff. and the cause of action for such a declaratory suit arises only when the plff.'s. rights are invaded by means of some overt act. (*Johnstone and Shah Din, JJ.*) AMIR BEGAM *v.* BEGAM.
9 P. W. R. 1914=22 I. C. 861=127 P. L. R. 1914.

———*Community—Public cannot acquire right by—Long user.*

The public as such cannot acquire by prescription the ownership of land or a right of easement over it. But the user by the public may be evidence of a dedication or grant in favour of the public. (*Oldfield and Ramesam, JJ.*) USSAM KASIM SAIT *v.* SECY. OF STATE FOR INDIA.
44 M.L J. 638=(1923) M.W.N. 315=
17 L.W. 610=74 1. C. 25=1923 Mad. 624.

———*Community—Trustee giving possession to stranger.*

If a trustee of a community gives possession of land of the community to a third person his possession is only permissive and not adverse to the community. (*Ayling and Tyabji, JJ.*) MURUGA CHETTY *v.* RAJASWAMY. 29 M.L.J. 574=
18 M.L.T. 327=(1915) M.W.N. 701=
30 I.C. 669=2 L.W. 813.

Co-mortgagors.

———*Co-mortgagors—Possession after redemption.*

Even though the possession of the entire property after redemption by a co-mortgagor is not *ipso facto* adverse there can be no doubt that that possession becomes adverse when the co-mortgagor holds the property openly asserting his exclusive title. 11 All 423; 38 All. 540 and 26 Bom. 500, Ref. (*Shadi Lal and Broadway, JJ.*) SHAHAB-UD-DIN *v.* KASIM ALI KHAN.
2 Lah. L.J. 160.

———*Co-mortgagors.*

The possession of the mortgagor who redeems the mortgage does not become adverse when he recovers possession of the property on redemption. (*Jwala Prasad C. J. and Dass J.*) RAM NARAYAN RAI *v.* RAMA DEVI RAI. 1923 P. 98=
1922 Pat. 129=6 Pat. L.J. 680=63 I.C. 282.

———*Co-mortgagors—Entry in record of rights—Knowledge.*

A mere entry in the Record of Rights of the possession of the redeeming mortgagor, is of no effect to prove adverse possession against a

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co-mortgagor. But it is valuable evidence of adverse possession if the Record is one of exclusive title of one mortgagor and he proves knowledge of it by the other co-mortgagor. (*Jwala Prasad and Das, JJ.*) RAM NARAYAN *v.* RAM DEVI 63 I. C. 282=
6 Pat. L. J. 680=1922 Pat. 129=
1923 P. 98.

Constructive.

———*Constructive—Trespasser.*

The doctrine of constructive possession cannot be applied in favour of a wrong doer whose possession must be confined to actual possession, that is to say, if he relies on adverse possession, he can succeed, only as regards the position of the land in suit, of which he proves actual possession for the statutory period. (*Mookerjee and Panton, JJ.*) H. H. MAHARAJAH OF COOCH BEHAR *v.* RAJA MAHENDRA RANJAN. 66 I. C. 923=
34 C. L. J. 465.

———*Constructive—Not applicable to trespasser.*

The theory of constructive possession of a whole land or of land under water by reason of possession of part is not applicable to a trespasser. (*Mookerjee and Walmsley, JJ.*) AMRITA SUNDARI *v.* SHEERAJUDDIN AHAMED.
29 I. C. 156=19 C. W. N. 565.

———*Constructive—Trespasser—Confined to spot actually in possession.*

The ordinary presumption, that a person having title has possession of the whole, though he exercises acts of ownership over a part only, does not arise in the case of a trespasser whose adverse possession will be restricted to the spot actually in possession. (*Sadasiva Iyer and Seshagiri Iyer, JJ.*) KARIA KOWDEN *v.* RAGHAVA REDDI. 23 I. C. 520=1 L. W. 410.

———*Constructive—Enjoyment of a part—Evidence of enjoyment of whole.*

Acts done on parts of a tract of land will be evidence of possession of the whole only when the boundaries of the tract are clearly defined. (*White, C. J. and Ayling, J.*) SUBRAMANIA PILLAI *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL.
34 Mad. 353=9 M.L.T. 181=21 M.L.J. 132=
9 I. C. 9=(1911) 1 M. W. N. 55.

———*Constructive—Possession of part if possession of whole—Trespasser.*

As a general rule possession of part is in law the possession of the whole if the whole is otherwise vacant; but constructive possession of this kind can only be presumed when there is a claim based on title and possession by a trespasser is confined to the land actually occupied by him. 12 O. C. 58 Ref. (*Wazir Hasan, A. J. C.*) DURGA *v.* RAM PADARATH. 65 I.C. 749=8 O.L.J. 495.

———*Constructive—Extent of the trespasser's right.*

The right of the person in adverse possession extends to the area actually in his possession and does not extend to the sub-soil. (*Jwala Prasad and Adami, JJ.*) RAMLAL *v.* SATIYA NIRANJAN CHAKRAVARTI. 5 Pat. L. J. 563=
57 I. C. 786=1 Pat. L. T. 474=
1921 Pat. 49.

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———*Constructive—Trespasser—Mines.*

A trespasser wrongfully working a vein of coal from an adjoining mine acquires possession only of the land worked but cannot be said to be in possession of the mine itself. If a person having title to all the seams of the coal under a defined surface enters on a seam, he will be taken to be in possession of all the seams over which he has title. (*Das and Foster, JJ.*) THE LODNA COLLIERY CO., LTD. *v.* BIPIN BEHARI BOSE. 55 I. C. 113=1 Pat. L. T. 84.

Co-owner.

———*Co-owners—Ouster.*

In the absence of an assertion of an adverse right the mere fact of a co-owner getting his name recorded in the Revenue Records will not amount to an ouster. The possession of one co-owner is that of all the co-owners unless there is some act of ouster by one co-owner against another. (*Banerji and Gokul Prasad, JJ.*) DEOKINANDAN *v.* ZAMIR HUSSAIN. 64 I. C. 24= L. R. 2 A. 22=1922 All. 399.

———*Co-owners—Ouster—Necessity for.*

Among co-owners the possession of one is the possession of all the co-owners and, in the absence of an ouster or something equivalent to ouster, there is no question of adverse possession. 37 A. 203, *Corea* v. *Appuhany* (1912) App. Cas. 230 Foll.; 38 M. L. J. 313 (P. C.) Ref. (*Stuart, J.*) LATCHMI NARAIN *alias* LALMAN *v.* NAUNHA MAL. 64 I. C. 471 (A.).

———*Co-owner—Burden of proof—Limitation.*

The onus lies heavily upon the co-owner who sets up adverse possession to prove that he or his predecessor in title had set up adverse title to the knowledge of the others more than 12 years before the institution of the suit because the ordinary presumption is that possession of one is not adverse to the others. (*Chamier and Piggott, JJ.*) AHMAD RAZA KHAN *v.* RAM LAL. 37 All. 203=26 I. C. 922=13 A. L. J. 204.

———*Co-owners—Exclusive possession of one not necessarily ouster of others.*

The essential feature of adverse possession as between tenants-in-common is exclusion or ouster of the other tenant-in-common, sole possession by one does not necessarily operate as ouster of the other but if it is maintained for a long time continuously, without any claim or demand by any person, claiming under the other tenant-in-common, it gives rise to a presumption of actual ouster. (*Chamier, J.*) MUHAMMAD ISHAQ *v.* NATHU. 16 I. C. 342=10 A. L. J. 59.

———*Co-owners—Khoti Kashgi lands—Division among branches—Effect.*

Members of branches of a family holding *Khoti Kashgi* lands in specific portions for the sake of convenience and before a general partition has taken place, do not hold adversely to one another. (*Macleod, C. J. and Crump, J.*) MOHIDDIN *v.* IBRAHIM. 74 I. C. 161. (Bom.)

———*Co-owners—Onus.*

In a suit for possession by one co-owner against another, the latter cannot succeed unless he definitely proves that he has been holding the land adversely against the world for 12 years; plaintiff having proved title, the onus is on the defendant to prove he was not entitled to property. (*Macleod, C. J. and Shah, J.*) VINAYAK KESHAV GULVE *v.* BALA SHIVRAM HINGNE. 24 Bom. L. R. 261=67 I. C. 176= 1922 Bom. 94.

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———*Co-owners—Ouster.*

The sole possession by one of two joint owners by itself is no evidence of his denial of the right of the other joint owner. Time does not run against the joint owner out of possession, until the joint owner in possession has done some act to the knowledge of the other which amounts to an ouster. The mere fact that the owner in possession redeemed a joint mortgage even though the plaintiff was aware of it, would not amount to an ouster. (*Macleod, C. J. and Shah, J.*) CHAND BHAI *v.* HASAN BHAI. 23 Bom. L. R. 1033=64 I. C. 205= 46 Bom. 213=1922 Bom. 150.

———*Co-owners—Nature of, at inception—Receiver—Appointment of—Effect.*

The possession of a co-owner is not ordinarily adverse to the other co-owners. But where a person originally entered not as a co-owner but asserting a hostile title and then became a co-owner and exercised his possession to the exclusion of the other co-owners, he continues to be in adverse possession. The appointment of a receiver does not stop limitation running. (*Chatterjee and Panton, JJ.*) PANKAJ MOHAN BAL *v.* BIPIN BEHARY CHAKLADAR. 38 C. L. J. 220= 76 I. C. 511=1924 Cal. 118.

———*Co-owners—Ouster—Exclusive possession.*

The sole occupation by one co-sharer, of a portion of joint property, does not constitute an ouster of the other co-sharers; and a co-sharer in possession of a portion of the common land, with the tacit or express consent of his co-sharers cannot change the nature of that possession. 43 M. 244; 28 C. L. J. 437; 21 C. L. J. 253; 41 C. 436 Rel. (*Mookerjee and Cuming, JJ.*) KAILASCHANDRA NAG *v.* BIJAYCHANDRA. 36 C. L. J. 434= 72 I. C. 680=1923 Cal. 18.

———*Co-owners—Ouster.*

Possession of land by one co-owner is not adverse to the others. Ouster in such cases to amount to adverse possession must be notorious and the intention must be established. (*Mookerjee and Buckland, JJ.*) JOYNARAIN *v.* SUCHITA DEBYA. 65 I. C. 8=33 C. L. J. 592.

———*Co-owners—Trespass by stranger—Co-owner holding as lessee under trespasser—Effect of.*

Where a stranger trespasses on land and ousts all the co-owners and subsequently one of the co-owners holds the land as lessee from the trespasser for more than 12 years, the possession of the lessee is not the possession of his co-owners and it extinguishes the title of all the co-owners to the land. (*Chatterjee and Suhrawardy, JJ.*) BHOLANATH DE *v.* GOLABDI SARDAR. 64 I. C. 553=35 C. L. J. 164.

———*Co-owners—Nature of possession of one co-owner.*

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The nature of possession of one co-owner is rightful but does not imply hostility and so it cannot be presumed that such possession is adverse to other co-owners. In general it is for the benefit of the rest. (*Mookerjee, A. C. J. and Fletcher, J.*) BALARAM GURIAH *v.* SYAMACHARIN MONDAL. 33 C. L. J. 344= 60 I. C. 298=24 C. W. N. 1057.

———*Co-owners—Ouster.*

In acquiring title by adverse possession a co-owner must prove that he set up a title against other co-owners and excluded them from possession. (*Mookerjee and Beachcroft, JJ.*) CHINTAMANI PRAMANIK *v.* HRIDAY NATH KAMILA. 51 I. C. 123=29 C. L. J. 241.

———*Co-owners—Lease from rival claimant.*

A co-owner holds adversely to others if he acquires possession from an adverse claimant claiming his exclusive right and title and denying that of the other co-owners. (*Sanderson, C. J., and Mookerjee, J.*) JATINDRA NATH ROY *v.* SABIDANNESSA KHATUN. 24 C. L. J. 165= 35 I. C. 36=20 C. W. N. 1258.

———*Co-owners—Presumption—Exclusive possession.*

The possession of one co-owner is presumed to be for the benefit of all and to establish adverse possession by a hostile act it must be shown that such act was inconsistent with his character as a co-owner and a case of adverse possession cannot be said to be established when there has been no exclusion of the others from use and enjoyment for the period of limitation. (*Mookerjee and Beachcroft, JJ.*) SURJA BIBI *v.* TARAP MONDAL. 26 I. C. 788 (C.)

———*Co-owners—Rule—Exception.*

When a question arises as to whether the possession of one co-owner is adverse to that of another, the fundamental rule is that the entry of possession of land under the common title of one co-owner will not be presumed to be adverse to the others but will be deemed for the benefit of all because a co-owner's possession does not imply hostility. (*Holmwood and Chapman, JJ.*) JAJNESHWAR SAHA *v.* SATISH CHANDRA SAHA. 23 I. C. 562 (C.)

———*Co-owners—Ouster.*

The possession of one co-owner is in law the possession of all the co-owners and nothing short of ouster or something equivalent to ouster can make the possession of one co-owner adverse to the others. (1912) A. C. 230 foll. (*Jenkins, C. J. and Ray, J.*) FAIZUDDIN KHAN *v.* REJU AKAN. 20 I. C. 584 (C.)

———*Co-owners—Sale by one of specific portion in possession.*

Where the sale is made by one co.sharer of a specific portion of the joint holding, which portion is in his possession and possession of which is immediately delivered to the purchaser, the possession of such purchaser is adverse from the moment of his entry. A co-owner's possession of the area cannot be adverse to his co-sharers until he has definitely declared to them his intention of holding on his own behalf, but this principle does not apply to the alienee of a co-sharer

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and if the purchaser obtains possession of the entire area brought by him under the deed of sale that possession must be regarded as adverse to the co-sharers from its commencement. (*Broadway, J.*) ANWAR *v.* KISHEN SINGH. 71 I. C. 171=1922 Lah. 205.

———*Co-owners—Entry in records as owner—Claim set up in suit—Effect.*

When the question was as regards title to a well and the evidence let in consisted of entries in revenue records of 1857 wherein the wells were claimed in ownership, the same being set up in a litigation of 1891 between the parties. *Held*, possession began to be adverse at least from 1891 and referred to ownership in twelve years therefrom. (*Broadway and Abdul Qadir, JJ.*) LALA *v.* KHALAS. 4 Lah. L. J. 181=1922 Lah. 102.

———*Co-owners.*

The possession of one co-sharer is possession of another co-sharer unless the former can show a clear adverse title asserted by 12 years' adverse possession. (*Robertson and Shah Din, JJ.*) PARS RAM *v.* MAHOMED YASIN KHAN. 14 P.W.R. 1912= 13 I. C. 953=150 P. L. R. 1912.

———*Co-owners—Knowledge.*

A co-owner's possession is not adverse to the other co-owners until he proves an open assertion of title hostile to the others or some fact showing that his possession could not be referred to his legal title as co-owner. (*Benson and Miller, JJ.*) TAJUDDIN *v.* ALI AHMAD. 18 I. C. 358=(1913) M. W. N. 381.

———*Co-owners—Possession of whole property.*

The possession of one co-owner even over the whole co-parcenary property is not *prima facie* adverse to the other co-owners. (*Stanyon, A.J.Cs.*) RAGHOBA *v.* PALHOBA. 45 I.C. 217 (N.)

———*Co-owners—Sole surviving co-parcener.*

The sole surviving co-parcener, dealing with the separate property of a deceased member, is deemed to be in adverse possession; such property does not thereby become joint family property. The heirs of the deceased can claim it. (*Kanhaiya Lal and Daniels, A.J.Cs.*) MAHADEI KUNWAR *v.* BANU RANI. 50 I.C. 180=6 O.L.J. 55.

———*Co-owner—Effect.*

Possession of one co-owner is the possession of all the co-owners and there must be ouster or something equivalent to ouster to put an end to that possession. 32 M. 191; 37 A. 203; 29 B. 300 Ref. No adverse possession arises among members of a joint family who have separated in mess, unless a clear disclaimer is made by one, and known to the other so as to afford ground for a title by adverse possession (1912) A. C. 212 foll. (*Stuart and Kanhaiya Lal, A.J.Cs.*) LASA JAGANA *v.* MUTHURA PRASAD. 39 I.C. 498 (Oudh.).

———*Co-owners—Essentials of.*

To establish adverse possession against a co-owner it is necessary to prove actual repudiation of his title and his exclusion for the statutory period. (*Evans, J.C.*) BHARAT PRASAD *v.* GANGA BAKHSH. 9 I.C. 425 (Oudh.).

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———*Co-owners—Hindu joint family—Possession of members of undivided property to one another—Right of other members.*

Where after a partial partition of joint family property one member continues in possession of certain properties not divided, his possession still continues to be the possession of the other members of the family though they may be divided, till some event happens which renders his possession exclusive or hostile to the others. 22 Mad. 191 Ref. (*Chapman and Atkinson, JJ.*) JAGDAMB LAL *v.* BIKULAL. 40 I.C. 115 (Pat.).

Co-parcener.

———*Co-parceners—Alienee from one of them.*

If a co-parcener alienated property belonging to the family excluding other co-parceners from it, adverse possession in favour of the alienee will begin to run from the date of alienation and the consequent exclusion of the co-parceners.

Per Batchelor, J.:—To constitute an adverse possession against the real owner possession must be ostensibly adverse. (*Chandavarkar and Batchelor, JJ.*) MALKAPPA BOD CHANBASSAPPAGOWDA *v.* MUDKAPPA BISAPPA MUDIGABDAR. 37 Bom. 84=17 I. C. 657=14 Bom. L. R. 931.

See CONTRA. 27 M. L. J. 600=16 M. L. T. 196=1 L. W. 699=(1914) M. W. N. 708=25 I. C. 573; 54 I. C. 385=11 L. W. 31.

———*Co-parcener.*

A Hindu co-parcener's possession is not adverse to other co-parceners unless they have notice of his so holding it. (*Ayling and Tyabji, JJ.*) MUTHU KRISHNA IYANGAR *v.* SANKARA NARAYANA IYER. 16 M. L. T. 196=1 L. W. 699=(1914) M. W. N. 708=25 I. C. 573=27 M. L. J. 600.

Co-sharer.

———*Co-sharer—Denial of title.*

Possession of one co-sharer can be said to be adverse against another, only if there is an open denial of title. Limitation can run, if at all, only from that date. (*Lord Atkinson.*) ARAB ALI KHAN *v.* MAHMAD ALI KHAN. 43 M. L. J. 104=35 C. L. J. 554=31 M. L T. 94 (P.C.)=20 A. L. J. 545=24 Bom. L. R. 951=67 I. C. 444=1922 P. C. 84 (P. C.)

———*Co-sharers—Ouster—Subsequent joint ownership—No interruption of adverse possession.*

Where a person has begun to hold possession of land adversely to two co-sharers, each being owner of a moiety, and before the expiration of the statutory period of limitation succeeds to one moiety upon the death of its owner, his possession continues to be adverse to the owner of the other moiety, although he has become jointly interested with the other.

Quaere:—Whether the rule that possession of one of several joint tenants or tenants-in-common is not adverse to others applies to joint sharers in a village who are not members of a joint Hindu family. (*Viscount Cave*). VARADA PILLAI *v.* JEEVARATHNAMMAL. 27 M. L. T. 6=22 Bom. L. R. 444=(1919) M. W. N. 724=10 L. W. 679=24 C. W. N. 346=38 M. L. J. 313=18 A. L. J. 274=53 I. C. 901=46 I. A. 285 (P. C.).
[O. A. FROM 19 M. L. T. 52=32 I. C. 111=(1916) 1 M. W. N. 17.]

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———*Co-sharers—Sole occupation—No exclusion—Possession of co-owner referred to his lawful title.*

Where one member of a joint family alone occupies the joint estate, that by itself affords no evidence of exclusion of other interested members of the family. Uninterrupted sole possession of such property without more, must be referred to the lawful title possessed by the joint holder to use the estate, and cannot be regarded as an assertion of a right to hold it as separate, so as to assert an adverse claim against other interested members. Where possession can be either lawful or unlawful, in the absence of evidence, it must be assumed to be the former. (*Lord Buckmaster*). HARDIT SINGH *v.* GURMUKH SINGH. 64 P. R. 1918=58 P. W. R. 1918=24 M. L. T. 389=28 C. L. J. 437=(1919) M. W. N. 1=9 L. W. 123=1 U. P. L. R. 8=47 I. C. 626=20 Bom. L. R. 1064 (P.C.)

———*Co-sharers—Knowledge.*

Sole possession by one of two or more joint owners is not adverse to others until the joint owner has done some act to the knowledge of the others which amounts to a denial of the latter's right. The mere execution of a registered deed affecting the property by one of the co-sharers is not notice of adverse possession to the other sharers. 48 C. 1; 46 Bom. 213, 37 A. 203 referred to. (*Daniels, J.*) SHAKUR *v.* HUSSAINI BIBI. 71 I. C. 653=1923 All. 447.

———*Co-sharer—Possession by some of them—Mortgage—Redemption—Effect of.*

The question of adverse possession is a mixed question of law and fact. As between co-sharers unless there was some act to the knowledge of the plaintiffs by which their title was denied or repudiated, the mere fact of the plaintiffs not being in actual possession would not amount to ouster such as would extinguish their right. Similarly the fact that some of the co-sharers mortgage the property and give possession thereof to the mortgagee would not make the possession of the mortgagee adverse to the other co-sharer. (*Mears, C. J. and Banerji, J.*) HAFIZ ABDULLAH *v.* ALLI. 21 A. L. J. 204=71 I. C. 640=L. R. 4 A. 139=1923 All. 291 (1).

———*Co-sharers—Acquiescence—Effect of—Permissive possession—Presumption.*

It is not an inflexible rule of law that a co-sharer's possession is the possession of all the co-sharers. The question depends on the circumstances of each case. Where co-owners are cousins by marriage who succeed to certain property, and one of them occupies more than his own share of the property without in any way indicating that he is doing so on behalf of the other, he really ousts the other co-sharer from possession of the portion exclusively occupied by

him. A consent to usurpation of possession by another does not prevent his possession from becoming adverse. (*Walsh, J.*) MUSTAFA KHAN *v.* DULARI. 3 U.P.L.R. (A) 5=65 I.C. 75=1922 All. 433.

———*Co-sharers.*

Possession of one co-owner can become adverse to the other. (*Tudball and Walsh, JJ.*) JHAMPHU *v.* KUTRAMANI. 39 All. 696=42 I. C. 713=15 A. L. J. 761.

———*Co-sharers—Ouster—Burden of proof.*

In a suit for possession by one co-sharer against another, plff. is entitled to rely on the presumption that possession of deft. was on behalf of plff. and it lies upon the deft. to prove that he had set up an adverse title to the knowledge of the plff. for more than 12 years before suit. The fact that plff. did not receive profits for many years alone does not raise a presumption of his ouster. (*Chamier and Piggott, JJ.*) MALLAH *v.* BEHARI. 28 I. C. 276=13 A. L. J. 298.

———*Co-sharer—Management.*

Management by one co-heir whose name alone is recorded in the Revenue papers, the other co-heir being a minor does not give him a title by adverse possession. *Richards, C. J. and Banerji, J.*) MAYAT HUSAIN *v.* AZIZ BANNO. 10 I. C. 413 (A.)

———*Co-sharers—Redemption of mortgage.*

Possession of mortgaged property by a co-sharer after redemption of the mortgage becomes adverse only from the time of assertion of exclusive title. (*Stanley, C. J. and Griffin, J.*) JAGDIP NARAYAN SINGH *v.* BILLAR SINGH. 33 All. 463=9 I. C. 572=8 A. L. J. 324.

———*Co-sharers.*

Exclusive possession of a tenant in common is not adverse until ouster by denial of the right of the tenant in common is established. Therefore, exclusive enjoyments of all profits is not by itself sufficient to constitute ouster. (*Macleod, C. J. and Shah, J.*) SHIVALINGAPPA *v.* SATYAVA. 64 I. C. 552=23 Bom. L. R. 967

———*Co-sharer—Assertion of hostile title—Disclaimer.*

A co-sharer in possession of joint property does not hold it adversely against any other co-sharer unless either the latter disclaims or the former openly asserts a hostile title. (*Scott, C. J., Beaman and Hayward, JJ.*) BHAIJI SHAM RAO DAREKAR *v.* HAJIMIYA MAHOMED AMIN. 15 I. C. 500=14 Bom. L. R. 314.

———*Co-sharer—Sole occupation by one is not ouster of others.*

The sole occupation by one co-sharer does not constitute an ouster of the other co-shares, and does not operate as exclusive possession. (*Mukerjee, J.*) KAILAS CHANDRA NAG *v.* BIJAYCHANDRA NAG. 36 C.L.J. 434=72 I. C. 680=1923 Cal. 18.

———*Co-sharers—Stranger in possession on behalf of co-sharer—Effect of.*

Where two sisters succeeded as co-heirs to certain properties of their deceased father, and the husband of one sister was in possession and management of the land for over 40 years after

which the other sister (plaintiff) sued for a declaration of her title to half of the properties: *Held* that the fact that the husband of one of the sisters was looking alter the land would not make his possession adverse unless it was found that he was in possession of the land asserting his own right and not as a manager of his wife's property. If he was in possession openly asserting his own right and not that of his wife for a period of 12 years in such a manner as to amount to what is called notorious exclusion, then the plaintiffs' case would fail. But if he merely possessed the land without any such assertion of title in himself and the facts were such that the plaintiff could not be expected to know that he was not in possession on behalf of the plaintiff's sister then the plaintiff's suit would not be barred. (*Newbould, J.*) JOYTUN BIBI *v.* SOLIMUDDIN CHOWKIDAR. 72 I.C. 33 (C.)

———*Co-sharers—Ouster—Knowledge essential to constitute possession of one co-sharer adverse to others.*

To prove dispossession by one co-sharer of another, it must be shown that there was exclusion or ouster to the knowledge of the latter. The principle does not depend on whether the parties are members of a joint family but rests upon the ground that they are co-owners and applies to all cases of co-owners. There can be no dispossession by one joint tenant in the absence of an assertion of a hosiile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy, and if no notice is given to the co-sharer of the denial of his right the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse as to justify the inference of knowledge on the part of tho co-owner sought to be ousted and of laches if he fails to discover and assert his rights. 26 C.W.N. 65; 26 C.W.N. 206; 29 Bom. 300 Rel. (*Chatterjee and Pearson, JJ.*) JAGENDRA NATH MOOKERJEE *v.* RAJENDRA NATH BHATTACHARJEE. 26 C.W.N. 890=68 I. C. 200=1922 Cal. 54.

———*Co-sharers—Ouster—Evidence of—Knowledge—Erection of building.*

To establish adverse possession as between co-sharers there must be evidence of an open assertion of a hostile title by one of them to the knowledge of the others. Mere non-participation in the profits by one party and exclusive occupation by the other is not conclusive. The erection of a substantial building on joint property by one co-owner is not conclusive evidence of ouster. If possession is such that it may be either lawful or unlawful in the absence of evidence it must be assumed to be lawful. (1912) A.C. 230, foll. (*Mukerjee and Buckland, JJ.*) JAGANNATH MARWARI *v.* CHANDNI BIBI. 67 I.C. 31=34 C. L. J. 432.

———*Co-sharers—Exclusive possession—Ouster.*

Where the widows of two brothers inherited their husbands' property and one of them left her husband's abode and became a mendicant while the other continued in sole possession of the entire property and paid rents and taxes and appropriated the whole profits of the estate to the exclusion of the other widow. *Held* that the possession of the widow was exclusive and hostie so

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as to deprive the absent widow, of her rights in the estate. (*Teunon and Newbould, JJ.*) CHAITANA KRISHNA MANDAL *v.* SOUDHAYAMANI DASI. 64 I. C. 773 (C)

———*Co-sharers—Sole occupation by one is not adverse to others.*

As between co-sharers, the mere fact that one of the co-sharers is in sole occupation of the property does not, by itself, show that such possession is adverse to the others. 16 C. W. N. 849; 24 C.W.N. 1057 Rel. (*Chatterjee and Cuming, JJ.*) SHEIKH SHACHUNI *v.* SHEIKH BASIR. 64 I.C. 613 (C.)

———*Co-sharers—Ouster.*

The plff. was a minor when his mother died in 1897. He attained his majority in 1911. He, in 1913 as the reversionary heir on the death of his mother, brought a suit for possession on the establishment of his title to a share of certain property alleging it to be joint family property against defts. The defence was that the suit was time barred. *Held*, that if the property was a joint property, it would be a case of adverse possession between co-sharers and in such a case to establish adverse possession exclusion or ouster of the mother more than twelve years before the suit must be proved. (*Chatterjee and Duval, JJ.*) GOBINDA CHANDRA BHATTACHARJEE *v.* DINANATH. 47 Cal. 274=23 C W. N. 977= 56 I. C. 141=30 C. L. J. 512.

———*Co-sharers—Possession under decree.*

Possession under a decree against one co-sharer is adverse against others also if the only possession relied on by the latter is that of the former. (*Fletcher and Cuming, JJ.*) ABDUL SOHAN *v.* LAXMI PRASAD AGARWALA. 50 I. C. 870 (C.)

———*Co-sharers—Requisites of.*

The possession of one co-owner is *prima facie*, the possession of the other co-owners and in order to make the possession of one co-owner adverse to the others there must be an actual ouster of the latter. Where one co-owner has been in uninterrupted possession for a large number of years, the Court may presume that there has been an ouster of the other co-owners without any express evidence of the fact of such ouster. (*Fletcher and Huda, JJ.*) AHAMUDDIN TAMIUDDIN *v.* AMIRUDDIN. 44 I.C. 216 (C.)

———*Co-sharer—Possession of one when becomes adverse to others.*

To acquire title by adverse possession against co-sharers, it must be proved that the title of the co-sharers was disclaimed to their knowledge and possession held by excluding them for the statutory period. (*D. Chatterjee and Walmsley, JJ.*) KETABDI SHEIKH *v.* TOLA BIBI. 38 I.C. 187 (C.)

———*Co-sharers—Some of them taking a lease from adverse claimant.*

Possession by some co-owners under a lease from an adverse claimant will be considered adverse to them and other co-owners so as to extinguish their title under the limitation law. (*Mookerjee and Roe, JJ.*) BISESWAR GANGOOLY *v.* BHAGBATI CHARAN BANERJEE. 35 I.C. 26= 24 C.L.J. 38.

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———*Co-sharers—Ouster.*

The possession of one co-sharer is in law the possession of all the co-owners. A secret intimation or mental determination of one co-sharer to put an end to the possession of others will not suffice. Nothing short of ouster or something equivalent to ouster can bring about adverse possession. (*Jenkins, C.J. and Ray, J.*) FAIZUDDIN KHAN *v.* REJU AKAB. 28 I.C. 22= 21 C.L.J. 192.

———*Co-sharers—Elements to constitute.*

To enable one sharer to acquire title by adverse possession against the co sharers, his possession must be so open, notorious, unequivocal, exclusive and hostile as to amount to an ouster of the other co-sharers. The ouster need not be violent nor need it be brought by formal communication to the notice of the other co-sharers. (*Mookerjee and Beachcroft, JJ.*) LOKINATH SINGH *v.* DHWAKESWAR PROSAD NARAIN SINGH. 21 C.L.J. 253= 27 I.C. 465=20 C.W.N. 51.

———*Co-sharer—Occupation of larger area.*

A co-sharer cannot be said to have been in adverse possession merely because he cultivated a larger area than what would fall to his share on a partition. To constitute adverse possession against a co-sharer, there must be an assertion of hostile title for more than 12 years prior to suit. (*Mookerjee and Beachcroft, JJ.*) KULADA PRASAD TEWARI *v.* SADU CHARAN BEWARI. 27 I. C. 412=20 C. L. J. 32.

———*Co-sharer—Possession.*

Possession by one co-sharer is possession by all. This joint possession cannot be put an end to by any secret intention by any one co-sharer in possession. Nothing short of ouster or some strong equivalent to ouster would bring about this result. Mere mental determination to hold adversely is insufficient for the purpose of extinguishing the title of the other co-owners and deprive him of the rights that would otherwise exist. (1912) A. C. 230, Foll (*Jenkins and Chatterjea, JJ.*) BIBI BAKHTUN *v.* AHMAD ISHAQUE. 27 I. C. 1 (C).

———*Co-sharers—Ouster.*

If one co-sharer keeps another out of possession appropriates the rents and profits and makes default in payment of revenue and purchases the same in revenue sale, the sale would not affect the other co-sharer's right. (*Chatterjea, J.*) MAIMUNNISSA KHATOON *v.* FAIZAR RAHMAN. 9 I. C. 507 (C).

———*Co-sharers—Adna maliks and Ala maliks—Non-payment of dues—Effect of.*

Where the defendants' rights as *ala maliks* existed before the settlement of 1858 and were affirmed in that settlement, their omission to enforce their rights does not imply an abandonment of their rights. Mere failure to pay dues does not establish adversity of possession. (*Le Rossignol and Abdul Quadar, JJ.*) LEKHU RAM *v.* MAHOMED RAMZAN. 5 Lah. L. J. 196=69 I. C. 6= 1923 Lah. 122.

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———*Co-sharers—Shamilat land—Partition.*

Where under a partition entered into by co-sharers, the shamilat land was divided and it was agreed that the lands should remain joint till Kharif 1905, the fact that some took possession of parts even before will not make it adverse. (*Le Rossignol and Harrison, JJ.*) HADAYAT KHAN *v.* SHAHAMAND. **73 I. C. 665 (Lah.)**

———*Co-sharer — Alienee — Possession of when adverse.*

Where a vendee from one of the co-sharers of shamilat land occupied the land and enjoyed it in the same way as his vendor, but the land was utilised by the other co-sharers for pasturing as before *held* that the possession of the alienee was not adverse to the body of co-sharers. 48 Cal. 1; 14 P. R. 1915; 39 Bom. 84 Ref. (*Broadway and Harrison, JJ.*) BIRJOO *v.* BHIKHU.
4 Lah. L. J. 3=64 I. C. 876=1922 Lah. 325.

———*Co-sharers—Alienee from one holds adversely to others—Alienation accompanied by delivery of possession.*

When a sale by a co-sharer of a particular portion of the joint holding, which is in his possession, is accompanied by an immediate delivery of possession to the purchaser, the latter holds it adversely to other co-sharers from the moment of the delivery of possession. (*Broadway, J.*) ANWAR *v.* KISHEN SINGH.
71 I. C. 171=1922 Lah. 205.

———*Co-sharers—Long silence and inaction—Effect of.*

The mere silence and inaction of one of the co-sharers coupled with the uninterrupted enjoyment of the common property by the other co-sharers does not amount to an adverse possession on the part of the latter or an abandonment of possession by the former. (*Leslie Jones and Dundas, JJ.*) MANGAL SINGH *v.* MAKHAN SINGH.
5 Lah. L. J. 17.

———*Co-sharers— Alienation by—Position of alienee.*

The alienee from a co-sharer stands in the shoe of the alienor and consequently the delivery of symbolical possession to an execution purchaser of the share of another co-sharer does not start adverse possession against the private purchaser. 104 P. R. 1919, foll. (*Wilberforce J.*) MALIK KHAN *v.* NAWAB. **4 Lah. L. J. 307.**

———*Co-sharer—Shamilat.*

A co-sharer claiming adverse possession over shamilat land must show (1) exclusive possession, (2) open assertion of exclusive ownership or some overt act showing an intention of holding the land exclusively as his own. The retention by the revenue authorities of the names of the other co-sharers after the adverse possession by one is begun, does not prevent time running against them. Even a decree in their favour unaccompanied by possession and effective assertion of rights will not help them. (*Abdul Raoof and Moti Sagar, JJ.*) HANS RAJ *v.* MAULU.
63 I. C. 881 (Lah.).

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———*Co-sharers.*

Where the defts. acted on their own behalf only in suing a trespasser for possession their adverse possession begins from the date of their possession as against their co-sharers. (*Rossignol, J.*) ZULPHI *v.* ASGHAR. **3 Lah. L. J. 441.**

———*Co-sharers—Sole possession—Non-payment of rent.*

To establish adverse possession as between co-sharers there must be evidence of an open assertion of a hostile act on the part of the co-sharers setting up adverse possession with notice to others, and that mere non-participation in the profits by one party and the exclusive occupation by the other party is not sufficient. (*Chevis, O. C. J.*) BALAK RAM *v.* KAURA.
56 I. C. 169 (L.)=2 U. P. L. R. 94 (L.).

———*Co-sharers—Presumption.*

A co-sharer, though not in possession, may be presumed to be in possession though his co-sharers are in actual occupation. (*Martineau, J.*) CHANAN MAL *v.* MELA RAM.
50 I. C. 762=117 P. R. 1919.

———*Co-sharers—Possession of one when adverse to others.*

In the absence of a clear and unequivocal act the possession of a joint owner cannot be regarded as adverse to his co-owner, because in a joint holding possession of one is the possession of all others. (*Johnstone and Shadi Lal, JJ.*) THIRAJ *v.* KASIM. **48 P. W. R. 1915=26 I. C. 481=124 P. L. R. 1915.**

———*Co-sharers—Possession of, if and when can be adverse to others.*

Possession of one co-sharer is ordinarily possession of all but such possession may become adverse to that of the others when the co-sharer in possession expresses by an overt act, an unequivocable intention to hold the property for himself exclusively; and time will begin to run and limitation can be avoided only by expressly breaking down the other exclusive possession. (*Johnstone and Chevis, JJ.*) AKBAR *v.* TABU.
105 P. L. R. 1914=61 P. W. R. 1914=22 I. C. 805=45 P. R. 1914.

———*Co-sharer—Abandonment.*

A co-sharer went to live in another place leaving his share of joint holding in possession of his brothers who paid rents for him. On his death his son's name was placed on revenue papers without any objections in 1890. In a suit by the son in 1906 it was held, that there was neither abandonment by the absentee nor adverse possession by co-sharers. (*Chevis, J.*) CHARAGH *v.* MAHOMED DIN. **12 I. C. 425=125 P. W. R. 1911.**

———*Co-sharers—Tawazhi in Tarwad.*

When the eldest male member of a Tawazhi forming a branch of a tarwad, the adverse possession by the Tavazhi as against the Tarwad cannot be established. (*Spencer & Devadoss, JJ.*) OLIYATH VAZHAYIL ABUBAKKAR *v.* OLIYATH KUNHIKUTTIYALI. **16 L. W. 768=31 M.L.J. 389=74 I. C. 27=1923 Mad. 153.**

ADVERSE POSSESSION—Co-sharer.

———*Co-sharers — Alienee from — Possession—Knowledge.*

The possession of an alienee from one of several co-tenants is adverse as against the other co-tenants from the moment of entry into possession by the alienee. (*Seshagiri Aiyar and Moore, JJ.*) SHEIKH ABDUR GAFUR *v.* ASHAMATH BIBI. 54 I.C. 385=11 L. W. 31.

———*Co-sharers—Possession of one, enures for all.*

Where a co-owner gets into possession of certain lands on behalf of the whole body of the co-owners, his possession enures for the benefit of all the members of the family and he cannot make it adverse to them. (*Wallis, C. J. and Srinivasa Iyengar, J.*) HIDAYAT ALI KHAN SAHEB *v.* KHADAR KHAN SAHEB. 30 I. C. 586 (M.).

———*Co-sharers—Limitation.*

The possession of one co-tenant is the possession of all persons entitled as tenants-in-common. (*Wallis, C. J. and Seshagiri Aiyar, J.*) HASSAN AMMAL BIBI *v.* ISMAIL MOIDEEN. 28 M.L.J. 642= 29 I.C. 976=(1915) M.W.N. 414.

———*Co-sharers—Possession.*

A person in physical possession of a property subject to a joint interest cannot claim adverse possession of his co-sharer's interest before partition. There can be no physical possession of an interest in an unascertained area. 24 A. 17 P. C. Ref. (*Stanyon, A. J. C.*) SADHURAM *v.* RAMADIN. 42 I. C. 291 (N.)

———*Co-sharers.*

Physical possession of one co-owner is presumably not adverse to others not in physical possession; hence the possession of a lambardar cannot be said to be adverse to the recorded co-sharers merely because he pays no share of profits to them nor does it amount to an ouster. 13 C. P. 99 diss., 2 C. P. 171, 8 C. P. L. R. 41 foll. (*Batten and Stanyon, A. J. C.*) DINA *v.* BISHAMBHAR SING. 31 I. C. 464=11 N. L. R. 164.

———*Co-sharers—Mothers and daughters.*

A mother of a minor daughter holding the whole estate of her father cannot claim adverse possession merely because the mother held the property and maintained the daughter. (*Lindsay, J. C.*) SADRANNISSA *v.* RAM BHAROSE. 55 I. C. 873=7 O. L. J. 78.

———*Co-sharers—Ouster.*

In the case of joint co-owners, like a son and his mother or brother and sister, living jointly and maintaining themselves out of the income of the joint property, the possession of one does not become adverse to the others unless ouster or a repudiation of title to the knowledge of the other owners is manifested. (*Kanhaiya Lal, A. J. C.*) ASGAR HUSSAIN *v.* AKBAR HUSSAIN. 36 I. C. 743= 3 O. L. J. 438.

———*Co-sharers—Withholding of share of collections—Effect of.*

If there is joint collection of rents at the time when any failure to deliver to the plaintiffs their share of the rent can hardly be held to amount to assertion of adverse title or to dispossession until it is shown that the plaintiff's title was definitely denied. (*Coutts and Das, JJ.*) KULDIP SINGH *v.* RAM SEWAK SINGH. 67 I.C. 795= 1923 Pat. 183.

ADVERSE POSSESSION—Co-tenants.

———*Co-sharers.*

The possession of one co-sharer cannot become adverse to that of other co-sharers except where one party asserts an exclusive title as against others. (*Pipon, J. C.*) GHULAM HAIDAR KHAN *v.* ALI KHAN. 73 I. C. 748 (Pesh.).

———*Co-sharers.*

There can be no adverse possession between co-sharers in joint possession. (*Twomey, J.*) MA NYAIN ME *v.* MA MAY. 32 I. C. 568=9 Bur. L. T. 84 (R.).

———*Co-sharers—Profits.*

Exclusive receipt of profits by one tenant-in common for a long time without any claim or demand from the other is evidence of ouster and is a denial of the rights of the tenant-in-common. (*Pratt, J. C. and Hayward, A. J. C.*) ASUDMAL *v.* ALI. 10 I. C. 554=5 S. L. R. 49.

Co-tenants.

———*Co-tenants—Ouster—Non-participation in profits.*

In deciding whether there has been an ouster, the Court may take into consideration, the fact that a tenant-in-common did not participate in the rents and profits for a considerable length of time and that other circumstances concur. (*Mears, C.J. and Piggott, J.*) NANHAY LAL *v.* LACHHMI NARAIN. L.R. 3 A. 605.

———*Co-tenants—Ouster.*

Exclusion or ouster by tenants-in-common is the chief requisite of adverse possession long and continuous sole possession of a tenant-in-common without any claim from others is the evidence of ouster of them by him. (*Chandavarkar and Batchelor, JJ.*) SAVALPURI BALPURI *v.* BALA YADAVSHET SONAR. 36 Bom. 543=16 I.C. 341= 14 Bom. L.R. 566.

———*Co-tenants—Ouster or exclusion—Denial of rights of other co-tenants—Circumstances showing exclusion.*

Adverse possession by one tenant-in-common against his co-tenants is established on proof of exclusion or ouster and possession subsequent to that exclusion or ouster for the statutory period. The exclusive possession or participation of profits by one co-tenant must be such as to afford an indication of denial of the rights of the other co-tenants. Mere non-participation in rents and profits would not of itself necessarily amount to adverse possession; but such non-participation or non-possession may, in a particular case, amount to adverse possession. Some of the circumstances to be taken into consideration are:—The relationship of the parties, their position, the mode of life in the particular community to which the parties belong, the character of the property and other circumstances of a similar nature. (*Jenkins, C.J. and Chatterjee, J.*) AMENNESSA BIBI *v.* SHEIK ISUF. 14 I.C. 722=16 C.W.N. 849.

———*Co-tenants.*

In the case of a tenancy-in-common, the possession of one co-tenant of a specific portion

of the property does not amount to adverse possession as against the other co-tenants in the absence of clear evidence of ouster. (1912) A. C. 250 foll. The history of the English and Indian law as to adverse possession among co-tenants reviewed. (*Wallis, C. J. and Seshagiri Aiyar, J.*) KUMARAPPA CHETTIAR *v.* SAMINATHA CHETTIAR. **42 Mad. 431=36 M. L. J. 612=52 I. C. 470=(1919) M. W. N. 328.**

———*Co-tenants.*

Possession by one tenant in common cannot be adverse against the others, unless there has been exclusion of the latter from enjoyment to their knowledge. Where possession can be referred to a legal right, there is no acquisition of title by prescription. (*Miller and Bakewell, JJ.*) GIRI APPAYA *v.* GIRI KRISTAMMA. **24 I. C. 436 (M.)**

———*Co-tenants—Ouster to the knowledge of others.*

The possession of one joint tenant is the possession of all and there can be no dispossession by one joint tenant in the absence of an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy. (*Das, J.*) LACHMI SAHU *v.* RADHA KRISHNA SAHU. **51 I. C. 77 (Pat.).**

Debutter Property.

———*Debutter property—Manager—Idol.*

Possession obtained from a manager of endowed property becomes adverse to the idol as represented by the succeeding manager. (*Beaman and Hayward, JJ.*) PANDURANGA BALAGI *v.* DNYAMNU. **36 Bom. 135=12 I. C. 926=13 Bom. L. R. 1169.**

———*Debutter property—Permanent lease for more than 60 years—Suit for resumption—Limitation.*

A permanent lease, not impeached for 60 years becomes indefeasible whatever the true character of the original grants may be and a suit for resumption of the debutter properties covered by the grants is barred by limitation. (*Mookerjee and Beachcroft, JJ.*) HULADA PRASAD DEGHORIA *v.* KALIDAS NAIK. **42 Cal. 536=20 C. L. J. 312=24 I. C. 899=19 C. W. N. 542.**

Donor and Donee.

———*Donor and donee—Right to possession—Donee's line extinct—Property reverting to donor's line.*

Where the donee's line of descent having become extinct the land goes back to the line of the donor, the possession of any person occupying the land along with the last male-holder does not become adverse during the lifetime of the latter. (*Johnstone, J.*) ILAHIA *v.* NIZAM-UD-DIN. **94 P.W.R. 1914=24 I.C. 623=193 P.L.R. 1914.**

Easement.

———*Easement—Permanent tenancy—Prescription by one tenant against another.*

In India, unlike in England, a tenant with permanent rights can acquire an easement by prescription against another tenant having the same rights. The incidents of a permanent tenancy in this country are different from the incidents of a

tenant for years as they obtain in England, 19 C. W. N. 1211 followed. (*C. C. Ghose and B. B. Ghose, JJ.*) KALIPADA BOSE *v.* FANI BHUSAN ROY. **70 I. C. 173 (Cal).**

Ejectment.

See LIMITATION ACT, ARTS. 142, 144.
LANDLORD AND TENANT.
POSSESSORY TITLE.

Elements of.

———*Elements of—Hostile possession—Proof of, if necessary.*

To constitute adverse possession it is sufficient that the person now claiming to be owner should stand by while others continue to possess not by derivative title but in practical contravention of his alleged rights. He need not prove that such claimant protested against the violation of his rights, and that possession went on in spite of such protest. (*Lord Shaw.*) ARUNACHALAM CHETTY *v.* VENKATACHALAPATHY GURUSWAMIGAL. **43 Mad. 253=46 I.A 204=37 M.L.J. 460=(1919) M.W.N. 850=10 L.W. 642=26 M.L.T. 479=24 C.W.N. 249=17 A.L.J. (1097)=53 I. C. 288=22 Bom. L. R. 457 (P. C.)**

———*Elements of—Minor Acts.*

Possession in order to be adverse must be adequate in continuity, in publicity and in extent. Where the acts of adverse possession consisted in "tethering of cattle and throwing cow-dung on the land". *Held* they did not denote an assertion of a claim of ownership to that land. (*N. Chatterjee and Greaves, JJ.*) MA HABIR MISSER *v.* NANDAKISHORE MISSER. **27 I. C. 640=27 C. L. J. 583.**

———*Elements of—Ineffective possession—When becomes adverse.*

Where a deft. whose possession is ineffective wants to base his claim upon an assertion of title it is necessary for him to prove that the owner had knowledge of such assertion. An openly avowed claim means a claim to the knowledge of the owner. (*Sundara Aiyar and Spencer, JJ.*) MALLA VEERANNA *v.* MALLACHELAMAYYA. **13 I. C. 467=(1912) M. W. N. 68.**

Enjoyment.

———*Enjoyment.*

The enjoyment of a right by the persons claiming it whether it takes the form of commuted money or the actual enjoyment of the immoveable property is for the purpose of limitation plainly adverse to the person owning the remaining interests in immoveable property. (*Beaman and Hayward, JJ.*) MAHASHANKAR *v.* MAHASHANKAR. **33 Bom. 174=12 I. C. 716=13 Bom. L. R. 1047.**

———*Enjoyment—Pond—Not capable of physical possesssion—Intermittent user—Effect of.*

Intermittent user of a pond accompanied by no assertion of right is a very common phenomenon in India and often arouses no opposition. The pond is not susceptible of actual physical possession by the legal owner and possession follows title unless the usurper can prove long and continuous exclusion of the rightful owner. (*Le Rossignol, J.*) BHURU *v.* DATU RAM. **4 Lah. L. J. 461=1922 Lah. 59 (1).**

ADVERSE POSSESSION—Enjoyment.

———*Enjoyment acts necessary—Vacant site.*

Where land consists of a vacant site desultory acts of possession such as storing cow dung cakes and tying cattle are insufficient to consitute adverse possession. (*William and Harrison, JJ.*) WAZIRI MAL *v.* GANGA RAM. 69 I. C. 573. (L.)

Essentials of.

———*Essentials requisities of—Receipt of rent.*

A person who has been merely asserting an adverse title, cannot be said to be in adverse possession against the owner while the former is neither in actual possession or in constructive possession as shown by receipt of rents and profits. (*Richards, C. J. and Banerjee, J.*) KUNVAR SEN *v.* DARBARI LAL. 34 I. C. 171= 38 All. 411.

———*Essential of—*

According to the Limitation Act adverse possession in order to ripen into ownership must be actual, exclusive and continuous for more than 12 years. (*Karamat Hussain, J.*) ZAHURAM *v.* RAHIM. 10 I. C. 742=8 A. L. J. 247.

———*Essentials of.*

There can be no question of adverse possession unless the party has come into possession not only against the mortgagor but also against the mortgagee. (*Macleod, C. J. and Shah, J.*)) VINAYAK KESHAV GULVE *v.* BALA SHIVRAM HINGNE.
24 Bom L. R. 261=67 I. C. 176=1922 B. 94.

———*Essentials of—Isolated acts of trespass do not constitute adverse possession.*

The possession must be adequate in continuity, in publicity and in extent, in order that it may be effective to destroy the title of the true owner. Possession to be adverse must be actual, exclusive and hostile, and a distinction must be made between continuous adverse occupation and isolated acts of trespass. (*Mookerjee and Panton, JJ.*) H. H. MAHARAJAH OF COOCH BEHAR *v.* RAJA MAHENDRA RANJAN. 66 I. C. 923= 34 C. L. J. 465.

———*Essentials of.*

Possession to be adverse must be *nec-vine clam nec precaris.* (*Greaves, J.*) PANCHU MUCHI *v.* BHUTO MUCHI. 50 I. C. 649 (C.)

———*Essentials of—Symbolical possession.*

Adverse possession to be effective, must be actual, visible, exclusive, hostile, and continuous for the statutory period. Symbolical possession by fixing bamboo with beat of drum does not constitute adverse possession. (*Greaves and Panton, JJ.*) TARA CHAND ROY *v.* SECRETARY OF STATE. 50 I. C. 45=23 C. W. N. 380.

———*Essentials of.*

Possession cannot be adverse against a person who has not an immediate right to possession either on his own account or through his predecessor-in-title. 4 C. 327, 27 B. 43, Ref. (*Reid, C.J., and Kensington and Rattigan, JJ.*) SUNDAR *v.* SALIG RAM. 9 I. C. 300=34 P. L. R. 1911= 33 P. W. R. 1911=26 P. R. 1911.

ADVERSE POSSESSION—Evidence.

Evidence.

———*Evidence—Beneficial owner.*

Against a person clothed with all the insignia of beneficial ownership, strong and reliable evidence is necessary to prove dispossession or adverse possession. (*Lord Atkinson.*) ARAB ALI KHAN *v.* MAHMAD ALI KHAN.
43 M. L. J. 104=20 A. L. J. 545= 35 C. L. J. 554=31 M. L. T. 94.(P. C.)
24 Bom. L. R. 951=67 I. C. 444= 1922 P C. 84.

———*Evidence of—Tenant not paying rent after term.*

It is necessary to prove an overt act of adverse possession before the possession which is non-adverse at its inception can become adverse. If a tenant does not pay rent after the expiry of the stipulated term, it does not mean that he possesses adversely from that date, the mere physical possession being presumed to be retained by him as before. 31 A. 514 Dist., 37 A. 557 (P.C.), Ref. (*Knox, J.*) BIJAI NARAIN SINGH *v.* PARBHU NARAIN SINGH. 37 I. C. 395=15 A. L. J. 317.

———*Evidence of—Proof—Sufficiency.*

The plff. in a suit for adverse possession must prove that his possession was adequate in continuity, in publicity and in extent to extinguish the title of the owner. The erection of a hut on a portion of the disputed land, or a projection of the eaves over a certain length are insufficient. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) RAMCHANDRA SIL *v.* RAMAN MANI DASI.
36 I. C. 890=20 C. W. N. 773.

———*Evidence of—Registration under the Bengal Land Registration Act—Effect.*

The registration of the name of a person under the Bengal Land Registration Act is some evidence of possession but the weight to be attached to this fact must depend upon the circumstances of each case. (*Mookerjee and Beachcroft, JJ.*) LOKENATH SINGH *v.* DHAKESHWAR PROSAD NARAIN SINGH.
21 C. L. J. 253=27 I. C. 465=20 C. W. N. 51.

———*Evidence—Acceptance of settlement from Government—Effect of—To be restricted to actual occupation.*

The circumstances of the possession by government of the various churs to the settlement proceedings is strong evidence to show that the title put forward by the plaintiff is unfounded. (*Mookerjee and Carnduff, JJ.*) SECRETARY OF STATE FOR INDIA *v.* KAILKA PROSAD MOOKERJEE.
14 I. C. 609=15 C. L. J. 281.

———*Evidence of—Acts of minor importance.*

The fact that plffs. have been grazing their cattle and cutting grass from time to time on the land in suit is not enough to prove their ownership of the land. (*Chevis and Jones, JJ.*) SANT SINGH *v.* FRANGU. 41 I. C. 755=54 P. W. R. 1917.

———*Evidence of—Knowledge of true owner.*

A true owner is precluded from pleading that the possession of another person is not adverse to him when he sees the other enjoying the property as owner, and could have acquainted

ADVERSE POSSESSION—Evidence.

himself with the facts and the law and had not been kept out of such knowledge by the fraud of the other. (*Sadasvia Iyer and Burn, JJ.*) SECRETARY OF STATE *v.* BOMMADEVARA VENKATANARASIMHA.

11 L. W. 256=(1920) M. W. N. 209=58 I. C. 689=27 M. L. T. 147.

———*Evidence of—Registry—Transfer of—Payment of rent.*

In 1895 two widows having an absolute interest in certain property gave it away to the daughter of one of them as *Stridhanam*, and effected transfer of registry in the Collector's office. The donee executed in 1901 a power of attorney in favour of her husband authorising him to collect rents and in 1901 the widows in a will acknowleged the possession of the donee. *Held*, that the donee though the gift was not proved, was in adverse possession of the property against the widows though the rents collected were paid indiscriminately to the two widows. (*Coutts-Trotter and Srinivasa Iyengar, JJ.*) JEEVARATHNAMMAL *v.* VARADA PILLAI. **19 M. L. T. 52=32 I. C. 111=(1916) 1 M. W. N. 17=[O. A. 43 Mad. 244=38 M. L. J. 313=53 I. C. 901=3 L. W. 1.]**

———*Evidence of—Enclosure.*

Enclosure is the strongest possible evidence of adverse possession. (*Miller and Sadasiva Aiyar, JJ.*) NARASAPPAYYA *v.* GANAPATHY RAO. **29 I. C. 255=38 Mad. 280.**

———*Evidence of—Usufruct of trees—Enjoyment of.*

Possession and enjoyment of the land, if no other profit can be derived other than the usufruct of the fruit trees which stand thereon, can be proved by the enjoyment of the trees, in such a case, the enjoyment of the produce of the trees cannot be separated from the enjoyment of the sites on which the trees stand. (*Sadasiva Aiyar and Hannay, JJ.*) VENKATESAM CHETTY *v.* SUBBIAH. **28 I. C. 266=2 L. W. 257.**

———*Evidence of—Neighbouring owners—Enclosure.*

Where one of two owners of neighbouring lands encloses his neighbour's land within his own, the possession must be held to be adverse, in the absence of anything showing the occupation to be permissive. (*Ayling and Tyabji, JJ.*) ROMPICHERLA *v.* SHAIK ISMAIL SAHIB. **21 I. C. 765 (M.).**

———*Evidence of—Entry in Government Survey.*

Effective occupation of land by a person for the statutory period and the absence of assertion of a claim of right to it by any one else is both strong evidence of title in pursuance of which he took possession and conclusive of his right to the land by prescription. It is sufficient for the person claiming the prescriptive right even if he proves that the only use he made of the land was to store water therein. An entry in the Govt. survey account and the Government land register is not strong evidence of title of the person in whose name the entry is made, unless it is accompanied by substantial acts of enjoyment. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) GOPALASWAMI CHETTY *v.* SECRETARY OF STATE FOR INDIA. **16 I. C. 955 (M.).**

ADVERSE POSSESSION—Extent of Right.

———*Evidence of—Title from last grant—Proof.*

The same characteristics are necessary whether enjoyment is set up as the basis of title by prescription or as raising presumption of last grant. (*Wihte, C. J. and Ayling, J.*) SUBRAHMANIA PILLAI *v.* SECRETARY OF STATE FOR INDIA. **34 Mad. 353=9 M.L.T. 181=21 M.L.J. 132=9 I.C. 9=(1911) 1 M.W.N. 55.**

———*Evidence of—Entry in revenue papers—Under-proprietor.*

The title of a person holding land as an under-proprietor cannot be disturbed or destroyed by an adverse entry in the revenue papers or any orders passed by the Revenue Court refusing to enter his name in the revenue papers provided this possession is not taken away. (*Kanhaya Lal, A. J. C.*) CHANDIKA *v.* SHEORAJ. **55 I.C. 490=7 O. L. J. 28.**

———*Evidence of—Cutting grass, etc.*

Occasional acts of possession on the whole land such as cutting grass etc. do not amount to an ouster of the landlord and do not constitute adverse possession unless some adverse title is set up to the knowledge of the landlord. 41 I. C. 80, approved. (*Kanhaiya Lal, A. J. C.*) NAGESHWAR DATT RAM *v.* CHHEDI SINGH. **42 I. C. 196=4 O. L. J. 506.**

———*Evidence of—User.*

User, to form the basis of title by adverse possession should be in the nature of ownership. Any possession is a legal one against a trespasser, who can never call upon a holder to show the superior title in the latter. (*Fox, C. J. and Parlett, J.*) ASHA BIBI *v.* SULEMAN ISMAIL ATCHA. **8 L. B. R. 372=36 I. C. 249=10 Bur. L. T. 55.**

———*Evidence of—Denial of title—Denial of user of land.*

Under the Bombay Revenue system denial of user of land in a particular way is no denial of title. (*Hayward, J. C. and Boyd, A. J. C.*) SECRETARY OF STATE *v.* MUSHTAK SING. **24 I. C. 813=7 S. L. R. 169.**

Ex-proprietary Tenancy.

———*Ex-proprietary tenancy—Declaratory suit.*

The possession of an ex-proprietary tenant can never be adverse to the landlord who can get a declaration that he is the owner, but he cannot get possession so long as the tenancy continues. (*Ryves and Gokul Prasad, JJ.*) GANESH PRASAD *v.* SHIB SINGH. **60 I. C. 261 (All.).**

———*Ex-proprietary tenancy.*

Adverse possession for more than the statutory period gives absolute title; but a person cannot acquire the status of an ex-proprietary tenant by adverse possession. (*Richards, C. J. and Banerjee, J.*) BALDEO *v.* ULFAT RAI. **37 All. 22=26 I. C. 21=12 A. L. J. 1153.**

Extent of Right.

———*Extent of right—Claim petition—Rejection of—Effect.*

Where a claim petition is rejected, the claimant cannot plead adverse possession. (*Odgers and Hughes, JJ.*) HISAMNA *v.* MOIDIN KUNHI BEARI. **(1923) M. W. N. 633=45 M. L. J. 690=18 L. W. 520=1924 M. 111.**

ADVERSE POSSESSION—Extent of Right.

———*Extent of right acquired.*

Ordinarily no one can prescribe for more than what the person against whom he prescribes is entitled to. (*Wallis, C. J. and Seshagiri Aiyar, J.*) *In re* KANCHARLA VENKATARAMIAH.

16 M. L. T. 435=27 M. L. J. 569=25 I. C. 692; Also 44 Cal. 495=37 I. C. 277; 35 M. 231=9 I. C. 791; 39 M. 811=31 I. C. 412; 36 A. 567=24 I. C. 997; 26 I. C. 523=28 M. L. J. 256.

Ferry.

———*Ferry.*

Right to ferry is immoveable property and may be acquired by adverse possession against the owners of the termini but not as against others. (*Cox, J.*) ABDUL KHOYARAT *v.* HEM CHANDRA ROY. **9 I. C. 846 (C.)**

Forest Land.

———*Forest land—Onus.*

If land is covered with jungle, plff. must show his title and if he does so and proves also that it was unfit for cultivation within 12 years, deft. will have to prove that plff. was not in possession within 12 years. (*Sharfuddin and Cox, JJ.*) SHIDDESWARI DASSAYA *v.* SHASHI BHUSAN CHAUDHURI. **16 I.C. 39 (C.).**

Hereditary Office.

———*Hereditary office—Office of Patil and Kulkarni—Adverse possession.*

The plaintiff was one of the eldest members of the family of Jaghirdars, to whom the village of Hebli was granted in Jaghir in 1748 A. D. inclusive of the confiscated lands of the Patilki and Nadgir Vatans. The latter lands had been resumed by Government prior to 1723 for non payment of jodi. The plaintiff's family was in possession of the bulk of those lands and exercised the rights of the service of Patilki and Kulkarniki; the lands were entered in their names as 'Kamavishi' in Government records. Somehow a small portion of the lands went into the possession of the defendants who belonged to the Nadgir family. In 1876, the defendants obtained possession of another portion of the lands from the plaintiff's family through a Civil Court; but from the date of the suit in 1868, the plaintiff's family discontinued entering the Vatan lands as 'Kamavishi,' in its books. In an inquiry under the Bombay Hereditary Offices Act, 1874 it was held by the Collector in 1906 and by the Government in 1908 that the whole of the Patilki and Kulkarniki Vatan should be entered as such in the Vatan register against the names of Nadgir defendants and that so much as was required for the emolument of the officiators should be recovered from the Jaghirdars in possession. Accordingly, a contribution was levied against the Jaghirdars in 1913. Thereupon, the plaintiff sued for a declaration that his family were Vatandar's Patils and Kulkarnis by virtue of the grant; or in the alternative by their long and exclusive possession and enjoyment of the offices until 1908:—

Held that the manner in which the Vatan lands were treated both by the Government and the Jaghirdars showed that the lands had not become the absolute property of the Jaghirdars:

ADVERSE POSSESSION—Hindu Family.

(2) that it was not competent to the Jaghirdars to acquire the offices of Patil and Kulkarni by adverse possession:

(3) that assuming that the Nadgir defendants were entitled either by agreement or by custom to get back their Vatan lands on payment of 'jodi' time would not begin to run against them until they were made aware that the Jaghirdars were setting up a title to hold the Vatan lands in their own right and there was nothing to show that the Nadgirs were aware of any alteration in the method of keeping the village accounts. (*Macleod, C. J. and Shah, J.*) SHRINIVAS LINGO NADGIR *v.* SECRETARY OF STATE FOR INDIA.

24 Bom. L.R. 214=1922 Bom. 18.

———*Hereditary office—Title acquired by statute.*

Where a title to an office has been acquired by prescription, the title of the true owner is not revived by re-entry. (*Mookerji, A. C. J. and Fletcher, J.*) KASIM HASSAN *v.* HAZRA. BEGUM. **60 I. C. 165=32 C. L. J. 151.**

———*Hereditary office—Service inam—Lands disannexed from office.*

Where service *inam* lands attached to the office of *karnam* become disannexed from the office. and are enjoyed by a person having no claim to the office, as ordinary private property, such possession is adverse to the holder of the office. (*Abdur Rahim and Ayling, JJ.*) IDARAPALLI DHANUSHKOTIRAYUDU *v.* VAKAYALA VENKATARATNAM.

38 M. L. J. 320=59 I. C. 65=11 L. W. 453.

———*Hereditary office.*

Even if joint possession of an office is regarded as adverse it does not give a title even to a share of the income of the lands attached to that office. 27 M. L. J. 100 (P. C), Ref. (*Ayling and Napier, JJ.*) VUSA CHANDRA KANTAM *v.* VUSA SUBBARAYADU. **(1914) M. W. N. 745=16 M. L. T. 347=25 I. C. 685=I. L. W. 827.**

Hindu Family.

———*Hindu family—Hindu widow—Family arrangement—Possession under, if adverse to other members of the family.*

Where a minor widow claims and retains possession under a family arrangement, her possession is not adverse to the other members of the family. 29 Cal. 664, Foll. (*Stuart and Sulaiman, JJ.*) RADHA DULIYA *v.* RASHIK LAL.

45 A. 1=L. R. 3 A. 544=75 I. C. 14=20 A. L. J. 814=1923 A. 25.

———*Hindu family—Co-widows.*

In a joint Hindu family all the property is presumed to be held jointly no matter whose name appears in the Revenue Records. Where two brothers were joint, their widows also must be deemed to be in joint possession of the property. No question of adverse possession arises in such a case. (*Griffin, J.*) SRI CHAND *v.* SURAJ.

9 I. C. 146 (A.)

———*Hindu family—Partial partition—*

One member holding a portion of joi after partial partition of Hindu famil hold adversely to other members. *Odgers, JJ.*) RAJAGOPALA IYENGAR RAJA IYENGAR. **1923 M. 45 M. L. J. 476=74 I. C. 1018=**

ADVERSE POSSESSION—Interruption of.

Interruption of.

———*Interruption of—Symbolical possession.*

Symbolical possession is sufficient to interrupt adverse possession against a person who was a party to the execution proceedings in which the symbolical possession was given. 5 Cal. 584 foll. (*Lord Sumner.*) RADHA KRISHNA CHANDERJEE *v.* RAM BAHADUR.

34 M. L. J. 97=23 M. L. T. 26=
16 A. L. J. 33=7 L. W. 149=
27 C. L. J. 191=22 C. W. N. 330=
(1918) M. W. N. 163=20 Bom. L. R. 502=
43 I. C. 268=4 Pat. L. W. 9 (P. C.).

———*Interruption of—Symbolical possession—Effect of delivery.*

Where the property is Zemindari property, is let out to tenants for cultivation and is not of a nature of which actual possession could be obtained by the purchaser, the delivery of formal possession to the plff., gives a fresh starting point of limitation to him against the defendant judgment-debtor. 19 A. L. J. 409, Dist. (*Ryves and Gokul Prasad, JJ.*) RAM LALLAN SINGH *v.* HARAKH NARAIN RAI.

20 A. L. J. 641=73 I. C. 920=
1922 All. 463.

———*Interruption—Burden of proof—Presumption.*

Where the deft. in a suit for the recovery of a house pleaded adverse possession for more than 12 years and the plffs. admitted that he came into possession after the death of the plffs'. ancestor which the Court found had occurred twelve years before, no presumption as to continuous possession could be made in favour of the plffs. and it is for them to prove that they had been in possession within 12 years. (*Rafique, J.*) HULASO *v.* SALAMAT KHAN. 23 I. C. 521 (A.).

———*Interruption of—Submersion of land—Revival of title—Possession of trespasser disturbed.*

Where a land remained submerged under water for a portion of every year, and during the remaining portion was in the possession of a trespasser, the possession during the period of submersion must be deemed to be constructively with the owner, and the trespasser therefore cannot acquire title by adverse possession. 29 C. 518, foll. (*Tudball, J.*) LOKENATH *v.* MANORATH RAM. 18 I. C. 613=11 A. L. J. 68.

———*Interruption of—Actual and formal possession.*

If in the execution of a decree the decree-holder is given formal possession, the judgment-debtor remaining in actual possession, the former can bring a suit for possession within 12 years from the formal possession, as formal possession amounts to actual possession in law so far as the judgment-debtor is concerned. (*Tudball, J.*) RAHIM BAKSH *v.* MUHAMMAD HAFIZ. 10 I. C. 319 (A).

———*Interruption of.*

Delivery of symbolical possession is sufficient to constitute interruption of adverse possession.

ADVERSE POSSESSION—Interruption of.

(*Macleod and Shah, JJ.*) MAHADEVAPPA *v.* BHIMA DODDAPPA.

24 Bom. L. R. 232=66 I. C. 320=
46 B. 710=1922 B. 27.

———*Interruption of—Symbolical possession is effective only in cases recognised by the C. P. Code.*

Delivery of symbolical possession in cases not contemplated by the C. P. Code and against person not bound by the decree are ineffective to interrupt adverse possession. (*Pratt and Kanga, JJ.*) RAGHUNATH WAMAN *v.* KONDIBA BABAJI. 24 Bom. L. R. 493=46 B. 932=
68 I. C. 91=1922 B. 2.

———*Interruption of—Decree—Possession of deft. after decree—Effect of decree—Tacking of possession before and after decree not permissible.*

The period of adverse possession is calculated for the benefit of the party alleging adverse possession and if he loses, then, there is an end of that period; and if he wishes to acquire a good title by adverse possession he must start afresh after the decree but to start a fresh period in this way there must be strong proof and he must act in such a way that the parties interested should have no doubts as to his motive so as to enable them to stop the running of time. (*Macleod, C. J. and Heaton, J.*) MEER AKBAR ALLI MEER INAYATALLI *v.* ABDUL AJIZ MIR SAHEB JAHAGIRDAR. 58 I. C. 96=
22 Bom. L. R. 916=44 B. 934.

———*Interruption of—Symbolical delivery of possession—Effect of—Decree-holder entitled to actual possession.*

Though the judgment-debtor is actually in possession and decree-holder is consequently entitled to take not merely formal possession but actual possession, yet the delivery of formal possession to the decree-holders is in the sight of law sufficient possession as against the judgment-debtor. 34 M. L. J. 97; 6 C. L. J. 472; 11 C. 93; 24 C. 715, followed. (*Mukerjee and Chotzner, JJ.*) KULADA PRASAD CHATTERJEE *v.* KUDIRAM MISRA.

27 C.W.N. 673=37 C.L.J. 515=70 I.C. 187=
1923 C. 371.

———*Interruption of—Delivery of symbolical possession.*

Delivery of symbolical possession does not in any way affect the possession or give start to a fresh period of limitation against persons who are not parties to a suit or execution proceedings 5 C. 584; 16 C. 530; 27 C. L. J. 191, Ref. As regards persons not so parties only actual possession can interrupt their adverse possession. The same principle has been extended to the case of purchaser at a revenue sale. (*Mookerjee and Chotzner, JJ.*) JOBEDA KHATUN *v.* TULSI CHARAN DAS. 36 C. L. J. 472=1923 C. 82.

———*Interruption—Symbolical possession—Effect of.*

Symbolical possession interrupt adverse possession of a party against whom the symbolical possession is obtained. (5 Cal 584 and 22 C. W. N. 330, followed.) (*Walmsley and Ghose, JJ.*) JOGENDRA NATH BHOMICK *v.* DINANATH DASS.
1922 Cal. 313.

ADVERSE POSSESSION—Interruption of.

———*Interruption of—Attachment of land under S. 146 of Cr. P. C. interrupts adverse possession.*

There can be no continuance of adverse possession when the land is not capable of use and enjoyment by the rightful owner. The intervention of public authorities, for preservation of peace, such as an attachment under S. 146 of the Cr. P. C. operates in the same way as *vis major* of the floods and the constructive possession of the land thereafter, is in the true owner. In the eye of the law, the effect of the attachment is to interrupt the adverse possession of the wrong-doer and revive the possession of the true owner. (*Mookerjee and Panton, JJ.*) SARAT CHANDRA *v.* BHIBAHI DEBI.
66 I. C. 433 (2)=34 C. L. J. 302.

———*Interruption of—Symbolical possession.*

Symbolical possession in execution of a decree is not of any avail except against the actual party to the suit or proceedings in execution. (*Richardson and Beachcroft, JJ.*) SATISH CHANDRA *v.* BOJO GOPAL. 46 I. C. 104=22 C. W. N. 807.

———*Interruption—What constitutes.*

Where exclusive possession is taken of such lands as are cultivated during the cultivation season and left fallow during the two following seasons and the owner is ousted, the mere fact that a stranger grazes his cattle during the fallow season would not interrupt the operation of adverse possession. (*Mookerjee and Beachcroft, JJ.*) KULADA PROSAD TEWARI *v.* SADHU CHARAN TEWARY. 27 I. C. 412=20 C. L. J. 32.

———*Interruption of—Formal possession, delivery of, does not affect—Effect.*

The fact that formal possession was given by decree against a stranger does not affect the position of the adverse possessor. (*Abdul Raoof, J.*) MAHOMMED RAMZAN *v.* THE MUNICIPAL COMMITTEE, ALIPUR DT. 1923 Lah. 534.

———*Interruption of—Symbolical possession does not interrupt.*

The merely formal possession of immoveable property by a purchaser at a court sale cannot prevent litigation running in favour of the judgment-debtor where the latter remains in actual possession and the property is not in the occupancy of a tenant or other person entitled to occupy the same. (*Scott Smith, J.*) SARDAR KHAN *v.* ABDULLA KHAN. 71 I. C. 885 (L).

———*Interruption—Declaratory judgment—No interruption of possession.*

The judgment of a court declaring that one of the parties has no legal title to the properties in suit cannot have the effect of causing his possession to cease to be adverse to the opposite party from the moment of its pronouncement so long as possession remains undisturbed. (*Spencer and Venkatasubba Rao, JJ.*) SINGARAVELU MUDALIAR *v.* CHOKKA MUDALIAR,
46 Mad. 525=70 I. C. 994=16 L. W. 514=
31 M. L. T. 298=(1922) M. W. N. 676=
43 M. L. J. 737=1923 Mad. 88 (2).

ADVERSE POSSESSION—Interruption of.

———*Interruption of—Co-owners—Ouster—Accrual of peaceful title before 12 years.*

Possession held by a co-owner will not be adverse to the others until they have knowledge of the hostile claim. Possession of one of the co-owners though adverse to the others when it commenced, does not continue to be so after the accrual of the peaceful title before the acquisition of a title by adverse possession. Possession should *prima facie* be attributed to a lawful title. (*Seshagiri Iyer and Kumaraswami Sastri, JJ.*) VELAYUTHAM PILLAI *v.* SUBBARAYA PILLAI.
39 Mad. 879=18 M. L. T. 424=
(1915) M. W. N. 873=31 I. C. 338=2 L. W. 989.

[This view seems questionable in the light of 53 I. C. 901=43 Mad. 244 (P. C.), Ed.]

———*Interruption of—Symbolical delivery.*

A land purchased at an execution sale being adversely held by a third person, symbolical delivery to the auction-purchaser is not effective in saving limitation. (*Ayling and Tyabji, JJ.*) ROMPI CHERLA *v.* SHAIK ISMAIL SAHEB.
21 I. C. 765 (M).

———*Interruption of—Decree.*

A decree in favour of a person in respect of property does not *per se* stop the running of limitation so long as the defendant continues in possession. (*Benson and Sundara Aiyar, JJ.*) PUTHIA VALAPIL AYISSA *v.* LAKSHMANA PRABU.
(1911) 1 M. W. N. 207=9 I. C. 795=
9 M. L. T. 420.

———*Interruption—Symbolical possession.*

Symbolical possession obtained behind the back of occupier who sets up adverse title will not save limitation. (*Benson, J.*) *In re* RAMA MOOTHAN.
9 I. C. 271=9 M. L. T. 359.

———*Interruption of—Symbolical delivery of possession.*

Symbolical delivery of possession operates to interrupt adverse possession on the part of the judgment-debtor. 34 M. L. J. 97 followed. (*Prideaux, A. J. C.*) SAWATRAM *v.* GANESHILAL.
69 I. C. 521 (1)=1923 Nag. 30.

———*Interruption of—Abandonment or relinquishment—Disclaimer.*

Where a trespasser in adverse possession of property makes a statement to the rightful owner that he disclaimed interest in the property but does not abandon or relinquish possession, the mere admission does not convert possession which was previously adverse into possession of a different character. (*Lindsay, J. C.*) MAULVI ABDUL RASHID *v.* JANKIDAS.
9 O. L. J. 2=4 U. P. L. R. (O. C.) 61=
66 I. C. 941=1922 Oudh. 24.

———*Interruption of—Running of time—Abandonment of right—Evidence.*

Limitation does not continue to run against the rightful owner of land after an intruder has relinquished possession without acquiring title by being in possession for the full prescriptive period. Possession so abandoned leaves the rightful owner in the same position in all respects as he was before the interruption took place. 29 C. 518 (P. C.) Ref. (*Wazir Hasan, A. J. C.*) DURGA *v.* RAM PADARATH.
65 I. C. 749=8 O. L. J. 495.

Joint Property.

———*Joint property—Onus.*

If any portion of property in suit can be described as joint property, the party alleging that he has acquired title by adverse possession to it must prove his allegation. (*Lindsay A. J. C.*) JAGANNATH *v.* KEDAR.

24 I. C. 633 (Oudh).

Landlord and Tenant.

———*Landlord and Tenant—Vatandars cannot acquire title by adverse possession.*

Persons who, and their predecessors in title, always claimed to be and were tenants of service. Vatan lands can never acquire any title to a permanent tenancy in the lands by adverse possession as against the Vatandar from whom they held the lands. History of vatan legislation reviewed. (*Sir John Edge.*) MADHAV RAO VAMAN *v.* RAGHUNATH VENKATESH.

47 Bom. 798=25 Bom. L. R. 1005=
33 M. L. T. 389=50 I. A. 255=
74 I. C. 362=(1923) M. W. N, 689=
1923 P. C. 205 (P. C.)

———*Landlord and Tenant—Rent, non-payment of, does not make possession adverse.*

Mere discontinuance or non-payment of rent does not, by itself, make the possession adverse. (*Amir Ali, J.*) JAGDEO NARAIN SINGH *v.* BALDEO SINGH.

1923 M. W. N. 361=3 Pat L. T. 605=
36 C. L. J. 499=49 I. A. 399 (P. C.)=
32 M. L. T. 1=2 Pat. 38=71 I. C. 984.=
45 M. L. J. 460=
27 C. W. N. 925. (P. C.)=(1922) P. C. 272.

———*Landlord and tenant—Occupancy right—Payment of rent.*

Where a squatter has been in possession of a plot of land without the consent of the landlord his occupation for any number of 12 years would not vest him with the rights of an occupancy tenant, but that occupancy rights would commence to accrue only from the date the squatter commences to pay rent. The question as to when a presumption arises that the possession of the tenant is without the consent of the landlord, depends upon the particular facts of each case and it is not a question capable of a uniform answer. (*Gokul Prasad, J.*) CHHAJJU *v.* JHABBA.

74 I. C. 681 (A)=L. R. 4 A. 221.

———*Landlord and tenaut—Cultivating possession by squatter if adverse possession against landlord.*

The mere cultivation of patti land by a person is consistent with a claim to be a tenant or proprietor or a mere squatter. A mere squatter or intruder who does not set up any claim of right cannot plead adverse possession. A man's cutivatory possession does not necessarily imply any claim to a proprietary right. (*Holms, S. M.*) BHAGWAN DIN *v.* SHANKAR PRASAD.

39 I. C. 520=14 A. L. J. 3.

———*Landlord and tenant—Possession by tenant—Presumption.*

If a tenant is in possession of a *parti* land at a short distance from the site of his house and used it for keeping his cattle-troughs, etc., the

presumption is that the land was given to him for purposes ancillary to agriculture. If he erects a building on the land for the stalling of cattle and storing of the implements of husbandry, the *Zemindar* cannot get the house demolished so long as he remains a tenant. No question of adverse possession arises in such a case. (*Banerji, J.*) PADARATH TEWARI *v.* BAZ SINGH.

29 I. C. 264 (A).

———*Landlord and tenant—Non-payment of rent.*

Mere non-payment of rent by the tenant unless accompanied by a denial of the landlord's title, cannot terminate the relationship or take away the landlord's right to rent. (*Banerji, J.*) ABDUL KARIM *v.* CHUNNI BIBI.

19 I. C. 119 (A).

———*Landlord aud tenant—Non-payment of rent for over 12 years—Presumption.*

Mere non-payment of rent by a tenant is generally insufficient to show that the tenant has acquired proprietary title against his landlord; but a denial of the landlord's title must be shown. But non-payment of rent, if proved to have continued for a very long period, might give ground for the inference that the landlord had been ousted or had transferred his right to the tenant. Where *parjawat* (a kind of ground rent) was not paid by the tenant or collected by the landlord for fifty years but the amount of the *parjawat* was very small, *i. e.*, only 2 pice per mensem held no adverse possession could be inferred. (*Chamier, J.*) DEOKINANDAN PERSHAD *v.* BINDESHWARY PERSHAD.

17 I. C. 523 (A.).

———*Landlord and tenant—Non-payment of rent.*

Mere non-payment of rent by the tenant will not amount to adverse possession though it may be some evidence of it. 11 I. C. 52, Ref. (*Richards, C. J.*) SHEO DAYAL SINGH *v.* GANGA.

14 I. C. 324 (A.)

———*Landlord and tenant—Eviction of tenant by stranger—Effect of.*

Where during the continuance of a tenancy, the original tenants are ejected by a stranger after open conflict and the new tenants pay rent to the stranger, the landlord's title is openly invaded and his title openly challenged and jeopardised, so that adverse possession commences to run against him even during the continuance of the tenancy. 27 Bom. 43 appl. (*Batchelor, A.C.J. and Kemp, J.*) YAMUNABAI *v.* LAGMANNA.

52 I. C. 770=21 Bom. L. R. 820.

———*Landlord and tenant—Tenant in actual occupation—Landlord's agent collecting rent—Assertion of title by adverse possession.*

Where land was let out to a tenant by the landlord's agent who was collecting rents and accounting for them and he afterwards claimed title in himself, *Held*, that the agent's suit based on adverse possession cannot be decreed since all the time the land was in the occupation of the tenant. (*Heaton and Shah, JJ.*) KRISHNA DIXIT BAL DIXIT *v.* BALDIXIT WAMAN DIXIT.

38 Bom. 53=21 I. C. 763=15 Bom. L. R. 1016.

ADVERSE POSSESSION—Landlord & Tenant.

———*Landlord and tenant.*

Where a tenant wants to plead adverse possession, there must be a clear, positive and continued disclaimer and disavowal of the landlord's title; the latter must have had actual notice of the claim or the acts of ownership must be open, hostile and notorious. Non-payment of rent will not do. (*Mookerjee and Walmsley, JJ.*) GIRIS CHANDRA GANGOPADHYAYA *v.* SRI KRISHNA DE NAG.

38 C. L. J. 266=75 I. C. 325=1924 Cal. 163.

———*Landlord and tenant.*

A tenant's possession of the lands encroached upon, can commence to be adverse only when title is asserted to the landlord's knowledge of such encroachments. (*Mookerjee and Buckland, JJ.*) JOGENDRA *v.* JAGADINDRA.

67 I. C. 170=34 C. L. J. 133.

———*Landlord and tenant.*

The possession of a tenant however long such possession might be cannot be adverse to the landlord. (*N. R. Chatterjee and Greaves, JJ.*) MUNMOTHA NATH MITTER *v.* ANATH BUNDHO PAL.

61 I. C. 469=25 C. W. N. 106.

———*Landlord and tenant—Commencement of limitation.*

A suit for possession was filed when the tenant was in possession as tenant whose tenancy was subsequently terminated by notice to quit. *Held*, for a subsequent suit for *khas* possession the limitation begins from the date of the termination of the tenancy. (*Chaudhuri and Ghose, JJ.*) JOGENDRA CHANDRA KAR *v.* SHYAN SUNDAR DAS.

57 I. C. 793 (C.)

———*Landlord and tenant—Non-transferable occupancy holding—Transfer of.*

To establish adverse possession against the landlord by the transferee of a non-transferable occupancy holding, possession must be shown to be adequate in continuity, publicity and extent. The element of publicity would be wanting if the landlord was not aware of the transfer and in that case the element of extent would also be wanting. (*Beachcroft, J.*) MANULLA KOLU *v.* PRASANNA KUMAR SARKAR. 56 I.C. 811 (C.).

———*Landlord and tenant—Knowledge.*

To have the possession of the tenant adverse to the landlord, the knowledge of the latter to the possession must be proved. (*Fletcher and Newbould JJ.*) MURALI-DHAR ROY *v.* SASADHUR PAL.

43 I.C. 344 (C.)

———*Landlord and tenant—Possession of under-tenant of tenant.*

The possession of an under-tenant of a tenant who had no power to transfer the demised land is not adverse to the landlord till the termination of the tenancy. 13 C. 101; 29 A. 593, Fol. (*Mookerjee and Beachcroft, JJ.*) ISHAN CHANDRA DUPI *v.* NISHI CHANDRA DUPI.

22 C.W.N. 853=41 I.C. 378=29 C.L.J. 1.

———*Landlord and tenant.*

Adverse possession by a patnidar of a tank of another patnidar holding under the same Zemindar creates a title against the Zemindar, if he obtains

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the interest of the latter by a private conveyance. Subletting, mortgaging, etc., are acts of a proprietary character creating adverse possession. Mere appropriation of *kist* will not prove adverse possession. (*Sanderson, C. J. and Mookerjee, J.*) BIJOY CHANDA *v.* ISWAR CHANDRA DAS.

35 I.C. 60=21 C.W.N. 199.

———*Landlord and tenant—Non-payment of rent.*

An under-raiyat holding possession from a landlord cannot acquire title by adverse possession unless he clearly asserts adverse possession giving notice of it to the landlord. Simple failure to pay rent does not create title in favour of a lessee by adverse possession. (*Sanderson, C. J. and Mookerjee, J.*) REAJUDIN BEHARI *v.* CHAND BAKSHA HAJI.

35 I. C. 23=24 C. L. J. 453.

———*Landlord and tenant—Rent-free title.*

A claim to hold land as rent-free is a hostile claim and if it is made to the knowledge of the plaintiff and a suit is brought more than 12 years after it is barred by limitation. 39 C. 453, foll. (*Jenkins, C. J. and Mookerjee, J.*) BIRENDRA KISHORE *v.* RAM KUMAR CHAKRAVARTHI.

32 I. C. 856=22 C. L. J. 308.

———*Landlord and tenant—Essentials of—Encroachment by tenant—Effect of.*

Long possession by deft. on his own behalf far beyond the statutory period, and no payment of rent by deft. and no receipt of rent by plff. in respect of the lands in suit furnish the elements required for a plea in bar by reason of adverse possession. (*Jenkins, C. J., Mookerjee and Beachcroft, JJ.*) KADIR BUX *v.* MAHARAJA BIRENDRA KISHORE MANIKYA BAHADUR.

30 I. C. 914=22 C. L. J. 119.

———*Landlord and tenant—Payment of rent to third party.*

Payment of rent by a tenant to a third person would not amount to denial of the landlord's title or to adverse possession against him unless he can show that his possession was in denial of the title of the real owner to his knowledge. (*Chatterjee and Teunon, JJ.*) SHYAMA CHARAN PAHARY *v.* RAM PROSAD DAS.

22 I. C. 796 (C.).

———*Landlord and tenant—Non-payment of rent—Patni.*

Mere non-payment of rent would not constitute adverse possession. The defendant should show in respect of each suit that he set up Lakhiraj title adverse to the Zamindar and patnidar for more than 12 years before suit and that he has been holding so adversely. (*Holmwood and Chapman, JJ.*) CHINTAMANI DUTT *v.* JOBESHAR BHATTACHARYA.

19 I. C. 64 (C.).

———*Landlord and tenant—Non-payment of rent.*

Mere non-payment of rent or discontinuance of payment of rent is of itself clearly insufficient to constitute adverse possession. 7 C. L. J. 615, 7 W. R. 100, 4 Cal. 314, 4 Cal. 661, 9 Cal. 808,

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2 All. 517, Rel. (*Mookerjee and Beachcroft, JJ.*) PROSONNA KUMAR MUKERJI *v.* SRIKANTHA.
40 Cal. 173=17 C.W. N. 137=16 I. C. 365=
6 C. L. J. 202.

———*Landlord and tenant—Non-payment of rent.*

Mere non-payment of rent by a tenant will not make his possession adverse to that of his landlord. There must besides be an independent assertion of title to the knowledge of the landlord. (*Chatterjee and Richardson, JJ.*) SRINATH ROY *v.* SATYA KINKAR SEN.
11 I. C. 395=13 C. L. J. 660.

———*Landlord and tenant—Repudiation of tenancy.*

The possession of a tenant does not become adverse to the landlord by the mere fact of his repudiating the tenancy unless the repudiation is accepted by the landlord. Where waste land as well as cultivated land form part of one tenancy adverse possession of the cultivated land also constitutes adverse possession of the waste land. (*Martineau, J.*) MAHOMED HUSSAIN *v.* SOHARA.
71 I. C. 805 (L).

———*Landlord and Tenant—Shamilat—Occupation by one tenant.*

An occupancy tenant who occupies a portion of the shamilat land with the consent or acquiescence of the proprietors for agricultural purposes cannot be disturbed in his possession so long as he remains a tenant in the village and uses the site for the purpose for which it was given, but if he diverts the site to other purposes as for instance to build upon and disclaiming the title of the proprietors sets up an adverse title in himself, he forfeits his rights of user and is liable to ejectment at the instance of the proprietors. Where there is no overt act as for instance by the erection of a building, the possession of the occupant is not adverse to the proprietors. (*Harrison, J.*) BHAG SINGH *v.* KHUSHAL SINGH.
71 I. C. 618. (L).

———*Landlord and Tenant—Ejectment—Decree conditional on payment of compensation—Decree not executed—Effect of—Subsequent suit for redemption.*

A suit for ejectment by a landlord against his tenant was decreed subject to the payment of compensation for improvements. The decree was not executed and the tenant continued in possession thereafter for more than 12 years. In a suit to eject the defendant on redemption by payment of the sum specified in the previous decrees as compensation. *Held*, that the decree in ejectment suit did not create or establish the relation of mortgagor and mortgagee between the parties to the suit and therefore a suit for redemption did not lie.

Ever since the previous suit, the possession of the defendants had been adverse to the plaintiff and the present suit was, therefore, barred by time. (*Scott-Smith, J.*) FAZAL *v.* MIHAN KHAN.
15 P. L. R. 1922=64 I. C. 352=1922 Lah. 70.

———*Landlord and tenant—Erection of buildings.*

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A tenant erected buildings on the land demised with the consent of the landlord who allowed the tenant to appropriate the rent towards the cost of the building in pursuance of an agreement recorded in the *Jamabandi*. Subsequently, he made further additions without the consent of the landlord: *Held*, that there was no overt act amounting to a denial of the landlord's title. (*Chevis and Shadi Lal, JJ.*) NAWAB BEGUM *v.* MUHAMMAD MIRAJUDDIN.
47 P. L. R. 1916=30 I. C. 28=
127 P. W. R. 1915.

———*Landlord and tenant—Non-occupancy tenants paying no rent—Holding over—Effect.*

The forefathers of the plaintiff's were holding shamilat land under a lease. In 1865 the lease period ended and still the lands were in their possession even after the lease period. Revenue records regarded them as non-occupancy tenants. They wanted to be called as proprietors by the said records but were refused to be given that right. The absence on their part of paying any rent except land revenue and other cesses was not sufficient to entitle them to be regarded as proprietors and there was no ground of adverse possession in 1881, as they merely continued to cultivate the lands and pay the land revenue and cesses as before. (*Rattigan and Scott-Smith, JJ.*) DALIP SINGH *v.* RANNIA.
25 P. R. 1915=29 I. C. 348=20 P. L. R. 1916.

———*Landlord and tenant—Onus on tenant to—prove nature of title.*

If the tenant claims adverse possession the burden is on him to prove the nature of his title, *i.e.*, he is not a tenant. (*Oldfield and Ramesam, JJ.*) SUBRAMANIYAM *v.* UTHENANTHIL.
16 L. W. 620=31 M. L. J. 454=69 I. C. 363 (2)
44 M. L. J. 596=1922 M. 519.

———*Landlord and tenant—Trespass by tenant in land of stranger—Presumption—Patta issued by Government.*

Where a tenant during the continuance of the tenancy encroached upon lands belonging to a neighbour the possession of encroached grounds is *prima facie* held by him for the benefit of the landlord. It is open to the tenant to prove that in making the encroachment he was making an acquisition for his own exclusive benefit but the burden is on him to prove the same. A mere grant of patta by the Government will not put an end to the original tenancy nor extinguish any right of the landlord. (*Seshagiri Iyer and Kumaraswawi Sastri, JJ.*) AMMU AMMAL *v.* PUTHIAPARAMBATH MOEDIN.
43 I. C. 677=(1918) M. W. N. 38.

———*Landlord and tenant—Holding over.*

A tenant continuing in possession after expiry of the lease cannot be said to be in adverse possession unless he actually surrenders possession to his landlord. 24 M. L. J. 472, foll; 31 M. 163; 33 M. 260 diss. (*Miller and Sadasiva Iyer, JJ.*) GANAPATHI MUDALI *v.* VENKATALAKSHMINARASAYYA.
25 I. C. 109=
1914) M. W. N. 728.

ADVERSE POSSESSION—Landlord & Tenant.

———*Landlord and tenant—Trespasser—Possession of.*

Rahim, J.—When land is in possession of a tenant, the term of whose lease is outstanding, and such tenant is ousted from possession by a trespasser, time will not run against the owner until after the expiry of the term. 21 M. 288; 19 M. L. J. 347, Cons. Per *Sundara Iyer, J.*:—If the trespasser asserts only a right of tenancy then, no doubt, limitation starts against the landlord only from the date the tenancy ceases. If he has not acquired by his adverse possession the right of a tenant under the statute, then, Art. 144 would be applicable, his possession being regarded as adverse to the lessor only when the latter's estate falls into possession. As against a stranger the landlord is entitled to recover possession even though his tenant's lease has not been terminated and when the stranger purports to hold absolutely and not by the acquisition of a prescriptive title as against the tenant the landlord's cause of action arises on the date of the dispossession of the tenant. (*Abdur Rahim and Sundara Iyer, JJ.*) AMBALAVANA CHETTY *v.* SINGARAVELU ODAYAR.

15 I. C. 146=(1912) M. W. N. 669.

———*Landlord and tenant—Encroachment—Suit by landlord for Khas possession—Limitation.*

A landlord can recover possession from his tenant of land which is the subject of an encroachment; but after a period of 12 years, the tenant will acquire an interest which will bar his suit for possession. (*Benson and Sundara Iyer, JJ.*) ANUDALA SUBRAMIAH *v.* KANDA SUBBA REDDI. 14 I. C. 213 (M.)

———*Landlord and tenant—Notice to quit—Continuance of tenant in possession—Effect of.*

After a service of notice to quit, a tenant becomes a trespasser and mere forbearance to sue the tenant in ejectment does not amount to acquiescence. (*Dhobley, A. J. C.*) YESHWANT *v.* SHIVAPPA. 1923 Nag. 129 (2).

———*Landlord and tenant—Entries in revenue records—Non-payment of rent—Effect of.*

Notwithstanding non payment of rent a tenant entered as such in the revenue records continues to be a tenant and mere non-payment of rent does not give any higher rights. (*Wazir Hasan, A. J. C.*) DURGA *v.* RAM PADARATH.

65 I. C. 749=8 O. L. J. 495.

———*Landlord and tenant—Trespasser cultivating land—Title of landlord lost after 12 years.*

The landlord has an option to treat a person cultivating his land without his permission as a trespasser and to sue him for possession as a trespasser and damages in the Civil Court or to treat him as a tenant and sue him for rent for the occupation of the same at a fair and equitable rate. But the landlord cannot exercise the choice with any effect after a hostile title has been acquired by the occupant by reason of his adverse possession, for more than 12 years as his title is lost at the end of that period. (*Kanhaiya Lal, A. J. C.*) SHEO GOBIND *v.* AMBIKA PRASAD.

47 I. C. 930=5 O. L. J. 455.

ADVERSE POSSESSION—Lessor & Lessee.

———*Landlord and tenant—Trespasser—Collection of dues from persons occupying land in village.*

Where a stranger has been collecting certain dues such as *Parjot Cherai, etc.*, adversely to the landlord during a series of years, it cannot be argued that because in any one year no collection of one or other of the items were made or because in some years full amounts of the dues were not collected, the adverse possession of the stranger was not exclusive especially where the landlord has made no collection at all during all these years. (*Lindsay, J. C.*) SHEORAJ SINGH *v.* DEBI BAKSH SINGH. 46 I. C. 439=21 O. C. 119.

———*Landlord and tenant—Cultivating possession.*

A mere cultivatory possession without paying rent for the statutory period and without setting up a claim to proprietary possession is not adverse. (*Holms, J. M.*) BHAGWAN DIN *v.* SHANKER PRASAD. 33 I. C. 161=2 O. L. J 709.

———*Landlord tenant—Limitation.*

Adverse possession as superior tenant begins against the Talukdar from the date the revenue court declares the tenants as superior to ordinary tenants. (*Lindsay, J. C.*) MAHAMMAD MUMTAZALI KHAN *v.* HARPAL SINGH. 32 I.C. 376=2 O.L.J. 556.

Lessor and Lessee.

———*Lessor and lessee—Case of successive leases.*

The possession of a trespasser during the continuance of a lease does not become adverse against the lessor; the lessor is in possession by receipt of rents from the lessee and so long as such rent is not intercepted by a trespasser, he cannot be said to be dispossessed. The position may be different where there are successive leases for terms and the termination of one. If the landlord gives a fresh lease without exercising his right to eject, time may begin to run against him from that date. [Case-law fully referred to.](*Mookerjee, Newbould and Pearson, JJ.*) UDAI KUMAR DAS *v.* KATYAINI DEBI.

35 C. L. J. 292=69 I. C. 126=49 C. 948=1922 Cal. 87.

———*Lessor and lessee—Nature of possession—Submerged land.*

Possession to be adverse, must be actual, visible, exclusive, hostile and continuous for the time necessary to create the bar. (*Mookerjee and Bucland, JJ.*) JOGENDRA *v.* JAGAJINDRA.

67 I.C. 170=34 C.L.J. 133.

———*Lessor and lessee—Trespass.*

If a tenancy is in operation at the date of the suit the lessor's title could not be extinguished by adverse possession of the trespasser against the lessee. It does not make any difference whether a tenant is dispossessed during the term of his tenancy or while holding over after the expiry of the term. (*Mookerjee, A. C. J. and Fletcher, J.*) BAIKUNTHA NATH SOMA *v.* CHAITANYA HARAN CHOWDHURY. 57 I. C. 994 (C.)

———*Lessor and lessee—Tenant holding over—Possession of trespasser.*

ADVERSE POSSESSION—Lessor & Lessee.

The general rule that where property is let out on lease the possession of a trespasser does not become adverse as against the lessor until the termination of the lease, is not applicable to a case where the tenant is holding over and the dispossession of the tenant is brought to the knowledge of the landlord. In such a case, the possession of the trespasser becomes adverse to the landlord's interest. 10 C. W. N. 343 foll. (*Newbould, J.*) BAIKUNTHA NATH SARMA *v.* CHAITANYA CHARAN CHOUDHURY. **52 I. C. 936 (C.)**

———*Lessor and lessee—Trespass.*

The possession of a trespasser of land let out on lease to a lessee does not become adverse as against the lessor until the lease terminates. (*Fletcher and Smith r, JJ.*) HAJRA SARDARA *v.* KUNJA BEHARI NAG. **25 C.L.J. 635=40 I. C. 271=21 C. W. N. 1001.**

———*Lessor and lessee—Lessee's possession is not adverse—Adverse possession.*

If a person, after taking a lease, allowed his brothers to occupy the leased house along with him, it could certainly not be said that their possession was adverse to the lessor. (*Martineau, J.*) CHAUHAR *v.* MANSHA SINGH. **70 I. C. 966 (2)=1923 Lah. 247.**

———*Lessor and lessee—Adverse possession.*

Possession taken during the currency of a lease cannot be adverse as against the lessor, until the lease expires. (*Chevis, J.*) GRIDHARI LAL *v.* UNDAJAN. **63 I. C. 717=3 Lah. L. J. 215. (L.)**

———*Lessor and lessee—Lessee in possession for more than 12 years.*

If the lessee holds land under the lease for over 12 years on a stipulated rent and without sharing profits with the lessor, he becomes a perpetual lessee, and his act amounts to a complete ouster of the grantor and his co-sharers and the time, for a suit to deprive him of possession, runs from the date of such possession. (*Wazir Hassan, A. J. C.*) FAZ-L-HAQ *v.* RUQUAIYA KHANAM. **60 I. C. 717=7 O. L. J. 692.**

———*Lessor and lessee—Under proprietary right.*

A lessee cannot set up an under proprietary right by adverse possession. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) RAM ASARE *v.* MUHAMMAD ABDUL HASAN KHAN. **30 I. C. 218=2 O. L. J. 241.**

License.

———*License—Erection of buildings.*

A raiyat obtained possession of the land as licensee on condition that so long as he was a cultivator and resided in the village he had a right to occupy the land for his own use, to construct buildings upon it, to dwell therein, and to enjoy the same but with no right in the soil. *Held*, that the raiyat could not claim to be in adverse possession against the licensor. The fact that he has improved the buildings on the land or has replaced erections would not confer such a title upon him. (*Stuart, J, C.*) RAMESHWAR BAKSH *v.* DWARKA. **54 I. C. 261=1 U. P. L. R. (J. C.) 60.**

ADVERSE POSSESSION—Limitation.

———*License.*

Where a person is granted a license coupled with an invalid grant of land the licensee in such an event is not a trespasser and cannot acquire title by adverse possession as his first entry was permissive. (*Stanyon, A. J. C.*) NARSING DAS *v.* RATAN LAL. **34 I. C. 471=12 N. L. R. 75.**

Lien Holder.

———*Lien-holder.*

The possession of a lien-holder cannot be adverse to those against whom the lien is claimed nor can the lien-holder transfer the property to third persons. (*Lindsay, J. C.*) AZIZ-UL-HAK *v.* MARIYAM BIBI. **1 O. L. J. 225=24 I. C. 45=17 O. C. 157.**

Limitation.

———*Limitation—Decree for possession—Execution barred—Decree-holder getting into possession—Judgment-debtor, if can recover possession.*

Where a decree-holder gets into possession of the property decreed to him without execution his possession must be ascribed to the decree and the judgment-debtor can turn him only if he can show that he had acquired a good title against the world before the decree-holder got into possession. When a decree for possession has been passed against a person in possession directing him to give up possession to the successful party and the former remains in possession waiting for execution it cannot be said that that party is holding adversely to the world. (*Macleod, C.J. and Fawcett, J.*) RAKHMABAI *v.* RAMCHANDRA. **45 Bom. 943=61 I. C. 414=23 Bom. L. R. 301.**

———*Limitation.*

The purchaser of a non-transferable occupancy holding paid rents to the landlord which were accepted. A purchaser from him did not pay to the landlord and was sued in ejectment: *Held*, he adverse possession is deemed to commence from the date of his purchase and not from the purchase of the first purchaser. (*Newbould and Buckland, JJ.*) KALIBROHMA MUKERJEE *v.* SAYIDAR RAHAMAN. **57 I. C. 986 (C.)**

———*Limitation—Collateral.*

D. S. sold certain ancestral property to the defendant after which D. S. died. After which the plaintiff sued to recover the land as his collateral. On the death of D. S. the plaintiff's father S. S. was the nearst collateral entitled to sue for the possession of the property. S. S. died about five years before the institution of the recent suit, and the plaintiffs contended that their right to sue did not accrue until the death of their father: *Held*, that the defendant's possession did not become adverse to the plaintiff, until the death of their father and that the suit is within time. (*Shadi Lal and Le Rossignol, JJ.*) ARUR SINGH *v.* SOLAKHAN SINGH. **37 I. C. 412=174 P. W. R. 1916.**

ADVERSE POSSESSION—Limitation.

———*Limitation.*

Long possession is not adverse possession unless there is an intention to hold it adversely. (*Johnstone, J.*) GOVIND SAHAI *v.* THAKARDAS.
12 I. C. 427=126 P. W. R. 1911.

———*Limitation—Starting point—Permissive possession.*

An occupant possessing land with the owner's permission, does not hold adversely until he denies permission and sets up an independent title. Ordinarily a Zemindar is a collector of revenue and has to prove his title in ejecting an occupant of the lands. It does not apply where the occupant holds possession recently under a *cowle* from the owner, without any previous rights. (*Tyabji and Spencer, JJ.*) ABBURI VENKATASAWMY *v.* NALLURI KUSTANAMMA. 24 I. C. 803 (M.)

Limited Interest.

———*Limited interest—Assertion of higher interest—Lapse of time—No acquisition of title.*

It is not correct as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of 6 or 12 years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the lands. Such a judgment might have very far-reaching results and would almost certainly lead to a flood of litigation. (*Lord Salvesen.*) MD. MUMTAZ ALI KHAN *v.* MOHAN SINGH. 45 A. 419=45 M. L. J. 623=
21 A. L. J. 757=26 O. C. 231=
33 M. L. T. 321 (P. C.)=L. R. 4 P. C. 1=
74 I. C. 476=9 O. & A.L.R. 901=10 O.L.J. 383=
50 I. A. 202=1923 P. C. 118 (P. C.)

———*Limited interest—Tenant.*

A limited interest such as that of a tenant can be acquired by adverse possession. (*Walmsley and B. B. Ghose, JJ.*) BHAIRABENDRA NARAIN ROY *v.* RAJENDRA NARAIN ROY. 50 Cal. 487=
74 I. C. 193=1924 Cal. 45.

———*Limited interest—Status of tenant.*

Limited interest, such as the status of a tenant can be acquired by prescription. (*Mookerjee, A. C. J. and Fletcher, J.*) SATYENDRA NATH BANERJEE *v.* KRISHNASAKHA KAR. 35 C. L. J. 185=
69 I. C. 67=1922 Cal. 193.

———*Limited interest—Status of a tenant, if can be acquired by.*

The status of a tenant can be acquired by prescription on the well-recognised principle that a limited interest in property can be acquired by adverse possession. (*Mookerjee, A. C. J. and Fletcher, J.*) UJIR ALI SARDAR *v.* SHADHAI BEHARA. 35 C. L. J. 182=68 I. C. 1003=
1922 Cal. 185.

———*Limited interest—Tenant encroaching on other lands.*

A tenant who has been occupying land other than that which he holds under the tenancy for more than 12 years claiming the right of tenancy thereto, is deemed to have acquired a limited interest in the land by adverse possession. (*Newbould, J.*) JNANDA SUNDARI *v.* JILAPI BEWA.
53 I. C. 134 (C.).

ADVERSE POSSESSION—Limited Interest.

———*Limited interest.*

In a suit for Khas possession, if deft. proves only the acquisition of a limited interest, *i. e.* that of a tenant when he had set up the plea of adverse possession, the plff. is entitled to a decree. (*Woodroffe and Beachcroft, JJ.*) NARAIN MOYIDASI *v.* UMESH CHANDRA DEY.
38 I. C. 459 (C.).

———*Limited interest.*

There can be an adverse possession of a limited interest in land (*i. e.,*) a tenant's interest. 2 C. L. J. 125 ref. (*Mookerjee and Beachcroft, JJ.*) PROTAB NARAIN *v.* BIRAJ DASI.
20 I. C. 823=19 C. L. J. 77.

———*Limited interest—Landlord and tenant.*

The interest of a tenant can be acquired by prescription. In such a case the landlord cannot get an injunction prohibiting the tenant with a prescriptive title from exercising acts of possession. 2 C. L. J. 125; 7 C. L. J. 499 Rel. (*Stephen and Mullick, JJ.*) KALICHARAN SHAHA *v.* DABIRUDDIN AHAMMAD.
18 I. C. 616=18 C. W. N. 654.

———*Limited interest—Prescription—Liability of mortgagee to account.*

A person in possession of a property as a usufructuary mortgagee under a void mortgage, for more than 12 years, acquires by prescription, the rights of a mortgagee, and inasmuch accountable to the mortgagor for the rents and profits not only of the last three years preceding the suit for redemption but for the whole period of his possession. 9 Mad. 244 foll. (*Ayling and Odgers, JJ.*) GOPALA DASU *v.* RAMI. 44 Mad. 946=
41 M. L. J. 194=64 I. C. 328=
(1921) M. W. N. 385.

———*Limited interest—Whether can be prescribed.*

A limited right of management of an endowment can be prescribed as well as any other limited right. (*Wallis, Offg. C. J. and Seshagiri Iyer, J.*) AMBALAVANA *v.* MINKASHY SUNDERESWARA DEVASTANAM. (1915) M. W N. 76=
28 M. L. J. 217=26 I. C. 841=17 M. L. T. 271.
[O.A. affirmed. 43 Mad. 665=39 M.L.J. 50 (P.C.).]

———*Limited interest—Superstructure.*

The ownership of the soil and the superstructure need not necessarily vest in one and the same person. The right to occupy a portion of the space above may be acquired by limitation. (*Sundara Iyer and Sadasiva Iyer, JJ.*) BASAVERWARASWAMI *v.* HAVALIJI HUSSAIN.
38 Mad. 6=12 M. L. T. 405=23 M. L. J. 479=
17 I. C. 158=(1912) M. W. N. 1080.

———*Limited interest—Void transfer.*

The result of a void transfer is that the property does not vest in the transferee but remains in the transferor. The transferee cannot consequently prescribe for an absolute title if the transferor had only a limited interest. (*Sundara Iyer and Sadasiva Iyer, JJ.*) SUNDRA GURUKKAL *v.* SUBRAMANIA ARCHAKAR. 16 I. C. 960 (M.)

ADVERSE POSSESSION—Limited Interest.

———*—Limited interest—Mortgagee's right.*

Where a person is in possession asserting only a limited title to the property, *i. e.* as usufructuary mortgagee he acquires only that right and could be redeemed by the lawful owner. (*Sundara Aiyar and Sadasiva Aiyar JJ.*) THEKKIAN RANGACHARLU CHETTIAR *v.* MUTHUKARNAPPAN KOTHAN.
16 I. C. 420=(1913) M. W. N. 134.

———*—Limited interest—Hindu woman's estate.*

When the possession of a Hindu woman is adverse the question must be decided as to what was her *animus possidendi*. Did she assert an absolute title in herself or did she claim to hold as the heiress of any person? The latter would be the ordinary presumption, and the heirs to her stridhanam must specially plead that by prescription she had acquired a title which would descend to the heirs as stridhana. (*Sundara Aiyar, J.*) *In Re* PRATTIPATI SESHAYYA.
11 M. L. T. 261=15 I. C. 403=
(1912) M. W. N. 515.

———*—Limited interest—Under-proprietary right.*

Held, on the evidence in the case that after the expiry of the settlement in 1896, the possession of the tenants notoriously claiming to be under-proprietors was adverse to the landlord and that the tenants have acquired such right by prescription. (*Kanhaiya Lal and Daniels, A. J. Cs.*) SHEO DAYAL *v.* PIRTHIPAL SINGH. 54 I. C. 100=6 O. L. J. 592.

———*—Limited interest—Lessee—Holding at uniform rate for 12 years.*

The mere fact that a lessee has remained in cultivatory possession of the land for over 12 years and all along paid the same amount of rent as entered in the lease, does not entitle him to hold in perpetuity by virtue of adverse possession. (*Holms, S. M.*) BHAGWANT *v.* RAI KRISHNA PAL SINGH. 30 I. C. 276=2 O. L. J. 320.

Limited Owner.

———*Limited owner—Hindu widow—Assertion of ownership—Absolute title—Acquisition of.*

On the death of the survivor of two brothers who formed a joint Hindu family the widow of the pre-deceased brother applied for mutation of names in respect of family property of which she had taken possession alleging that she was owner of it as heir to her husband's separate property; subsequently she put forward the same claim in written statements in suits. She also made a gift of the property to religious purposes: *Held*, that the aforesaid acts were public assertions by the widow of a right to exclusive possession and ownership and made her title absolute. (*Viscount Haldane.*) CHAUDHURI SATGUR PRASAD *v.* KISHORE LAL,
42 All. 152=18 A. L. J. 235=38 M. L. J. 259=
11 L. W. 334=(1920) M. W N. 3=
27 M. L. T. 200=24 C. W. N. 394=
22 Bom. L. R. 451=55 I. C. 486=
46 I. A. 197 (P. C.).

———*Limited owner—Hindu widow.*

Where the widow of a member of a joint family is in possession of properties for more than 12 years, unless it is shown that when she took possession she claimed only a limited interest, she acquires full title by adverse possession. The onus is on the persons who claim against her title. (*Lindsay and Sulaiman, JJ.*) UMA SHANKAR *v.* MT. AISHA KHATUN. 45 A. 729=74 I. C. 869=
1924 A. 88.

ADVERSE POSSESSION—Limited Owner.

———*Limited owner—Hindu widow—Suit by reversioners after widow's death—Compromise decree with the widow when binding on reversioners.*

Adverse possession cannot run against Hindu reversioners until after the death of the widow. In order to make the principle laid down in *Shivaganga case* (9 M. I. A. 543 P. C.) applicable, the possession of the defendant must be by force of the decree which is binding against the widow and not in spite of the decree. (*Lindsay, J.*) JAGANNATH SINGH *v.* SARDAR SINGH.
75 I. C. 614=1923 A. 448.

———*—Limited owner—Hindu widow—Possession under Ekrarnamah.*

Where after the death of the last male owner, a brother of his takes possession claiming it under a gift deed, and later obtains an ekrarnama from the widow, admitting the gift, his possession is not adverse to the widow. (*N. R. Chatterjea and Suhrawardy, JJ.*) SARAT CHANDRA CHATTERJEE *v.* SATINDRA MOHAN BANERJEE.
63 I. C. 887 (Cal.)

———*—Limited owner—Hindu widow—Possession under a will.*

Where by a will a Hindu widow disposed of her woman's estate and the legatee was in possession till her death, it was held that her possession was not adverse to the son or son's son of the testator where the legatee set up no other title than under a will. (*Teunon and Sheepshanks, JJ.*) DURGADAS KHAN *v.* ISHAN CHANDRA DEY.
39 I. C. 223=44 Cal. 145.

———*—Limited owner—Hindu widow—Invalid transfer by Hindu widow—Possession for more than half-a-century with deft.'s ancestors—Not permissive.*

Where properties came under the possession of the deft.'s ancestors under an invalid transfer by a Hindu widow and have been in their possession for more than half-a-century, the defts. had acquired title by adverse possession, when the plffs. have failed to prove that the possession of the defts. has all these years been only permissive. (*Holmwood and Chapman, JJ.*) GOBINDANATH *v.* MOHINI MOHUN MOJUMAR. 23 I. C. 931 (C).

———*—Limited owner—Hindu widow—Gift by widow—When time begins.*

Time runs against the reversioners and in favour of the donee from a widow holding a life estate, from the death of the widow. (*Rattigan, C. J.*) KHAN BAHADUR *v.* IBRAHIM KHAN.
46 I. C. 565=131 P. W. R. 1918.

———*—Limited owner—Hindu widow—Nature of estate prescribed.*

A Hindu widow in possession of her father-in-law's property without any title or right acquires an absolute interest therein at the end of 12 years of such possession. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) MUTHAYYA *v.* KOTHANDARAMAYYA.
23 I. C. 594=(1914) M. W. N. 387.

ADVERSE POSSESSION—Limited Owner.

———*Limited owner—Effect.*

Adverse possession by limited owner claiming as heir confers only a life estate. (*Mitra, Offg. A. J. C.*) SHEO LAL *v.* SHEO RAJIA.
23 I. C. 719=10 N. L. R. 35.

Mines.

———*Minerals—Grant of leases in sub-soil.*

Leases purporting to grant sub-soil rights will not give a title by adverse possession to adjacent mines for which actual working must be established. (*Miller, C. J. and Coutts, J.*) KUMAR PREMATHNATH *v.* MEIK. 5 P. L. J. 273=56 I. C. 184=1 P. L. T. 760=1920 Pat. 146.

Minor.

———*Minor—Guardian.*

In Hindu law, possession by a minor's uncle of share allotted to the minor is presumed to be not adverse to the minor. (*Wallis and Sankaran Nair, JJ.*) THANDAVARAYA ODAYAR *v.* NARAYANA GOUNDAN. 9 I. C. 505=9 M. L. T. 387.

Mortgagor and Mortgagee.

———*Mortgagor and mortgagee—Estoppel.*

The purchase of a portion of the mortgaged property by the mortgagee's separated heirs from a person who had no title to convey and enjoyment thereof for over the statutory period confers a title by adverse possession on the purchaser. (*Sir John Edge.*) PARBATI *v.* MUHAMMAD MUZAFFAR ALI KHAN. 34 All. 289=(1912) M. W. N. 417=11 M. L. T. 316=9 A. L. J. 450=15 C. L. J. 468=14 Bom. L. R. 460=23 M. L. J. 11=15 I. C. 196=16 C. W. N. 913 (P. C.)
[O. A. from 29 All. 640.]

———*Mortgagor and mortgagee—Compromise between—Unregistered deed—Possession of mortgagee under.*

The possession of a mortgagee in pursuance of an unregistered deed of compromise between him and the mortgagor transferring the equity of redemption to the former is adverse to the mortgagor and his heirs. 42 Cal. 801, Foll. (*Tudball and Rafiq, JJ.*) KHEDU RAI *v.* SHEO PARSAN RAI. 39 All. 423=40 I. C. 121=15 A. L. J. 366.

———*Mortgagor and mortgagee—Right to redeem, if can be adversely possessed.*

A right to redeem immoveable property cannot be adversely possessed when the right and actual possession is in the hands of the mortgagee. (*Richards, C. J. and Banerjee, J.*) KUNWAR SEN *v.* DARBARI LAL. 34 I. C. 171=38 All. 411.

———*Mortgagor and mortgagee—Assertion of hostile title.*

No assertion of adverse title on the part of the mortgagee during the continuance of a mortgage can set time running against the mortgagor so as to deprive the latter of his right to redeem within 60 years. (*Piggott, J.*) PANNA LAL *v.* RAMESHAR SAHAI. 29 I. C. 403 (A.)

———*Mortgagor and mortgagee—Redemption—Proof of mortgage.*

ADVERSE POSSN.—Mortgagor & Mortgagee.

Per *Richards, C.J.*—To redeem a mortgage, a mortgagor must prove that there is a subsisting mortgage and that the equity of redemption is vested in him. It is not necessary for him to prove that he or the person from whom he claims was in possession for 12 years prior to suit. The mortgagor has to prove a subsisting legal possession in him either directly or through his mortgagee or in some other way. Per *Banerji J., Dissenting.*—If the ownership of the property was vested in the mortgagors and not in the party claiming adversely, the mortgagors are entitled to recover possession unless they have lost their title by reason of the adverse possession of some one for a period exceeding 12 years. (*Richards and Banerji, JJ.*) ASAD ALI *v.* ANAND SARUP.
27 I. C. 35=12 A. L. J. 1233.

———*Mortgagor and mortgagee—Mortgagee's possession after redemption.*

Where the relationship of mortgagor and mortgagee comes to an end by the satisfaction of the mortgage, the possession of the mortgagee will be adverse from that date, against the mortgagor, within Art. 144, Limitation Act. 24 A. 44 (F. B.), Foll. (*Piggott, J.*) MUSSAMAT ZAIBUNNISSA *v.* PARCHHAT. 25 I. C. 611 (A.)

———*Mortgagor and mortgagee—Redemption price, to whom payable.*

Where a trespasser has acquired by adverse possession the rights of the mortgagee, the mortgagor should pay the mortgage money to the trespasser in order to redeem the property. 30 A. 119 Foll. 27 B. 43 dist. (*Banerji and Tudball, JJ.*) RAM SARUP *v.* GANGA SAHAI.
20 I. C. 468 (A.)

———*Mortgagor and mortgagee.*

Possession of trespasser who ousted the mortgagor of a simple mortgage is not adverse to the mortgagee and does not extinguish the mortgage security. (*Knox and Hussain, JJ.*) NANDAN SINGH *v.* JUMMAN. 34 All. 640=17 I. C. 632=10 A. L. J. 278.

———*Mortgagor and mortgagee.*

A mortgagee cannot hold adversely to a mortgagor during the mortgage. (*Karamat Husain, J.*) GANDHURAP SINGH *v.* HARI KRISHNA.
10 I. C. 999=8 A. L. J. 458.

———*Mortgagor and mortgagee—Suit by mortgagee—Limitation.*

A mortgagee must bring a suit within 12 years of the date when possession becomes adverse to the mortgagor. 25 A. 35, 2 M. 226 Foll. (*Richards, J.*) BAIJNATH *v.* BHADAIYAN.
9 I. C. 990 (A.)

———*Mortgagor and mortgagee—Void sale of equity of redemption—Effect of.*

S the owner of certain property mortgaged it in 1898 with possession, S died in 1899 and soon after his eldest son, a minor, purported to sell the equity of redemption to the defts. The vendees redeemed the mortgage in 1908 and an younger son of S instituted a suit

for redemption in 1918. The defendant contended that their possession was adverse since 1899 and that the present suit was barred. *Held*, that the sale to defts. being void, the possession of the mortgagee was on behalf of the rightful owners, the sons of the mortgagors and was not adverse to them till 1908 when the defendants obtained possession. Consequently the suit for redemption was in time and there was no acquisition of title by adverse possession on the part of the defendants. (*Shah, A. C. J. and Crump, J.*) RAMLINGAPPA *v.* DHONDI SUBRAO.
24 Bom. L. R. 1304 = 76 I. C. 145 = 1922 B. 451.

———*Mortgagor and mortgagee—Mortgagee acquiring rights of one mortgagor—Effect.*

If a mortgagee gets the equity of redemption from one of two co-mortgagors and claims to be in possession as owner to the knowledge of the other co-mortgagor, then it may be said that the right of the co-mortgagor to redeem his share will be extinguished after twelve years. The position is otherwise, in the absence of knowledge of the purchase. (*Macleod, C. J. and Shah, J.*) IBHRAM GULAM HUSAIN MULNAJI *v.* MOHIDDIN BALKU MODAK. **24 Bom. L. R. 287 = 67 I. C. 219 = 1922 Bom. 1.**

———*Mortgagor and mortgagee—Dispossession of mortgagee—Effect of.*

Where the mortgagee took possession under their mortgage and remained in possession, the dispossession of the mortgagee by the landlord, even assuming that it was done against their will cannot by itself operate as adverse possession as against the mortgagor during the continuance of the mortgage. Besides, the mortgagees by suffering dispossession and having taken a new title from the landlord cannot affect the right of the mortgagors in the property of which they were put in possession under the mortgage. (*Walmsley and Ghose, JJ.*) KAMALA KANTA *v.* ANANDA CHANDRA CHAKRABARTY. **71 I. C. 1030 (C.)**

———*Mortgagor and mortgagee—Simple mortgagee in possession under a sale.*

Where a simple mortgagee got possession under a sale but the sale was set aside, and he was treated as mortgagee in possession and was made liable for realisations made by him, his possession does not become adverse to the mortgagor or assignee from him so as to bar a redemption suit within 12 years after the purchase. (*N. R. Chatterjee and Panton, JJ.*) KALI MAHAMUD *v.* DINA BANDHU.
62 I. C. 502 (Cal.)

———*Mortgagor and mortgagee.*

Adverse possession against a mortgagor is not adverse against a mortgagee, before the latter has a right to possess the property. 44 C. 425; 33 C. 1015 foll. (*Fletcher and Walmsley, JJ.*) KALI KRISHNA *v.* TARA PROSANNA.
50 I. C. 304 = 23 C. W. N. 815.

———*Mortgagor and mortgagee—Dispossession of mortgagor.*

Though dispossession of the mortgagor, after execution of a simple mortgage, may, under

S. 28 of the Lim. Act operate to extinguish the equity of redemption in favour of the adverse possessor, yet it leaves the interest of the mortgagee unaffected, and it is only in the case of a mortgagee being entitled to possession that adverse possession is operative against him. (*Sanderson, C. J. and Mookerjee, J.*) PRIYA SAKHI DEBI *v.* BIRESHWAR, SAMANTA.
44 Cal. 425 = 21 C. W. N. 177 = 37 I. C. 277 = 27 C. L. J. 212.

———*Mortgagor and mortgagee.*

Where a mortgagor has been dispossessed by a third party, the possesssion of the latter is adverse to the mortgagee also. In a case of dispossession by a third party there is no distinction between the position of a mortgagor and mortgagee. 5 I. A. 1, foll. 38 Cal. 1015 not foll. 36 M. 87 ref. (*Fletcher, J.*) BISHWESHWAR SAMANTA *v.* PRIYA SAKHI DEBI. **28 I. C. 917 (C.)**

[This view is not supportable—39 Mad. 811 (F. B.) 44 C. 425—*Ed.*]

———*Mortgagor and mortgagee—Unregistered sale of the equity of redemption—Commencement of adverse possession.*

A mortgagee can set up adverse possession if his possession at the inception was that of a trespasser. Where therefore a mortgagee obtained an unregistered sale of the equity of redemption and thereafter held possession of the property as owner held that the unregistered sale, though inadmissible to prove the passing of title to the property as vendee, was admissible for the purposes of proving that the possession of the mortgagee thereafter was adverse to the mortgagor. 43 M. 244, 44 M. 253, 63 I. C. 215, 63 I. C. 284 referred to. (*Broadway and Moti Sagar, JJ.*) QADAR BAKHSH *v.* MANGHA MAL. **4 Lah. 249 = 5 L. L. J. 175 = 73 I. C. 889 = 1923 Lah. 495.**

———*Mortgagor and mortgagee—Sale of equity of redemption—Mortgage.*

The owner of the equity of redemption in certain property sold to the plaintiffs. He sold the same equity of redemption to the defendant who was an assignee of one-third of the mortgagee rights in the property. On the purchase of this equity of redemption, the defendant redeemed the remaining two-thirds of the mortgage. When the plaintiffs sued to redeem the property, the defendant set up his adverse possession from the date of the sale of the equity of redemption in his favour; *Held*, (1) that the sale of the equity of redemption which had been previously sold did not amount to adverse possession as the vendor had no rights left to him which he could sell and therefore the subsequent sale was a mere nullity in law.

(2) That where a mortgagee has once got possession of the mortgaged property, he cannot alter the nature of his possession.

(3) That a mortgagee in possession cannot by merely asserting possession as owner under an invalid sale convert his possession into adverse possession so as to prescribe for a title. (*Broadway and Zafar Ali, JJ.*) SHUJA-UDDIN KHAN *v.* SHER MUHAMMAD KHAN. **73 I. C. 475 = 1923 L. 366.**

ADVERSE POSSN.—Mortgagor & Mortgagee.

———*Mortgagor and mortgagee.*

The mortgagees cannot rely on the 12 years' rule of limitation in support of a plea of adverse possession unless he can prove a subsequent valid sale, of the equity of redemption. Sale of the whole property by only one co-mortgagor is not a valid sale as regards his co-mortgagors. (*Scott-Smith, J.*) AMIR *v.* NADIR ALI. 68 I. C. 733 = 1923 Lah. 74 (1.)

———*Mortgagor and mortgagee.*

A mortgagee cannot set up adverse possession within the period of 60 years from the date when the mortgage money becomes due. (*Chevis, J.*) ZORA *v.* CHANDU. 68 I.C. 883 = 1923 Lah. 71 (2).

———*Mortgagor and mortgagee—Relationship—Creation of.*

Where ejectment was decreed on paying compensation to the defendants ; *Held* that the decree did not create the relationship of mortgagor and mortgagee, and the suit for redemption is not competent. (*Scott-Smith, J.*) FAZAL *v.* MIHAN KHAN. 15 P. L. R. 1922 = 64 I. C. 352 = 1922 L. 70.

———*Mortgagor and mortgagee—Mutation of names.*

A mortgagee is not entitled to have acquired ownership of the equity of redemption by adverse possession on the ground that his name was mutated in the Revenue Register when it is not shown that he had any manner of possession actual or construtive. 34 I. C. 171, foll. (*Scott-Smith and Abdul Raoof, JJ.*) SHAH NAWAZ *v.* SHEIKH AHMAD. 1 Lah. 549 = 59 I. C. 478 = 2 Lah. L. J. 573.

———*Mortgagor and mortgagee.*

Generally speaking a mortgagee cannot set up adverse possession against the mortgagor during the continuance of the mortgage but a mortgagee can do so if on the death of the mortgagor, he claims to be the heir of the mortgagor and mutation has been effected in his favour as such and no person brings a suit against him for more than 12 years. (*Shah Din, J.*) RAM SINGH *v.* BASTI. 48 I. C. 447 = 89 P. W. R. 1918.

———*Mortgagor and mortgagee.*

Title by adverse possession cannot be acquired by a mortgagee by 12 years' possession unless he proves a subsequent valid sale. (*Shadi Lal and Leslie Jones, JJ.*) ABDUL AZIZ KHAN *v.* KALA SHAH. 32 I. C. 961 = 50 P. W. R. 1916.

———*Mortgagor and mortgagee.*

A mortgagee encroaching upon other land of mortgagor holds it adversely to him. (*Beadon, J.*) MULA SINGH *v.* BUDH SINGH. 100 P. W. R. 1914 = 25 I. C. 616 = 200 P. L. R. 1914.

———*Mortgagor and mortgagee.*

As a general rule a mortgagee cannot set up adverse title to the mortgaged property. This is however not an absolute rule. Once the relationship of mortgagor and mortgagee is created and

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the mortgagee is put into possession, the nature of such possession can never change either by assertion of title or a record in the mutation proceedings, except perhaps by assertion of absolute purchase, where the purchase is valid and binding. (*Johnstone and Chevis, JJ.*) JIVA KHAN *v.* LAKHMI CHAND. 146 P. W. R. 1911 = 11 I. C. 429 = 232 P. L. R. 1911 (L).

———*Mortgagor and mortgagee.*

Adverse possession against the mortgagor would not operate to the prejudice of the mortgagee, if the mortgage is simple. A trespasser's adverse possession which commences after the date of the hypothecation is not a bar to the mortgagee's right to recover the land. 48 Cal. 425 foll. (*Ayling and Venkatasubba Rao, JJ.*) TANJORE PALACE ESTATE BY ITS RECEIVER SUNDARAM IYER *v.* THIYAGARAJA PILLAI. 1923 Mad. 160 (2).

———*Mortgagor and mortgagee—Decree of court declaring that relationship never existed—Possession subsequent to decree is adverse.*

A decision of Court which in effect says that the relationship of mortgagor and mortgagee has come to an end renders the subsequent possession of the mortgagee adverse to the mortgagor. (*Ayling, Offg. C. J. and Odgers, J.*) OMAYURUPAGAM MUTT *v.* SIVASOORIA THEVAN. 42 M. L. J. 144 = 16 L. W. 475 = 70 I. C. 33 = 1922 Mad. 407 (2) = (1921) M. W. N. 876.

———*Mortgagor and mortgagee—Mortgagee getting name entered in Revenue records does not get title.*

Where the right to possession and the actua possession is with the mortgagee there can be no adverse possession of the equity of redemption. The mere fact that he succeeds in getting his name recorded in the Revenue Registers does not confer a title on him. (*Scott-Smith and Abdul Raoof, JJ.*) SHAH NAWAZ *v.* AHMAD. 1 Lah. 549 = 59 I. C. 478 = 2 Lah. L. J. 573.

———*Mortgagor and mortgage.—Possession under void mortgage.*

Where the mortgagee under a void usufructuary mortgage remained in possession for over 12 years but there was no evidence that the mortgagee ever claimed that he was prescribing for the whole interest, *Held*, that possession obtained through a transaction which is void is adverse, that a limited interest can be acquired by adverse possession that the mortgagee did not prescribe for any higher title than that of usufructuary mortgagee and that he could be redeemed, *Held* also, that 8 years' rents and profits prior to date of suit could be recovered. (*Ayling and Odgers, JJ.*) SONTYANA GOPALA DASU *v.* INAPATALUPULA RAMI. 44 Mad. 946 = 41 M. L. J. 194 = 64 I. C. 328 = (1921) M. W. N. 385.

———*Mortgagor and mortgagee—Subsequent agreement.*

Where subsequent to a mortgage, the mortgagee, under an agreement between the parties, agrees to give up some lands and retain others as full owner, his title to the lands ripens into full ownership by prescription and the mortgagor

cannot redeem them after 12 years. (*Ayling and Odgers. JJ.*) KANDASAMI PILLAI *v.* CHINNAPPA. **44 Mad. 253=40 M. L. J. 105=(1921) M. W. N. 1=29 M. L. T. 167=62 I. C. 603=13 L. W. 423.**

———*Mortgagor and mortgagee—Change of relationship.*

Where possession which commenced under a mortgage is continued under a different capacity it will suffice to start adverse possession. 38 M. 1158 Foll. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) PANDYAN PILLAI *v.* VELLAYAPPA ROWTHAR. **33 M. L. J. 316=42 I. C. 433=6 L. W. 588.**

———*Mortgagor and mortgagee—Title to equity of redemption.*

Trespasser in adverse possession of mortgaged property prior to the mortgage date can acquire title by prescription to the equity of redemption as against the mortgagor. (*Seshagiri Iyer and Kumaraswami Sastri, JJ.*) PUNUGU SUBBIAH *v.* NUKALAPATI RAMI REDDI. **39 Mad. 959=19 M.L.T. 210=30 M. L. J. 331=33 I. C. 326=(1916) 1 M. W. N. 239.**

———*Mortgagor and mortgagee—Simple mortgagee acquiring prescript ve title through oral sale.*

Per *Spencer, J.* (*Contra Phillips, J*) A simple mortgagee who gets into possession of the mortgaged property of Rs. 100 in value during the continuance of the mortgage cannot prove an oral sale as a starting point for acquiring prescriptive title against the mortgagor. 37 M. 423 foll (*Spencer and Phillips, JJ.*) GOVINDU *v.* PEPAKAYALA MALLAYYA.
31 I. C. 678 (M).
ALSO **37 M. 423=15 I. C 343.**
CONTRA. **37 M. 545=16 I. C. 694.**
ALSO **(1921) M. W. N. 1.**

———*Mortgagor and mortgagee—Simple mortgagee.*

A trespasser in possession by dispossessing mortgagor does not get adverse possession against the simple mortgagee whose right is therefore not defeated though the trespasser is in possession for more than 12 years. (*Wallis, C. J., Sadasiva Iyer and Srinivasa Iyengar, JJ.*) VIYAPURI *v.* SONNAMMA BAI AMMAM. **39 Mad. 811=2 L. W. 1080=29 M. L. J. 645=31 I. C. 412=18 M. L. T. 436=(1915) M. W. N. 927 (F. B.).**

———*Mortgagor and mortgagee.*

Where a mortgagee has only an incorporeal right the mortgagor cannot acquire the right by denying the mortgagee's title and professing to hold it adversely. (*Sadasiva Aiyar and Hannay, JJ.*) VENKATARAMANACHARI *v.* THIRUNARAYANACHARI. **27 I. C. 930=2 L. W. 212.**

———*Mortgagor and mortgagee—Mortgagee entitled to possession—Trespasser—Possession of, whether adverse to mortgagee.*

The mortgagee has no legal possession when the terms of the mortgage recite that he is entitled to possession only on default of the mortgagor and the possession of trespasser will not therefore become adverse to the mortgagee. 21 M. L. J. 467; 15 M. L. T. 112 followed. (*Sadasiva Aiyar and Napier, JJ.*) VENKATA KRISHNA MOORTHI *v.* BHEEMAKKA. **26 I. C. 295 (M.)**

———*Mortgagor and mortgagee—Usufructuary mortgage—Trespass.*

Where the mortgagor is entitled to immediate possession or where the possession of the trespasser is coupled with a denial of mortgagor's title, adverse possession against the mortgagee amounts to adverse possession against the mortgagor; the mortgagee in possession represents the possession of the mortgagor and when the mortgagee is dispossessed on grounds affecting only his right, the dispossession does not affect the right of the mortgagor and the possession taken is not adverse to him and time cannot run against him. (*White, C. J. and Sankaran Nair and Oldfield, JJ.*) PERIA AIYA AMBALAM *v.* SHUNMUGASUNDARAM. **38 Mad. 903=15 M. L. T. 112=26 M. L. J. 140=1 L. W. 119=22 I. C. 615=(1914) M. W. N. 417 (F. B.).**

———*Mortgagor and mortgagee—Failure of mortgagee to take possession on default.*

Where in spite of a provision in a mortgage deed, the mortgagee does not take possession on default, the mortgagor's possession does not become adverse as against the mortgagee. (*Sankaran Nair and Bakewell, JJ.*) KHANDE KONDAYYA *v.* KANDUKAR SUBBHAYYA CHETTY. **21 I. C. 773 (M.)**

———*Mortgagor and mortgagee—Possession under agreement that mortgagee is to be owner.*

It is open to both parties to a mortgage-deed the mortgagor and the mortgagee, to agree at any time that the mortgagee shall be in possession of the mortgaged property as owner thereof, and possession so held by the mortgagee for over 12 years will extinguish the mortgagor's title to redeem. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) USMAN KHAN *v.* NAGALLA DASANNA BENAMIDAR. **23 M. L. J. 360=12 M. L, T. 330=(1912) M. W. N. 295=16 I. C. 694=37 M. 545.**

———*Mortgagor and mortgagee—Invalid sale.*

A mortgagee cannot, by merely asserting possession as owner under an invalid sale of the equity of redemption subsequent to mortgage, convert his possession as mortgagee into a possession as owner and thereby plead Art. 144 of the Limitation Act in answer to a suit for redemption. (*Miller and Sadasiva Iyer, JJ.*) ARIYAPUTHIRA *v.* MUTHUKUMARASWAMY. **23 M. L. J. 339=12 M. L. T. 425=(1912) M. W. N. 854=15 I. C. 343=37 Mad. 423.**

———*Mortgagor and mortgagee—Simple mortgage.*

Adverse possession against the true owner commences only from the time when he has the right to immediate possession and affects only the interest which the person who was entitled to immediate possession had at the time the adverse possession began, and continues to run as against the entirety of such interest even though part of it is subsequently transferred. Possession adverse to

the mortgagor is not adverse to a simple mortgage. (*Benson and Munro, JJ.*) PARTHASARATHI NAICKAN *v.* LAKSHMANA NAICKEN. 35 Mad. 231= (1911) 1 M. W. N. 201=9 M. L. T. 399= 9 I. C. 791=21 M. L. J. 467.

———*Mortgagor and mortgagee—Simple mortgagee—Effect.*

The acquisition of title to land by prescription is not affected by the existence of a previous mortgage. But if the person claiming title by prescription intended to acquire a title subject to the mortgage, then he will get only such a title. (33 C. 1015, 8 M. L. T. 377, diss.) (*Abdur Rahim and Ayling, JJ.*) RAMASWAMI CHETTI *v.* PONNA PADAYACHI. 36 Mad. 97=21 M. L. J. 397=9 M. L. T. 264= 9 I.C. 28=(1911) 1 M. W. N. 209. [Overruled in 31 I.C. 412=39 Mad. 811.]

———*Mortgagor and mortgagee—Mortgagee without possession.*

Adverse possession against the mortgagor is not adverse to a mortgagee not entitled to possession when the adverse possession commenced nor when such mortgage was prior to the commencement of such possession. (*Batten, A. J. C.*) NAZAR ALI *v.* HIRAMAN. 22 I. C. 94= 9 N. L. R. 191.

———*Mortgagor and mortgagee—Possession adverse to mortgagor when adverse to mortgagee.*

Ordinarily there can be no prescription against a mortgagor unless he is entitled to immediate possession. *Contra non valenten agere nulla currit praescriptio.* The fact that he would be entitled to bring a suit for declaration is of no consequence. It is not incumbent on a party to bring a suit for declaration. (*Dalal and Simpson, A.J.C.*) JAI GOBIND SINGH *v.* ABHAIRAJ SINGH. 26 O. C. 308=9 O. & A. L. R. 651= 10 O. L. J. 216=1924 Oudh 40.

———*Mortgagor and mortgagee.*

During the continuance of a mortgage no act of mortgagee alone can make his possession adverse but where both parties treat the mortgage as having come to an end, any continuance in possession must be deemed to be adverse. (*Daniels and Lyle, A. J. Cs.*) BIJAI PARTAB SINGH *v.* RAGHURAJ SINGH. 9 O. L. J. 173= 4 U. P. L. R. (J.C.) 33=67 I. C. 572= 25 O. C. 115=1922 Oudh 7.

———*Mortgagor and mortgagee.*

Where an occupation is permissive, its conversion into one of an adverse nature, cannot be presumed in the absence of evidence. The mere denial by a mortgagee of the mortgagor's title cannot constitute adverse possession. But where a change in the mode of occupation is made by both parties (*e. g.*,) a sale of the equity of redemption, the mortgagee's possession would become adverse to that of the mortgagor. (*Lindsay, J. C.*) MAHENDRA *v.* CHANDRAPAL. 63 I. C. 284=24 O. C. 155.

———*Mortgagor and mortgagee—Claim as against each other.*

As between mortgagor and mortgagee, no question of adverse possession arises, during

the period with which either of them can enforce their rights and no acquiescence by the mortgagor not amounting to release of the equity of redemption can be a bar or defence to a redemption suit if the party is otherwise entitled to redeem. (*Stuart and Kanhaiya Lal, A. J. Cs.*) TILAK SINGH *v.* SHAMBHU SINGH. 7 O. L. J. 524=23 O. C. 269= 60 I. C. 404=2 U. P. L. R. (J. C.) 163.

———*Mortgagor and mortgagee.*

A mortgagee is not entitled during the continuance of the mortgage to hold possession of the mortgaged property adversely to the mortgagor. (*Daniels, A. J. C.*) MOHAMMAD MOHSIN *v.* MOHAMMAD ABID. 52 I. C. 159=22 O. C. 72.

———*Mortgagor and mortgagee—Mortgage—Trespasser redeeming mortgage—Right of mortgagor.*

If a mortgagee allows a mere trespasser, who has not perfected his title by adverse possession to redeem the mortgage, the true owner can treat the transaction as a nullity. (*Daniels and Lyle, A. J. Cs.*) BASANT SINGH *v.* RAMPAL SINGH. 51 I. C. 985=6 O. L. J. 248.

———*Mortgagor and mortgagee.*

The purchaser who acquires only the right of redemption by purchase could not set up the plea of adverse possession against the mortgagee from the date of his purchase. (*Lindsay, J. C.*) BHAWANI DIN *v.* JHAMAN. 35 I. C. 753=3 O. L. J. 252.

———*Mortgagor and mortgagee.*

Where a simple mortgagee not entitled to possession is by a subsequent agreement between him and the mortgagor put in possession of the property to enjoy the profits in satisfaction of interest, such mortgagee cannot set up adverse proprietary possession. (*Stuart, J.C.*) JAGAT PAL SINGH *v.* HARNAM SINGH. 3 O. L. J. 244= 34 I. C. 745=19 O. C. 166.

———*Mortgagor and mortgagee.*

Where the mortgagee in possession obtained possession through court, the mortgagor having no notice thereof, *Held*, no question of adverse possession arose in the case, 8 O. C. 33, 9 I. C. 337 Expl. (*Stuart, J. C. and Kendall, A. J. C.*) VIDYASAGAR *v.* RATIPAL. 1 O. L. J. 433= 25 I. C. 752=17 O. C. 347.

———*Mortgagor and mortgagee—Equity.*

There can be adverse possession of an equity of redemption. 32 C. 296, P. C. Ref. (*Stuart, Offg. J. C.*) HUBDAR KHAN *v.* GAJADHAR CHAUBE. 25 I. C. 600=17 O. C. 294.

———*Mortgagor and mortgagee—Denial of right of redemption.*

Mere declaration or assertion on the part of the mortgagee that he had purchased the equity of redemption from a person whom he called the rightful heirs of the mortgagor cannot amount to adverse possession as against the real heirs of the mortgagor in the absence of acquiescence on their part amounting to a release of their interest. 32 C. 296; 14 M. 38, Rel. (*Lindsay, A.J. C.*) AMIRALI *v.* NAIZ ALI. 14 I. C. 584=15 O. C. 39.

ADVERSE POSSN.—Mortgagor & Mortgagee.

———*Mortgagor and mortgagee—Simple mortgage—Possession adverse to mortgagor—When adverse to mortgagee.*

When after a simple mortgage has been granted a third person begins to hold adversely to the mortgagor, the period of adverse possession against the mortgagor cannot operate against the mortgagee while he is not entitled to possession. Adverse possession operates against a mortgagee only when the mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land. In the case of the grant of a mortgage by a person previously dispossessed the adverse possession which had commenced to operate against the mortgagor would not by the grant of the mortgage be arrested but would operate equally against the mortgagee. (*Adami, J.*) KUNJ LAL *v.* KANHAI MAHTO. 68 I. C. 641=1923 P. 305.

———*Mortgagor and morigagee—Assertion of a proprietary title.*

A mortgagee who comes into possession as a mortgagee cannot force the mortgagor to come into court and to sue for redemption merely by asserting a proprietary title. The mortgagor is perfectly entitled to sleep upon his rights until the 60 years allowed for redemption have expired. 49 P. R. 1882; 65 P. R. 1908; 9 P. W. R. 1912; 1 L. 549 Rel. (*Pipon, J. C.*) GHULAM HAIDAR SHAH *v.* BAZID SHAH 72 I. C. 989 (Pesh.)

———*Mortgagor and mortgagee—Condition that mortgagee is to be absolute owner on default of payment—Possession after default.*

The mortgagee cannot set up an adverse title against his mortgagor during the mortgage term so as to acquire a title by prescription. Where in a case outside the scope of the T. P. Act the mortgagee gets into possession of property as owner on default of payment by the mortgagor within a specified time, the mortgagee's possession thereafter becomes adverse to the mortgagor. (*Fox, C. J. and Ormond, J.*) ABDUL HAMID *v.* DURRIAH BIBI. 36 I. C. 959=10 Bur. L. T. 219 (R.).

Municipality.

———*Municipality—Drains.*

For private persons to acquire right to drains by adverse possession it is not enough for them to show that they were repairing the drains but they must show that the Municipality was prevented openly from using the drains as drains. (*Sadasiva Aiyar and Burn, JJ.*) ARUNACHELLA CHETTIAR *v.* MUNICIPAL COUNCIL OF MAYAVARAM. 38 M. L. J. 222=(1920) M. W. N. 229=55 I. C. 493=11 L. W. 202. Also 17 I. C. 158=38 M. 6.

Nankar Allowance.

———*Nankar allowance—Right forming part of a larger estate.*

A right to Nankar allowance may or may not be the subject of adverse possession but when that right forms part of a larger estate which has been enjoyed for more than 12 years, it can form the subject of adverse possession. (*Kanhaiya Lal, A. J. C.*) DEPUTY COMMISSIONER, FYZABAD *v.* N. BAKSH SINGH. 33 I. C. 461=19 O. C. 49.

ADVERSE POSSESSION—Neighbours.

Nature of.

———*Nature of—Onus.*

Possession to be adverse, must be adequate in continuity, in publicity, and in extent and this will vary according to the nature of the land. The onus of establishing such adverse possession is on the adverse possessor. Acts of possession by the person, in whom title stands, though insufficient to constitute adverse possession as against another, will be sufficient to destroy the adequate, exclusive and continuous character of the possession of the person challenging the title which the owner claims. (*Lord Shaw*). KUTHALI MOOTHAVAR *v.* KUNHARANKUTTI. 14 L. W. 721=L. R. 3 P. C. 9=44 M. 883=(1921) M. W. N. 847=41 M. L. J. 650=30 M. L. T. 42=48 I. A. 395=66 I. C. 451=26 C. W. N. 666=24 Bom. L. R. 669=1922 P. C. 181 (P.C.).

———*Nature of*

Per *Batchelor, J.*:—Possession is a mere matter of fact and adverse possession is possession held by some person for himself or for some person other than the true owner. (*Chandavarkar and Batchelor, JJ.*) BABAJI AKOBA *v.* DATTU LAXMAN. 37 Bom. 64=17 I. C. 642=14 Bom. L. R. 923.

———*Nature of—Mixed question of fact a d law.*

The question of adverse possession is a mixed question of law and fact requiring further evidence and as such cannot be allowed to be raised for the first time in second appeal. (*Chatterjee and Walmsley, JJ.*) PRIYANATH MITTER *v.* ANATH NATH DEY. 37 I. C. 942 (C.)

———*Nature of—If affected by intervention of life estate.*

Where a person takes possession of property adversely to the owner, the fact that before he acquires title by adverse possession a limited-owner comes into the legal estate will not affect the nature of the possession. The reversioner cannot get a fresh starting point for limitation thereby. (*Abdul Qadir, J.*) KHILU RAM *v.* BHIRANWAN RAI. 69 I. C. 393 (Lah.)

———*Nature of—Question of fact.*

The question of adverse possession is essentially a question of fact. (*Das and Adami, JJ.*) KHUB LAL UPADHYA *v.* JUGDISH PRASAD SINGH. 1 P. 23=69 I. C. 185=3 P. L. T. 795=1923 P. 398.

———*Nature of—Juridical possession.*

Possession which is relied on as evidence of title must be juridical as against defendant. Possession juridical against one may not be juridical against another. (*Pratt. J. C. and Crouch A. J. C.*) VISHUNDAS *v.* MUNICIPALITY OF HYDERABAD. 34 I. C. 494=9 S. L. R. 220.

Neighbours.

———*Neighbours—Vacant site.*

Possession of site belonging to another adjacent to his house, as a convenient adjunct, cannot be regarded as an indication of an assertion of title to the land—such user for

ADVERSE POSSESSION—Neighbours.

any length of time does not amount to adverse possession. (*Broadway, J.*) MUSAMMAT GULAB DEVI *v.* MONJI RAM
51 I. C. 575=38 P. L. R. 1919 (L.)

———*Neighbours—Mistake in boundaries—Effect.*

Where by a mutual mistake as to boundaries a neighbour holds possession of the others'propertics for more than twelve years, his title is perfected by adverse possession. (*Heald, J.*) MA SHAN MA *v.* SOMASUNDARAM CHETTY.
1 R. 492=75 I. C. 217=2 B. L. J. 39=
1923 Rang. 246.

Permissive.

———*Permissive—Gramanatham User by villagers of, does not create any rights.*

Natham Poramboke in a village vests in the government and the latter can grant portions for building purposes. The fact that the villagers have been using portions as a threshing floor or for storing hay, paddy, manure, etc., does not create a right adverse to Government. The enjoyment is too fugitive and patently permissive to support a right by custom or prescription. (*Ayling, and Odgers, JJ.*) TALUK BOARD, DINDIGUL *v.* VENKATARAMA AIYAR.
46 Mad. 866=45 M. L. J. 333=
18 L. W. 366=75 I. C. 38=40 (H. C.).
33 M. L. T.

———*Permissive—Precarious possession is only permissive possession.*

A person who has acquired a precarious possession is not deemed to have judicial possession. He is liable to be condemned to deliver up such possession to his opponent as soon as the latter is ready and willing to restore what he holds to the other. The possessory relation, in such circumstances, is imperfect. It is vitiated by the duty to restore and must, therefore be deemed as equivalent to permissive possession. Permissive possession does not barely rest on an expressed agreement by means of which one party permits another to take possession of his property. It is a question of legal inference from the circumstances of a particular case. (*Wazir Hasan, J.*) MAQBUL AHMAD *v.* FARHAT ALI.
4 U. P. L. R. (J.C.) 6=66 I. C. 461=
8 O. L. J. 546=1922 Oudh 152.

———*Permissive—Possession of Hindu widow on behalf of her minor son—When adverse to the reversioner.*

Possession of the mother is to be reckoned as possession on behalf of her son when the son is incompetent to manage his affairs. Her possession after the death of the son, cannot be adverse to the reversioner since the reversioner cannot sue for possession as long as she is alive. (*Chamier, J. C.*) BHAGWANDAS *v.* ISHAR DAT.
11 I. C. 93 (O.)

Plea of.

———*Plea of—Second appeal.*

Plea of adverse possession cannot be raised for the first time in second appeal. (*Chatterjee and Cuming, JJ.*) ANIL KUMAR BISWAS *v.* RASH MOHAN SAHA.
28 C. W. N. 46=
1924 C. 245.

ADVERSE POSSESSION—Proof of.

———*Plea of—A question of law.*

Where the question is whether from the facts found, inference can be drawn that the possession is adverse, it is a question of law and the Court can investigate it, though in general the question of adverse possession is a mixed question of law and fact. (*Mookerjee, A. C. J. and Fletcher, J.*) BALARAM GURIA *v.* SYAMA CHARAN MONDAL.
33 C. L. J. 344=
60 I. C. 293=24 C. W. N. 1057.

———*Plea of—Title—Suit on—Decree on possessory title.*

A claim should not be allowed when the deft. had no opportunity of meeting it. In a suit on title as owner, courts cannot give a decree on a prescriptive title. (*Kumaraswami Sastri and Phillips, JJ.*) VENKATASWAMI NAICK *v.* KALI SAMATAN. 33 I. C. 167=(1916) 1 M. W. N. 110.
Also (1914) M. W. N. 784=
25 I. C. 934=1 L. W. 853.
But see 36 I. C. 890=20 C. W. N. 773.

Possession.

———*Possession.*

In order to prove title to lands by adverse possession, the possession must be adequate, in continuity, in publicity and in extent so as to indicate that it is possession adverse to the competitors. (*Mookerjee and Carnduff, JJ.*) SECRETARY OF STATE FOR INDIA v. KAILKA PROSAD MOOKERJEE.
14 I. C. 609=15 C. L. J. 281.

Presumption.

———*Presumption—Possession—Title—Evidence evenly balanced.*

Where there is strong evidence of possession on the part of A opposed by evidence apparently strong also on the part of his opponent B, in estimating the weight due to the evidence on both sides, the presumption may well be regarded that possession went with title. (*Mookerjee and Chotzner, JJ.*) PROMODE KUMAR ROY *v.* KALI MOHAN SAHA. 27 C. W. N. 305=70 I. C. 555=
36 C. L. J. 396=1923 Cal. 228.

Proof of.

———*Proof of—Mortgagor's title—Acknowledgment.*

A person in possession of certain property took an assignment of a mortgage decree on the same property and allowed the puisne mortgagee to redeem the property: *Held*, that by doing so he must be deemed to have acknowledged the mortgagor's title to the equity of redemption. (*Stanley, C.J. and Griffin, J.*) JAGDIP NARAYAN SINGH *v.* BILLAR SINGH.
33 All. 463=9 I. C. 572=8 A. L. J. 324.

———*Proof of—Duties of trespasser.*

A person who acquires title by holding adversely is not bound by all the obligations which rested upon the owner in respect of the property, as the trespasser-owner in no sense stands in the shoes of the original owner. (*Seshagiri Iyer and Kumaraswami Sastri, JJ.*) PUNUGU SUBBIAH *v.* NUKALAPATI RAMI REDDI.
39 Mad. 959=19 M. L. T. 210=
30 M. L. J. 331=33 I. C. 326=
(1916) 1 M. W. N. 239

ADVERSE POSSESSION—Proof of.

———*Proof of—Presumption of lawful origin.*

The principle that possession is not adverse if it can be referred to a lawful title applies equally to cases where there was no prior possession under a lawful title. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) RAYILU PATTER *v.* ANNAKUTTI MANNADIAR. 16 I. C. 27=(1913) M. W. N. 55.

———*Proof of—Continuous possession—Jungle land—Presumption.*

To succeed on the plea of adverse possession evidence of continuous possession for a period of 12 years must be given. Revenue records of seven years do not prove continuous possession for the statutory period. The possession of uncultivated lands covered by jungle trees is presumed to be with the owner. (*Lindsay, J.C.*) DAN BAHADUR SINGH *v.* PIRTHIPAL SINGH.
57 I. C. 538 (Oudh.)

Purchaser at Revenue Sale.

———*Purchaser at Revenue sale.*

The purchasers of an estate at Revenue sale have a right to all the lands included in the estate at the time of the Permanent Settlement; they cannot have the advantage of, any more than they can be prejudiced by, adverse possession after that date. (*Mookerjee and Roe, JJ.*) BAIKUNTHA NATH RAI *v.* BASANT KUMARI DASI.
34 I. C. 946=23 C. L. J. 151.

———*Purchaser at Revenue sale—Fraud.*

A person in adverse possession did not pay the Government dues on the estate in his possession. The property was sold for the arrears of rent dues and purchased by himself. *Held* that the purchase is not invalid for fraud. (*Seshagiri Iyer and Kumaraswami Sastri, JJ.*) PUNUGU SUBBAYA *v.* NOKALAPATI RAMU REDDI.
39 Mad. 959=19 M. L. T. 210=
30 Mad. L. J. 331=33 I. C. 326=
(1916) 1 M. W. N. 239.

Receiver.

———*Receiver—Possession of.*

A receiver *pendente lite* cannot hold the properties put in his possession by the Court adversely to the parties to the suit. The possession of the receiver is in a sense the possession of the court and it is also possession of all the parties to the suit according to their titles. (*Wallis, C. J. and Spencer, J.*) KUPPUSWAMY CHETTY *v.* KUSALA RAMIAH.
(1918) M. W. N. 683=8 L. W. 551=
49 I. C. 89=24 M. L. T. 424.

Religious Endowment.

———*Religious endowment—Mahant of Dharamsala—Possession of—When adverse to founder.*

The possession of a Mahant does not become adverse to the founder unless he does some overt act repudiating the founder's title for over 12 years. (*Chevis, J.*) PREM SINGH *v.* MOKAND SINGH. 151 P. W. R. 1914=
26 I. C. 345=281 P. L. R. 1914.

———*Religious endowment—Pujari in possession—Possession if adverse to worshipper.*

ADVERSE POSSESSION—Submerged Land.

The possession or enjoyment of a pujari for the time being is not adverse to the worshipper. (*Muthusami Iyer and Wilkinson, JJ.*) KADUMBI SRINIVASACHARLU *v.* DURLABHA SUBUDDHI.
17 I. C. 589=23 M. L. J. 348.

———*Religious endowment.*

Property vested in an idol is distinct from property vested in a Mahant for a particular purpose and where the mahant alienates property not entrusted to him, Art. 134 of the Limitation Act. does not apply. (*Das and Bucknill, JJ.*) RAMRUPGIR *v.* LALCHAND MARWARI.
3 P. L. T. 352=1 P. 475=67 I. C. 401=
1922 P. 243.

Religious Office.

———*Religious office.*

Mere receipt of profits without possession of office does not amount to adverse possesssion. Every fresh receipt of profits is a fresh wrong but such receipt does not make the deft. a shebait or office holder. (*Sir John Edge.*) JALANDHAR THAKUR *v.* JHARULA DAS. 42 C. 244=
18 C. W. N. 1029=27 M. L. J. 100=
1 L. W. 549=16 M. L. T. 210=
(1914) M. W. N. 636=20 C. L. J. 360=
24 I. C. 501=16 Bom. L. R. 845 (P. C).
[On appeal from 14 I. C. 142=39 C. 887.]

———*Religious office—Endowments.*

A right to perform a worship in a temple for endowments can be acquired by prescription where the worship is divisible. The acquisition of a right to perform a minor worship will not entitle the acquirer to perform the major worship. (*Sankaran Nair and Oldfield, JJ.*) IYYADURAI GURUKKAL *v.* RAMASAWMY GURUKKAL.
18 I. C. 475 (M).

Service Tenure.

———*Service tenure—Lands annexed to office—Denial of right.*

Where a person holds adversely lands granted in perpetuity to an *ala lambardar*, the possession is adverse to the *ala lambardar in esse and in posse* and if it continues for 12 years bars the title of the latter. (*Scott-Smith and Wilberforce, JJ.*) GHULAM MAHOMED *v.* AHMAD KHAN.
55 I. C. 335 (L.)

———*Service tenure—Failure to perform services—Effect.*

In the case of a service tenure, the fact that no services were performed for more than 12 years cannot make the holding adverse. To make the holding adverse there must be a refusal to perform service or a claim to hold the lands free of service. (*Coutts and Ross, JJ.*) NAND LAL SAHU *v.* TIKAIT SRINIVAS HUKUM SINGH DEO.
1 P. 292=69 I. C. 703=1922 P. 541.

Submerged Land.

———*Submerged land—Periodical submersion—Dispossession.*

The possession of lands remains with the true owner while they are submerged. There cannot be discontinuance of possession or dispossession of the true owner during the period

ADVERSE POSSESSION—Submerged Land.

of submersion. Consequently there cannot be continuous adverse possession for the statutory period where the land is subject to yearly submersion. 29 I. A. 104 Rel. (*Lord Sumner.*) BASANTA KUMAR ROY *v.* SECRETARY OF STATE.
44 Cal. 858=1 P. L. W. 593=32 M. L. J. 505=
21 C. W. N. 642=15 A. L. J. 398=
25 C. L. J. 487=19 Bom. L. R. 480=
(1917) M. W. N. 482=6 L. W. 117=
22 M. L. T. 310=40 I. C. 337=
44 I. A. 104. (P. C.)

[O. A. from 3 I. C. 15.]

———*Submerged land—Revival of possession of true owner.*

Land when submerged revives the possession of the true owner and discontinues that of the trespasser who claims adverse possession. (*Gokul Prasad and Sulaiman, JJ.*) RAM NARAIN MISIR *v.* DEOKI MISIR. 20 A. L. J. 756=
L. R. 3 A 552=69 I. C. 912=
4 U. P. L. R. (A) 129=1923 A. 75.

———*Submerged land.*

Where land is submerged it becomes dereliet and during submersion no title can be conveyed against the true owner. (*Mookerjee and Buckland, JJ.*) JOGENDRA *v.* JAGADINDRA.
67 I. C. 170=34 C. L. J. 133.

———*Submerged land—Periodical flooding—Interruption of adverse possession.*

Lands after submersion become derelict, and so long as they remain submerged, no title can be made against the true owner; this principle is applicable where the reflooding is periodical or seasonal. 29 Cal. 513, 44 Cal. 858 foll. Where land is re-submerged the possession as adverse holder and the possession of the true owner constructively revises. (*Mookerjee and Panton, JJ.*) H. H. MAHARAJAH OF COOCH BEHAR *v.* RAJA MAHENDRA RANJAN. 66 I. C. 923=34 C. L. J. 465.

———*Submerged land.*

Land when submerged, becomes derelict and so long as it remains submerged no title can be made against the true owner. No distinction can be drawn where reformed land is again submerged by flood for a time and cases where the reflooding is seasonal. (*Mukerjee and Buckland, JJ.*) SECRETARY OF STATE *v.* WAZED ALI.
65 I. C. 866=34 C. L. J. 141.

———*Submerged land—Reformation—Exercise of fishery rights—Effect of.*

Plaintiff's land submerged and remained under water till within 12 years of the suit. After the re-appearance, the deft. took possession of it. Deft. leased out the fishery rights during the period of submersion and in a survey made during the period of submersion, the lands were recorded in plff.'s name. *Held*, that the possession during the period of submersion should be attributed to plff. (*Coxe and Richardson, JJ.*) MAHADEO PRASAD *v.* SHEONANDAN KUER. 28 I. C. 426 (Cal.)

———*Submerged land—Constructive possession.*

Where certain land was submerged and eventually reformed *in situ* and no act of possession was done over it till deft. attempted to reclaim it by erecting a *bheri* within 12 years of suit: *Held*,

ADVERSE POSSESSION—Tacking of.

that no constructive possession could be implied in favour of any one but the true owner and possession during submersion must be taken to be with plff. and his suit was maintainable. (*Carnduff and Chapman, JJ.*) GOAMANI *v.* KALI CHARAN.
16 I. C. 17 (C.).

———*Submerged land—Interruption of possession.*

Where land in the possession of a trespasser is submerged on account of floods the possession of the land during the period of submersion vests in the true owner and operates as an interruption of the possession of the trespasser. (*Wazir Hasan, A. J. C.*) BACHCHA SINGH *v.* SRI KAMLAPAT PRASAD.
65 I. C. 769=8 O. L. J. 501.

———*Submerged land—Interruption.*

Where the plaintiff's title to the land in suit was acknowledged and it was found that the land was under water for some time during 12 years before suit, the presumption as to possession must be in favour of the plff. even though the defts. were in actual possession immediately before and after the period during which the land was under water. (*Lindsay, J. C.*) BRIJRAJ SINGH *v.* GANGA BAKSH SINGH.
2 O. L. J. 346—28 I. C. 855=18 O. C. 43.

Tacking of

———*Tacking—When allowed.*

Two successive trespassers cannot claim to tack on the period of their possession so as to bar the rights of the true owner unless the succeeding trespasser claims under the first trespasser by some lawful title. (*Lord Sumner.*) BASANTA KUMAR ROY *v.* SECRETARY OF STATE FOR INDIA.
44 Cal. 858=25 C. L. J. 487=21 C. W. N. 642=
32 M. L. J. 505=44 I, A. 104=22 M. L. T. 310=
15 A. L. J. 398=19 Bom. L. R. 480=40 I. C. 337
(1917) M. W. N. 482=6 L. W. 117=
1 P. L. W. 593 (P. C.).

———*Tacking—Hindu widow.*

In a joint Hindu family the possession taken by Hindu widow professing to claim but a limited estate of a widow does not extinguish the rights of the reversioners after the lapse of the statutory period. (*Lindsay and Sulaiman, JJ.*) UMAN SHANKER *v.* AISHA KHATUN.
45 A. 729=74 I. C. 869=1924 A. 88.

———*Tacking—Hindu widow—Reversioner's right not affected.*

Adverse possession against a widow does not bar reversioners, whose title accrues from the date of the widow's death. (*Banerji, J.*) HARDWAR RAI *v.* BALRAM RAI. 18 I. C. 959 (A).

———*Tacking—Hindu widow—Reversioner.*

Adverse possession against a widow is not adverse against the reversioners. (*Banerji, J.*) SHEO CHAUDHARI *v.* SADHO DAS.
18 I. C. 948 (A.).

———*Tacking—Mortgagor and Mortgagee.*

A mortgagee in possession from a mortgagor who is a trespasser, completes his title by adverse possession by tacking his possession on to that of the mortgagor against the true owner if they are in possession for more than 12 years. (*Banerji, J.*) BENI MADHO SINGH *v.* DEBI SARAN DUBE.
10 I. C. 545 (A).

ADVERSE POSSESSION—Tacking of.

———*Tacking of- -Independent trespasser—Limitation Act, Art.* 144.

It is not open to persons who come into possession of property independent of any title derived from the previous possessor to tack on their predecessors' possession to their own. (*Fletcher and Walmsley, JJ.*) CHANDRODAYA BHATTACHARJEE *v.* CHANDRAKALA.

49 I. C. 751 (C).

———*Tacking of—Nature of interest acquired.*

A person who enters into possession of an estate under a title from a life estate-holder cannot by continuing his possession after the death of such holder add it to his prior possession, so as to make out a title by adverse possession for the statutory period. (*Fletcher and Smither, JJ.*) GNANENDRA NATH SANYAL *v.* MOHENDRA MOHINI DEBYA.

42 I. C. 884 (C).

———*Tacking—Hindu widow—Reversioners.*

Adverse possession against the widow extinguished the title of the reversioner also, before Act IX of 1871. (*Mookerjee and Beachcroft, JJ.*) MOHENDRANATH BISWAS *v.* SHAMSUNNESA KHATUN.

19 C. W. N. 1280=27 I. C. 954=21 C. L. J. 157.

———*Tacking of.*

A deft. can supplement his own adverse possession by the previous adverse possession of another person only if he derives his liability to be sued from or through that other person. A lessee for less than 12 years cannot add to his period of adverse possession the period of his lessor's adverse possession prior to the grant of the lease. (*Holmwood and Chapman, JJ.*) LAHURI BIBI *v.* BIJOY CHANDRA MAHTAP.

19 I. C. 367=17 C. W. N. 748.

———*Tacking of—Revenue sale—Purchaser.*

A purchaser at a revenue sale under the Bengal Revenue Sale Law purchases the property and not the interest of the defaulter. The purchaser claims under a paramount title and not from the defaulter. Consequently adverse possession against the defaulter cannot be tacked on as against the purchaser. (*Stephen and D. Chatterjee, JJ.*) BILAS CHANDRA *v.* AKSHAY KUMAR DAS.

15 C. L. J. 436=14 I. C. 219=16 C. W. N. 587.

———*Tacking—Hindu family—Hindu reversioner*

Possession adverse to nearest reversioner is not adverse to a remote reversioner. (*Scott-Smith, J.*) HASTI *v.* HIRA.

4 Lah. L. J. 201=1922 L. 37.

———*Tacking—Hindu widow—Reversioner if bound.*

Adverse possession against the widow is not adverse against the reversioners during the life time of the widow. (*Scott-Smith and Dundas, JJ.*) NAND SINGH *v.* MT. DHAN KAUR.

68 I. C. 299=2 Lah. L. J. 573.

———*Tacking—Independent trespassers.*

It is not open to one of two independent trespassers (not claiming through one another) to tack on the possession of the other trespasser to his own. (*Rattigan, C J.*) HUSSAIN BAKSH *v.* PALA SINGH. **47 I. C. 189=153 P. W. R. 1918.**

ADVERSE POSSESSION—Tacking of.

———*Tacking of.*

The possession of one trespasser can be tacked on to that of another and a continuity of adverse possession may result thereby only when the interests of both are identical, not different and antagonistic. (*Johnstone and Chevis, JJ.*) BALDEO SINGH *v.* MOHAN SINGH. **119 P. L. R. 1914=22 I. C. 855=72 P. W. R. 1914.**

———*Tacking—Hindu widow—Reversioners, ultimate reversioners—When possession becomes adverse against them.*

Adverse possession against reversioners begins only from the time they became entitled to it. Even against the ultimate reversioners the same principle applies. (*Ayling and Srinivasa Aiyangar, JJ.*) NEO KANTH RAO *v.* NARAYANSWAMI AIYAR. **20 M. L. T. 526=37 I. C. 733=31 M. L. J. 847.**

———*Tacking.*

A person found to have no title cannot tack on the possession of another when the former has not entered into possession as the latter's heir. (*Sundara Iyer and Sadasiva Iyer, JJ.*) VEERAMMA *v.* CHINNA REDDY. **37 Mad. 440=16 I. C. 43=23 M. L. J. 443.**

———*Tacking—Hindu widow—Adopted son.*

An adopted son derives title not from the adoptive mother but from his father; so adverse possession against the widow cannot affect the right of the adopted son. (*Mitra and Prideaux, A. J. Cs.*) SITARAM SHEOKARAN *v.* RAJARAM LATIJEE. **48 I. C. 230.**

———*Tacking—When allowed.*

A title by adverse possession though not perfected by the lapse of 12 years is heritable, transferable and devisible. But one trespasser cannot be allowed to add to his possession the possession of another previous trespasser whom he dispossessed. (*Stanyon, A. J. C.*) GANNO *v.* BENI. **43 I. C. 943=14 N. L. R. 82.**

———*Tacking—Hindu widow—Possession adverse to widow not adverse to reversioner.*

Possession adverse to a Hindu widow which commences during her life-time cannot be adverse to the reversioners. (*Daniels and Lyle, A. J. Cs.*) MT. PARBATI *v.* SAIYID MAHOMED HADI.

9 O. L. J. 304=68 I. C. 534=1923 O. 31.

———*Tacking of—Mortgagee from trespass.*

It is essential that the adverse possessions which are to be tacked on must be of the same or of an identical nature. A mortgagee from a trespasser cannot as against the true owner, tack his own possession as mortgagee to that of the mortgagor, for the latter is a trespasser on the proprietary right whilst the mortgagee holds adversely merely to the extent of the mortgage interest. (*Lindsay, J. C.*) SAIYAD UN-NISSA *v.* MAIKU LAL.

47 I. C. 687=5 O. L. J. 391.

———*Tacking of—Periods of possession by successive trespassers.*

A subsequent trespasser if his title is to some extent dependent on the previous trespasser can tack the period of possession of a

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previous trespasser to his own period of adverse possession as against the rightful landowner. But independent trespassers cannot tack on. (*Lindsay, J. C. and Stuart, A. J. C.*) GHISA SINGH *v.* GAJRAJ SINGH. 18 O. C. 289 = 33 I. C. 371 = 3 O. L. J. 45.

———*Tacking of—Estoppel.*

When two parties unite and claim property from a third party, and get a decree and afterwards the first party claims the entire property in preference to the second party: *Held*, the first party is estopped from setting up a claim contrary to the agreement, though it was based on an incorrect conception of the law. There is no question of tacking on of the possession. (*Kanhaiya Lal, A.J.C.*) SHEDAMAR SINGH *v.* BALBAHADRA SINGH. 2 O. L. J. 137 = 28 I. C. 357 = 18 O. C. 51.

———*Tacking of—Transfer or devise of.*

The possession of a trespasser although without title, confers upon him a devisable and transferable interest in the property and his heir or devisee can bring an ejectment suit against any person other than the true owner who has entered upon the land. 12 A. 51; 24 A. 157; 3 C. 224, Ref. For the purpose of upholding a plea of adverse possession an addition of the period of possession of the property by the second trespasser with that of the first from whom the second derived his title is allowable in a suit of ejectment. (*Jwala Prasad, J.*) RATTAN KUMAR MAHTO *v.* KANGAL KUMAR MAHTO. 49 I. C. 767 (Pat.)

———*Tacking of—Independent trespassers.*

Two independent trespassers cannot tack their periods of possession against the owner. (*Mullick and Atkinson, JJ.*) MIDNAPUR ZEMINDARY CO. *v.* PANDEY SARDAR. 2 Pat. L. W. 143 = 41 I. C. 114 = 2 Pat. L. J. 506.

———*Tacking—Possession by turns.*

When the parties are working all the lands in suit in turns by mutual arrangement, there is no adverse possession. (*Parlett, J.*) MA MIN KYIN *v.* MAUNG WA. 31 I. C. 875 = 9 Bur. L. T. 53 (R.)

Test of.

———*Test of—Acts necessary to constitute—Tying cattle.*

The user of land for tying cattle and maintaining cattle troughs gives the right to occupy the land, if continued for a sufficiently long time. It is not merely a temporary user. 16 B. 338 dist. (*Kanhaiya Lal, J.*) KAMLAPAT DUBEY *v.* RAM RAJ. L. R. 4 A. 378.

———*Test of—Possessory title—Dispossession under S. 9 of the Sp. Rel. Act.*

Mere previous possession for less than the statutory period should not enable a party to succeed in an ejectment suit under S. 9 of the Sp. Rel. Act. (*Coxe and Ray, JJ.*) SATYENDRA NATH MISRA *v.* SHEIK LATIF KHAN. 21 I. C. 118 (C.)

ADVERSE POSSESSION—Trust & Trustee.

———*Test of.*

The criterion of adverse possession is whether a person possesses land claiming it as his own. If he does, he must be held to be in adverse possession. (*Shadi Lal and Le Rossignol, JJ.*) ALLAH DAD *v.* FAZAL DAD. 46 I. C. 964 (L.)

Trust and Trustee.

———*Trusteeship—General and particular trusts Kattalai.*

An idol may have not merely a general trustee but also other subordinate representatives having the right to manage certain special portions of his property, and pay over the income so collected to the endowment and even to some degree control its use. Such rights are not inconsistent with the existence of a general trustee, but they are fatal to his claim to possession of the properties from which those revenues were derived. The position of such subordinate trustees could be acquired by prescription against the subordinate trustee as well as the general trustee. (*Lord Moulton.*) AMBALAVANA PANDARASANNADHI *v.* MEENAKSHI SUNDARESWARA DEVASTANAM. 43 Mad. 665 = 23 M. L. T. 83 = (1921) M. W. N. 11 = 12 L. W. 212 = 39 M. L. J. 50 = 18 A. L. J. 594 = 56 I. C. 730 = 47 I. A. 91 (P. C.). [Affirming O. A. 28 M.L.J. 217 = 17 M.L.T. 271 = (1915) M. W. N. 76 = 26 I. C. 841 = 2 U. P. L. R. (P. C.) 95.]

———*Trusteeship—Right to—Management of trust properties.*

Where the leading disciples of a Mutt manage the Mutt properties without any interference from the head of the Mutt, for over the statutory period, they acquire a right to trusteeship by adverse possession. It is not necessary to prove that the head of the Mutt protested against the violation of his right and the possession went on despite such protest. (*Lord Shaw.*) ARUNACHELLAM CHETTI *v.* VENKATACHALAPATHI GURUSWAMIGAL. 43 Mad. 253 = 37 M. L. J. 460 = 24 C. W. N. 249 = 22 Bom. L. R. 457 = 17 A. L. J. 1097 = 26 M. L. T. 479 = (1919) M. W. N. 850 = 46 I. A. 204 = 53 I. C. 238 = 10 L. W. 642 (P. C.). [Overruling 33 I. C. 216 = (1915) M. W. N. 650.]

———*Trusteeship—Right of management.*

It could not be said that a right of joint management cannot be acquired by adverse possession. (*Wallis, C. J. and Kumaraswami Sastri, J.*) ARUNACHELLAM CHETTI *v.* VENKATACHALAPATHI GURUSWAMIGAL. 33 I. C. 216 = (1915) M. W. N. 650.

———*Trust—Ghat dedicated to public—Rights of owner when destroyed.*

The owner of a *ghat* on the banks of the Ganges dedicated the same to the public use for pious Hindus bathing in the river. Certain *ghatias* with the leave and license of the owner sat at the *ghat* and assisted the bathers and gradually began to erect platforms on the steps on which they sat. In a suit by the plff. for a declaration of his right to the *ghat* and for

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injunction restraining them from using the ghat, *held*, that the dedication did not destroy the plff's. right as proprietor that the use of the *ghat* by the *Ghatias* did not constitute adverse possession against the plff. and that the plff. was entitled to the injunction. (*Tudball and Rafique, JJ.*) RAMA GHATIA *v.* HEMANTA KANWARI.

19 A. L. J. 483=63 I. C. 498=
3 U. P. L. R. (A) 102.

———*Trustee*—Samudayi — Uralan — *Malabar temple.*

It is competent to the *Samudayi* to acquire a title by prescription to the *devaswom* properties and to be recognised as trustee. In such a case the *Samudayi* can sue for recovery of the *devaswom* properties. (*Seshagiri Aiyar and Napier, JJ.*) RAMAN SOMAYAJIPAD *v.* KUNHU KUTTI KOVILAMMA.

34 M. L. J. 344=23 M. L. T. 187=
(1918) M. W. N. 179=44 I. C. 630=
7 L. W. 490.

———*Trustee.*

As long as the office of the trustee is vacant there can be no adverse possession of trust property inasmuch as there is then no person capable of taking proceedings to protect the trust property. So a trustee is entitled to maintain a suit for possession at any time within 12 years since his appointment. (*Bakewell and Phillips, JJ.*) MANIKAM PILLAI *v.* THANIKKACHALAM. PILLAI.

(1916) 2 M. W. N. 87=34 I. C. 945=4 L. W. 369.

———*Trust—Vacancy in office.*

Limitation will not run where there is no person competent to sue and a trespasser cannot be said to be in adverse possession of the trust properties till there is a trustee in existence. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) PALANIYANDI MALAVARAYAN *v.* VADAMALAI OODAYAN.

18 I. C. 373 (M).

———*Trust property—Sale of endowed property.*

On a sale of endowed property, the possession of the vendee becomes adverse to a worshipper or the representative of the founder from the date of sale. (*Muthuswami Iyer and Wilkinson, JJ.*) KADAMBI SRINVASACHARULU *v* DURLABHA SUBUDDHI.

17 I. C. 589=23 M. L. J. 348.

———*Trustee—Prescription*—Animus possidendi

A person purporting to hold property as a trustee cannot by such possession acquire a right to the property by prescription for himself as against the beneficiaries. In determining what right adverse possession would confer on the holder, the *animus possidendi* is the decisive factor. (*Benson and Sundara Iyer, JJ.*) PATTAIKARA MANAKKAL *v.* CHIRRAKKAPATTI MUNDE.

37 Mad. 373=11 M. L. T. 355=
14 I. C. 168=1912 M. W. N. 445.

———*Trusteeship*—Uraima *right.*

Where the plff. has kept quiet for more than 12 years, after sole *uraima* right had been claimed in a suit by the defts. and which had been decreed in their favour, his suit to establish his *illom* right to *uraima* ship is barred by limitation. (*Krishnaswami Aiyar and Ayling, JJ.*) PALLITHARA VAYAL *v.* ABDKESAVA VADHYAR.

9 M. L. T. 261=9 I. C. 155=21 M. L. J. 175.

ADVERSE POSSESSION—Waste Land.

Under Proprietary Rights.

———*Under-proprietary right—Acquisition by prescription.*

A person after losing all his rights in certain land retained possession thereof, to the knowledge of the superior proprietor, without any title whatever, and he was continuously recorded for more than 12 years as under-proprietor: *Held* he acquired title by adverse possession to the under-proprietary right. (*Lindsay, J. C.*) NADIR SINGH *v.* MUSSAMMAT ANPURNA KUNWAR.

7 A. L. J. 282=56 I. C. 759=
2 U. P. L. R. (J.C.) 113.

———*Under-proprietary right—Acquisition of title.*

Under-proprietary rights may be acquired by adverse possession for the requisite period but the acquirer must give definite evidence to show that he asserted an under-proprietary title. Where a person has been treated as holding his land as *sir*, he cannot be held to be an under-proprietor. (*Lindsay, J. C.*) KHUNNU SINGH *v.* ABBAS BANDI.

45 I. C. 849=5 O. L. J. 121.

Vacant Site.

———*Vacant site—Presumption.*

Possession of open sites would naturally go with the possession of the building which they adjoin. Where plaintiff is the owner of the building as well as the site and has been in possession of the building, this is one of these cases in which the fact of the plaintiff's title comes to his aid with greater force as far as the evidence goes with regard to the possession of the open sites. (*Macleod, C. J. Coyajee, J.*) MAHAMED SAHIB IBRAHIM SAHIB *v.* TILOKCHAND.

24 Bom. L. R. 373=66 I. C. 764=
1922 Bom. 243.

———*Vacant site—Possession follows title—Burden of proof.*

In the case of a vacant site, possession follows title and the party alleging to have acquired ownership thereof by adverse possession has to strictly prove his case. (*Shadi Lal, J.*) CHAIN SUKH *v.* GOPI RAM. 134 P. L. R. 1916=
35 I. C. 120=116 P. W. R. 1916.

Waste Land.

———*Waste land—Vacant site.*

Where it was found that the title in one-third of the land was with the plaintiffs that the plot had been for many years lying unoccupied and that the Municipal Board had been using it for the deposit of refuse. *Held*, that this use of the land by the Municipal Board did not amount to adverse possession or to the dispossession of the plaintiffs. (*Daniels, J.*) HAJI MOQBUL HUSSAIN *v.* HAFIZ AHMED HUSAIN.

74 I. C. 251=1923 A. 557.

———*Waste land.*

Where the plot in suit was waste land which was of no immediate use to its owner the mere fact that the tenants have been enclosing it and tying their cattle upon it would not constitute adverse possession so as to deprive the owner of his ownership. Such temporary user which might

ADVERSE POSSESSION—Waste Land.

be unnoticed or permitted would not amount to adverse possession. (*Gokul Prasad, J.*) LAKHU *v.* LAL SINGH.

71 I. C. 265=1923 A. 399.

———*Waste lands.*

For possession of waste lands to become adverse, it must be adequate in continuity, in publicity, and in extent of area. (*Mukerjee and Buckland, JJ.*) SECRETARY OF STATE *v.* WAZED ALI. 65 I. C. 866=34 C. L. J. 141.

———*Waste land—Depositing earth on another's ground—Planting trees.*

Depositing earth on another's land, while digging a tank on one's own, and planting trees of more value on it amounts to adverse possession and suit for possession by the person aggrieved must be brought within 12 years of the excavation and deposit of earth. (*Teunon and Newbould, JJ.*) MAHARAJ BAHADOOR SINGH *v.* PULIN MAL.

60 I. C. 386 (Cal.).

———*Waste land.*

Acts of possession exercised at intervals over different portions of waste lands in different years cannot amount to adverse possession as the possession is not continuous. (*Chatterjee and Panton, JJ.*) PYARY DEBEE *v.* SAKIR MANDAL.

57 I. C. 716 (C).

———*Waste land.*

In the case of jungle lands possession *prima facie* is with the person whose title is established. (*Mookerjee and Teunon, JJ.*) PRIA NATH *v.* MAHENDRA KUMAR. 14 C. L. J. 578=10 I. C. 376=16 C. W. N. 317.

———*Waste land—Intermittent and temporary user are insufficient.*

In the case of waste land, mere intermittent and temporary user such as tethering of cattle and storing of fodder are insufficient to establish a title by adverse possession. 16 B. 338 foll. (*Abdul Raoof, J.*) MANSA *v.* KHUSHALI RAM.

4 Lah. L. J. 467=69 I. C. 4=58 P. L. R. 1922=1923 L. 25.

———*Waste land—Acts necessary.*

In the case of waste land possession follows title. Tying sheep or cattle or storing dung cakes in the land is not adverse possession. (*Scott-Smith, J.*) FATEH KHAN *v.* BAISAKHI RAM.

117 P. L. R. 1917=161 P. W. R. 1917=42 I. C. 412 (L.)

———*Waste land—Paper delivery.*

Where the plaintiffs got possession of *Banjar* land by a decree in a former suit, the deft. must show ouster of the plff. more than 12 years before suit. In disputes as to *Banjar* land 'paper' possession is sufficient possession. (*Johnstone and Beadon, JJ.*) PERTHI *a.* RATTI RAM.

18 P. L. R. 1914=21 I. C. 972=19 P. W. R. 1914.

———*Waste land—Cutting leaves.*

The fact of cutting leaves for manure is worthless as evidence of any proprietary title in the land. 28 M. 257 foll. (*Spencer and Seshagiri Aiyar, JJ.*) RAMA THANTHRI *v.* SECRETARY OF STATE. 42 I. C. 290 (M).

AFFILIATION.

———*Waste land—Who is presumed to be in possession.*

Where waste lands are not actually occupied by any one, legal possession must be presumed to continue with the actual owner. 12 C. W. N. 273 and 3 M. L. T. 212 expl. Where persons frequenting the deft.'s land tethered their animals in the disputed vacant site just as they could in any piece of waste land adjoining a temple and the temple servants occasionally stacked grass and fuel therein and grew a few flowers, *Held*, that no adverse possession could be presumed. (*Batten, A. J. C.*) RADHIKADAS *v.* HAR MOHAN LAL.

39 I. C. 54=13 N. L. R. 25.

———*Waste land.*

No question of adverse possession or limitation can arise in respect of land practically lying unoccupied. (*Kanhailal, J. C.*) PADDU *v.* MAHABIR PRASAD. 53 I. C. 683=6 O. L. J. 455.

———*Waste or jungle land—Acts necessary.*

Where actual possession cannot be ascertained the presumption is that possession follows title. Mere casual acts of cutting wood in a large tract of jungle or occasional acts of cultivation need not be treated as an ouster. There must be some clear assertion of adverse title or some conduct from which an intention to exclude the actual owner can be inferred. But once it is shown that acts of adverse possession were committed to the knowledge of the owner no such presumption arises. 8 O. C. 177, Exp. (*Lindsay, J. C.*) RATIPAL *v.* BIPIN CHANDRA CHATTERJEE.

4 O. L. J. 354=41 I. C. 80.

ADVERSE TITLE.

See ADVERSE POSSESSION.
- (1) LANDLORD AND TENANT.
- (2) LEASE.
- (3) MORTGAGOR AND MORTGAGEE.
- (4) T. P. ACT S. 111 (G).

ADVERTISEMENT.

See CONTRACT ACT, S. 2 ETC.

ADVOCACY.

See LEGAL PRACTITIONER.

ADVOCATE.

See LEGAL PRACTITIONER.

ADVOCATE-GENERAL.

See (1) C. P. CODE, S. 92.
(2) LETTERS PATENT.

AFFIDAVIT.

See C. P. C. O. 19, R. 3.

AFFILIATION.

See BUDDHIST LAW, BURMESE, MAHOMEDAN LAW.

AGE—

AGE—Of Ceremonial Competency.

See HINDU LAW.

Of Discretion.

See HINDU LAW-ADOPTION.

Of Majority.

See MAJORITY ACT.

AGENCY.

See (1) CONTRACT ACT 1872, CH. X.
(2) PRINCIPAL AND AGENT.

AGENCY RULES—(Ganjam and Vizagapatam.)

———*C. P Code—Not applicable.*

The C. P. Code has no application to the Ganjam and Vizagapatam Agency Tracts. (*Lord Dunedin.*) SETRUCHARLA RAMABADRA RAJU *v.* MAHARAJAH OF JEYPORE. 42 Mad. 813 = 37 M. L. J. 11 = 26 M. L. T. 127 = 17 A. L J. 694 = 21 Bom. L. R. 914 = (1919) M. W. N. 502 = 23 C. W. N. 1033 = 30 C. L. J. 209 = 10 L. W. 362 = 51 I. C. 185 = 46 I. A. 151 (P. C). [O. A. from (1916) 1 M. W. N. 354 = 34 I. C. 411 = 19 M. L. T. 360.]

———*Attachment—Claim petition allowed—Suit for declaration of judgment-debtor's title to property not maintainable.*

Under the Law prevailing in the Vizagapatam Agency, an action will not lie for a declaration, that an attached property in respect of which a claim has been allowed belongs to the judgment-debtor. (*Sadasiva Iyer and Spencer, JJ.*) MAHARAJA OF JEYPORE *v.* HARI KRISHNA PATRO. 32 I. C. 226 = 29 M. L. J. 730.

———*Division into Agency—District and non-Agency District—Sessions Court—Agent—Jurisdiction.*

The Old Ganjam Collectorate was long ago divided into an Agency District and a non-Agency District. The fact that the same person is a first class Sub-Divisional Magistrate in both Districts does not make him subordinate to the Sessions Court of the Ganjam Division for the Magistrate's jurisdiction in the Agency. The Agency District is a Sessions Division, the Agent being the Sessions Judge. A case for an offence in the Agency was transferred by the Agent to the first class Magistrate of Gumsoor Sub-Division, having local criminal jurisdiction over certain agency as well as non-agency tracts. *Held* the proper forum of appeal was the Agent and not the Sessions Judge of Ganjam Division. (*Benson and Sundara Iyer, JJ.*) PUBLIC PROSECUTOR *v.* SADANANDA PATNAIK. 23 M L. J. 670 = 17 I.C. 786 = 13 Cr. L. J 850 = 12 M. L. T. 601.

———*C. P. Code—Applicability of.*

The provisions of the C. P. Code have no application to the Agency tracts. (*Benson and Sundara Iyer, JJ.*) TYADA POOSAPATI *v.* MAHARAJA OF JEYPORE. 11 M. L. T. 385 = 14 I. C. 286 = 23 M. L. J. 97.

AGENCY RULES—(Ganjam & Vizaga patam.)

———Rr. 10 and 20—*Transfers of suit to Assistant Agent for decision—Decision of Agent—Powers of High Court under Rule* 20.

It is competent to an Agent in whose Court a suit exceeding Rs. 5,000 in value is instituted, to refer the suit at any stage, even after the framing of issues ,for the decision of the Assistant Agent. *Per Krishnam, J:*—Rule 20 ot the Ganjam and Vizagapatam Agency Rules gives power to the High Court to direct the Agent to review his judgment on special grounds and does not give any right to the parties by way of appeal or otherwise. The High Court will not interfere with the decision of an agent on purely technical grounds or on account of errors which have not led to any prejudice on the merits. When the application is in the nature of a second appeal the High Court will not ordinarily interfere with the findings of facts. (*Spencer and Krishnan, JJ.*) ZAMINDAR OF BODOKIMIDI *v.* KUMAR LAHIRI. 49 I. C. 811 = (1918) M. W. N. 772.

———Rr. 10 (2) and 16—*Divisional Assistant—Appeal to agent.*

A Divisional Assistant has on a true construction of Rr. 10, Cl. (2) and 16 of the Agency Rules, power to decide cases referred to him for disposal by the Agent. Under the Rules the Agent can entertain and dispose of appeals preferred in such cases, disposed of by the Divisional Assistant. (*Seshagiri Iyer and Napier, JJ.*) RAJENDRA SINGHA BAHU GARU *v.* MAHARAJAH OF JEYPORE. 30 I. C. 76 (M.).

———Rr. 10 (4), 18 and 20—C. P. Code S. 151—*Inherent power of Court to re-hear and correct mistake.*

The rule being that parties are entitled to be heard before orders against them are made, a party prejudiced by any order made without hearing him should apply to the same Court to be re-heard. The Court possesses an inherent power to rectify an inadvertent mistake (apart f rom S. 151, C. P. C.) and so the party, instead of appealing to a higher Court should get the mistake rectified by the very Court committing the mistakes wherever he can do so. (*Spencer and Phillips, JJ.*) RAGUNADA DOSS *v.* MAHARAJA OF JEYPORE. 31 M. L. J. 319 = (1916) 2 M. W. N. 203 = 37 I. C. 385 = 4 L. W. 240.

———R.10 (5)—*Leave of agent—Suit to recognise plff. as landholder under S. 73 of the Local Boards Act.*

A suit by the purchaser of a *Vizarmokasa* in Court-auction for recovery of cess collected by the deft. and for injunction against future collections is virtually a suit to recognise the plff. as a landlord for purposes of S. 73 of the Local Boards Act and could be filed in the Agency Court without the Agent's permission. (*Oldfield and Sadasiva Iyer, JJ*) MAHARAJA OF JEYPORE *v.* LAKSHMI NARASIMHA. 7 L. W. 564 = 35 M. L. J. 284 = 45 I. C. 729 = (1918) M. W. N. 830.

AGENCY RULES—(Ganjam & Vizagapatam.)

———R. 14—*Agency Commissioner.*

The High Court can transfer case from the file of the Commissioner to its own file, but not to the file of a District Court.

46 Mad. 726=(1923) M. W. N. 277=
45 M. L. J. 8=32 M. L. T. 269=
72 I. C. 745=17 L. W. 517=1923 M. 604.

———Rr. 17 to 20—*Assistant agent—Appellate judgment of—High Court, if empowered to review.*

Under the Vizagapatam Agency Rules the only course open to a party dissatisfied with an appellate judgment passed by an Assistant Agent is to appeal to the Agent under Rule 17 and not to move the High Court to direct a review under Rule 20. The judgment of the Assistant Agent cannot be treated as passed by the Agent. (*Oldfield and Seshagiri Aiyar JJ.*) LALA KIRAT CHUND SINGH *v.* MAHARAJA OF JEYPORE.

52 I. C. 694=9 L. W. 533.

———Rr. 17 and 20—*Right of appeal.*

Rule 17 does not confer on the party any right of appeal. There is no right of appeal without the consent of the Agent. The Agent's order refusing to admit an appeal against an appellate judgment of a Special Assistant Agent is not a decree and therefore Rule 20 does not apply to it. (*Benson and Sundara Iyer, JJ.*) LAKSHMINARAYANA PANIGRAHI *v.* PASUPPU REDDI GOPI.

25 I. C. 282=27 M. L. J. 177.

———Rr. 18 and 70—*Petition to High Court from order of agent—Summary dismissal of appeal.*

A petition lies to the High Court from the order of the Agent to the Governor of Ganjam and Vizagapatam Agency Tracts under R. 20 even though the agent might have acted under R. 23 and summarily dismissed an appeal without issuing notice to respondents, for it nevertheless is a decree. 15 Mad. 229, not appr. (*Abdur Rahim and Sundara Iyer, JJ.*) VENKATARAMA DEO *v.* RAGHUNATH PATRO.

36 Mad. 128=10 M. L. T. 261=21 M. L. J. 887=
12 I. C. 73=(1911) 2 M. W. N. 237.

———R. 20—*Claim procedure—Remedy by suit.*

The remedy by way of claim petition does not exist in the Agency Courts and the institution of a suit is the only remedy available to a person whose property has been attached in execution of a decree obtained against a third person. *Held*, that in the circumstances of the case, the claim petition presented to the Agent's Court could be treated as a suit and the order thereon as a decree subject to appeal or interference by the High Court under Rule 20 of the Vizagapatam Agency Rules. Miscellaneous orders by Agent or Assistant Agent are liable to be revised by Governor-in-Council. (*Oldfield and Venkatasubba Rav, JJ.*) THE RANI OF TUNI *v.* THE MAHARAJAH OF JEYPORE.

46 Mad. 35=42 M. L. J. 487=30 M. L. T. 339=
66 I. C. 115=16 L. W. 8=(1922) M. W. N. 314=
1922 Mad. 271.

———Rr. 20 and 31—*'Decree'—High Court's power to revise.*

AGENCY RULES—(Godavari.)

Order of remand by the Agent to the Governor under the Agency Rules is not a "decree" and the High Court cannot revise such order under R. 20 but it may do so under R. 31 at the invitation of Govt. R. 31 provides for cases for which no appeal is allowed. (*Oldfield and Krishnan, JJ.*) PEDDA VIKRAMA DEO GARU *v.* MAHARAJAH OF JEYPORE. (1916) 2 M. W. N. 269=
36 I. C. 801=4 L. W. 499.

———Rr. 24 and 25—*Assistant Commissioner—Order in execution is not a decree—Appeal, if maintainable—Remedy of aggrieved party.*

The order of an Assistant Commissioner in execution proceedings is not a decree and there is no provision in the Agency rules for appeals against orders passed in execution or miscellaneous proceedings. The remedy lies by way of petition under R. 24 against the order in execution of the agency Commissioner: 26 M. 266; 41 M. 325; 16 L. W. 8 referred to. Where a person aggrieved by an order of an Assistant Commissioner in execution proceedings preferred an appeal against it to the Agency Commissioner who rejected it on the ground that there was no appeal and the person aggrieved preferred a revision petition to the High Court: *Held* that the order of the Commissioner was correct inasmuch as there was no appeal to the Commissioner from the order of the Assistant Commissioner and that even assuming the High Court might interfere in exceptional cases in the exercise of its powers of interference under S. 107 of the Government of India Act, there was no ground for such interference in the particular case. (*Spencer and Venkatasubba Rao, JJ.*) VENKATANAGABUSHANAM *v.* KARELLA RAMASWAMI.

17 L. W. 375=45 M. L. J. 78=
73 I. C. 131=1923 Mad. 500.

———R. 31—*Refusal to rectify a sale certificate—Appeal if lies to Government.*

An order passed by an Agent of Govt. under Rule 31 refusing to rectify a sale certificate is appealable to Govt. Mere framing up of a sale certificate is no judicial order but an adjudication as to what the sale certificate should contain is a judicial order. A petition to rectify an alleged mistake in a sale certificate would not amount to a petition for review of a judicial order. (*Benson and Sundara Aiyar JJ.*) TYADA POOSAPATI *v.* MAHARAJA OF JEYPORE. 11 M. L. T. 385=
14 I. C. 286=23 M. L. J. 97.

AGENCY RULES—(Godavari).

———Rr. 3, 2 and (3)—*Cancellation of pleader's sanad—Judicial act—Suit for declaration.*

Where the Government Agent of Godavari Agency cancelled the sanad of a pleader in the Agency tract for misconduct, and the pleader first preferred an appeal to Government who declined to interfere, and subsequently filed a suit in the Agency Court for the cancellation of the Agent's order. *Held*, the Agent acted as a Court and no suit lay against a Court for what it did as such Court. 9 Mad. 888 Dist. (*Spencer and Ramesam, JJ.*) VENKATARAMAYYA *v.* SECRETARY OF STATE FOR INDIA. 42 M. L. J. 148=
15 L. W. 236=(1921) M. W. N. 830=
65 I. C. 345=30 M. L. T. 76=1922 M. 1.

AGENCY RULES—(Godavari.)

———Rr. 6 and 16—*Decree—Meaning of—Order restoring suit, if decree—Petition against Forum.*

"Decree" in rules must be taken to mean the same thing as a decree under the C P. C. and an order restoring a suit dismissed for default is not a "decree" within Rule 6 of the Agency Rules. All petitions against the proceedings of the Agent must in the first instance be submitted to Government and it is open to the Government then to refer the matter to the High Court or the Board of Revenue. (*Abdur Rahim and Kumaraswami Sastry, JJ.*) LEGADAPATI VENKATANAGABUSHANUM *v.* OVILAPATI MAHA LAXMI.

41 Mad. 325=42 I. C. 555=34 M. L. J. 524.

———Rr. 10 and 16—*Agency—Munsiff—Execution of a decree by the Government Agent—Appeal.*

The order of the Agency Munsiff employed in executing the decree of the Agent's Court is not a decree, the provisions of the C. P. Code not being applicable to the case. and therefore no appeal lies against the order. The order of the Agency Munsiff, cannot, in law, be said to be a prooceeding of the Government Agent so as to attract the operation of R. 16 of the Agency Rules. The proceedings of a subordinate officer of a Court of Justice do not become the proceedings of the Court itself unless the Statute Law makes them so in respect of particular matters or unless those proceedings are submitted to the presiding officer of the Court and adopted or approved by him. 27 Mad. 109 Dist. (*Sadasiva Iyer and Bakewell, JJ.*) MANYAM MAHALAKHMAMMA *v.* MUCHIKA APPALA RAJU. **34 M. L. J. 473=47 I.C. 718.**

AGENT—

See (1) CONTRACT ACT, Ss. 182 to 238 and Ch. X.
(2) HUSBAND AND WIFE.
(3) POWER OF ATTORNEY.
(4) PRINCIPAL AND AGENT.

AGRA AND OUDH WATER WORKS ACT (1 OF 1891).

———S. 46—*Waste water used in garden—Offence.*

Waste water may be used for the purposes of a garden as it cannot be used for domestic purposes again. No offence is committed by such user. (*Tudball, J.*) SITAL PRASAD GHOSH *v.* EMPEROR.
16 Cr. L. J. 558=29 I. C. 830=13 A. L. J. 546.

———S. 46 (a)—*Water used for non-domestic purposes on behalf of, but without the knowledge of person—Whether guilty.*

Municipal water used in repairing a house cannot be said to be used for domestic purposes. A person on whose behalf but without whose knowledge or sanction municipal water is used for non-domestic purposes, is not guilty under S. 46 (a); a penalty clause should be construed strictly. (*Rafique, J.*) SAT NARAIN PRASAD *v.* EMPEROR.
15 Cr. L. J. 291=23 I. C. 499=12 A. L. J. 288.

AGRAHARAM—

See (1) GRANT.
(2) INAM.
(3) LAND TENURE.
(4) MADRAS ESTATES LAND ACT.

AGRA TENANCY ACT—(II of 1901).

———*Scope of—*

Provisions of the Provincial Insolvency Act do not affect the rights of a land-holder under the Agra Tenancy Act. (*Piggott and Walsh, JJ.*) PARBATI *v.* SHYAM RIKH. **20 A. L. J. 147=44 A. 296=66 I. C. 214=L. R. 3 A. 73=1922 A. 74.**
(Note: See also 62 I. C. 897=43 All. 510 F. B.)

———*Act not retrospective—Succession—Death of tenant before new Act—Law applicable is Hindu Law as modified by Rent Act.*

The Agra Tenancy Act has no retrospective operation so as to affect a succession to the holding of a tenant who died before the Act. The succession is governed not by the pure Hindu law but by the Hindu Law as modified by the Rent Act. 38 A. 197; 16 A. L. J. 459; 27 A. 658 Ref. (*Ryves and Gokul Prasad, JJ.*) BECHU SINGH *v.* BALDEO SINGH.
44 A. 327=L. R. 3 A. 93=20 A. L. J. 165=65 I. C. 507=4 U. P. L. R. (A.) 12=1922 All. 84.

———*Sir—Joint sir—Transfer of sir and relinquishment of ex-proprietary rights by each holder separately—Order under S. 36, U. P. Land Revenue Act—Date of extinction of sir rights.*

Where sir was held jointly by two persons and each of them separately transferred his sir and relinquished his ex-proprietary right in favour of the transferee at the same time but order under Section 36 U. P. Land Revenue Act was not passed till after a year of the transfer. *Held* Sir rights in the whole of sir were extinguished not from the date of the order under S. 36 but from the date of the transfer. Had one of the holders retained his sir rights the whole of the sir would have retained its character until the demarcation of the other's share. (*Hopkins, S. M. and Freemantle, J. M.*) MUSE *v.* SURAJ BALI.
L. R. 2 All. 245.

———*Sir—Sale by widow—Suit to set aside by daughter compromised on vendee conveying to her half the property—Title to sir is extinguished.*

A Hindu widow sold the property after her husband's death and relinquished her sir rights in vendee's favour. Her daughter brought a suit to set aside the sale but that was compromised on an agreement that the suit should be withdrawn and vendee should convey to the daughter half of the property. *Held*, the effect of the conpromise was the daughter abandoned her claim on title and accepted half the property as a transfer from the widow's alienee and that being so her claim to succeed as sir holder was lost. (*Hopkins, S. M. and Burn, J. M.*) CHETAN DAS *v.* HAR KUAR.
L. R. 2 A. 173.

———*Under proprietory right—Prima facie case need be made out.*

Only a *prima facie* case need be made out when a claim to an under proprietory right is raised. S. D. S of 1893, foll. (*Ferard, S. M. and Harrison, J. M.*) CHHATARPAL SINGH *v.* MAHARAJ DIN.
2 U. P. L. R. B. R. 131.

AGRA TENANCY ACT—(II of 1901.)

———*Sir land—Recorded holder holding after ejectment—Presumption.*

The presumption which can arise that when a recorded *sir* holder holds the land after dispossession by Civil Court, he holds as ex-proprietary tenant, does not arise when there is no evidence of his remaining in cultivating possession. (*Hopkins, S. M.*) SHEO JATAN NAIK *v.* MUKAL NATH SUKUL.

2 U. P. L. R. B. R. 105 (2).

———*Female's estate.*

The previous interest of a Hindu female in possession on the date of the Act is not enlarged by the Act. (*Richards, C. J. and Tudball, J.*) BISESHWAR AHIR *v.* DUKHRAM AHIR.

32 I. C. 771=38 All. 197=14 A. L. J. 127.

———*Mortgage of* khudkhast—*N. W. P. Rent Act* (1881)—*Effect.*

Grant of lease to mortgagor by usufructuary mortgagee of the mortgagor's old *khudkhast* land, is not rendered illegal by the passing of the new Act of 1901. (*Chamier, J.*) DEBI CHAND *v.* BHARAT. 16 I. C. 44 (A).

———S. 1 (2)—*Applicability of—Cantonment land.*

The Agra Tenancy Act has no application to cantonment lands. They are under the direct administration of the Government of India. (*Stuart, J.*) SECRETARY OF STATE FOR INDIA *v.* MULLA. L.R. 3 A. 169=66 I.C. 532=1922 A. 57.

———Ss. 4, 58 and 63—*Suit for possession—Grazing land—Jurisdiction, Revenue Court.*

A suit for possession of land used for grazing cattle and for arrears of rent is in fact one for ejectment and is cognizable by Revenue Court. (*Piggot and Walsh, JJ.*) PARAM HANSMAN *v.* DASRATHMAN. 43 All. 445=60 I. C. 770=19 A. L. J. 292.

———Ss. 4. and 167—*Suit for share of fruit grove—Jurisdiction of Revenue Court.*

A suit for a share of the value of the fruits of a grove against the tenant is a suit for rent and is cognizable by the Revenue Court. (*Tudball and Rafique, JJ.*) RAGHUBIR RAI *v.* MADHO.

39 All. 605=41 I. C. 908=15 A. L. J. 623.

———S. 4—*'Tenant' and 'holding'—Meaning.*

A Thekadar's interest in agricultural land under a lease is a 'holding' and he is a 'non-occupancy tenant' of it. (*Piggott and Walsh, JJ.*) DAHAN DEI KUNWAR *v.* CHOTU LAL.

39 All. 254=38 I. C. 828=15 A. L. J. 227.

———S. 4—*Planting of grove—Transfer.*

Per Richards, C. J.—(*Bannerji J. contra*) A person planting a grove with the permission of the landlord on an agreement to pay rent, can transfer the grove against the wishes of the landlord. (*Richards, C. J. and Bannerji, J.*) ISMAIL KHAN *v.* MITHU LAL. 17 I. C. 656=11 A. L. J. 649.

———S. 4—*Rent—Suit for recovery of money—Equivalent of produce—Revenue Court.*

AGRA TENANCY ACT—(II of 1901.) S. 4.

"Rent" in S. 4 of the Agra Tenancy Act is quite wide and a suit for the recovery of the cash equivalent of one half of the produce of fruit trees in a grove occupied by a tenant is a suit for arrears of rent cognisable by a Revenue Court. (*Piggott, J.*) MURAT PANDE *v.* KESHO DAS.

15 I. C. 27 (A.)

———Ss. 4 (2), 19 and 54—*Grove—Yearly rent—Ejectment.*

The grantee of some land, planted a grove there; after his death, D was admitted as a tenant on payment of an yearly rent. He paid this rent from 1899 till 1910 when deft. sued in the Revenue Court and obtained a decree for his ejectment. D thereupon brought the present suit to declare that the decree of the Board of Revenue was without jurisdiction. *Held*, that a grove-holder such as D was a non-occupancy tenant and the Revenue Courts had the power to eject him and that the decision of the Board of Revenue confirming the right to eject was in no way illegal. (*Stuart and Ryves, JJ.*) MAHARAJA SIR RAMESWAR SAHIB BAHADUR *v.* RAJA MUNSHI MADHO LAL. 42 All. 36=52 I. C. 191=17 A. L. J. 971.

———Ss. 4 (2), 56, 57, 58 and 167—*Agricultural purposes'—Grazing—Jurisdiction of Civil or Revenue Court—Suit for ejectment of tenant.*

The words "agricultural purposes" in S. 4 (2) of the Agra Tenancy Act must be construed in their ordinary sense; they refer to tilling and cultivation for purposes of raising crops. In their widest sense, the words may include grazing but it is impossible to hold that all land held for grazing purposes is land held for agricultural purposes. A suit for ejectment of a tenant from a pasture land, not held for agricultural purposes, is cognisable by the Civil Court and not by the Revenue Court (*Chamier, J.*) MOHIB ALI *v.* SURAT SINGH. 15 I.C. 743 (A.).

———S. 4 (2)—*Land — Meaning of, if includes grove land.*

A grove-holder is a tenant within the meaning of the Act. (*Tudball, J.*) CHOTTEN LALL *v.* HARI NARAIN. 13 I. C. 634 (A).

———S. 4 (3)—*Interpretation—Land—Meaning of.*

S. 4 Cl. 3 of the Tenancy Act does not cover a small plot partly occupied by a bamboo clump and partly by buildings. (*Pearson, J.*) BINDYACHAL PD. GOBIND RAI *v.* RUP KURMI.

L. R. 3 A. 405.

———S. 4 (3)—*Rent.*

An annual rent agreed to be paid by a person to the zemindar for cutting and grazing grass on the latter's land is rent within S. 4 (3). (*Ryves, J.*) MANOHAR LAL *v.* MT. GAURI RAINTAN.

22 I. C. 16=12 A. L. J. 36.

———Ss. 4 (5) and 34—*Person occupying land without consent of the Zemindar—Liability—Jurisdiction of Revenue Court.*

A person occupying land without the consent of the land-holder such a trespasser can be ejected as a non-occupancy tenant by a suit in a

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Revenue Court according to S. 4 (5) and S. 34 of the Act if he does not pay rent. (*Knox, J.*) BALLI *v.* NAUBAT SINGH. 16 I. C. 120=9 A. L. J. 771.

——S. 4 (12)—*Improvement—Building on abadi, by agriculturist tenant.*

An agriculturist tenant has no right to build a shed upon a plot of land in the abadi without the permission of the Zemindar although it was found as a fact that the tenant had been throwing rubbish over it for a long time. A structure built on such a plot of land does not come within the definition of improvement as defined in S. 4 (12) (d) of the Tenancy Act. (*Griffin, J.*) JAGANNATH *v.* GURDAYAL SINGH. 10 I. C. 284 (2) A.

——S. 4 and Ch. X—*Land, meaning of—Grove whether agricultural land.*

Land held as a grove, is not land held for agricultural purposes. The word 'land' in Chapter X of the Act is used in the same sense as in S. 4 (2). (*Griffin and Chamier, JJ.*) HADI HASAN KHAN *v.* PATI RAM. 35 All. 200= 19 I. C. 416=11 A. L. J. 236.

——S. 6—*Construction.*

Owing to the too rigid classification of tenants in S. 6 all lessees including *Thekadars* have to be included in the class of non-occupancy tenants. No adequate provision has been made for lessees holding under a sub-contract and in such cases the intention of the parties is liable to be frustrated. (*Daniels, J.*) INDER DEO RAI *v.* RAM CHARITTER RAI. 74 I. C. 971= 1923 A. 560.

——S. 7—*Usufructuary mortgage before Act.*

Where an usufructuary mortgage of an occupancy holding was completely executed and became enforceable prior to the Agra Tenancy Act but the mortgagor had not devivered possession thereof: *Held*, the mortgagee could sue for possession even after the passing of the Act in a proper Civil Court. (*Hussain and Chamier, JJ.*) HARBANS RAI *v.* SRINIVASA RAO. 12 I. C. 631=8 A. L. J. 1301.

——S. 8—*Fixed rate tenancy—Cannot be created by contract.*

A fixed rate tenancy cannot be created by contract, because a fixed rate tenant is defined in S. 8 of the Act and no person can be classed as a fixed rate tenant who does not come within the definition. 28 All. 747 Ref. (*Daniels, J.*) INDER DEO RAI *v.* RAM CHARITTER RAI. 74 I. C. 971= 1923 A. 560.

——Ss. 9 and 20—*Scope of—Section applies only to disputes between Landlord and tenant Presumption under section is conclusive.*

S. 9 of the Agra Tenancy Act is very limited in scope and applies only where the dispute is between a landlord and his tenant and relates to the nature of the tenancy. A dispute may arise in proceedings to which the landlord is not at all a party. Under S. 20 (1) of the Tenancy Act the interest of a permanent tenure-holder or of a fixed-rate tenant is heritable according to his personal law. Whereas other tenancies devolve according to the rule laid down in Section 22. A dispute may very well arise between the rival heirs of a deceased tenant and the question of the true nature of the tenancy may have to be decided in a litigation to which the landlord is not a party. It is not open to either set of these heirs to go behind the entry at the last revision of records and adduce evidence to the contrary. The presumption under S. 9 is conclusive.

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There are many ways in which fixed rate tenancies may come to an end, *e. g.* by surrender, ejectment, express agreement with the landlord, or as in this case, by merger. I cannot therefore see how one can shut out evidence directed to show that a new position has arisen since the settlements. (*Lindsay and Sulaima, JJ.*) SHEO NANDAN *v.* BALGOBIND MISRA. 45 A. 744= 21 A. L. J. 697=74 I. C. 647= L. R. 4 A. 333=1924 A. 91.

——S. 9—*Suit for a declaration that a revenue entry is wrong is not maintainable.*

A suit for a declaration that an entry in the Revenue Records as to the nature of a tenancy is wrong, is not maintainable in view of S. 9 of the Act. (*Walsh and Wallach, JJ.*) RAM SARAN *v.* LALJI UPADHYA. 43 All. 615=19 A. L. J. 653= 63 I. C. 711=3 U. P. L. R. (A.) 79.

——S. 9—*Entry at fixed rate tenancy—Presumption conclusive.*

The entry as to fixed rate tenancy mentioned in S. 9 of the Act is conclusive proof of the nature of the tenancy only and not of title. (*Richards, C. J., Tudball and Chamier, JJ.*) JAINATA PATHAK *v.* KALKA UPADHYA. 13 I. C. 643=34 All. 285=9 A. L. J. 238.

——S. 10—*Proprietor—Right to—Khudkasht—Possession.*

Khudkasht can only be held by a proprietor who is in possession. When a proprietor makes a transfer, he loses his *sir* and *khudkasht* rights under S. 10 of the Tenancy Act even in the land which he has been cultivating for 12 years and becomes an ex-proprietory tenant. He obviously cannot claim *khudkasht* rights in land which he only begins to cultivate at the time when he loses his possession. (*Ryves and Daniels, JJ.*) GULAB SINGH *v.* SHIB LAL. 21 A. L. J. 331= L. R. 4 A. 206=74 I. C. 286= 1923 A. 347.

——S. 10—*Mortgage of khudkasht lands—Mortgagor becomes ex-proprietary tenant.*

Where an owner of *khudkasht* lands, usufructuarily mortgages the lands, he becomes an ex-proprietary tenant and under law he is liable to pay only three-fourths of the rent which is ordinarily paid in respect of non-occupancy holdings. (*Sulaiman and Kanhaiya Lal, JJ.*) BALDEO SINGH *v.* CHHAIL BEHARI LAL. 59 I. C. 688=18 A. L. J. 944.

——S, 10—*Ex-proprietary tenant—Excess rent under compromise, if recoverable.*

The deft. sold his rights in a village to the plff. and became an ex-proprietary tenant in respect of certain lands which he was cultivating. In a suit for ejectment a compromise was made by which the deft. agreed to pay an enhanced rate of rent: *Held* that S. 10 was mandatory and

the compromise was not binding. (*Tudball and Rafique, JJ.*) MUNSA RAM *v.* GANGA RAM.
18 A. L. J. 282=55 I. C. 889=42 A. 334=
2 U. P. L. R. (A.) 71.

——Ss. 10 and 21—*Usufructuary mortgage of* sir—*Covenant not to set up ex-proprietary rights—Relinquishment of* sir.

If a covenant to relinquish the *sir* lands is part of a transaction of sale or of mortgage, then the agreement to surrender will be void as unenforceable, no matter what ingenious devices may be employed to give colour to it. If a Court is satisfied that there was first of all a transfer by way of sale or mortgage and that the transferor, having obtained the status of an ex-proprietary tenant with full knowledge of that fact and of the rights preserved to him by statue, deliberately chooses as a separate transaction, to relinquish his ex-proprietary tenancy into the hands of the proprietor, or of the mortgagee in possession, the law cannot protect a reckless and imprudent man against the consequences of his own acts. (*Piggott and Walsh, JJ.*) MIR DAD KHAN *v.* RAMZAN KHAN.
40 All. 449=44 I. C. 988=16 A. L. J. 329.

——S. 10—*Contract as to rate of rent—Enforceability of.*

S. 10 of the Act merely fixes a maximum rent and does not prevent the party concerned from contracting for a lower rate or agreeing as to the prevailing rate of rent; but such an agreement is not enforceable as it stands. An order under S. 10 (5) fixing the rent to be paid by the ex-proprietary tenant is necessary; but that order might be passed on the agreement of the party. (*Piggot and Walsh, JJ.*) JAHANGIRA *v.* KARIAR HUSSAIN.
44 I. C. 513=16 A. L. J. 212.

——S. 10—*Ex-proprietary tenant—Contract to pay higher rate of rent, whether enforceable.*

A contract by an ex-proprietary tenant stipulating payment of rent at a higher rate than that allowed by Section 10 of the Agra Tenancy Act is illegal. (*Richards, C. J. and Banerjee, J.*) PIRA *v.* SITAL PERSHAD. 36 All. 155=
22 I. C. 965=12 A. L. J. 136.

——S. 10—*Partition—U. P. Land Rev. Act Ss. 122 to 129.*

Perfect partition of a mahal under the U. P. Land Rev. Act does not create ex-proprietary tenancy under S. 10, Agra Ten. Act. (*Piggott, J.*) SARNAM SINGH *v.* BISRAM SINGH. 9 A. L. J. 701=
16 I. C. 81.

——S. 10—*U. P. Land Revenue Act—Co-sharer who has transferred his share—If becomes ex-proprietary tenant of entire co-parcenary body.*

Where a co-sharer in an undivided mahal transferred his sharer to a third person and became an ex-proprietary tenant in respect of *sir* land in his possession and the third person after trying to eject the co-sharer and failing in it, sued the lambardar for profits on the ground of neglect by the latter. *Held*, that the lambardar was not liable as he could not have been considered to have neglected to collect the rent. *Per Hussain, J.*—When an undivided co-sharer

transfers his share he becomes an ex-proprietary tenant in respect of *sir* land of the entire co-parcenary body and not only of his transferee. (*Hussain and Chamier, JJ.*) KISORI LAL *v.* TODAR SINGH. 13 I. C. 535=9 A. L. J. 244.

——Ss. 10 and 202—*Exchange—Exproprietary tenancy—Suit for possession in Civil Court—Deft. pleading tenancy—Procedure.*

By S. 10 no ex-proprietary tenancy arises where there is an exchange of *Zemindaris* between co-sharers. If in a suit for possession in a Civil Court, the deft. pleads tenancy, the Court of first instance must follow the procedure laid down in S. 202 and require the deft. by order in writing, to sue within three months in the Revenue Court for the determination of the question whether the deft. is plff.'s tenant. (*Stanley, C. J. and Banerji, J.*) KURA SINGH *v.* CHALLU. 33 All. 507=
10 I. C. 845=8 A. L. J. 329.

——S. 10 (12)—*Usufructuary mortgage of Zemindari including* Sir—*Ex-proprietary tenant—Right of mortgagee—N. W. P. Rent Act, S. 7.*

A Zemindar usufructuarily mortgaged a portion of his Zemindari including *Sir* in 1896. In 1907, a portion of the same Zemindari was sold by auction. The auction purchasers got rent assessed on the portion purchased by them. In 1912 they ejected the Zemindar himself from that share; a suit was then brought to eject the mortgagees from two of the plots. *Held* that the mortgagees could not be ejected in as much as the usufructuary mortgage having been made before the Agra Tenancy Act, the Zemindar had not become an ex-proprietary tenant in respect of his *Sir*. A new Act. could not affect the mortgagee's rights. (*Knox, J.*) BHAGWANA *v.* BHAGAWAND DAS.
30 I. C. 911=13 A. L. J. 925.

——S. 11—*Occupancy right—12 years' occupations creates.*

A right of occupancy is created by twelve years' continuous occupation under S. 11 of the Agra Tenancy Act and this right is not affected by the fact that the tenant was recorded as a non-occupancy tenant and did not claim a higher right. (*Stuart, J.*) PRAG NARAIN *v.* ANGAD.
L. R. 3 A. 132=70 I. C. 495=1922 A. 55.

——S. 11—*Occupancy rights—Possession of landholder fraudulent—Tenant if acquires rights.*

Per *Walsh, J.*—A tenant who has held the same land continuously for a period of 10 years gets occupancy rights, but this only refers to a tenant to whom the landlord rightfully leases the land possessed by him. Where the landlord obtained possession of the land fraudulently by colluding with the guardians of a minor, the possession is not legal and the tenant having obtained from the landholder possession, which in its nature was a fraudulent one, did not acquire any rights of occupancy or otherwise by holding the land continuously for 12 years. (*Walsh and Ryves, JJ.*) JAMMU *v.* MAHADEO PRASAD. L. R. 3 A. 195=66 I. C. 559=
4 U. P. L. R. (A) 84=1922 A. 294.

——S. 11—*Occupancy right—Creation, of by landlord.*

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A landlord can agree that his tenant should have the rights of an occupancy tenant and, amongst others, the right not to be ejected so long as be pays his rent and observes the conditions of his tenancy. (*Richards, C.J. and Bannerji, J.*) BHOLA NATH TEWARI *v.* SURAJ BALI RAI.
41 All. 223=49 I. C. 357=17 A. L. J. 120.

———S. 11—*Mutt—Mahunt—Occupancy holding—Acquisition of.*

The manager of a *mutt* can acquire an occupancy holding on behalf of the *mutt* for it is not necessary that the owner should personally cultivate. (*Richards, C. J. and Tudball, J.*) PARMANAD SINGH *v.* RAMANAND GIR. 35 All. 474=21 I. C. 43=11 A. L. J. 761.

———Ss. 11 and 34—*Holding of tenancy without payment of rent—Consent of Zemindar—Acquisition of occupancy right.*

Section 11 of the Tenancy Act provides that a tenant who has been in possession of a holding for over 12 years with the consent of the Zemindar can acquire an occupancy right in the holding notwithstanding non-payment of rent. S. 34 of the Agra Tenancy Act does not apply to such a case. (*Richards, J.*) KHUSHI RAMA *v.* MAHA SINGH. 10 I. C. 112 (A.).

———Ss. 14 and 22—*Grove land—Succession—Jurisdiction.*

Land held as grove is not held for agricultural purposes and therefore the Tenancy Act does not apply and S. 22 is inapplicable in the matter of succession to such land and the Civil Courts have jurisdiction to entertain a suit. (*Sunder Lal, J.*) HABIBULLAH *v.* KALYAN DAS. 25 I. C. 169=12 A. L. J. 1080.

———S. 18—*Not exhaustive—Agreement—"Groveland."*

The methods provided by S. 18 of the Act for the extinction of an occupancy tenancy are not exhaustive, but such tenancy may be extinguished by agreement express or implied between the Zemindar and the tenant. Where a Zemindar gave permission to an occupancy tenant to plant trees, and the tenant planted trees and the land ceased to be agricullural. *Held*, that the land ceased to be an occupancy holding and beeame a "grove land." (*Walsh and Wallach, JJ.*) JALESWAR SAHU *v.* RAJ MANGAL. 43 All. 606=63 I. C. 437=19 A. L. J. 616.

———S. 20—*Relinquishment of ex-proprietary tenancy—Validity—Delivery of possession necessary.*

Mere execution of a deed of relinquishment by an ex-proprietary tenant cannot amount to constructive fraud on behalf of the landlord. In order that the registered deed of relinquishment should operate as a valid surrender it is necessary that sctual possession should be made over by the ex-proprietary tenant to the landlord. [7 All. 847 (F. B.); 20 All. 219 (F B.); 27 I. C. 586; 31 I. C. 794 followed.] Where according to the plaintiff's case itself as put forward in the plaint, the defendants were actually in possession but as su b-tenants and where the fact that they were

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in actual possession when the deed of relinquishment was executed was nowherr denied. *Held* there is no necessity for delivery of possession because the landholders were already in actual physical possession. Where the Revenue Court passed a decree for ejectment in favour of the plaintiff after failure of defendants to file a suit for declaration of right as proprietors and the plaintiff was put in possession: *Held*, the decision of the question of subtenancy against the defendants by the Revenue Court bars the defendant from contending that they have been in possession as landlords. The mere fact of the removal of the plaintiff's name from the revenue papers as an exproprietary tenant does not affect the question. The delivery of possession whether actual or formal to the plaintiff amounted to the plaintiff's getting possession as exproprietary tenant (the title which he had claimed) and a suit for actual possession within six months from that date, is not barred. (*Gokul Prasad, J.*) BHAGWANT *v.* HARE. 72 I. C. 1024=1923 All. 113.

———Ss. 20 and 79—*Occupancy tenant—Transferee—Position of—Possessory right—Ejectment.*

The transferee from an cocupancy tenant has no title to the land but he has a possessory title good against all the world except the Zemindars. Consequently a person who is not a member of the Zemindari body cannot forcibly oust the transferee without incurring a liability to pay damages. (*Gokul Prasod, J.*) RAMESHWAR DUBE *v.* SHEO HARAKH DUBE. 66 I. C. 529=4 U. P. L. R. (A.) 87=1922 A. 277.

———S. 20—*Mortgage void—Personal covenant.*

Where a usufructuary mortgage is void of an occupancy holding a personal covenant to that effect is also unenforceable. (*Lindsay and Stuart, JJ.*) HAR PRASAD *v.* SHEO GOBIND. 20 A. L. J. 318=67 I. C. 792=44 A. 486=1922 A 134.

———S. 20—*Mortgage of occupancy holding—Relinquishment by mortgagor—Right to redeem.*

A relinquishment by the mortgagor of an occupancy holding in favour of the Zemindar for a cash consideration is in law a transfer of the right to redeem. (*Stuart, J.*) YAD RAM *v.* BALDEO SINGH. 64 I. C. 418 (A.).

———S. 20—*Occupancy holding—Sale of in execution is not valid.*

A court is precluded under S. 20 of the Act from decreeing a sale of an occupancy holding and a judgment-debtor is entitled to object to it even in execution proceedings. A Court executing a decree, has no jurisdiction to order such a sale. (*Banerjee, Rafique and Ryves, JJ.*) KATWARI *v.* SITA RAM. 43 All. 547=3 U. P. L. R. (A.) 99=63 I. C. 264=19 A. L. J. 473.

———S. 20—*Attachment and sale.*

The holder of a decree against a permanent lessee of a Zemindari can attach and sell trees standing on the land. (*Tudball and Sulaiman, JJ.*) KIRATARATH GIR *v.* RAGHUNANDAN RAM. 57 I. C. 198=2 U. P. L. R. (A.) 283.

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———S. 20—*Execution of decree—Trees on ex-proprietary holding.*

Trees existing on an ex-proprietary holding are appurtenant to the holding and not liable to attachment and sale in execution of a decree in view of S. 20 (b) of the Agra Tenancy Act. (*Bannerji, J.*) PHAKI LAL *v.* BRIJ MOHAN SINGH.
54 I. C. 805 (A.).

———S. 20—*Mortgage of occupancy holding—Suit for redemption.*

A usufructuary mortgage of an occupancy holding in 1903 is void under S. 20 of the Act. Where the mortgagor sued to redeem the mortgage and offered to pay the money due thereunder: *Held*, that the plff. is entitled to get back possession on his paying the mortgage money as he had offered to do. (*Richards, C. J. and Tudball, J.*) RAMJAN *v.* BHUKHAL RAI.
47 I. C. 852=16 A. L. J. 747.

———Ss. 20 and 122—*Occupancy tenancy—Transfer—Acquisition by member of joint Hindu family—Profits thrown into common stock—Personal law—Applicability.*

A special statute like the Agra Tenancy Act can and does modify the operation of the ordinary Hindu law in certain matters. S. 22 of the Act modifies to a limited extent the Hindu law. Where the tenancy is created in favour of one member of a joint Hindu family, his throwing of the profits derived from the tenancy into the common stock does not change the tenancy to the family. The interest of a non-occupancy tenant or an occupancy tenant is not transferable except under S. 20 of the Act. (*Piggott and Walsh, JJ.*) KALLU *v.* SITAL
40 All. 314=44 I. C. 717=16 A. L. J. 225.

———Ss. 20, 31 and 167—*Scope of.*

In 1897 an occupancy tenant mortgaged by conditional sale his occupancy tenure. The mortgagee brought a suit for foreclosure which was decreed. In execution the mortgagee obtained possession of the holding through Civil Court in 1912. The Zemindar or his representative was not made a party to these proceedings. A suit by him against the occupancy tenants and the mortgagees, in a Civil Court, to declare that all the proceedings consequent on the mortgage were null and void and to eject the tenant and his transferee was not cognizable by Civil Court, under Ss. 20, 31 and 167, but the Civil Court, could grant the declaration asked for. If an illegal transfer of any description whatsoever is made by the tenant, the landlord, if he wishes to interfere in the matter, must do so by a suit in a Revenue Court under S. 31. (*Tudball, J.*) LACHMI NARAIN *v.* KALKA PRASAD.
26 I. C. 419=13 A. L. J. 43.

———S. 20—Sir *land—Right of mortgagee to possession—Perpetual lessee from the mortgagor.*

Where during the pendency of a mortgage suit, the mortgagor made a perpetual lease of his *sir*, the mortgagee purchasing the property in execution of his decree cannot bring a suit to eject the lessee as he could not maintain a suit for possession against the mortgagor under the Tenancy Act.

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(*Richards, C. J. and Banerjee, J.*) GHURE *v.* SITAL KUAR.
23 I. C. 102=36 All. 248=12 A. L. J. 370.

———S. 20—*Mortgage of occupancy holding—Sub-mortgage—Right of sub-mortgagee.*

A sub-mortgagee from the mortgagee of a fixed rate holding and an occupancy holding can recover his money from the mortgagee if no interest in occupancy holding had been transferred to him under the deed of the sub-mortgage. (*Richards, C.J. and Lyle, J.*) BALGOBIND BHAGAT *v.* NAGINA MISIR.
19 I. C. 745=35 All. 405.

———Ss. 20 and 31—*Mortgage in favour of Landlord—Occupancy holding—Illegal and void.*

An occupancy tenant can transfer his interest to his landlord only in the manner provided in the Act, namely, by abandonment of the holding. A simple mortgage by an occupancy tenant of his interest in his holding in favour of his landlord is a nullity whether made before or after the Tenancy Act. 29 A. 327, Ref. (*Chamier, J.*) BADRI MULLAH *v.* SUDAMA MAL.
16 I. C. 981=10 A. L. J. 176.

———S. 20—*Occupancy tenant—Decree for sale of house of occupancy tenant.*

Under the Act the occupancy holding of a tenant is not transferable and cannot be sold in execution of a decree. The dwelling house may be deemed to be appurtenant to the holding. (*Stanley, C. J. and Banerji, J.*) RAMDIAL *v.* NARPAT SINGH.
33 All. 136=9 I. C. 931=8 A. L. J. 190.

———S. 20—*Effect of sale after the passing of the Act.*

The effect of a sale in execution of a decree on a simple mortgage, of a zemindari and *sir* which had been subsequently usufructuarily mortgaged to the defendant is to determine the usufructuary mortgage if such usufructuary mortgage had been executed before the passing of the Act. The effect of the sale if it took place after the passing of the Act is to make the ex-proprietary rights which accrued by reason of the usufructuary mortgage not transferable. (*Stanley, C. J. and Griffin, J.*) DWARKA CHAND *v.* KHADIM HUSAIN.
9 I. C. 553 (A.).

———S. 20—*Occupancy holding—Usufructuary mortgagee.*

An occupancy tenant after mortgaging his holding with possession cannot relinquish it in favour of the Zemindar so as to determine the possession of the mortgagee. (*Knox and Karamat Husain, JJ.*) CHOTEY LAL *v.* SHEOPAL SINGH.
33 All. 335=9 I. C. 217=8 A. L. J. 117.

———S. 20 (2)—*Ex-proprietary holding—Execution sale.*

Exproprietary holdings cannot be sold in execution of a decree according to S. 20 (2), Agra Tenancy Act. A purchaser cannot recover possession of the lands or of the trees on the plot. (*Richards, C. J. and Banerjee, J.*) CHUNNI LAL *v.* BIRI SINGH.
41 All. 346=50 I. C. 430=17 A. L. J. 302.

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———Ss. 20 (2) and 25 (1)—*Mortgage of occuptancy holding—Suit for possession by lessee against usufructuary mortgagee in possession—Lease granted and registered by mortgagor during the pendency of proceedings for compulsory registration of mortgage.*

An occupancy tenant made a usufructuary mortgage of certain plots of lands but during the pendency of the proceedings to get the mortgage deed registered granted a registered lease of some of these plots of land and no fraud or collusion on the part of the lessee was proved and the lessee sued to recover possession from the mortgagee who had been put in possession: *Held*, that the lessee was entitled to possession without having paid the mortgage money. (*Piggott and Walsh, JJ.*) HABIB-UL-LAH *v.* MANRUP.
40 All. 228=43 I. C. 514=16 A. L. J. 137.

———S. 20 (2)—*Ex-proprietary tenancy.*

A and B were co-sharers of an undivided patti. A sold his share to C and became thereby an *ex-proprietary* tenant of his *Sir* holding. The patti being undivided A became an ex-proprietary tenant of the entire body of co-sharers and C had not the exclusive right of collecting rent from him. (*Griffin, J.*) BHAGAVANDIN *v.* DEBI PRASAD.
12 I. C. 630 (A.).

———S. 21—*N. W. P. Rent Act, XII of 1889—Validity of mortgage of occupancy holding—Surrender of holding, if affects rights of mortgagee.*

An occupancy tenant could not confer the rights of occupancy on his mortgagee but he could give him the right to possess and hold his holding before the passing of the Agra Tenancy Act. Therefore the mortgagor could not surrender his holding to prejudice the rights of his mortgagee and the landlord cannot validly take the surrender with the knowledge of the mortgage. (*Richards, C. J. and Banerjee, J.*) CHHIDDU *v.* SHEO MANGAL SINGH. 39 All. 186=39 I. C. 585=15 A. L. J. 44.

———S. 21—*Suit for possession.*

A usufructuary mortgagee cannot recover possession of an occupancy holding if he got possession after the Act came into force. (*Walsh, J.*) NAJAJ KHAN *v.* GIRDHARIA.
32 I. C. 593 (A.).

———S. 21—*Mortgage of occupancy holding—Zemindar taking rent from mortgagee—Ejectment.*

An occupancy holding was mortgaged with possession by the tenant in 1901. The Zemindar accepted rent from the mortgagee. In 1911 the tenant relinquished the holding: *Held*, that the occupancy holding having come to an end, the mortgagee was a mere tenant of the Zemindar liable to be ejected by him. (*Chamier, J.*) CHAND MAL *v.* SARJU. 30 I. C. 70 (A).

———S. 21—*Transfer of trees on waste land by tenant.*

A tenant cannot transfer trees planted by him on the waste land of a village which is not his occupancy holding and therefore an auction sale of such trees does not give the transferee the ownership thereof. (*Sunder Lal, J.*) RAM SARUP *v.* JAGANNATH. 25 I. C. 152 (A).

AGRA TENANCY ACT (II of 1901) S. 22.

———S. 21—*Mortgage of cultivatory holding—Validity.*

A mortgage of a cultivatory holding is under the Act void; but once a mortgage has been created, the mortgagor will not be entitled to get back possession without restoring to the mortgagee the money received from him. (*Banerji and Tudball, JJ.*) BAHORAN UPADHYA *v.* UTTAMGIR.
33 All. 779=12 I. C. 112=8 A. L. J. 931.

———S. 21 (2)—*Occupancy holding—Mortgage before the Act—Execution of decree.*

On a mortgage of an occupancy holding made before the Agra Tenancy Act if a decree for possession is passed in favour of the mortgagee in 1912 the mortgagee is entitled to possession. 3 A. L. J. 40; 8 A. L. J. 1301 Ref. (*Tudball and Rafique, JJ.*) RANG LAL KUAR *v.* KISHORI LAL.
37 All. 278=28 I. C. 278=13 A. L. J. 300.

———S. 22—*Joint holding—Mortgage of portion—Right to redeem.*

Where two persons are in joint cultivation and a portion of the holding is mortgaged by one, the other is entitled to redeem. (*Kanhaiya Lal, J.*) GANESH DIN *v.* LACHMAN SINGH.
74 I. C. 755=1924 A. 147.

———S. 22—*Inheritance—Daughter's sons and collaterals.*

Under the Agra Tenancy Act, a daughter's son or a collateral can only inherit if he shared in the cultivation of the holding at the time of the tenant's death. (*Gokul Prasad, J.*) SHAIKH SATYAD HUSSAIN *v.* SHAIKH WALI MUHAMMAD.
73 I. C. 1030 (2)=1923 All. 451.

———S. 22—*Succession of Widow.*

A widow who succeeds to an occupancy holding on the death of her husband may not have anything more than a life-interest therein; but she would be an occupancy tenant for the time being and the succession would open out on her death to the heirs of the last male holder and would go to the persons entitled under S. 22 of the Agra Tenancy Act and then in existence, provided that if those persons are the daughter's sons or collateral male relatives in the male line of descent, they must be co-sharers in the cultivation of the holding at the time when the last occupant died. Case-law discussed. (*Kanhaiya Lal, J.*) BHAWANI BHIKH *v.* SIDH NARAIN. 70 I. C. 820=1923 A. 18.

———S. 22—*Death of occupancy tenant before Act—Succession by widow—Reversioners, when can succeed—Law governing—Hindu Law modified by N. W. P. Rent Act, S. 9.*

An occupancy tenant died before the Agra Tenancy Act of 1901 came into force and was succeeded by his widow. She died after the Act, and the reversioners claimed to succeed; *Held*, succession must be governed by Hindu Law as modified by the N. W. P. Rent Act, S. 9 and they could succeed only if they cultivated jointly with the deceased tenant. (*Ryves and Gokul Prasad, JJ.*) BECHU SINGH *v.* BALDEO SINGH.
20 A. L. J. 165=4 U. P. L. R. (A.) 12=44 A. 327=65 I. C. 507=1922 A. 84=L. R. 3 A. 93.

AGRA TENANCY ACT (II of 1901) S. 22.

———S. 22—*Acquisition of occupancy rights by widow—Succession—Occupancy rights if transferable and heritable.*

Under the Act X of 1859 the right of occupancy tenancy was neither transferable nor heritable and came to an end on the death of the tenant if it took place before the passing of Act XVIII of 1873. If the tenant's widow remained in possession in such case, she acquires the rights of an occupancy tenant by twelve years adverse possession. If the widow having acquired a title by prescription dies after the coming into operation of the Agra Tenancy Act, the succession to the holding is governed by S. 22 of the Act. 7 W. R. 528, 13 B. L. R. 274, Ref. (*Gokul Prasad and Stuart, JJ.*) MANPAL SINGH *v.* RAJ PARTAB SINGH.

L. R. 3 A. 66 = 44 All. 376 = 65 I. C. 824 = 20 A. L. J. 181 = 1922 A. 31.

———S, 22—*Occupancy tenancy—Devolution—Joint holding.*

The devolution of interest of an occupancy tenant of a joint holding is governed by S. 22 and his successors-in-interest cannot redeem a mortgage effected by him of his interest in the property. (*Piggot and Walsh, JJ.*) MUTASADDI LAL *v.* DAYA SHANKAR.

2 U. P. L. R. (All) 417 = 62 I. C. 103 = L. R. 2 A. 3

———S. 22—*Joint Hindu Family owning tenure—Death of a member.*

Where one member of a joint Hindu family which has acquired an occupancy tenure dies, the tenure devolves on the remaining members and therefore S. 22 of the Agra Tenancy Act does not apply to the case. (*Tudball and Sulaiman, JJ.*) MENDYA *v.* JHURYA.

18 A. L. J. 769 = 57 I. C. 272 = 2 U. P. L. R. (A.) 257 = 42 A. 668.

———S. 22. Proviso—*Joint Occupancy holding—Death of one tenant—Succession.*

Where a deceased tenant of a joint occupancy holding was in separate possession of a specific plot, held that the other co-owners, sharing as they did in the cultivation of the holding in which the deceased tenant had an interest, were entitled to succeed to his share undsr S. 22 of the Act. (*Richards, C. J. and Banerji, J.*) BHUP SINGH *v.* JAI RAM. 46 I. C. 387 = 16 A. L. J. 459.

———S. 22—*Joint Hindu family as tenant. Death of one member.*

When a joint Hindu family constitutes one tenant and one of the members dies, the surviving members continue to be the tenant and such member has no interest which devolves after him on any one in particular. (*Richards, C. J. and Rafique, J.*) MAHABIR SINGH *v.* BHAGWANTI.

38 All. 325 = 33 I. C. 110 = 14 A. L. J. 278.

———S. 22—*Succession to daughters.*

The sons of daughters are equally entitled to the occupancy holding of the last male owner (maternal grandfather). (*Richads, C. J. and Tudball, J.*) BISESHAR AHIR *v.* DUKHRAM AHIR.

38 All. 197 = 32 I. C. 771 = 14 A. L. J. 127.

AGRA TENANCY ACT (II of 1901) S. 22.

———S. 22—*Succession—Occupancy holding—Hindu Law.*

An occupancy tenant died, while the Act of 1881 was in force, leaving a widow and a daughter. The widow succeeded and died while the Agra Tenancy Act was in force. In a suit between the brothers and nephews of the original occupancy tenant and his daughter for succession, *held*, that the daughter was entitled to succeed whether the provisions of the Tenancy Act applied or not. (*Richards, C. J. and Banerjee, J.*) NATHU *v.* GOKALIA. 37 All. 658 = 30 I. C. 215 = 13 A. L. J. 947.

———S. 22—*Lineal descendant—Adoption—Effect of.*

Once a boy has been adopted into another family he ceases to be a lineal descendant of his natural father. (*Richards, C.J. and Tudball, J.*) THAUMAN SINGH *v.* DAL SINGH.

37 All. 7 = 27 I. C. 34 = 12 A. L. J. 123.

———S. 22—*Succession — Daughter's son—Daughter succeeding to her father while Rent Act of 1881 was in forcee.*

Where a daughter succeeded to her father in respect of a hol ing under a permanent lease while the Rent Act of 1881 was in force but died after the Tenancy Act of 1901 came into force: *Held*, that her son was entitled to succeed, (*Richards, C. J. and Banerjee, J.*) DAOKI RAI *v.* PARBATI. 23 I. C. 100 (A.).

———S. 22—*Occupancy tenant—Inheritance.*

Where on the death of an occupancy tenant before the Act, his widow succeeded to the holding and died after the Act came into force, the daughter of the tenant is not entitled to succeed to the occupancy holding. 32 A. 314 dist. (*Ryves, J.*) SUMARI *v.* JAGESHAR.

20 I. C. 7 (A.).

———S. 22—*Adopted son—Lineal descendant.*

A Sudra can take a daughter's son in adoption. An adopted son is a lineal descendant within S. 22. (*Richards, C. J. and Bannerji, J.*) LALA *v.* NIHAR SINGH. 34 All. 658 = 16 I. C. 181 = 10 A. L. J. 299.

———S. 22—*Occupancy holder's succession—Mahomedans—Personal law.*

The personal law of the parties has nothing to do with the rule of succession laid down by S. 22. A son of a Mahomedan does not succeed to the exclusion of the son of his deceased brother. (*Griffin and Chamier, JJ.*) ALI BAKSH *v.* BARKATULAH. 34 All. 419 = 14 I. C. 181 = 9 A. L. J. 488.

———S. 22—*Occupancy holding—Succession—*Chela—*Illegitimate son.*

Succession to an occupancy holding under the Tenancy Act, is in the legitimate male lineal descent. An illegitimate son of a person who is not a Sudra cannot succeed to his occupancy holding. Neither can a *Chela* succeed to the occupancy holding of a *Mathadhari* ascetic. (*Bannerji, J.*) JAGESHAR JATI *v.* BINDESHRI PRASAD. 11 I. C. 936 = 8 A. L. J. 731.

AGRA TENANCY ACT (II of 1901) S. 22.

———S. 22—*Widow succeeding to occupancy holding.*

The interest of a Mahomedan widow succeeding to the occupancy holding of her husband is a limited one and comes to an end on her death or re-marriage. (*Griffin, J.*) JHABBAR MUSALMAN *v.* SURAJ PRASHAD. 9 I. C. 894 (A.).

———Ss. 23 to 30—*Thekadars are tenants.*

Thekadars are tenants for the purpose of applying the provisions of the Tenancy Act and the provisions of Ss. 23 to 30 regarding the right of sub-leasing are applicable to them. 6 A. L. J. 649, *Ref.* (*Daniels, J.*) INDER DEO RAI *v.* RAM CHARITTER RAI. 74 I. C. 971=1923 A. 560.

———S. 25—*Sub-lease in contravention of, cannot be enforced.*

Where a sub-lease is made in contravention of S. 25 of the Agra Tenancy Act, by not being made under a registered instrument, the agreement is unenforceable and cannot be given effect to by a court of law, (*Lindsay, J.*) DHARMAN *v*, SUKHI. 73 I. C. 981=1923 A. 453.

———Ss. 28 and 29—*Ex-proprietary tenant—Rent not fixed by agreement or by decree—Suit for arrears of rent.*

The purchaser of *zemindari* rights could not maintain a suit to recover rent from the usufructuary mortgagee of the vendor of the *zemindari rights*, when the rent was not fixed either by agreement of parties or by decree of Court. (*Richards and Tudball, JJ.*) KAMTA PRASAD *v.* PANNA LAL. 35 All. 123=18 I. C. 575=11 A. L. J. 29.

———S. 31—*Inaction of landlord in getting a sub-lease declared void—Effect.*

A landholder might accept and recognize a transfer but if he wishes to repudiate it he must do so at an early date and bring his suit within one year of the transfer. Where the landlord was found to be the sub-tenant of a transferee under an invalid lease from the ex-proprietary tenant, he is liable to be ejected at the instance of the ex-proprietary tenant. (*Gokul Prasad, J.*) MAKHAN LAL *v.* DEBI PRASAD. 1923 A. 401 (2).

———S. 32—*Applicability.*

S. 32, Agra Tenancy Act, does not apply to a suit to recover a fractional share in a holding against a person in lawful possession. (*Daniels, J.*) RAM KISHAN RAI *v.* SHEO SAGAR PANDEY. 73 I. C. 462.

———S. 32.—*Division of holding—Suit for possession of portion of holding.*

Where the plff. sued for possession of a portion of a fixed rate tenancy alleging that he was the owner thereof and the deft. was a trespasser, the suit is not barred by S. 32 of the Act. 31 A. 38, foll. (*Richards, C. J. and Banerjee, J.*) KEDAR *v.* DEO NARAIN. 30 I. C. 89=37 All. 656=13 A. L. J. 919.

———S. 32—*Occupancy holding—Included in joint family property—Partition—Suit for possession.*

AGRA TENANCY ACT (II of 1901) S. 34.

A suit for partition of joint family property is not bad because it includes an occupancy holding. The Court need not sub-divide the holding against the provisions of the Tenancy Act, but it can allot the occupancy holding to one party or can leave the same undivided with a declaration that the parties are jointly entitled thereto. (*Richards, C. J. and Tudball, J.*) DWARKA *v.* RAMPAT. 24 I. C. 235=36 All. 461=12 A. L. J. 696.

———Ss. 33 and 34—*Tenant in possession.*

Agreement to pay at a certain rate is not affected by S. 34 which applies to possession without the landlord's consent. The tenant is liable to pay the rent agreed upon by him under S. 33 of the Act. (*Knox, A. C. J. and Banerjee, J.*) HOTILAL *v.* CHUTTAN LAL. 51 I. C. 15 (A.).

———Ss. 34 and 177—*Proprietary title pleaded—Appeal lies to District Court.*

Where in a suit in ejectment, the defendant sets up a proprietary title within S. 177 (e) of the Agra Tenancy Act, an appeal lies to the District Court. (*Daniels, J.*) NAUJADIK RAI *v.* RAM JATAN RAI. 73 I. C. 534 (1)=1923 A. 558.

———S. 34—*Person in possession for more than 12 years.*

Under S. 34 of the Tenancy Act a person who has cultivated land without the consent of the landholder becomes a tenant when the landholder chooses to acknowledge him to be so, either by suing for rent or by suing for ejectment. It is at the option of the landlord to treat such a person either as a trespasser and sue him in the civil courts or as a person liable to pay rent and sue him in the Revenue courts, but until the landlord has exercised this option such a person cannot be considered to be a tenant. (*Gokul Prasad, J.*) TARIF *v.* ASA RAM. 73 I. C. 212=1923 A. 419.

———S. 34.—*Suit for rent under—When tenable.*

A Thekadar of a village from the Zemindar sued the defendant for rent under S. 34 of the Agra Tenancy Act. Agreement for payment of rent had never been made between the parties; nor was ever any rent formally got assessed by any Court. *Held*, that the suit was not tenable. 8 A. L. J. R. 1087 Ref. (*Ryves, J.*) MANNU LAL *v.* BABU RAM. 1923 A. 402.

———Ss. 34 and 177—*Order of remand—No appeal lies.*

No appeal lies to the High Court from an order of remand passed by the District Judge in an appeal under the provisions of the Agra Tenancy Act from the Court of the Assistant Collector. (*Piggott and Walsh, JJ.*) JAI PRASAD *v.* DALSINGAR. 60 I. C. 991=19 A. L. J. 146.

———S. 34—*Effect of—Commencement of tenancy.*

A suit in the Civil Court for the ejectment of a person is not barred where the person is not a tenant. The relationship of landlord and tenant commences only after rent has been paid or assessed. (*Richards, C. J. and Banerjee, J.*) MUKH RAM *v.* CHHAJJU. 17 A. L. J. 646=50 I. C. 734=1 U. P. L. R. 74.

AGRA TENANCY ACT (II of 1901) S. 34.

———Ss. 34 and 193—*Occupancy of land without consent of landlord—Ejectment decree—Revenue Court—Usufructuary mortgage of Sir before the Act—Mortgagee in possession.*

Plaintiffs were in possession of *sir* land under a usufructuary mortgage effected prior to the passing of the Agra Tenancy Act. Defts. who had acquired in part the equity of redemption got possession of these lots. Plffs. sued to eject defts. in the Revenue Court. The defts. denied the relationship of landlord and tenant and also raised other pleas. They were referred by the Revenue Court to the Civil Court. The Civil Court held the plffs. were entitled to remain in exclusive possession as mortgagees and that the defts. had acquired a share in the equity of redemption. *Held*, that the defts. could be ejected under S. 34 of the Agra Tenancy Act. Per *Walsh*, *J.* The words "a person occupying land without the consent of the landlord" in S 34 of the Act mean one who enters into occupation without express consent or without any previous arrangement. 9 A. L. J. 71, foll. (*Piggott and Walsh, JJ.*) JAGADAR DEO SINGH *v.* ALI HAMMAD.

40 All. 303=44 I. C. 919=16 A. L. J. 249.

———S. 34—*Civil and Revenue Court.*

A suit in a Civil Court under S 34 of the Act is not barred by reason of a prior suit in the Revenue Court by the plff. for ejectment of the deft. on the ground that he was holding against his will. (*Richards, C. J., Banerjee and Tudball, JJ.*) NANDAN SINGH *v.* GANGA PRASAD.

35 All. 512=20 I. C. 832=11 A. L. J. 786.

———S. 34—*Partition—Possession without consent of Zemindar—Suit to recover rent.*

Where deft. continues in possession of the land allotted to the plffs. on partition, a suit for rent against the deft. at such rate as the Court might think fair and equitable is maintainable under S. 34 of the Act. 20 A. 296; 2 A. L. J. 1 dist. (*Griffin and Ryves, JJ.*) KHUHAL SINGH *v.* ADKARAN SINGH. 20 I. C. 183=11 A. L. J. 377.

———Ss. 34 and 95—*Suit for rent—Rent to be agreed between landlord and tenant or fixed by the Court—Amendment of plaint—Suit for occupation without consent—Second appeal.*

To get rent from agricultural tenants the landlord must either make an agreement with them for the rent or get it fixed by the Court. An amendment that the defendant occupied the land without plaintiff's consent cannot be allowed in second appeal in a suit for recovery of rent on the basis of a compromise with the tenant. (*Chamier, J.*) SHEO GOPAL PANDE *v.* BALDEO SINGH. 12 I. C. 180=8 A. L. J. 1087.

———S. 34—*Tenant—Consent—Occupancy.*

The case of a tenant holding land with the consent of the Zemindar falls under the section and not of one who occupies as a tenant. (*Stanley, C. J. and Banerji J.*) CHIDDA SINGH *v.* RUP RAM. 10 I. C. 224 (A.).

———S. 36—*Suit by grove-holder—Wrongful appropriation of fruits—Suit lies in Civil Court.*

AGRA TENANCY ACT (II of 1901) S. 41.

The plaintiff was a grove-holder and the defendant the Zemindar. The suit was brought on the allegation that the defendant being entitled to one-fourth of the fruits of the grove had wrongfully appropriated one half of the fruits. The suit was filed in the Small Cause Court claiming the value of the fruits wrongfully appropriated. The defence was that the suit was cognisable only by the Revenue Court being a suit contemplated by S. 36 of the Tenancy Act, and that, therefore, the jurisdiction of the Civil Court was ousted by S. 167 of the same Act. *Held*, that the intention of the framers of the Tenancy Act was to include such a case as the present within the jurisdiction of the Civil Court, and if S. 36, as framed, does not cover it, it is merely because the possibility of such a case was not thought of at that time when the section was drafted. (*Daniels, J.*) RAJA RABI PRATAB NARAIN SINGH *v.* MAHANTH RAM PRASAD.

45 A. 725=21 A. L. J. 646=74 I. C. 502=L. R. 4 A. 331=1924 A. 125.

———Ss. 40 (3), 44 and 57—*Suit for declaration that defendants have no interest in holding lies in Civil Court.*

Considering S. 40 (3), neither S. 44 nor S. 57 debars a Civil Court from entertaining a suit regarding an entry made on the basis of possession in the tenant's register. A suit for declaration that the defts. have no interest in or concern with the occupancy holding of which the plff. is the sole tenant is cognizable by the Civil Court as it is not a suit seeking to have the defts. declared to be tenants of a particular class. (*Lindsay, J.*) DAULAT SINGH *v.* INDAR SINGH. 63 I. C. 97 (All.).

———Ss. 41 and 95—*Oral agreement for enhancement of rent is not enforceable.*

A claim for enhanced rent under an oral agreement or unregistered deed cannot be enforced in a revenue court. 23 I. C. 417, Ref. (*Stuart, J.*) PRAG NARAIN *v.* ANGAD. 70 I. C. 495=L. R. 3 A. 132=1922 A. 55.

———S. 41—*U. P. Land Revenue Act (III of 1901). S. 33—Agreement for payment of enhanced rent by tenant of ex-proprietary holding.*

A tenant of an ex-proprietary holding can validly execute an enforceable registered agreement, prior to the expiry of 10 years from the creation of the tenancy, for payment of enhanced rent. (*Richards, C. J. and Banerjee, J.*) BHAIRON PRASAD *v.* SOMVAR PURI. 37 I. C. 1031=39 All. 318=15 A. L. J. 117.

———Ss. 41 and 97—*Agreement to enhance rent if not registered must be in writing and attested under S. 97.*

An agreement enhancing the rent of a tenant under S. 41 of the Act must be in writing and attested under S. 97 of the Act if not registered under the provisions of the Registration Act. (*Walsh, J.*) MUHAMMAD YUNIS ALI KHAN *v.* KAIAN SINGH. 34 I. C. 369 (A.).

———S. 41—*Agreement to pay enhanced rent.*

An agreement to pay enhanced rent is not illegal, when there has been no legal enhancement within 10 years. (*Griffin, J.*) BHOLA *v.* MAHOMED HABIBUL RAHMAN KHAN. 10 I. C. 465 (A.).

AGRA TENANCY ACT (II of 1901) S. 51.

———S. 51—*Government revenue—Remission—Biswadaran Sahiq are entitled to benefit.*

The *biswadaran sahiq* of a village were in possession of their holdings and they were allowed to collect rent from the tenants of those holdings subject to payment of a certain rent to the proprietor 21 days before the Government revenue fell due, and there was a remission of Government revenue for a certain year, *Held*, that the *biswadaran sahiq* had a right to the benefit of the remission according to justice, equity and good conscience as according to S. 51 of the Act they were not entitled to collect any rent from the tenants from whom they used to collect rents before the remission was granted. (*Lindsay and Kanhaiya Lal, JJ.*) NATHA *v.* GOBIND RAM. 64 I. C. 153= 19 A. L. J. 681.

———S. 51 (5)—*Distraint of crops by Zemindar—Suspension of rent—Offence under S. 188, I. P. C.*

An order suspending or remitting arrears of rent under S. 51 of the Agra Tenancy Act is not an order prohibiting the landholder from receiving the same if tendered or from attempting to realize the same by lawful means. Its effect is simply to make him lose his right of suit in respect of the arrears remitted or suspended during the period of suspension. A Zemindar may have a right in law to distrain for the suspended arrears in which case he is not to be punished for availing himself of the right. Even if he has not got the right of distraint his only liability is to compensate the tenants inconvenienced thereby. (*Piggott, J.*) EMPEROR *v.* RAM SARUP.
30 I. C. 722=16 Cr. L. J. 674=13 A. L. J. 619.

———S. 56—*Ejectment of sub-tenant—Revenue Court.*

Where an occupancy tenant under a compromise of a suit in a Civil Court sub-let a portion of his holding to another person for a fixed rent, the latter is a tenant within the meaning of S. 56 of the Agra Tenancy Act and she could be ejected only in accordance with that Act. (*Stuart, J.*) RAM GAJADHAR *v.* MT. SURTANI. 71 I. C. 381= 1923 A. 343.

———Ss. 56, 57, 58 and 167—*'Agricultural purposes'—Grazing—Jurisdiction of Civil or Revenue Court—Suit for ejectment of tenant.*

The words "agricultural purposes" must be construed in their ordinary sense; they refer to tilling and cultivation for purposes of raising crops. In their widest sense, the words may include grazing, but it is impossible to hold that all land held for grazing purposes is land held for agricultural purposes. A suit for ejectment of a tenant from pasture land, not held for agricultural purposes is cognizable by the Civil Court. (*Chamier, J.*) MOHIB ALI *v.* SURAT SINGH.
15 I. C. 743 (A.).

———S. 56—*Jurisdiction of Civil and Revenue Courts.*

A suit for ejectment on the footing of tenancy will not lie in the Civil Courts even though relief has not been obtained in the Revenue Courts. (*Knox and Karamat Husain, JJ.*) NARAIN SINGH *v.* GOBIND RAM. 9 I. C. 1022= 33 All. 523=8 A. L. J. 431.

AGRA TENANCY ACT (II of 1901) S. 57.

———Ss. 57 and 63 (a)—*Alienation by Hindu widow—Suit by reversioners for ejectment does not lie.*

A Hindu widow's estate is not a life estate and it is not an estate held in trust for reversioners. She represents the estate and has power to make alienations subject to the rights of reversioners to have those alienations set aside if they are found to be either not for legal necessity or not for the benefit of the estate. They do not cease to be operative. A reversioner therefore cannot institute a suit for ejectment in the Revenue Court without setting aside the alienation. (*Stuart. J.*) KANDHYA *v.* RAJ KUNWAR.
75 I. C. 681 (2)=1923 A. 367 (2).

———Ss. 57, 65 and 167—*Landlord and tenant—Tree cutting by occupancy tenants—Suit for damages—Maintainability—Small Cause Courts—Jurisdiction.*

S. 167 of the Act does not debar the plff. from claiming damages in a Civil Court on the allegation merely that defts. had taken advantage of their position as tenants and cut down trees belonging to the plff. The plff's. claim is cognizable by a Small Cause Court. The cutting down of trees is not necessarily detrimental to the land within S. 57 of the Act. (*Piggott, J.*) MANSUKH RAM *v.* BIRJRAJ SARAN. 46 I. C. 971= 40 All. 646=16 A. L. J. 621.

———Ss. 57 and 177—*Court Fees Act, S. 7. Cl. XI (cc)—Suits Valuation Act, S. 8.*

A suit for ejectment of tenants under S. 57 (b) of the Tenancy Act is within S. 7, cl. xi (cc) of the Court-Fees Act and where the valuation for Court-Fees is, under that clause below Rs, 100 the value for the purposes of jurisdiction also, is the same and therefore no appeal lies under S. 177 of the Tenancy Act. (*Sunder Lal, J.*) NANDAN SINGH *v.* DEBI DIN. 25 I. C. 975= 12 A. L. J. 933.

———S. 57 (a). (c)—*Ejectment—Mere non-payment of rent not sufficient.*

Mere non-payment of rent is not sufficient for ejectment. For the maintainability of suit a decree against the appellant for arrears of rent is required. (*Mears, C. J. and Piggott, J.*) MAHANT KUBER DAS *v.* RAM DIN KALWAR. 45 A. 5= 1923 A. 14 (2)=20 A. L. J. 769.

———Ss. 57 (b) and 177—*Ejectment—Injurious act—Brickfield—Conversion of land into.*

Plff. granted a perpetaul agricultural lease of certain land to deft. who sub-let a portion to the other defts. for the purpose of making bricks. In a suit for ejectment of the deft. on the ground that he had done an act inconsistent with the purpose for which the land was let, *held*, that the suit was one under S. 57 (b) of the Act and an appeal against the decree of the Asst. Collector lay to the District Judge. 6 A. L. J. 39. dist. If a tenant does an act inconsistent with the purpose for which the land is let in a part of the land let out to him, he is liable to ejectment from the whole of the holding and not only a part of it. (*Banerji, J.*) DINA *v.* HARKISHEN DAS.
28 I. C. 298=37 All. 272=13 A. L. J. 302.

AGRA TENANCY ACT (II of 1901) S. 57.

———S. 57 (b)—*Ejectment—Trees planted by tenant—Breach of contract.*

Planting trees by a tenant in contravention of the contract under which he holds the land, is an act inconsistent with the purposes for which the land was let and the tenant, in such a case is liable to ejectment under S. 57 (b). (*Stanley, C. J. and Banerji, J.*) SHIAM NARAIN SINGH *v.* RAM PRASAD. 10 I. C. 23 (A.).

———S. 57 (d)—*Grove—Tenant grove-holder—Ejectment.*

A suit to eject tenant grove-holders stand on a different footing from a suit to eject a tenant of a grove. Neither S. 57 of the Agra Tenancy Act nor any other provision of law entitles the landlord to eject a tenant grove holder. (*Stuart, J.*) SHEO PRASAD *v.* BABU RAM. 71 I. C. 350 = 1923 A. 163.

———S. 57 (d) and Sch. C. No. 18—*Proprietary tenant—Sub-lease for more than five years—Ejectment—Appeal to District Court—Jurisdiction.*

Certain ex-proprietary tenants executed a sub-lease for more than five years. The Zemindars brought a suit in the Revenue Court under S. 57 (d) of the Act for ejectment. The lessee contended that there had been a *zuri peshgi* lease in his favour executed prior to the Tenancy Act and that he was not liable to ejectment. *Held*, that upon the allegations in the plaint the suit was one for the cancellation of an illegal sub-lease mentioned in Sch C. to the Tenancy Act in which an appeal lay to the Revenue Court. (*Richards, C. J. and Banerjee, J.*) EWAZ SINGH *v.* UMRAI SINGH. 49 I. C. 732 = 41 All. 270 = 17 A. L. J. 189.

———Ss. 58 and 83—*Contract of sale—Agreement to surrender ex-proprietary rights—Surrender of exproprietary rights after sale.*

A contract of sale including an agreement to transfer by surrender the ex-proprietary rights just after their creation is unenforceable by law. But if after a sale-deed has been executed of the proprietary rights and after the occupancy tenancy has come into existence, the ex-proprietary tenants desire to execute a deed of relinquishment in favour of the landlord, the law does not prevent them from doing so, even though it had all along been intended that they should do so. (*Richards, C. J. and Piggott, J.*) KAMLA CHARAN SHUKAL *v.* SHEO SHANKAR. 36 I. C. 1007 (A.).

———S. 58—*Mortgage of Zemindari—Ejectment.*

A subsequent mortgagee of the entire Zemindari of the mortgagor is not entitled to eject the prior mortgagee of the mortgagor's *sir* land, without redeeming that mortgage. (*Sunder Lal, J.*) KALYAN MAL *v.* SAMONDU. 25 I. C. 272 (A.).

———Ss. 58 and 95—*Declaratory suit that lease granted by agent was without authority—Jurisdiction of Revenue Court.*

A suit for declaration that a lease granted by the plff.'s agent is void as having been granted without his consent or authority is not maintainable in a Revenue Court under S. 58 or 95 of the Act. (*Rafique and Piggott, JJ.*) RAM SINGH *v.* RAO GIRRAJ SINGH. 23 I. C. 705 (A.).

AGRA TENANCY ACT (II of 1901) S. 79.

———S. 58 (b)—*Suit triable only by Revenue Court—Appeal to District Judge, or Revision is not maintainable.*

A suit under S. 58 (b) being triable only by a Revenue Court a District Judge has no jurisdiction to entertain an appeal, nor is an application under S. 115 of the C. P. Code to the High Court maintainable. (*Ryves, J.*) SAHHEI HUSAIN *v.* NAND KISHORE. 19 A. L. J. 596 = 63 I. C. 891 = 3 U. P. L. R. (All.) 94.

———S. 63—*Ejectment—Co-sharer entitled to collect entire rent can eject tenant.*

A co-sharer who is entitled to collect the entire rent of a particular tenant is also entitled to eject him, as he is a landholder for the purpose of the Act. (*Daniels, J.*) MUNESHAR TEWARI *v.* MT. MAHESHA KUERI. 74 I. C. 197 = L. R. 4 A. 329.

———S. 67—*Stipulation for penalty.*

A stipulation in a lease for a fixed period binding the lessee to pay rent at an enhanced fixed rate per annum for an unspecified future period as a penalty, in the event of his failing to give up possession on his own account on the expiration of the lease, is unlawful within S. 23 of the Contract Act and would defeat the provisions of S. 67 of the Agra Tenancy Act. (*Piggott, J.*) SANWAL KUNWAR *v.* MURLI. 10 A. L. J. 52 = 16 I. C. 339.

———S. 68—*Lease—Thekadar can grant.*

The Thekadar has the ordinary powers of a landlord including the power to grant a lease. (*Simpson, A. J. C.*) BHUSAN *v.* JAGESHWAR. 1922 Oudh 216.

———S. 79—*Dispossession by Zemindar—Suit for possession—Limitation is 6 months.*

Where the Zemindar is responsible for the plaintiff's dispossession from his holding, a suit for recovery of possession thereof is governed by the six months rule under S. 79. (*Gokul Prasad, J.*) PARSOTAM *v.* GANPAT RAM. 73 I. C. 1012 = 1923 A. 517.

———Ss. 79 and 167—*Jurisdiction—Suit for possession as occupancy tenant lies only in Revenue Court and damages.*

Where the plaintiff brings a suit for possession as occupancy tenant and damages for crops forcibly cut and appropriated by the defendant claiming under a lease from the Zemindar *held* that the plea for possession was maintainable only in the Revenue Court and that the claim for damages must also fail. The suit was in effect an attempt to evade the provisions of the Agra Tenancy Act. The Civil Court cannot investigate, much less find on the allegations of the plaintiff that he is for one reason or other an occupancy tenant. Nor can it for the same reason decide whether the defendants are permanent lessees. A suit for declaration between two rival tenants may be brought in a Civil Court but a suit for possession as an occupancy tenant must be brought in a Revenue Court. (*Ryves, J.*) SITA RAM *v.* CHAIT RAM. L. R. 4 A. 291 = 71 I. C. 447 = 1923 A. 257.

AGRA TENANCY ACT (II of 1901) S. 79.

———S. 79—*Jurisdiction—Provisions of Rent Act cannot be evaded by filing suit in Civil Court.*

It is not open to a party to evade the provisions of the Rent Act by bringing a suit so framed as to lie in the Civil Court the real object of which is to obtain a remedy which was obtainable in the Revenue Court. 27 A. 372 foll. (*Ryves and Stuart, JJ.*) PRAYAG AHIR *v.* MAHABIR AHIR. L. R. 3 A. 233 = 69 I. C. 811 = 1922 All. 317.

———S. 79—*Ejectment by landlord—Omission to recover possession within six months by tenant extinguishes his rights.*

The failure of a tenant to apply to recover possession of a holding from which he has been wrongfully ejected by the landholder within the period of six months allowed by the Tenancy Act bars not only his remedy but extinguishes his rights also. 21 A. 304; 13 A. L. J. 295, Ref. (*Gokul Prasad, J.*) BHIKHARI SINGH *v* JOKHAN. 4 U. P. L. R. (A.) 104 = 66 I. C. 856 = 1922 All. 124.

———S. 79—*Grove—Is not a holding.*

Land held for a grove is not land held for agricultural purposes and is not a holding and S. 79 of the Act would not apply to a suit by a grove-holder to recover possession of the grove. (*Banerji, Tudball and Sulaiman, JJ.*) KESHO PRASAD *v.* SHEOPARGASH. 3 U. P. L. R. (All.) 117 = 64 I. C. 248 = 19 A. L. J. 749 (F. B.).

———S. 79—*Civil or Revenue Court—Rent free grantee—Dispossession—Suit in ejectment.*

A suit by a rent free grantee for recovery of possession as such grantee against his Zemindar who has wrongfully ejected him is not provided for by the Agra Tenancy Act and lies in the Civil Court. (*Piggott and Walsh, JJ.*) GOBIND RAI *v.* BANWARI LAL. 42 All. 412 = 18 A. L. J. 383 = 58 I. C. 594 = 2 U. P. L. R. (A) 93.

———S. 79—*Jurisdiction of Civil or Revenue Courts—Suit by tenant for damages for crops, whether cognizable by Civil Court.*

A suit by a tenant against his landlord to recover damages for crops wrongfully cut by the latter is cognizable by a Civil Court. (*Banerji, J.*) RAM SARANDAS *v.* HARI KISHEN KOERI. 58 I. C. 511 = 18 A. L. J. 431.

———S. 79—*Suit for possession of holding—Civil and Revenue Courts—Jurisdiction.*

If a person seeks to recover possession of his holding the suit should be brought under S. 79 and is exclusively cognizable by a Revenue Court. (*Knox, J.*) TAJMAL HUSSAIN *v.* ALI BAHADUR KHAN. 56 I. C. 946 (A.).

———S. 79—*Suit for possession by Mortgagee—Purchaser of a holding against zemindar—Jurisdiction.*

A mortgagee of a holding purchased the holding himself in execution of his decree. The Zemindar resisted his mutation of name. The mortgagee then sued for possession. It was held that the mortgagee purchaser was a tenant and ejected illegally by the landlord and that therefore the mortgagee's suit coming under S. 79 of the Act was not cognizable by *the* Civil Court. (*Tudball and Rafique, JJ.*) ABDUL HASSAN *v.* MAKHDUM BAKSH. 39 I. C. 944 = 39 All. 455 = 15 A. L. J. 502.

———S. 79—*Dispute between tenants.*

Where one set of tenants sued another for unlawful encroachment on their lands and the Zemindar had nothing to do with the dispossession: *Held*, the only remedy was one by a suit under S. 79 of the Agra Tenancy Act. (*Chamier and Piggott, JJ.*) HARNARAIN *v.* BALWANT SINGH. 23 I. C. 452 (A.).

———S. 79—*Person in constructive possession—Dispossession.*

A person who has been constructively in possession of a holding may be regarded as having been ejected within S. 79 and must sue under the section for possession of the holding. (*Chamier and Piggott, JJ.*) COLLECTOR OF BENARES *v.* SHIAM DAS. 23 I. C. 302 = 13 A. L. J. 329.

———Ss. 79 and 81—*Dispossession by lessee from Zemindar—Remedy.*

Where a lessee from the Zemindar dispossesses a previous lessee, there is a dispossession of the latter by the Zemindar through his tenant. The remedy of the dispossessed lessee is a suit under S. 79 of the Tenancy Act for recovery of possession of the land, against the Zemindar and the person claiming through him within six months of the dispossession. (*Banerji, J.*) BALABHADDAR CHAUBEY *v.* SOMAROO RAI. 27 I. C. 914 = 13 A. L. J. 295.

———S. 79—*Fixed rate tenancy—Succession—Successor dispossessed by Zemindar—Suit to recover possession—Jurisdiction—Civil or Revenue Court.*

Where a person succeeding to a fixed rate tenancy by right of inheritance is ousted by the Zemindar, he suffers an ejectment at the hands of the landlord within the meaning of Section 79 of the Agra Tenancy Act and his remedy lies by way of a suit under the Tenancy Act, such a suit is cognizable only by a Revenue Court. (*Ryves and Piggott, JJ.*) BADRI KASODHAN *v.* SAIJU MISER. 36 All. 55 = 22 I. C. 668 = 12 A. L. J. 29.

———Ss. 79 and 95—*Jurisdiction—Civil or Revenue Court—Occupancy tenant not in possession—Suit for declaration.*

A suit for possession by a tenant illegally dispossessed by the Zemindar should be brought within 6 months of dispossession in the Revenue Court. A Civil Court has no jurisdiction to entertain such a suit, and declaration of his right to the property cannot be granted as it would be of no value. (*Tudball and Rafique, JJ.*) SRIMAHANT BRAMHA KHUSHAL *v.* SUMERA. 18 I. C. 957 35 All. 299 = 11 A. L. J. 310.

AGRA TENANCY ACT (II of 1910), S. 79.

———S. 79—*Suit for possession.*

A usufructuary mortgagee of a fixed rate tenancy, in possession under his mortgage, paying rent for the same to the landholder, is a tenant and if he is dispossessed by the landlord he should sue for recovery within the time laid down by S. 79. The suit, however, cannot be entertained by a Civil Court. (*Piggott, J.*) RAM NARAIN SINGH *v.* RAMPAT BHAGAT.
16 I. C. 1007=10 A. L. J. 178.

———S. 79 (1) (b)—*Wrongful removal of crops by landlord.*

A suit for compensation for the value of the crops which were wrongly removed by the landlord is one for damages for illegal ejectment by the landlord and should be brought in a Revenue Court. (*Tudball, J.*) CHET RAM *v.* SAHABA.
27 I. C. 532=13 A. L. J. 102.

———S. 79 (b)—*Civil or Revenue Court—Suit for value of crops wrongfully cut and taken.*

A suit by a tenant for recovery of the value of certain crops grown by him but forcibly cut and removed by the landlord, plff. not alleging dispossession is not one under S. 79 of the Act and is cognizable by the Civil Court. (*Bannerji, J.*) RAM SARAN DAS *v.* HARI KISHEN KOERI.
58 I. C. 511=18 A. L. J. 434.

———S. 82—*Relinquishment by a widow.*

Relinquishment of her limited rights in an occupancy holding by a widow who had succeeded thereto, to the prejudice of the reversioner is not permissible. 27 All. 18 Ref. (*Griffin, J.*) JHABBAR MUSALMAN *v.* SURAJ PRASHAD. 9 I. C. 894 (A.).

———Ss. 83 and 20—*Sale or relinquishment of ex-proprietary rights, whether lawful.*

A sale of ex-proprietary rights or an agreement to relinquish those rights when they arise, is unlawful. (*Karamat Husain and Chamier, JJ.*) IKRAMULLAH *v.* MOTI CHAND. 33 All. 695=
11 I. C. 17=8 A. L. J. 826.

———S. 88—*Mango trees planted with landlord's consent are not transferable.*

Where it is found that trees were planted presumably with the consent of the Zemindar on the occupancy holding by the tenant, the tenant acquires no transferable right. 13 A.L.J. 833 Foll. 34 All. 545 Dist. (*Sulaiman, J.*) ABDUL RAUF *v.* RAJU MUHAMMAD SHAH. 75 I. C. 655=
1923 A. 340.

———S. 88—*Occupancy tenant—Improvement made by consent of 17 out of 18 Zemindars.*

Where 17 out of 18 Zemindars consented to the making of an improvement held that the court will not compel the occupancy tenant making the improvement to destroy it at the instance of the 18th Zemindar as the benefit of that occupancy holding is the benefit of the whole village whether the plaintiff is interested in it or not. (*Stuart, J.*) RESHNA BIBI *v.* BHAWANI SARAN. 1923 All. 281.

———S. 90—*Agreement—Improvement.*

An agreement by tenant not to take compensation for improvement made without consent of the Zemindar is illegal and unenforceable. (*Griffin, J.*) BHOLA *v.* MAHOMMAD HALIBUL RAHMAN KHAN.
10 I. C. 465 (A.).

AGRA TENANCY ACT (II of 1910), S. 95.

———S. 94—*Suit by one co-sharer.*

One of several co-sharers can sue to recover rent to the extent of his share on the refusal of the other co-sharers to join as plaintiffs. 15 All. 40, Ref. (*Rafique, J.*) FATAH BAHADUR *v.* LALTA PRASAD. 17 I. C. 488 (A.).

———S. 95—*Suit for declaration that defendant is sub-tenant lies only in Revenue Court.*

A suit for a declaration that the defendant is a sub-tenant of the plaintiff falls under S. 95 Agra Tenancy Act and is not cognizable by the Civil Courts. (*Daniels, J.*) GHISWA *v.* DEO NARAIN.
73 I. C. 947=L. R. 4 A. 460=1923 A. 568.

———Ss. 95 and 167—*Suit for declaration that deft. is only a tenant-at-will lies only in Revenue Court.*

Plffs. were Zemindars of a village in which L was an occupancy tenant of a holding. L died and on his death the defts. applied for mutation of their names in the place of L as being entitled to succeed to his occupancy holding. While those proceedings were pending a suit was brought by plff. in the Munsiff's Court for a declaration that defendants were not the grandsons of L and the defence was that the suit was not cognizable by the Civil Court. *Held* that the suit was not cognizable by the Civil Court. The appropriate suit for the plffs. to have brought was for a declaration under S. 95 of the Tenancy Act. Taking the pleadings, it was admitted that the relationship of landlord subsisted between the parties and that the tenancy was still subsisting. The only dispute was as to the tenancy. Was it an occupancy tenancy as the defts. claimed or a non-occupancy tenancy from year to year as the plffs. asserted? Consequently S. 95 (*a*) and (*b*) of the Agra Tenancy Act applied to the case. An appeal in a suit under S. 95 of the Act lies to the Revenue Court and not to the District Judge. 36 A. 48; 5 A. L. J. 374; 35 A. 299 Rel. (*Mears, C. J. and Ryves, J.*) JAGANNATH *v.* BALWANT SINGH. 20 A. L. J. 570=L. R. 3 A. 235=
68 I. C. 247=4 U. P. L. R. (A.) 194=
44 All. 692=1922 All. 372.

———S. 95—*Revenue Court—Oral agreement for enhanced rent—If enforceable.*

A claim for enhanced rent under an oral agreement or unregistered deed cannot be enforced in a Revenue Court. (*Stuart, J.*) REAG NARAIN *v.* AUGAD. L. R. 3 A. 132=70 I. C. 495=
1922 A. 55.

———S. 95—*Suit by mortgagee for declaration of rights—Civil or Revenue Court.*

A suit by a usufructuary mortgagee of a fixed rate tenancy for a declaration of his rights is cognizable by a Civil Court and S. 95 does not apply to such a suit as there is no contract of tenancy between the mortgagee and the Zemindar. (*Walsh and Wallach, JJ.*) SAUDAGAR SINGH *v.* GANGA SINGH.
63 I. C. 274=19 A. L. J. 702.

AGRA TENANCY ACT (II of 1910), S. 95.

———S. 95—*Applicability.*

S. 95 refers to suits between landholders and tenants and does not apply to a suit between an occupancy tenant and persons who are alleged to be trespassers. (*Lindsay, J.*) DAULAT SINGH *v.* INDAR SINGH.
63 I. C. 97 (All.).

———S. 95—*Jurisdiction—Denial that plaintiff is a tenant, does not raise a plea of jurisdiction.*

The mere denial by the defendant in a suit under S. 95 of the Agra Tenancy Act that the plaintiff is a tenant, does not amount to a plea of jurisdiction. (*Rafique and Ryves, JJ.*) RATAN SINGH *v.* PRAN SUKH.
43 All. 368=19 A. L. J. 120=
61 I. C. 44=2 U. P. L. R. (All.) 435.

———S. 95—*Declaration of the rate of rent—Subsequent suit for a higher rate.*

Declaration of the Court as to the rate of rent under the section bars a subsequent suit for higher rent. (*Tudball and Sulaiman, JJ.*) ISHRI SINGH *v.* KALNA. 57 I. C. 683=
2 U. P. L. R. (A.) 369 (A).

———Ss. 95 and 167—*Civil and Revenue Court—Suit for declaration of occupancy rights.*

Where both parties come to Court admitting that there is a plot of land held under occupancy right each claiming to be entitled to the holding, the suit is cognizable by a Civil Court. If plff. alleges that defts. and other persons are his zamindars, and he, as their occupancy tenant, asks for a declaration to that effect, the suit is barred from the cognizance of a Civil Court by Ss. 95 and 167 of the Agra Tenancy Act. (*Richards, C. J. and Banerji, J.*) MADAN LAL *v.* MANZUR AHMAD.
43 I. C. 652 (A.).

———S. 95—*Suit for fixation and arrears of rent, if maintainable.*

Where a tenant is in occupation of land without an agreement and without a decree of Court fixing any rent under the Tenancy Act, the landlord can bring one suit for the determination of the amount of rent payable and also for the arrears of rent payable for the period during which the tenant has been occupying the land without paying anything. (*Walsh, J.*) HOTI LAL *v.* CHUTAN LAL. 42 I. C. 898 (A.).

———S. 95—*Rival claims to tenancy—Civil or Revenue Court.*

A suit between rival claimants to a tenancy can only be brought in a Civil Court, and not in a Revenue Court. A decision of the Revenue Court in a suit for rent between rival claimants to a tenancy would not operate as *res judicata* in a subsequent suit in the Civil Court. (*Banerji, J.*) BALBHADDAR CHAUBEY *v.* SOMAROO RAI.
27 I. C. 914=13 A L. J. 295.

———S. 95—*Rival claimants to tenancy—Jurisdiction—Civil Court.*

S. 95 of the Agra Tenancy Act deals with question arising between landlord and tenant, and not between rival claimants to a tenancy. A suit between rival claimants to a tenancy for establishing title is cognizable by the Civil Court.

AGRA TENANCY ACT (II of 1910), S. 95.

(*Richards and Banerji, JJ.*) KANHIRAM *v.* DURGA PRASAD. 37 All. 223=27 I. C. 913=
13 A. L. J. 278.

———Ss. 95 and 167—*Suit for ejectment of tenant from year to year—Suit in Civil Court to cancel lease.*

Where a suit to eject the defendant on the ground that he was a non-occupancy tenant from year to year was dismissed by the Revenue Court as the deft. was holding under a lease and plff. next sued to cancel the lease in the Civil Courts, on the ground that the lease was given without authority. *Held* that the Revenue Court could go into the question of validity of the lease and the suit was barred. 25 All. 138, dist. (*Richards, C. J. and Banerji, J.*) RAM SINGH *v.* GIRRAJ SINGH.
37 All. 41=26 I. C. 731=12 A. L. J. 1252.

———S. 95—*Jurisdiction—Revenue Court or Civil Court—Suit for declaration of the status of occupancy tenant.*

A suit for a declaration that the plff. is an occupancy tenant and that he is not joint with the deft. in the holding is cognizable by the Revenue Court and not by the Civil Court. (*Knox, J.*) DIWAN SINGH *v.* RANDHERA.
26 I. C. 718—12 A. L. J. 1322.

———S. 95—*Rent—Court—Power to fix rent.*

Under Section 95, the Court has no power to fix the rent; it can ascertain only what in fact the rent payable is. (*Richards, C. J. and Tudball, J.*) RAMCHARAN LAL *v.* KARIM-UN-NISSA BIBI.
37 All. 12=26 I. C. 121=12 A. L. J. 1131.

———Ss. 95 and 167—*Declaratory suit by plaintiff—Heirship—Jurisdiction.*

A declaratory suit by a plff. as to heirship to a deceased occupant under Ss. 95 and 167 of the Agra Tenancy Act is cognizable by a Revenue Court only. (*Ryves and Piggott, JJ.*) RAMCHARITAR RAI *v.* JIANI. 36 All. 48=21 I. C. 859=
11 A. L. J. 1022.

———S. 95—*Scope.*

The question of title to a tenancy between rival claimants is cognizable by Civil Courts and does not come within the scope of S. 95. 22 A. 83, 22 A. 93, 33 A. 795 foll. (*Richards, C. J. and Banerji, J.*) JAGAR NATH *v.* AJUDHYA SINGH. 35 All. 14=
17 I. C. 376=10 A. L. J. 408.

———Ss. 95 and 167—*Rival claimants to occupancy tenancy—Jurisdiction of Civil Courts.*

Civil Courts are not precluded from determining a dispute between rival claimants to an occupancy tenancy. 33 All. 795 foll. (*Piggott, J.*) GANESH *v.* KUNDAN. 15 I. C. 33 (A.).

———Ss. 95 and 167—*Suit for declaration regarding various cesses recorded in the settlement records.*

A suit by the tenants of a village for declaration that no custom exists entitling the Zemindars to take from them certain cesses recorded in the settlement papers is cognizable by a Civil Court and not by a Revenue Court. (*Richards, C. J. and Banerji, J.*) SHEOAMBAR AHIR *v.* THE COLLECTOR OF AZAMGARH. 34 All. 358=14 I. C. 138=
9 A. L. J. 431.

AGRA TENANCY ACT (II of 1910), S. 95.

———S. 95—*Proprietary title—Appeal to Dt. Judge—Jurisdiction—First Court, power of, after remand—C. P. Code, S. 115—Revision.*

In a suit under S. 95 of the Tenancy Act, the deft. pleaded that he was a proprietor and the claim was partially decreed by Assistant Collector. The Dt. Judge on appeal remanded the case for determining questions about rents. The first Court dismissed the suit on the ground that it had then no jurisdiction to try it. The Dt. Judge did not also allow the appeal against it. It was held that the District Judge could hear the appeal and his refusal was a failure to exercise jurisdiction vested in him by law and that the first Court had no power after remand to decide that the suit did not lie. (*Knox and Piggott, JJ.*) RAMCHARAN LAL *v.* MUHAMMAD SHAFI. 12 I. C. 107=8 A. L. J. 894.

———S. 95—*Applicability and scope—Suits between rival claimants to occupancy holding.*

Section 95 of the Agra Tenancy Act was intended to apply only to suits between a landlord and a tenant and not to suits between rival claimants to holding. The Section applies only to matters specified in the section. (*Richards, C. J. and Banerji, J.*) BHUP *v.* RAM LAL. 33 All. 795=11 I. C. 268=8 A. L. J. 1009.

———S. 96—*Applicability—Section does not apply to Thekadars.*

Even though a Thekadar is a non-occupancy tenant under S. 19 of the Agra Tenancy Act, nevertheless S. 96 can apply only to a non-occupancy tenant of *an agricultural* holding which a Thekadar is not; consequently he cannot sue under S. 96 in a Revenue Court. His proper remedy is to bring a suit for specific performance if there was a contract for permanent lease. (*Ryves, J.*) GIRJA NAND *v.* HIS HIGHNESS THE MAHARAJA PARBHU NARAIN SINGH KASHI NARESH. 75 I. C. 605=1923 A. 398 (2.)

———Ss. 97 and 47—*Enhancement of rent—Compromise in Court not made part of decree and not registered inoperative.*

Where a landlord dropped ejectment proceedings against a non-occupancy tenant on his agreeing to pay an enhanced rate of rent; but the terms of compromise were not embodied in the decree and the document was not registered, the enhancement is inoperative as contravening the provisions regarding registrations set out in S. 47 of the Agra Tenancy Act, and as not falling within the provisions of S. 97. (*Piggott, J.*) DAT PRASAD SINGH *v.* GOPAL RAM.
34 I. C. 234=14 A. L. J. 57.

———S. 97 (3)—*Endorsement of document by Revenue Officer—Registration Act, S. 47.*

A lease deed endorsed by Revenue Officer under S. 97 is as valid as if it had been taken to the Registration Office and registered under the Registration Act. The deed takes effect from the date on which it was executed and takes priority over a subsequent lease of the same property though registered prior to the former. (*Chamier and Piggott, JJ.*) BANWARI LAL *v.* KHUBI RAM.
37 All. 59=26 I. C. 458=12 A. L. J. 1265.

AGRA TENANCY ACT (II of 1910), S. 150.

———Ss. 102 and 167—*Rent payable in kind—Refusal of tenant to cultivate land—Suit for damages.*

A suit for payment of rent in kind, where defendant is alleged to have purposely left land fallow is triable only by a Revenue Court. (*Ryves, J.*) RAJA NARANDRA BAHADUR PAL *v.* BAFATI.
45 A. 7=20 A. L. J. 771=68 I. C. 985=4 U. P. L. R. (A.) 206=L. R. 3 A. 477=1923 A. 50.

———S. 108—*Entries of payment of rent in a pocket book—Presumption as to full payment.*

In a suit for arrears of rent the defts. pleaded full payment of rent and produced a pocket book which contained certain entries of payments made. The plff. admitted the entries: *Held*, that the entries in the pocket book were not receipts within S. 108 of the Agra Tenancy Act and therefore they raised no presumption that the payment entered into the book amounted to an acquittance in full of all demands up to the dates on which the entries were made. (*Stanley, C. J. and Banerji, J.*) GULAB SINGH *v.* DEBI SINGH.
10 I. C. 1002=8 A. L. J. 505.

———S. 146—*Suit for damages for wrongful distraint—Cause of action—Limitation.*

The cause of action of a wrongful distraint under the first clause of S. 146, Agra Tenancy Act, takes its origin on the day when it comes to an end and suit for damages may be lawfully instituted within the limitation period of 3 months from the said date. (*Piggott, Walsh and Lindsay, JJ.*) JHABBU *v.* BATUL. 45 A. 208=73 I. C. 299=L. R. 4 A. 1=1923 All. 146.

———S. 146 and Sch. 4 No. 6—*Suit for damages—Distraint—Cause of action—Knowledge—Limitation.*

We are of opinion that the decision under No. 6 of the 4th Sch. the limitation for a suit for compensation for wrongful acts of a distraint brought under S. 146 is 3 months from the date on which the rights to sue accrued. Such a right to sue accrues when the plff.'s property is lost, destroyed or damaged or he has knowledge of the loss, destruction or damage. (*Banerji and Tudball, JJ.*) DAMBAR SINGH *v.* BALWANT SINGAH.
10 I. C. 502=8 A. L. J. 503.

———S. 150—*Order rejecting petition of appeal—No revision lies.*

In a suit under the Tenancy Act the Assistant Collector passed a decree and a petition of appeal was presented to the District Judge. The suit was under Sch. IV Group C. No. 39 of the said Act and under the provisions of Ss. 150 and 154 of the said Act. The District Judge refused to entertain the petition on the ground that he had no jurisdiction under S. 177 of the Tenancy Act. On revision to the High Court *held* that no revision lay. 14 A.L.J. 281 Ref. (*Piggott, J.*) ADYA SARAN *v.* KALI CHARAN. 45 A. 567=75 I. C. 280=21 A. L. J. 524=L. R. 4 A. 223=1923 A. 580.

———S. 150—*Resumption of* Muafi—*Proprietor of* Muafi, *who is.*

AGRA TENANCY ACT (II of 1910), S. 150.

The holder of a perpetual *Istimrar* lease who has thereunder, all rights of all sorts subject to payment of rent to the Zemindar who could recover on default thereof is a proprietor of the *Mahal* within S. 150 of the Act and can resume a *Muafi* comprised in the *Mahal*. (*Tudball and Abdul Raoof, JJ.*) MALA BALAL SINGH *v.* GOURISH NARAIN SINGH. 40 All. 656=46 I. C. 920=16 A. L. J. 619.

———Ss. 150—158, Ch. X—*Grove—Assessment of rent—Civil Court.*

A Civil Court can assess rent on a grove. 35 All. 200, foll. (*Knox, J.*) PRESIDENT, KAYASTHA PATHSHALA *v.* SHEO BALAK. 24 I. C. 98=12 A. L. J. 449.

———S. 150—*Declaration—Rent free grantee—Jurisdiction.*

A suit for a declaration that the defendant is only a rent free grantee is exclusively triable by the Revenue Court. 7 A. L. J. 818 Foll. (*Tudball, J.*) STURMER *v.* CHATOO RAI. 9 I. C. 813 (A.).

———S. 151—'*Judicial decision*'—*Meaning of.*

The 'Judicial decision' in Section 151 of the Act and other similar provisions must be one pronounced by an officer competent to deal with the matter. (*Chamier, J.*) MUHAMMAD KARIMULLAH KHAN *v.* JHAMAN SINGH. 18 I. C. 734=11 A. L. J. 277.

———Ss. 154 and 177 (f)—*Jurisdiction—Plea of Civil Court—Jurisdiction of, to entertain an appeal.*

A suit under Section 154 for resumption of land held rent free is cognizable only by a Revenue Court and even a plea about jurisdiction does not confer jurisdiction on Civil Court to entertain an appeal. (*Banerji, J.*) GULBI *v.* MITHAN LAL. 58 I. C. 661 (A.)=2 U. P. L. R. (A.) 416.

———Ss. 154 and 177—*Suit for redemption—Rent free land—Revenue Court—Question of proprietary title in issue.*

A Zemindar took proceedings before an Asst. Collector to resume certain land under S. 154 of the Act. The defence was that the land was not resumable and that it had been held rent free for fifty years and by two successors to the original grantee. The Asst. Collector holding that the land was resumable passed a decree for ejectment. The defts. appealed to the Commissioner who dismissed the appeal. Upon revision the Board of Revenue held that the land was not resumable and the case was remanded to the Court of first instance for trial of the other issues. The Asst. Collector held that S. 158 applied, that deft. was a proprietor and proceeded to fix the revenue. *Held*, that *prima facie* an appeal lay to the Commissioner. A question of proprietary title was not in issue in the appeal merely because the defts. claimed by a ground of appeal the benefit of S. 158 of the Tenancy Act and the decision of the Board of Revenue in revision was not null and void. The Asst. Collector was, therefore, right in determining the matter upon remand. (*Richards, C. J. and Banerji, J.*) KAREHRU *v.* MATHURA PRASAD. 41 All. 318=49 I. C. 747=17 A. L. J. 195.

AGRA TENANCY ACT (II of 1910), S. 158.

———S. 154—*Landlord and tenant—Rent free grant—Forcible dispossession by zemindar.*

A zemindar cannot forcibly take possession of land granted rent-free until the grant is legally determined under Agra Tenancy Act. (*Richards, C. J. and Banerji, J.*) AMBIKA PRASAD *v.* JAG PRASAD SINGH. 36 I. C. 958 (A.).

———Ss. 154 (b), (c), 158 and 177 (c)—*Resumption — Proprietary title—Appeal to Dt. Judge—Question of law.*

In a suit for resumption of land held rent-free, filed in the Court of an Assistant Collector deft. pleaded that it had been held rent-free for a period of 100 years and that he was the proprietor of the land. *Held*, that under S. 177 (c) an appeal lay to the District Judge from the decision of the Assistant Collector. Notwithstanding the misapprehension by the District Judge of a certain entry in the *Wajib-ul-arz* and the omission to discuss the evidence upon which the finding was based, the High Court, in the absence of a certificate that the finding rested upon no evidence treated the decision of the lower Appellate Court as a finding of fact. (*Piggott, J.*) SUNDAR LAL *v.* MALTHU. 29 I. C. 710 (A.).

———Ss. 156 and 158—*Suit for assessment of rent—Revenue Court.*

A suit for the assessment of certain land in the occupancy tenancy of the defendant who had refused to pay rent falls within S. 156 of the Act. Reliance could not be placed upon the "headings" of chapters or descriptions given of sections in the margin of the same, especially in the case of the Agra Tenancy Act which could not be said to be a model of good drafting. (*Knox, J.*) AJNASI KUAR *v.* PRAYAG SINGH. 45 I. C. 534 (A.).

———S. 158—*Suit for resumption—Plea by defendant—Proprietary title.*

A plea by the defendant in a resumption suit based on S. 158 of the Agra Tenancy Act raises a question of proprietary title within S. 177 (e) of the Tenancy Act. (*Lindsay, J.*) LALTA PRASAD *v.* KHARGA. 45 A. 336=L. R. 4 A. 84=21 A. L. J. 189=71 I. C. 773=1923 A. 313.

———S. 158—*Rent-free grant in favour of Idol—Successors in office—Protest.*

Where a rent free grant of land was made in favour of the idol of a certain shrine, and not in favour of the priest or manager of the shrine, successive priests in office of the shrine could not be deemed to be successors to the "original grantee" within S. 158 of the Tenancy Act. (*Piggott and Walsh, JJ.*) MATHURA PRASAD *v.* RAMESHWAR. 44 All. 169=19 A. L. J. 964=65 I. C. 371=1922 All. 312.

———Ss. 158 and 167—Muafi *land—Suit for declaration of title to be brought in Revenue Court.*

A suit for declaration that muafi rights have ripened into proprietary rights can only be brought in a Revenue and not in a Civil Court. 6 I. C. 425 Foll. (*Bannerjee and Piggott, JJ.*) NANHU *v.* THAKURJI MAHARAJ. 41 All. 37=46 I. C. 764=16 A. L. J. 881.

AGRA TENANCY ACT (II of 1910), S. 158.

——S. 158—*Resumption — Portion converted into grove.*

A portion of certain land held as rent-free grant was converted into a grove which was cut down and the land brought under cultivation. The entire area having been rent free the mere fact that a portion was converted into a grove did not alter its character as a rent free grant and under S. 158, it is not liable to resumption. Under the Rent Act there is no definition of the word "land" but the provisions applied to groves as well as to culturable or cultivated lands. (*Piggott and Walsh, JJ.*) MUHAMMAD ISA KHAN *v.* MUHAMMAD KHAN. 40 All. 60=42 I. C. 956=15 A. L. J. 867.

——S. 158—Muafi — *Resumption — Grant to temple—Two successors to original grantee.*

A rent free grant to Manager who was succeeded by more than two successors for the benefit of the temple. In a suit by the Zemindar for the resumption of the *muafi, held*, that the land was held in proprietary rights by the mahant on behalf of the temple and was not resumable under S. 158. (*Piggott and Ryves, JJ.*) BHARAT DAS *v.* NANDRANI KUAR. 39 All. 689= 42 I. C. 818=15 A. L. J. 769.

——S. 158—*Grants after the Act.*

The section confers certain rights on certain individuals who have been occupying land for the period mentioned in the section, irrespective of the date of commencement. It is not limited to grants made after the passing of the Act. (*Richards, C. J. and Banerji, J.*) MAHAPAT RAI *v.* BHARADWAJ.
37 I. C. 818=15 A.L. J. 200.

——S. 158—*Appeal—Successor, meaning.*

The decision of a Revenue Court deciding the question of successor under S. 158 can be appealed against, in the Court of District Judge. Under S. 158, a survivor of a Hindu joint family is a "successor." (*Walsh, J.*) DAYAL PURI *v.* NARAYAN DUTT. 34 I. C. 26=14 A. L. J. 878.

——S. 158—'*Successor*'—*Meaning of.*

'Successor' in S. 158 of the Agra Tenancy Act includes also a transferee (*Stanley, C. J. and Banerji, J.*) SUNDAR SINGH *v.* COLLECTOR OF SHAHJAHANPUR. 33 All. 553= 11 I. C. 514=8 A. L. J. 539.

——S. 158—*Rent free grant—Resumption—Two successors meaning of—Proof as to who was the original grantee.*

S. 158 does not provide that the person succeeding must necessarily be the heir of the person who preceded him. For the purpose of this section it is not necessary to prove who the original grantee was. (*Richards, J.*) NIHAL SINGH *v.* BALDEO PERSHAD. 10 I. C. 39 (A.).

——S. 159—*U. P. Land Revenue Act, S.* 144—*Co-sharer.*

The word "co-sharer" in S. 159 means a person holding proprietary rights in the mahal who is jointly and severally liable for land revenue with other proprietors in the mahal and whose revenue is payable through the lambardar under the provisions of S. 144 of the Land Revenue Act. (*Piggott and Walsh, JJ.*) MURLI DHAR *v.* BABU. 18 A. L. J. 121=55 I. C. 74= 2 U. P. L. R. (A.) 41=42 A. 311.

AGRA TENANCY ACT (II of 1910), S. 164.

——S. 159—*Suit by lambardar.*

A lambardar sued the deft. for the proper share of the Govt. Revenue on that portion retained by the deft. and his predecessors for their maintenance when they sold the village to the predecessors of plff. From the year 1872 till suit, plff. paid revenue. Deft. was liable to pay his share of the revenue. An agreement to the contrary would be void. (*Richards, C.J. and Banerji, J.*) PACHEN SINGH *v.* JANGJIT SINGH.
39 All. 166=38 I. C. 647=15 A. L. J. 17.

——Ss. 159 and 160—*Suit for arrears of revenue payable or paid by lambardar—Limitation.*

S. 159 contemplates a suit by a lambardar for arrears of revenue payable to the Government through the lambardar by a co-sharer whether such revenue has actually been paid or not. The limitation for such a suit is three years from the date when the revenue became payable. S. 160 contemplates a case where arrears of revenue have actually been paid by one co-sharer for another, whether the co-sharer paying the revenue be a lambardar or not. The limitation under this section runs from the date of actual payment. (*Banerji, J.*) RAM SINGH *v.* LALTA PRASAD.
15 I. C. 733=9 A. L. J. 581.

——S. 160—*Usufructuary mortgagee's name entered in revenue records—Suit for recovery of proportionate amount on account of that share which has been redeemed does not lie.*

Plaintiff was a usufructuary mortgagee under two mortgages; one was redeemed but his name continued to be recorded as a mortgagee. He sued for recovery of the proportionate amount of the money which he had to pay on account of that share which had already been redeemed. *Held* that where a person's name is entered as mortgagee lessee the revenue court was not competent to go behind the entry and to find that he was not in possession. Consequently such a suit does not lie. (*Gokul Prasad, J.*) IRSHAD MAHOMED KHAN *v.* JWALA PRASAD. 75 I. C. 663= 1923 A. 344.

——S. 160—*Default of co-sharer not in possession—Payment by another—Effect of.*

A co-sharer paying Revenue for a defaulting co-sharer cannot recover the same under S. 160 of the Agra Tenancy Act if the defaulter was not in possession at the time of default. (*Tudball, J.*) BALLAB DAS *v.* SITARAM.
14 I. C. 578 (A.).

——Ss. 163 and 164—*Suit for profits—Limitation.*

Under S. 164, Agra Tenancy Act, profits are payable when they are divisible under S. 163 and limitation begins to run from the date they are divisible. (*Ryves and Gokul Prasad, JJ.*) HAKIMI NAZIRUDDIN *v.* MUSSAMMAT ACHCHI BEGAM.
20 A. L. J. 95=64 I. C. 988= L. R. 3 A. 20=1922 All. 348.

——S. 164—*Suit by a mortgagee of a Lambardar for profits—Does not lie.*

AGRA TENANCY ACT (II of 1910), S. 164.

An 8 annas sharer who was also a lambardar mortgaged his 3 annas share. The mortgagee gave him a lease for 7 years. After that period the lambardar continued making collections. The mortgagee sued him for recovery of profits. *Held* that such a suit did not lie, 14 I. C. 260 Affir. (*Gokul Prasad, J.*) TIRBANI SAHU *v.* LACHMI PANDE. 75 I. C. 666=1923 A. 346.

———S. 164—*Suit against Lambardar for profits —Onus when shifted.*

When a co-sharer has given general evidence to show that the rents are greatly in arrears that the tenants are solvent and that there are no special circumstances why the rents should not have been collected, the *onus* is shifted on the Lambardar to show that for some reason not connected with his own negligence or misconduct, he was unable to collect the rent. Collection charges should be awarded to the Lambardar, even though he does the work of collection himself. 13 A.L. J. 851, Foll. (*Sulaiman, J.*) MUSAMMAT HIRIA *v.* RAM ADHN SINGH. 75 I. C. 553=1923 A. 335.

———S. 164—*Co-sharer—Lambardar — Collections—Suit and decree for a portion of the rental—Decree for share of rent—Interest.*

The amount of the actual collections shows that the lambardar realised 76 per cent. With regard to the rest he brought suits and obtained decrees against defaulting tenants. *Held*, the fact that some of the decrees cannot be realized is no fault of the lambardar nor can it be said to constitute negligence. No negligence of the lambardar in the Collection of rents has been proved and that the decree in favour of co-sharer for profits should proceed on the basis of actual collections, with 12 per cent. interest which is the proper rate of interest in the case up to realization. (*Rafiq and Lindsay, JJ.*) RAMCHANDRA SARUP *v.* KIRPA DEVI. 65 I. C. 648=4 U. P. L. R. (A.) 33= 1923 A. 216.

———Ss. 164 and 165—*Suit by co-sharer for share of profits—Decree on actual collections—Previous arrears.*

In cases under S. 164 of the Agra Tenancy Act, it is the duty of a Lambardar to make collections both of the rents due for the year as well as for the arrears of rent, on behalf of the whole body of co-sharers. A co-sharer may either be given a decree on the basis of the gross rental or on the basis of actual collections, and if a decree is based on actual collections such collections include arrears of the previous years also. But this principle would not apply to a suit under S. 165 of the Act where it cannot be said that it was the duty of the defendants to make collections of the plff.'s share also. The defendants can be held liable only if they have collected rents in excess of their own legitimate shares. (*Sulaiman, J.*) LALA DURGA PRASAD *v.* GANGA SARAN.
L. R. 3 A. 471=70 I. C. 763=1922 All. 501.

———S. 164—*Suit for profits from lambardar lies in Revenue Court.*

A suit by a recorded co-sharer for arrears of profits from the lambardar is maintainable only in a Revenue Court. The deft. is entitled to plead and prove if he can, that he owes nothing or is only partly liable. But the suit is not liable to be defeated *in limine* by producing in evidence the decree of a Civil Court as regards the liability of the defendant. (*Ryves and Gokul Prasad, JJ.*) KUNJ BEHARI LAL *v.* GHANSHAM DAS.
4 U. P. L. R. (A.) 3=65 I. C. 530=1922 All. 397.

———S. 164—*Suit against lambardar for profits —Decree—Actual collections—Negligence.*

A co-sharer suing for his share of the profits under S. 164 of the Agra Tenancy Act can only get a decree for his share of the actual collections unless the case comes within S. 164 (2) of the Agra Tenancy Act so as to entitle him to a decree on gross rentals. Negligence on the part of the lambardar cannot be inferred from the mere fact that the rents for a particular year remained unpaid. 43 A. 29 Foll. (*Ryves and Gokul Prasad, JJ.*) JODHI RAM *v.* MT. KAUNSILLA.
20 A. L. J. 313=L. R. 3 A. 205= 4 U. P. L. R. (A.) 160=67 I. C. 521= 1922 All. 111.

———S. 164—*Dismissal of suit—Subsequent suit for possession is barred.*

If a suit for profits under S. 164 is dismissed on the ground that the defendant has acquired title by adverse possession, a subsequent suit for possession is barred by *res judicata*. (*Ryves and Gokul Prasad, JJ.*) SYED MURTAZA HUSSAIN *v.* ZIAUL HASAN. 19 A. L. J. 279=62 I. C. 684= 3 U. P. L. R. (All.) 47.

———Ss. 164 and 201—*Suit for profits—Khewat, amendment of during pendency of suit should not be considered by Court.*

In a suit by a co-sharer for his share of the profits of a *mahal* the Court is not entitled to take into consideration an amendment of the *khewat* subsequent to the suit by the Revenue Court directing the removal of the plaintiff's name therefrom. The amendment operates only from the date the order directing amendment was passed. (*Tudball and Sulaiman, JJ.*) LACHMAN PRASAD *v.* SHITABA KUNWAR. 43 All. 177= 18 A. L. J. 1008=59 I. C. 639= 2 U. P. L. R. (All.) 386.

———Ss. 164 and 194—*Suit against defaulting tenants.*

In a lambardari *mahal* the lambardar from the date of his appointment, is the appointed agent of the co-sharers, and he is the only person who under S. 194 (1) can sue against defaulting tenants for the recovery of arrears of rent which accrued due prior to the date of his appointment but which are not time-barred. (*Piggott and Walsh, JJ.*) MOJI FATIMA *v.* ALI AKBAR.
18 A. L. J. 435=56 I. C. 112=42 All. 414.

———S. 164—*Profits—Co-sharer in possession of excess* sir *and* khudkhast—*Liability to account.*

If different co-sharers are entitled to different portions of the mahal as their *sir* and *khudkhast* each co-sharer will be entitled to the profits of his own *sir* and *khudkhast* and he would not be obliged to account for those profits to other co-sharers. On the other hand, if any co-sharer had in his hand and in his own cultivation an excess of land, over and above his proper share of *sir* and *khudkhast* he should account for the excess. In this case the quality of the land in excess will have

to be taken into consideration. If some of the co-sharers neglect to cultivate their *sir* and *khudkhast* they cannot call up on the others to account for the profits of *sir* and *khudkhast* of those co-sharers unless such *sir* and *khudkhast* were in excess of their own. (*Richards, C. J. and Banerji, J.*) ANGAD SINGH *v.* ZORAWAR SINGH.
44 I. C. 542=16 A. L. J. 146.

——S. 164—*Suit for share of profits from lambardar—Liability of legal representative.*

Where pending a suit for recovery of the plff.'s share of the profits deft. lambardar died and his legal representative was brought on record, the latter is liable not only for the collections actually made by the lambardar but also for the profits which remained uncollected owing to the neglect or misconduct of the lambardar. But this liability is limited to the extent of the assets of the deceased which have come to his hands. (*Banerjee, Piggott and Walsh, JJ.*) BHARATH SINGH *v.* TEJ SINGH. 40 All. 246=43 I. C. 636=16 A. L. J. 193 (F. B.).

——S. 164—*C. P. Code, O. 26 if applies to the Agra Tenancy Act.*

Report of a Commissioner appointed by an Asst. Collector in a suit for profits under S. 164 of the Agra Tenancy Act can be admitted in evidence according to O. 26, Rr. 9,16, 17 and 18, C. P. Code. (*Piggott and Ryves, JJ.*) BAKHTAWAR *v.* SHEO PRASAD. 39 All. 694=42 I. C. 720=15 A. L. J. 766.

——S. 164—*Jurisdiction—Civil and Revenue Courts.*

A claim for plff.'s share of rents of shops and houses, market dues and ground rents in connection with a market realised by the deft., a lambardar, is not cognizable by the Revenue Courts under S. 164, as these profits were not strictly in respect of revenue paying lands. (*Piggott and Walsh, JJ.*) DIGHIJAI SINGH *v.* HIRA DEVI. 38 All. 322=34 I. C. 276=14 A. L. J. 419.

——S. 164—*Suit for profits by co-sharer.*

In a suit for profits by a co-sharer against a lambardar under S. 164, profits of *sir* and *khudkhast* land held by co-sharers are also to be taken into account. 34 All. 98 Discussed. 36 All. 44, Ref. (*Richards, C. J. and Rafique, J.*) GANGA SINGH *v.* RAM SARUP. 38 All. 223=33 I. C. 119=14 A. L. J. 252.

——S. 164—*Suit for village profit.*

The defendant co-sharer is not liable if it is not proved by the plff. that he recovered more than his share of profits. (*Richards, C. J. and Rafique, J.*) BHAGWANT *v.* ARJUN. 32 I. C. 617=14 A. L. J. 209.

——S. 164—*Co-sharer—Suit against lambardar for share of profits*—Onus.

In a suit by a co-sharer for his share of profits against the lambardar he gave general evidence to show that the rents were greatly in arrears though the tenants were solvent and that there were no special circumstances why the rent should not have been collected. *Held*, that the *onus* was shifted on to the deft. of showing that for some reason not connected with his own negligence or misconduct he was unable to collect the rents.

10 A. L. J. 529, appr. (*Richards, C. J. & Rafique, J.*) SHIVA CHANDER SINGH *v.* RAMACHANDER SINGH.
37 All. 595=30 I. C. 550=13 A. L. J. 851.

——S. 164—*Co-sharer—Suit against lambardar.*

A co-sharer suing for the share of profits against the lambardar must in the first instance adduce some general evidence of negligence on the part of the lambardar, such as that a very large percentage of the rent has remained uncollected. Where this is proved and the lambardar admitted that no accounts were kept, the burden of proof is shifted on to the lambardar to show why so large a sum remained uncollected. (*Chamier, J.*) MITHAN LAL *v.* MIZAJI LAL. 17 I. C. 914=10 A. L. J. 529.

——Ss. 164 and 193—*Suit for profits—Deficiency in one year, if can be set off against profits in another.*

In a suit by a co-sharer against the *lambardar* for profits under S. 164 of the Act the latter cannot claim that the deficiency in one year should be set off against the profits of the succeeding year. (*Karamat Husain, J.*) MURLI DHAR *v.* SITA RAM. 14 I. C. 121 (A.).

——S. 164—*Suit against lambardar for profit—Interest—Liability to pay.*

In a suit by a co-sharer against the lambardar for his share of the profit the lambardar is liable to pay interest on the profits if it is found that he had falsified the accounts. (*Lindsay, J. C.*) DORI LAL *v.* RAMCHARAN LAL.
44 I. C. 415=4 O. L. J. 708.

——S. 164 (2)—*Suit for profits—Form of decree.*

Where a plff. claims under S. 164 (2) on the basis of gross rental for the profits for a particular year, he cannot be given a decree for arrears for past years, collected in the year in question. But if S. 164 (2) does not apply, he can be given a decree on the basis of the actual collections in that year for whatever year, past or present. He cannot, however, be given a decree on the basis of both the gross rental and actual collections. (*Ryves and Gokul Prasad, JJ.*) CHABRAJI KUAR *v.* GANGA SINGH. 43 All. 29=18 A. L. J. 863=60 I. C. 643=2 U. P. L. R. (All.) 272.

——S. 164 (2)—*Lambardar—Liability of, to account—Profits, suit for—Burden of proof.*

A lambardar is bound to maintain accounts of collection and disbursement. In a suit for profits against a lambardar the initial burden is on plaintiff to prove his liability to account and when this is done, the lambardar must produce his accounts and then it is open to plff. to prove that there are uncollected items which have remained so through negligence of the lambardar. (*Tudball, J.*) RAGHUBAR CHARAN *v.* KRISHEN BALDEO. 26 I. C. 515 (A.).

——Ss. 165 and 10 (5)—*Purchaser of Khudkhast land—Suit for profits by, is a suit for rent and is not governed by section—Rent.*

In a suit for profits by the purchaser of Khudkhast land against the vendor the ex-proprietary tenant of the plots, the other co-sharers in the village are not necessary parties. The suit is one

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for rent and is not governed by S. 165. But having regard to S. 10 (5) of the Agra Tenancy Act and S. 36 of the Land Revenue Act as a preliminary step to such a suit it is necessary first to have the rent assessed by the Collector. (*Ryves, J.*) KISHORI MAL *v.* PARASADI.
1922 All. 319.

———S. 165—*Suit for profits against lambardar —Liability for ex-proprietary rent.*

In virtue of S. 36 of the U. P. Land Revenue Act the unassessed exproprietary rent is not taken into consideration in a suit for profits against the Lambardar. (*Lindsay and Kanhaiya Lal, JJ.*) KUNJ BEHARI LAL *v.* ABDUL HADI.
L. R. 3 A. 260=4 U. P. L. R. (A.) 200.

———S. 165—*Suit for profits against co-sharer-lambardar.*

A co-sharer by becoming a *lambardar* does not cease to be a co-sharer, and a suit brought against him by another co-sharer under S. 165 of the Tenancy Act is sustainable. (*Chamier and Piggott, JJ.*) BANKEY BEHARI *v.* CHARNI.
29 I. C. 473 (A.).

———Ss. 166 and 201—*Lessee recorded in revenue papers—Right to sue for profits.*

A lessee of a proprietary right recorded as such in the Revenue papers is entitled to superior profits under Chap. XI of the Act and the Court is bound to presume such right under S. 201. (*Karamat Hussain and Chamier, JJ.*) AHMAD SAID KHAN *v.* MASIULLAH KHAN.
34 All. 250=13 I. C. 975=9 A. L. J. 152.

———S. 167—*Suit for declaration of occupancy rights—Cognisable only by Revenue Court.*

A suit for declaration of occupancy rights both against a zemindar and a co-tenant, is cognisable only by a Revenue Court. (*Ryves, J.*) KHAIRUDDIN *v.* SAHU GULAB DAS.
74 I. C. 220 (1)=1924 A. 102.

———S. 167—*Suit for possession of trees in grove —Lies only in Civil Court.*

A suit for possession of trees in a grove does not create the question of ownership to the land on which those trees stand and hence such suit is within the jurisdiction of the Civil Courts only. (*Mears, C. J. and Stuart, J.*) RAM PRASAD *v.* SUMER NATH PANDE.
L. R. 3 A. 530=45 All. 191=76 I. C. 12= 9 O. & A. L. R. 277=21 A. L. J. 33=1923 All. 134.

———S. 167—*Wilful neglect to cultivate—Damages—Suit for—Forum—Revenue Court.*

A suit by landlord for damages for non-cultivation by tenant by which he was deprived of his *Balai* rent lies only in Revenue Court. (*Ryves J.*) RAJA NARENDRA BAHADUR PAL *v.* BAFATI.
L. R. 3 A. 477=20 A. L. J. 771=68 I. C. 985= 4 U. P. L. R. (A.) 206.

———S. 167—*Two rival Zemindars—One fraudulently entering other's name as sub-tenant, obtaining* ex parte *decree for rent, and suing for ejectment—Civil Court not bound by decree of Revenue Court.*

A suit for ejectment was brought by a Zemindar against his rival Zemindar, after having fraudulently entered the other as sub-tenant and having

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obtained a decree for arrears of rent from the Revenue Court. The other Zemindar defended his proprietary possession and in the Civil Court he asked for a declaration of his proprietary title. In such a case the Revenue Court has no power to pass a decree and that the passing of the decree furnishes a fresh cause of action. Such a decree does not bind the Civil Court and does not estop the plff. and the findings of the Revenue Court do not bind the Court. The Civil Court can consider the case independently in accordance with the circumstances of the case. An alleged owner cannot bring a claim for declaration of title within the meaning of S. 167 of the Agra Tenancy Act. (*Walsh, J.*) RAM DHARI UPADHIA *v.* BABU LAL UPADHIA.
65 I. C. 101=3 U. P. L. R. (All.) 21.

———S. 167—*Assistant Collector's order—Revision.*

The High Court has no power to revise an order passed in appeal against the decision of an Assistant Collector under S. 167 of the Act. (*Stuart and Wallach, JJ.*) GAJ KUMAR CHANDER *v.* SALAMAT ALI. 42 All. 83=17 A. L. J. 1057= 52 I. C. 756=1 U. P. L. R. (H. C.) 142.

———S. 167—*Restitution—Revision.*

The High Court cannot revise an order made by an Assistant Collector rejecting an application for restitution, however erroneous. (*Rafique and Walsh, JJ.*) POHKAR *v.* RAMLAL.
52 I. C. 640 (A.).

———S. 167—*Revenue Court—Declaration of status of tenant—Maintainability.*

A person who has been declared a tenant by the Revenue Court in a suit between the parties, the nature of whose tenancy has also been determined is debarred from suing in Civil Court by S. 167 of the Agra Tenancy Act. (*Rafique and Walsh, JJ.*) AJUDI PURI *v.* BRIJ BHUKHAN.
17 A.L.J. 922=51 I.C. 143=1 U.P.L.R. (H.C.) 64.

———Ss. 167 and 199—*Revenue Court—Dispute as to rent—Order under S. 167—Revision.*

Under S. 167 of the Act *prima facie* no revision lies to the High Court from an order of a Revenue Court. The remedy in the Civil Court is by appeal only in cases in which an appeal is given. (*Tudball, J.*) MAHOMED EHTISHAM ALI *v.* LALJI SINGH. 41 All. 226=49 I. C. 362= 17 A. L. J. 123.

———S. 167—*Suit for ejectment—Revenue Court—Sub-tenant—Defendants held to be joint tenants—Subsequent suit in the Civil Courts for ejectment.*

Plaintiffs sued to eject defendants in the Revenue Court from a holding on the ground that the latter were sub-tenants. The defendants pleaded they were joint tenants. The Revenue Court dismissed the suit holding they were joint tenants. The plaintiffs then sued in the Civil Court for ejecting the defendants as trespassers. *Held*, that the suit was barred by S. 167 of the Act. (*Piggott and Walsh, JJ.*) BALJIT *v.* MAHPAT.
41 All. 203=49 I. C. 118=17 A. L. J. 60.

———S. 167—*Ejectment—Revenue Court—Deft. sub-tenant—Suit in Civil Court by Deft. in prior suit for declaration of title as co-tenant.*

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Where a Revenue Court has exclusive jurisdiction to try a certain question and decides it as between the parties the decision is binding on the parties and a suit in a Civil Court cannot be maintained. Where a Revenue Court in a suit for ejectment decided that A was B's sub-tenant and accordingly decreed A's ejectment, a subsequent suit in the Civil Court by A for a declaration that he was a co-tenant of B is not maintainable in view of S. 167 of the Agra Tenancy Act. (*Tudball and Abdul Raoof, JJ.*) KISHORE SINGH *v.* BAHADUR SINGH. 41 All. 97=48 I. C. 470=16 A. L. J. 933.

———S. 167—*Jurisdiction of Civil and Revenue Courts—Declaration of rights to receive rent.*

A suit for a declaration alone that plff. is entitled to realise rent from 2nd deft. and for an injunction restraining 1st. deft. from interfering with this right, is not barred from the cognizance of a Civil Court by any provision of the Agra Tenancy Act. (*Piggott and Walsh, JJ.*) SIDDIGA BIBI *v.* RAM AUTAR PANDE. 39 All. 675=42 I. C. 575=15 A. L. J. 745.

———Ss. 167, 180 and 185—*Suit for arrears of rent—Tenant at fixed rates.*

Maharajah of Benares sued the deft. for arrears of rent describing him as a fixed rate tenant under S. 120 of the Act in the Court of an Assistant Collector of the second class. The deft. was entered as a fixed rate tenant in the revenue registers at the last revision of Settlement of Benares District. The deft. denied the relation of landlord and tenant between the Maharajah and himself and disputed the amount of rent claimed. The Judge in second appeal held that the plot in suit did not fall within the word 'land' in the Tenancy Act and that upon the plaint as framed no suit lies in the Civil Court. On an application for revision, held per *Walsh, J.* The decision of the Dt. Judge given by way of an appeal from a Revenue Court is a decision of a Civil Court and it is therefore subject to revision. *Per Piggott, J.*—That no revision lies under S. 115 of the C. P. Code as the Dt. Judge had not refused to exercise a jurisdiction vested in him by law or acted with material irregularity in the exercise of his jurisdiction; that having regard to S. 167 of the Act the High Court could not entertain the revision. (*Piggott and Walsh, JJ.*) PARBU NARAIN SINGH *v.* HARBANS LAL. 35 I. C. 279=14 A. L. J. 281.

———Ss. 167 and 89—*Civil Court*—Muafi land—*Resumption—Privileged rates of rent—Suit to recover possession as proprietor.*

Certain persons held some plots of land as *Muafi* before 1838. In 1838 the *Muafi* was resumed. In 1861 upon application by some holders of these plots the Settlement Officer decided that they were hereditary tenants at privileged rates of rent. In 1888 again they were entered as occupancy tenants with rights of transfer. In 1892 the Board of Revenue also held them to be privileged tenants. In a suit in the Civil Court by some of the descendants of one of the original holders to recover possession as proprietors of a plot of land forming part of his *Muafi*. *Held*, that the plffs. were tenants and the suit was not maintainable. (*Chamier and Piggott, JJ.*) KULSUM-UN-NISSA *v.* DAURU NATH. 30 I. C. 552=13 A. L. J. 857.

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———S. 167—*Civil and Revenue Courts—Ejectment—Land let for pasturage.*

A suit for ejectment from a plot of pasture land is cognizable by the Civil Court. 15 I. C. 743 foll. (*Chamier, J.*) ABDUL QAYUM *v.* FIDA HUSSAIN. 30 I. C. 551=13 A. L. J. 854.

———S. 167—*Civil and Revenue Courts—Jurisdiction—Deft. sued by trespasser.*

A suit in ejectment on the ground that the deft. whatever he might at one time have been, was in possession as a trespasser and, in the alternative for a declaration that the deft. was a tenant, if so found by the Court, is not maintainable in the Civil Court. (*Piggott, J.*) ALI JAFAR *v.* PHULMANTA KUAR. 30 I. C. 546=13 A. L. J. 843.

———Ss. 167 and 95—*Suit to set aside—Jurisdiction.*

A decree for sale on foot of property was passed in favour of the deft. Later on the plff. brought this suit for ejectment of defts. on the ground that they were trespassers. The defts. set up their tenancy under a perpetual lease in defence and were required by the Civil Court to get a declaration from the Revenue Court. When the matter came before the Revenue Court, plffs. admitted the tenancy and the Revenue Court dismissed the suit. The plff. amended the plaint by asking for a declaration that the perpetual lease was not binding on him. *Held*, that the matter set up in defence was a matter in respect of which a suit might have been brought in the Revenue Court within the meaning of S. 167 of the Act and the Civil Court had no jurisdiction to entertain the present suit. (*Chamier and Piggott, JJ.*) SHER KHAN *v.* DEBI PRASAD. 37 All. 254=23 I. C. 552=13 A. L. J. 364.

———S. 167—*Suit by assignee of rent to recover rent—Jurisdiction of Civil or Revenue Court—Second appeal if lies.*

A suit by an assignee of arrears of rent to recover such arrears is not in the nature of a Small Cause suit. Such suit is cognizable only by a Revenue Court and a second appeal would therefore lie in such a case. (*Tudball, J.*) KANHAI RAM *v.* SUKH DEO. 22 I. C. 337=12 A. L. J. 98.

———S. 167—*Suit for possession—Usufructuary mortgagee—Ex-proprietary tenancy—Civil or Revenue Court.*

The question, whether a person lawfully in possession of land as a mortgagee must give up possession to his mortgagor when the latter becomes entitled to ex-proprietary rights in land (*i.e.*), becomes exproprietary tenant of the land, is not a question reserved exclusively for the Revenue Courts and S. 167 of the Agra Tenaocy Act does not apply. 1 A. L. J. 555, 6 I. C. 831 Ref. (*Chamier, J.*) GHISA LAL *v.* RAM AUTAR LAL. 15 I. C. 438=9 A. L. J. 547.

———Ss. 167 and 95—*Suit between rival claimants to occupancy holding—Jurisdiction, Civil or Revenue Court,*

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A Civil Court is the proper Court to try suits between rival claimants to occupancy holdings and its jurisdiction can be ousted only by express exclusion of such suits from its cognizance. (*Richards, C. J. and Banerjee, J.*) BHUP *v.* RAM LAL. 33 All. 795=11 I. C. 268=8 A. L. J. 1009.

——Ss. 175 and 177—*Order of Revenue Court refusing to stay suit—Decree—Appeal.*

S. 175 of the Act applies both to appeals to the Revenue Court and to the Civil Court. An order of a Revenue Court staying or refusing to stay suit under para 18 of Sch. II of the C. P. Code is not a 'decree' within S. 177 of the Agra Tenancy Act and no appeal lies against such an order to the Civil Court. (*Richards, C. J. and Banerjee, J.*) KIRPA DEVI *v.* RANCHANDER SARUP. 40 All. 219=43 I. C. 531=16 A. L. J. 231.

——S. 175—*Appeal—Order of Record Officer, if appealable.*

No appeal lies to the District Judge from an order of the Record Officer. (*Knox, J.*) BHARAT DUAJ DAMODAR *v.* MAHABBAT. 29 I. C. 421 (A.).

——Ss. 177 and 198—*Ejectment suit—Plea of* jus tertii—*Appeal can lie to District Judge.*

The defendant in a suit for ejectment denied the landlord's title and set up that of a third person. *Held*, that there was a question of proprietary title raised in the suit and where the question was decided by the Revenue Court an appeal lay to the District Judge. The remedy under S. 198 of the Tenancy Act is an additional remedy but does not prevent an appeal lying to the District Judge under S. 177. Cl. (e) of the Agra Tenancy Act. (*Gokul Prasad, J.*) TULSI PRASAD SAHAI *v.* RAM RAJ AHIR. 71 I. C. 308=1923 A. 414 (2).

——S. 177—*Ejectment suit—Order of Asst. Collector—Appeal lies to District Judge.*

An appeal from the decision of an Assistant Collector First Class in an ejectment suit lies to the District Judge. 22 I. C. 964 Foll. (*Stuart, J.*) RAM DIN *v.* HAR DAYAL. 1923 A. 368.

——S. 177—*Applicability of—Appeal—Forum.*

The words "in all suits" in S. 177 of the Agra Tenancy Act would comprise suits of any description in whatever group they may be and it cannot be said that because a particular kind of suit falls in Group C, the appeal does not lie to the District Judge. (*Lindsay, J.*) LALTA PRASAD *v.* KHARGA. 45 A. 336=21 A. L. J. 189=71 I. C. 773=L. R. 4 A. 84=1923 A. 313.

——S. 177—*Order refusing restitution by Revenue Court—Not a decree and not appealable.*

The word 'decree' in S. 177, Agra Tenancy Act, does not include an order refusing restitution and as such no appeal lies against such an order. 28 All. 753 Foll. (*Mears, C. J. and Banerjee, J.*) KASHI PRASAD SINGH *v.* BALBHADHAR SINGH. 44 All. 283=20 A. L. J. 133=65 I. C. 798=L. R. 3 A. 97=1922 A. 71.

——S. 177—*Appeal—Valuation of suit—Principle guiding.*

In a suit under S. 165 of the Tenancy Act the plaintiff claimed Rs. 70 and prayed that if anything more was due to her she should receive it. A

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decree for Rs. 158-5-1 was passed in her favour. In appeal by the defendant, the plea of the plaintiff was that no appeal lay under S. 177, Tenancy Act, as the value of the suit was Rs. 70 only. *Held*, that under the peculiar conditions of the Tenancy Act, it is obvious that in a case of this kind the valuation should be taken to be the value as found by the Court and therefore an appeal would lie. (*Stuart, J.*) MUSSAMAT UMME KHAIR *v.* AZIZ ALI. 1922 All. 47.

——Ss. 177 and 95—*Jurisdiction, plea of, not raised or decided—Appeal—Forum is Revenue Court.*

Where no plea of jurisdiction is raised or decided, in a suit under S. 95 of the Act, an appeal lies to the Commissioner and not to the District Judge. (*Rafique and Ryves, JJ.*) RATAN SINGH *v.* PRAN SUKH. 43 All. 368=19 A. L. J. 120=61 I. C. 44=2 U. P. L. R. (A.) 435.

——S. 177—*Appeal—Order of ejectment.*

An order of ejectment in a suit by a usufructuary mortgagee of fixed rate tenure in which the defendant pleads to be sub-tenant, is not appealable to a District Judge as he has jurisdiction to hear appeals in the cases in which the "proprietary titles" both in Revenue Courts and in appeal are contested under S. 177 of the Act; which expression merely refers to the Zemindari and not to a disputed title to a tenure or tenancy rights. (*Tudball, J.*) GURU CHARAN KUER *v.* DEVIKINANDAN KUER. 58 I. C. 760 (A.).

——Ss. 177 and 198—*Ejectment—Denial of plff's. proprietary title—Appeal—Forum.*

In a suit to eject defts. on the ground that they were tenants without occupancy rights, they denied plff.'s title alleging that a third person was the landlord *Held*, that the deft.'s plea raised a question of proprietary title and as it was in issue in the Court of first instance and on appeal, the appeal lay to the District Judge. (*Banerji and Tudball, JJ.*) HARPRASAD *v.* TAJAMUL HUSAIN, 44 I. C. 720=16 A. L. J. 239.

——Ss. 177 to 180—*Decree of Revenue Court—Severable decree of Revenue Court; appeal against different portions of it to different Courts.*

Where the decree of a Revenue Court is severable, an appeal may be preferred to a Civil Court against that part of the decree dealing with a question of proprietary title, and as to other portions of the decree not so dealing, an appeal may be preferred to the Commissioner. (*Walsh and Stuart, JJ.*) JACKSON *v.* SARJIT SINGH. 37 I. C. 771=15 A. L. J. 6.

——S. 177—*Proprietor and tenant—Question of proprietary title involved—Appeal, where lies.*

An appeal against the order of a Revenue Court under S. 177 of the Act where a question of proprietary title is involved, lies to the District Court. (*Richards, C. J., Banerjee and Ryves, JJ.*) BINDESHWARI *v.* GOKUL. 36 All. 183=22 I. C. 964=12 A. L. J. 251 (F. B.).

——S. 177—*Proprietary title—Appeal.*

Where the defence to a suit for ejectment is that the plaintiff is only a mortgagor and the defendant a mortgagee. *Held*, that a question

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af proprietary title was distinctly claimed and on appeal did lie to the Dt. Judge. (*Tudball, J.*) KALYAN MAL *v.* SAMAD. 35 All. 157= 18 I. C. 244=11 A. L. J. 118.

———S. 177—*Order of Assistant Collector—Appeal.*

An appeal does not lie to the District Judge against an order of the Assistant Collector of first class to the effect that an award made on a matter referred to arbitration without the intervention of the Court should be filed. (*Chamier, J.*) GOBARDHAN *v.* GURA PRASAD. 12 I. C. 181= 8 A. L. J. 1090.

———S. 177 (c)—*Proprietary title.*

A dispute relating to ownership of tenancy involves no question of proprietary title. (*Tudball and Sulaiman, JJ.*) DAULATEA *v.* HARGOBIND. 43 All. 18=57 I. C. 206=18 A. L. J. 923= 2 U. P. L. R. (A.) 289.

———S. 177 (e)—*Proprietary right—Mortgage right.*

The question whether the defendants are mortgagees of proprietary right or have no right at all in the land in dispute amounts to a question of proprietary right within Section 177 (*e*). 35 All. 157, Foll. (*Daniels, J.*) DHIRJA *v.* MITHAN LAL. 74 I. C. 914=1923 A. 562.

———Ss. 177 (e) and 195—*Conflict of jurisdiction in connection with a question of proprietary title in issue—Appeal.*

Where the question of proprietary title has been in issue in the court of first instance as well as in appeal, an appeal will lie to the Civil Court under S. 177 (e) of the Act. (*Knox and Tudball, JJ.*) MANNA LAL *v.* FATEH SINGH. 39 I. C. 958 (A.).

———Ss. 177 (e) and 58—*Grounds of Appeal.*

In a suit for ejectment under S. 58 of the Act the deft. pleaded that he was a tenant of the land under a person other than the plff. The first court decreed the claim. *Held*, that an appeal lay from the decision to the District Judge under S. 177 (e) as the question of the plff.'s proprietary title was put in issue in the Court of the first instance and in appeal it was a matter in issue. (*Walsh and Sundar Lal, JJ.*) GANGA PRASAD *v.* HAR NARAIN. 38 All. 465=35 I. C. 739= 14 A. L. J. 666.

———S. 177 (e)—*Question of proprietary title.*

Decision in a suit for arrears of rent involving a question of proprietary title in the Lower Courts is appealable to the Dt. Judge. (*Banerjee, J.*) SAKHAWATALI *v.* SURAJ PRASAD. 33 I. C. 343=14 A. L. J. 140.

———S. 177 (e)—*Proprietary title—Appeal to District Judge—Jurisdiction.*

An appeal under S. 177 (e) lies to the District Judge, only if a question of title is in issue in the appeal too, but the questions need not be precisely the same in both the Courts. (*Richards, C. J. and Banerji, J.*) RAM CHARAN LAL *v.* FAIZULLAH. 21 I. C. 870 (A.)

———S. 177 (f)—*Question of jurisdiction arises when deft. raises a plea to that effect.*

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In order to make a question of jurisdiction which can be decided within the meaning of S. 177 (f), there must be a plea by the defendant that the suit as brought is not cognizable by a Revenue Court. In other words there must be a plea that assuming the allegations made in the plaint to be true, a Revenue Court has no jurisdiction to entertain the plaint. (*Stuart, J.*) POHAP SINGH *v.* MOHAN SINGH. 70 I. C. 578= 1922 All. 424.

———S. 177 (f)—*Objection to jurisdiction—Appeal to Dt. Judge.*

Deft. raised the plea that the suit was not cognizable by a Revenue Court but the objection was overruled and a decision given upon the merits. *Held*, an appeal lies, under S. 177 (f) of the Act to the District Judge. (*Banerji, Rafique and Piggott, JJ.*) GOKARAN SINGH *v.* GANGA. 42 All. 91=17 A. L. J. 1072= 52 I. C. 779=1 U. P. L. R. (H. C.) 136.

———S. 177 (f)—*Appeal—Question of jurisdiction.*

An appeal lies in all suits where a question of jurisdiction has been decided, whether properly or improperly. (*Tudball and Rafique, JJ.*) DAMODAR DAS *v.* ZHAOO SINGH. 39 I. C. 87=15 A. L. J. 319.

———Ss. 180 (2) and 193—*High Court—Appeal from Dt. Judge.*

Appeal does not lie to the High Court from the District Judge passing the order in a second appeal under S. 180 (2). (*Tudball and Walsh, JJ.*) GULZARI LAL *v.* LATIF HUSSAIN. 38 All. 181=35 I. C. 27=14 A. L. J. 84.

———S. 180 (2) (a)—*Appeal lies to District Court where a question of proprietary title is raised.*

Where in a suit in ejectment under the Agra Tenancy Act a question of proprietary title is raised an appeal lies to the District Court. (*Gokul Prasad, J.*) SHEIKH SAJJAD HUSSAIN *v.* SHAIKH WALI MOHAMMAD. 73 I. C. 1030 (2)=1923 All. 451.

———S. 180 (2) (b)—*Second appeal to Dt. Judge—Question of proprietary title or jurisdiction.*

Where a District Judge remanded a case to Revenue Court for trial on merits, a second appeal to him from the Collector's decision lies, as a question of jurisdiction within S. 180 Cl. 2 has already been decided at a previous stage. (*Ryves, J.*) KESHO DAS *v.* MORAT PANDE. 23 I. C. 320=12 A. L. J. 367.

———Ss. 181 and 182—*Remand—Appeal.*

Under Agra Tenancy Act an order of remand made by the Dt. Judge under O. 41, R. 23 C. P. C. is not appealable. (*Piggott and Walsh, JJ.*) HIRA LAL *v.* MAHARAJ SINGH. 35 I. C. 105 (A.).

———S. 182—*Appeal to District Judge—Memo. returned to be presented to the Revenue Court—Order of return is not open to appeal.*

An order of a District Judge returning a memorandum of appeal for the purpose of its being presented to the Appellate Court on the Revenue side is not appealable to the High Court. (*Walsh and Wallach, JJ.*) BANKEY LAL *v.* MEGHRAJ. 63 I. C. 951=19 A. L. J. 868.

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———S. 182—*Suit for arrears of rent—Third appeal whether lies.*

No third appeal lies to the High Court against the decision of the District Judge in appeal from an appellate order of the Collector, in a suit for arrears of rent. (*Griffin, J.*) GADUNANDAN SINGH *v.* RAM CHANDAR SINGH. 12 I. C. 139 (A.).

———S. 193—*Order of remand—Appeal—Maintainability of.*

Plff.'s suit to be declared proprietor of a *Muafi* was dismissed by the Revenue Court. The District Court set aside that decree, allowed the appeal to the extent that it held the plff. entitled to be declared a rent free grantee of so much of the land as was entered in his name and remanded the suit to the Lower Court for determination of the revenue payable by the plff. *Held*, that the order being one on remand, no second appeal lay to the High Court. There was no provision in the Tenancy Act about preliminary or final decree and the order could not be appealed against as a preliminary decree. (*Knox, A. C. J. and Banerjee, J.*) ANANDGIR *v.* SRINIWAS.
40 All. 652=47 I. C. 1008=16 A. L. J. 711.

———S. 193—*Transfer of decree.*

A Tahsildar is not justified in transferring to the District Collector a decree not passed by himself. (*Griffin and Chamier, JJ.*) MT. RUKMIN *v.* JODHA SINGH. 19 I. C. 120 (A.).

———S. 193 (a)—*Suit against occupancy tenant for arrears is not barred by S. 16 (2) of the Prov. Insol. Act.*

The Prov. Insol. Act does not apply to any suit or proceeding under the Agra Tenancy Act and therefore S. 16 of the Prov. Insolvency Act does not bar a suit against an occupancy tenant who has been declared insolvent for arrears of rent of the holding which therefore cannot be dealt with by an Insolvency Court. (*Tudball, Rafique and Ryves, JJ.*) KALKA DAS *v.* GAJJU SINGH. 43 All. 510=19 A. L. J. 439=62 I. C. 897=3 U. P. L. R. (All.) 73 (F. B.).

———S. 193 (g)—*Suit for arrears of rent—If the deft. can plead set off for wrongful collections.*

A lessee against whom a suit has been instituted for arrears of rent cannot claim a set off for the amounts wrongfully collected by the plaintiff as rent. (*Karamat Hussain and Chamier, JJ.*) MUHAMMAD HUSAIN *v.* AMIR HAIDAR. 13 I. C. 150 (A.).

———S. 194—*Right of one co-sharer to sue—Civ. Pro. Code, O. 1, R. 8.*

When there are many co-sharers in the village an informal partition between the co-sharers is the only means by which the rent can be realised and the revenue paid and when such a partition or *phatbandi* is in existence in the village and is formally recorded in the *wajib-ul-arz*; and it has been in force for over forty years, the co-sharer in whose share particular plots fall is perfectly entitled to collect the rents and eject the tenants of those plots, and the land is not removed from his share merely because particular tenant happens to die without heirs. (*Daniels, J.*) JOKHU RAI *v.* BHABHUTI RAI. 1923 A. 559.

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———S. 194—*Lambardar—Powers of.*

A lambardar can give possession to a tenant to erect a kucha house on land belonging to the joint path as he is an implied agent of the co-sharers. (*Daniels, J.*) ABDUR RAOOF *v.* BACHCHOO. 73 I. C. 495 (1)=1923 A. 532 (1).

———S. 194—*Private partition—Effect—Rent suit by one co-sharer—Special contract.*

A vague private partition will not take a case out of S. 194 of the Act. To entitle a co-sharer to sue separately for rent, there must be a special contract clearly setting out the opposition to law as stated in S. 194 (1). (*Knox, J.*) GOBARDHAN *v.* PADAM SINGH. 46 I. C. 652 (A.).

———S. 194—*Lambardar—Suit for rent.*

A lambardar can sue alone without joining the other co-sharers for the recovery of the entire rent due from a tenant. 33 All. 441, Foll. (*Rafique, J.*) MAHABIR PRASAD *v.* RAM TAWAKUL. 28 I. C. 838 (A.).

———S. 194—*Co-sharer—Suit for arrears of rent.*

One of several co-sharers cannot sue for arrears of rent in the absence of a local custom or special contract to the contrary. (*Rafique, J.*) MATA DAYAL *v.* DEBI PRASAD. 25 I. C. 531 (A.).

———S. 194—*Lambardar's right to sue alone.*

In a *lambardari* village a *lambardar* can sue alone under the act without impleading the other co-sharers. (*Richards, C. J., Banerji and Tutball, JJ.*) GULZARI LAL *v.* JAI RAM.
36 All. 441=24 I. C. 178=12 A. L. J. 606.

———S. 194—*Ejectment from joint khata—Suit by lambardar alone.*

In the case of a joint khata, a lambardar cannot sue, by the mere fact of his being such, to eject a tenant without joining other co-sharers. (*Rafique, J.*) GULZARI MAL *v.* JAI RAM. 21 I. C. 38=11 A. L. J. 742.

———S. 194—*Co-sharer—Lambardar.*

Generally a lambardar is not the agent of co-sharers and cannot sue on their behalf to recover profits due from other co-sharers holding *sir* and *khudkhast* lands in excess of their proper shares. (*Knox and Griffin, JJ.*) BISHAMBHAR NATH *v.* BHOLA. 34 All. 98=12 I. C. 920=8 A. L. J. 1245.

———S. 195—*Reference to the High Court under—When permissible.*

Reference to the High Court under S. 195 is permissible only when there is a doubt whether the Revenue or Civil Court has jurisdiction. (*Karamat Hussain and Tudball, JJ.*) SRINARAIN SINGH *v.* RAMKUMAR SINGH. 14 I. C. 123 (A.).

———S. 196 and 197—*Ejectment—Denial of title is no ground for—Section do not apply to suits which do not lie at all.*

Where a suit in ejectment was based on the ground that the defendants had incurred forfeiture because of their denial of the plaintiff's title in the Revenue Courts. *Held*, this was not one of the grounds on which a tenant could be ejected under the provisions of the Tenancy Act. The decision of Revenue Court in the suit for arrears of rent was binding on the Civil Courts, Ss. 196

and 197 have no application to suits which do not lie at all but they only contemplate suits which might have been brought in one Court but have been by mistake or otherwise brought in another. 8 A. L. J. 431 followed. *(Gokul Prasad, J.)* JANKI *v.* DEBI SHANKER. 69 I. C. 799 = 1922 All. 274.

——S. 196—*Jurisdiction—Objection to, must be raised in the first Court.*

Where an objection to jurisdiction of the Civil Court is not raised in the first Court it cannot be raised on appeal or second appeal by reason of S. 196 of the Agra Tenancy Act. But the fact that if the question of jurisdiction is not raised in the first Court the Appellate Court is to decide the suit as if it had been brought in the right court does not in any way warrant the conclusion that the limitation to be applied to that suit is not the one which would have applied if the suit had been brought in the right court but that some other rule of limitation is to be applied. *(Gokul Prasad, J.)* BHIKHARI SINGH *v.* JOKHAN. 66 I. C. 856 = 4 U. P. L. R. (A.) 104 = 1922 All. 124

——Ss. 196 and 197—*Invalid lease—Ejectment—Suit on the ground of, does not lie in Civil Court.*

A Civil Court cannot try a suit for ejectment on the plea that the person who gave the lease has no right to do so. The appellant cannot take the support of Secs. 196 and 197 of the Act in the above case for ejecting the tenant. This can alone be done by the Revenue Court exclusively. *(Stuart, J.)* LALA SUNDAR LAL *v.* KIFAYAT HASAN KHAN. L. R. 3 A. 134.

——Ss. 196 and 197—*Applicability—Suit by co-sharer for profits—Jurisdiction—Appeal.*

In case of a suit by a co-sharer for profits for the period during which he was kept out of possession by other co-sharers, provisions of Secs. 196 and 197 apply and so, if a suit is dismissed by a Civil Court for want of jurisdiction and appeal is preferred to the District Judge, he must deal with the case in accordance with the provisions of those sections. *(Rafique and Piggott, JJ.)* SAID-UN-NISSA *v.* FIDA HUSSAIN. 61 I. C. 385 = 19 A. L. J. 194.

——Ss. 196 and 197—*Landlord and tenant—Ejectment—Jurisdiction—Civil Court—Denial of title.*

An agricultural tenancy can be determined only by ejectment suit by the lessor against the lessee or tenant under the Tenancy Act. A mere denial of title by the lessee does not put an end to the tenancy. The lessor cannot treat the lessee as a trespasser and the Civil Courts cannot entertain a suit in ejectment. S. 196 of the Tenancy Act applies to suits in which an appeal lies to the Dt. Judge or High Court whether they are first instituted in the Civil or Revenue Court. *(Piggott, J.)* BECHU *v.* NAND RAM. 24 I. C. 700 = 12 A. L. J. 902.

——S. 196—*Objection as to jurisdiction not taken in first Court.*

When the parties to a suit in Revenue Court for resumption were referred to the Civil Court

and in accordance therewith one of the parties instituted a suit in the Civil Court, the other party not raising any objection to jurisdiction in the Civil Court, S. 196 will apply and the plea of jurisdiction cannot be raised in the High Court. *(Richards, J.)* CHHATURBHUJ *v.* MANGAL SINGH. 9 I. C. 1005 (A.).

——S. 197—*Suit in Revenue Court—Cantonment land—Jurisdiction.*

Plff. sued in a Revenue Court for ejectment of deft. from land to which the Agra Tenancy Act did not apply. The deft. objected to the jurisdiction of the Court and asserted proprietary title. The Court however decreed the suit. *Held*, that the District Court to which an appeal had been preferred against the decree, ought to dispose of the appeal on the merits, since the necessary materials for the decision of the case were on record. *(Stuart, J.)* SECRETARY OF STATE *v.* MULLA 66 I. C. 582 = L. R. 3 A. 169 = 1922 All. 57.

——S. 197—*Revenue Court—Suit for profits—Nazrana and Haqchaharam—Procedure.*

A co-sharer brought a suit for profits against the Lambardar. On the plea of negligence the lower Courts maintained that the claim should be decreed on the demand and not on collections. It was held that District Judge ought to have been guided by the procedure under Sec. 19 of the Agra Tenancy Act. Regarding the claims of Nazrana and Haqchaharam the District Judge was not right in holding that these could not be brought in the suit. *(Stuart, J.)* LALMAN *v.* DIN DAYAL. L. R. 3 A. 149.

——Ss. 197 and 202—*Applicability—Suits where deft. claims to be tenant are not within S. 197.*

In suits relating to agricultural land, in which the defendant claims to be the tenant of the plaintiff, the procedure laid down by S. 202 of the Act is compulsory and S. 197 does not apply to such cases. The fact that the defendant pleads that he is the tenant of the plaintiff along with his co-sharers does not make any difference. *(Banerji and Gokul Prasad, JJ.)* BHAUNI *v.* RAMDAYAL. 64 I. C. 426 = 19 A. L. J. 850.

——S. 197—*Bengal, N. W. P. and Assam Civil Courts Act, S. 21—Jurisdiction.*

A Subordinate Judge authorised by the High Court under a notification under S. 21 of the Bengal, N. W. P. and Assam Civil Courts Act, to hear all appeals from the decrees or orders of a Munsiff is thereby empowered to dispose of all appeals preferred to him as effectively as the Court of the Dt. Judge. He has therefore power to take action under S. 197 of the Agra Tenancy Act. 26 I. C. 783, Rel. on. *(Knox, J.)* PIRTHI SINGH *v.* LAIQ SINGH. 46 I. C. 736 (A.).

——S. 197—*Jurisdiction of Civil and Revenue Courts.*

A suit for declaring the invalidity of a lease does not lie in a Civil Court. 37 A. 41, Foll; and under the above Act and Acts before it, the Revenue Court alone was intended to have jurisdiction when it could try the issue between the parties. *(Knox, J.)* POORAN SINGH *v.* HAIDRI. 37 I. C. 358 (A.).

AGRA TENANCY ACT (II of 1910), S. 197.

———S. 197—*Suit triable by Revenue Court —Appeal—Transfer to Subordinate Judge—Powers of.*

Where a District Judge transfers an appeal to a Subordinate Judge, the latter may exercise all the powers vested in an Appellate Court by S. 197 of the Act. (*Chamier and Piggott, JJ.*) AFZAL SHAH *v.* MOHAMED ABDUL KARIM KHAN.
29 I. C. 633=37 All. 232.

———S. 197—*Ejectment—Adverse Possession—Plea of—No issue.*

In a suit instituted in a Revenue Court for ejectment the defendant pleaded that he was in proprietary and adverse possession of the land but this issue was not tried. *Held*, that the District Judge on appeal ought to have disposed of the plea of jurisdiction under S. 197 of the Agra Tenancy Act. (*Knox, J.*) MANOHARI *v.* BHURA.
29 I. C. 565 (A.).

———S. 197—*Conversion of suit—District Judge —Agrement by tenant to pay rent at higher rate for unspecified period—Agreement unenforceable—Contract Act, S. 23.*

S. 197 of the Act does not justify a Court in turning a suit of one description into a suit of a totally different description. A District Judge is bound to dispose of an appeal before him, as the suit had been filed in what, in his opinion, was the right Court to try the same. (*Piggott, J.*) SANWAL KUNWAR *v.* MURLI.
16 I. C. 339=10 A. L. J. 52.

———S. 197—*Scope of.*

Under S. 197 it is the duty of the Appellate Court to treat a suit instituted in a wrong court which had no jurisdiction to try it, as properly instituted and deal with it on the merits. (*Tudball, J.*) BHARAT INDU *v.* KHETSI DAS.
9 I.C. 848 (A.).

———S. 198—*Suit for arrears of rent—Plea of payment to third person—Decision against latter—Suit by latter not barred.*

A landlord brought a suit for arrears of rent and the defence set up by the tenant was payment in good faith to a third person who was impleaded as a party to the suit. The title of the third person was negatived whereupon he brought a suit in a Civil Court for the declaration of his title as landlord *Held* that the suit was not barred by S. 11, C. P. C., and that it was maintainable in a Civil Court. (*Ryves and Gokul Prasad, JJ.*) HABIB KHAN *v.* FIDA HUSAIN KHAN.
71 I. C. 1017=L. R. 4 A. 138.

———S. 198—*Applicability—Payment of money to a third person after suit and filing of defence takes the case out of section.*

Where the deft. pays the amount due to a third person, after a suit to recover arrears of rent is instituted and he has filed his defence, S. 198 does not apply. (*Ryves and Gokul Prasad, JJ.*) JEONI *v.* CALOO.
43 All. 448=60 I. C. 837=19 A. L. J. 298.

———S. 199—*Suit under—Ownership of trees apart from the land can be determined.*

AGRA TENANCY ACT (II of 1910), S. 199.

It is competent to a person in a suit under S. 199 of the Tenancy Act to have the question of title determined and to prove that he is the owner not of the land but of the trees on the plot. (*Lindsay and Daniels, JJ.*) LALTA PRASAD *v.* RAM BAHADUR. 21 A. L. J. 434=74 I. C. 349=1923 A. 540.

———Ss. 199 and 201—*Question of proprietary title—Decision of Revenue Court*—Res-judicata.

Ss. 199 and 201 of the Agra Tenancy Act confer special jurisdiction on the Rent Courts to try and decide questions of titles to property and when so decided their decision is *res judicata* and binding on the Civil Courts in subsequent suits, based on the same issues, filed in Civil Courts. (*Lindsay and Stuart, JJ.*) MT. JHAMOLA KUNWAR *v.* HANWANT SINGH. 4 U. P. L. R. (A.) 113=1922 A. 129.

———Ss. 199, 200 and 201—*Decision of Revenue Court, when* res-judicata *in Civil Court.*

The decision of a Revenue Court cannot operate as *res judicata* in a Civil Court unless the case comes within the purview of Ss. 199 to 201 of the Agra Tenancy Act. In other cases the question is not one of *res judicata* but whether the point before the Civil Court has been decided by a Rent Court under its exclusive jurisdiction in such a manner as prevents the Civil Court having jurisdiction to decide it. 37 A. 41 Foll. Where however the point under the Tenancy Act is itself within the jurisdiction of the Civil Court, it can decide it. (*Stuart, J.*) SARABJIT MAL *v.* RAM KHELAWAN MAL.
66 I. C. 714=4 U. P. L. R. (A.) 90.

———S. 199—*Legal representatives—Question as to, in suit for profits—Court must decide title or refer parties to Civil Court.*

When a person claims that he is the legal representative of the deceased and as such brings a suit for recovery of profits due to his share and the defendants deny his character of legal representative, the question of title must be decided by the Court or the parties must be referred to a Civil Court by a written order under S. 199 of the Act. (*Banerji, J.*) SYED MADAD ALI *v.* SHEIKH SHAMSHER ALI. 4 U. P. L. R. (A.) 9.

———S. 199—*Suit by alleged tenant against landlord—Jurisdiction of Revenue Court.*

S. 199 of the Act applies to the case of a suit brought against a person whom the plff. alleges to be his tenant and not to a case where the suit is brought by the alleged tenant against the alleged landlord. (*Richards, C. J. and Banerji, J.*) SURAJ KUAR *v.* CHET RAM. 41 All. 369=49 I. C. 591=17 A. L. J. 352.

———S. 199—*Ejectment suit—Lease set up by deft.—Declaration suit in Civil Court after expiry of time granted.*

The Revenue Court directed the defendant to institute a suit in the Civil Court within three months to establish his rights under a lease. The suit was instituted after the expiration of 3 months. *Held*, that a cloud being cast on the plaintiff's title under his lease, he was entitled to institute the present suit notwithstanding that the period prescribed in the order of the Revenue Court had

AGRA TENANCY ACT (II of 1910), S. 199.

expired. (*Richards, C. J. and Banerji, J.*) SURAJ MAL *v.* HIRA KUNWAR. 37 All. 94= 27 I. C. 511=13 A. L. J. 31.

———S. 199—*Plaintiff claiming to be occupancy tenant—Deft. claiming as* Khudkhast—*Jurisdiction—Appeal.*

If in a suit by a plff. claiming to be occupancy tenant to eject the deft. as his sub-tenant the latter claims to be a *Khudkhast*, the suit raises no question of proprietary title and no appeal lies from the decision by the Assistant Collector to the District Judge. (*Tudball and Piggott, JJ.*) UDIT TEWARI *v.* BALHARI PANDE.
35 All. 521=21 I. C. 460=11 A. L. J. 812.

———Ss. 199 and 201—*Civil or Revenue Court—Question between rival tenants.*

A suit to determine the right to an occupancy tenancy is maintainable in a Civil Court. (*Chamier, J.*) SHEO BHAROSE *v.* PANDOHI-AHIR.
18 I. C. 220 (A).

———S 199 (1)—*Decision under, on a question of title is* res judicata—*Effect of.*

The decision on a question of title under S. 199 of the Agra Tenancy Act has the force of a decision of a Civil Court and where such a decision has been arrived at by an Assistant Collector, Second Class, in the United Provinces, it will be *res judicata* when the same is attempted to be raised before an Assistant Collector, Fist Class. (*Daniels, J.*) AMIN-UD-DIN *v.* ABDUL SHAKOOR.
73 I. C. 460=1923 A. 556.

———S. 199, Cl. (1) (b)—*Decision of Revenue Court*—Res judicata.

S. 199 of the Agra Tenancy Act is confined to questions of title to land. Where a Revenue Court does not act under S. 199 (1) (b) of the Agra Tenancy Act, its decision does not operate as *res judicata*. 29 All. 160; 29 All. 601 Ref. (*Hussain and Chamier, JJ.*) TAUFIQUNNSSA *v.* TASKIN BANU. 15 I. C. 239 (A.).

———S. 199 Cl. (a)—*Order of Revenue Court whether constitutes reference to Civil Court.*

A suit instituted in consequence of an order of Revenue Court under S. 199. Cl. (a) of the Act is not a reference to the Civil Court inasmuch as the Civil Court has jurisdiction to declare the title of the plff. notwithstanding the order of the Revenue Court unless any matter is excluded from the cognizance of the Civil Court by the Act of the legislature. (*Richards, C. J. and Banerjee, J.*) MANNA *v.* RANGA LAL. 39 I. C. 859.

———S. 201—*Record of rights—Entry in—Presumption.*

Where notwithstanding the order of a competent authority the entries in the record of rights have not been corrected for over two years there is no presumption that the entries are correct. 33 A. 799 distinguished. (*Gokul Prasad, J.*) TIKA RAM *v.* DUBO SHIB LAL. 71 I. C. 992= 1923 A. 401 (1.).

———S. 201—*Suit for profits—Alteration in record—Duty of Court trying rent suit to give effect to entries in Revenue record as on the date of suit.*

AGRA TENANCY ACT (II of 1910), S. 201.

Where there has been an alteration in the Revenue record prior to the institution of the suit, but made during the period for which profits are claimed, the duty of the court trying a suit for profits must be to consider the order by which the alteration was made and give effect to the intention of the said order. If, for instance, a plff. was the recorded proprietor of an 8 annas share of a mahal during the first year in respect of which profits were claimed and it were shown that after the close of that year he had been recorded as proprietor of a 4 annas share only, upon a finding that he had transferred his interest in the remaining 4 annas share after the close of the first year in suit, then the duty of the Court should be to give effect to the entries year by year calculating the profits for each year on the basis of the record as it stood in respect of the said year in the revenue papers. When however it is clear upon an examination of the order passed by the Revenue Court, that the alteration made in respect of the extent of the plaintiff's share was intended to be a correction of a previous erroneous entry, and it was not passed upon any alleged transfer having occurred during the years covered by the suit then the Revenue Court is bound to give effect to the entries as it stood on the date of the institution of the suit. (*Piggott and Stuart, JJ.*) MUSSAMMAT MUBARAK FATIMA *v.* MAHOMED QULI KHAN. 20 A. L. J. 243=L. R. 3 A. 140= 44 All. 413=66 I. C. 125= 4 U. P. L. R. (A.) 188=1922 All. 102.

———S. 201—*Decision in question of proprietary title is* res judicata.

The decision on a question of proprietary title by a Revenue Court under Ss. 199 and 201 of the Agra Tenancy Act operates as *res judicata* and bars the trial of a subsequent suit in a Civil Court relating to the same proprietary right. (*Lindsay and Stuart, JJ.*) THAKUR HANWANT SINGH *v.* MT. JHAMOLA KUNWAR. 20 A. L. J. 340= 66 I. C. 915=1922 A. 95.

———S. 201—*Revenue Court—Suit for profits—Record of share in revenue papers—Binding nature of.*

To see the share of profits to which a party is entitled a Revenue Court must consider the evidence of the record in the revenue papers as the last word. It has also jurisdiction to enter on the issue whether a certain sharer holds *sir* or *khudkhast* in excess of his share. If he does he has to return his excess share to one who holds less. One who does not hold in excess of his share is not prevented from showing that he does not hold it in excess. (*Stuart, J.*) MSST. SUGHRA BIBI *v.* SHAH FAIYAZUL HASAN.
L. R. 3 A. 146.

———S. 201—*Suit for profits—Plff. not recorded co-sharer.*

The fact that a person is not recorded co-sharer of the property in dispute is not sufficient to prevent him from maintaining a suit for profits which have accrued due in respect of the property. (*Richards, C.J. and Banerji, J.*) JAIMAL SINGH *v.* SHIB SARAN SINGH. 45 I. C. 115=16 A. L. J. 504.

———S. 201—*Recorded co-sharer—Suit for profits—Title negatived in Civil Court,*

AGRA TENANCY ACT (II of 1910), S. 201.

A recorded co-sharer in a village was declared by a Civil Court to have no title as such and pending an application for correction of the Revenue records accordingly he sued for profits as a co-sharer. *Held*, that under the circumstances he could not take advantage of the presumption of S. 201 of the Agra Tenancy Act. (*Banerji and Rafique, JJ.*) HARGU LAL *v.* MED SINGH. 29 I. C. 509 (A.).

——S. 201—*Scope of entry in revenue papers—Presumption of correctness—Admissibility of entry in evidence.*

Entries in revenue papers especially those prepared at a settlement, are presumed to be correct; such entries are admissible in evidence in proof of title. S. 201 applies only to suits instituted under the provisions of Ch. XI of the Act. (*Piggott, J.*) SHYAM LAL *v.* KAKHNATH. 11 I. C. 426 (A.).

——S. 201—'*Shall presume*'—*Presumption unrebuttable—Revenue Courts bound by entries in Revenue records.*

(*Knox Diss.*) The words 'shall presume' in Section 201 of the Agra Tenancy Act import an irrebuttable presumption and therefore in a suit under Ch. XI by a recorded co-sharer, the Court is bound to assume the plff.'s proprietary title. 32 All. 427 overruled (*Richards, C. J., Knox, Bannerjee, Karamat Hussain, Tudball, Chamier and Piggott JJ.*) DURGA PRASAD *v.* KUAR HAJARI SINGH. 11 I. C. 116=33 All. 799=8 A. L. J. 1025 (F.B.).

——Ss. 201 (3) and 134—*Question of title—Decision of Civil Court pending appeal from a decree of Revenue Court—Duty of the latter.*

Where during the pendency of an appeal from a decree in a suit for profits under S. 164 of the Agra Tenancy Act, the defendant obtained a decree of the Civil Court that plaintiff had no title it is the duty of the appellate court to give effect to the decision of the Civil Court and dismiss the suit. (*Kyves and Gokul Prasad, JJ.*) SURJAN SINGH *v.* CHATURA KUNWAR. 44 A. 250=64 I. C. 964=20 A. L. J. 61=L. R. 3 A. 17=1922 A. 356.

——S. 201 (3)—*Presumption—Entries in Khewat—Suit for profits.*

In suits for profits brought by the plaintiff against his brother lambardar, the defendant pleaded that he and his brother were members of a joint Hindu family and that such a suit was not maintainable: *Held* the names of the parties to the suit being entered on a moiety share in each of the two mahals and having regard to the view taken of the S. 201 (3) of the Tenancy Act by the High Court the claim of the plaintiff, whose name was entered on a moiety of the property, ought to have been decreed. There is a presumption resulting in preventing persons from pleading that the family is a joint Hindu family, as against the entries in the khewat. 32 All. 779 Ref. (*Lindsay and Gokul Prasad, JJ.*) SHEO NARAIN *v.* BALA RAO. 44 All. 616=69 I. C. 208=9 O. & A. L. R. (H.) 150=1922 A. 332.

——S. 201 (3)—*C. P. Code, S. 11—Transfer of Property Act, S. 41—Scope of.*

A Mahomedan died leaving a widow and 2 sons; during the minority of the latter, the former

AGRA TENANCY ACT (II of 1910), S. 202.

though entitled to only $\frac{1}{8}$th share, got her name registered in respect of a third of the property, and mortgaged the same to M who subsequently purchased it in execution of a decree on the same mortgage. A suit by M against the sons for profits of the share purchased by him was decreed *ex parte*. *Held*, that a subsequent suit by the sons for a declaration of their right in respect of 5/24th share of the property sold by the widow is neither barred by *res judicata* nor by S. 41 of the T.P. Act. The sons are protected by S. 201 (3) of the Tenancy Act. (*Knox and Piggott, JJ.*) ABDULLAH KHAN *v.* BUNDI. 34 All. 22=11 I. C. 710=8 A. L. J. 1084.

——S. 202—*Lease by Lambardar—Suit for cancellation by co-sharer—Plea of valid lease.*

The lambardar of a village granted a perpetual lease to the defendant of 20 bighas of land. The plaintiff, a co-sharer, brought a suit in the Civil Court for the cancellation of this lease on the ground that it was beyond the powers of the lambardar to execute. The defendant pleaded that the lease was a good and valid lease. His contention was that not only was it within the powers of the lambardar but that it was executed with the consent of all the co-sharers. *Held* that this was in substance a plea that the defendant was the tenant of the whole proprietary body including the plaintiff and that under these circumstances the Trial Court should have under S. 202 of the Agra Tenancy Act directed the defendant to file a suit in the Revenue Court within 3 months to establish the tenancy which he set up. (*Lindsay and Daniels, JJ.*) KALI DIN *v.* RAMAPAT. L. R. 4 A. 167=73 I. C. 953=1923 A. 534.

——S. 202—*Suit in ejectment—Plea of tenancy—Power of Civil Court.*

Where a suit for ejectment from a certain plot of agricultural land on the ground that the defendant is a trespasser is brought in the Civil Court and the defendant pleads a tenancy it is incumbent on the Civil Court to refer the plaintiff to a Revenue Court under S. 202 of the Agra Tenancy Act. There is nothing in the section itself to require the Civil Court to decide that the claim to a tenancy is *bona fide* before applying S. 202. (*Daniels, J.*) JASRAM *v.* AMAR NATH. 71 I. C. 475 (1)=1923 A 439.

——S. 202—*Possession under invalid lease—Suit for ejectment of lessee lies in Civil Court.*

Where a defendant holds under a lease which is void *ab initio* his possession is that of a trespasser and if the plff. has not acknowledged the deft. as tenant, a suit for ejecting the latter lies in the Civil Court. A lease for collection of rent and Zemindari dues is not a lease granted for agricultural purposes and S. 202 of the Agra Tenancy Act does not apply to a suit to set aside the lease. (*Lindsay and Kanhaiya Lal, JJ.*) AMINA BIBI *v.* SAIYID YUSUF. 4 U. P. L. R. (A.) 209=20 A. L. J. 731=70 I. C. 968=44 A. 748=1922 All. 449.

——S. 202—*Applicability of—Suit in Civil Court for ejectment—Plea of sub-tenancy.*

AGRA TENANCY ACT (II of 1910), S. 202.

A suit was brought in a civil court for ejectment and the plea set up in defence was one of sub-tenancy. *Held*, on the pleadings S. 202 applied and the procedure laid down therein should be followed. (*Piggott and Walsh, JJ.*) SHEIKH MUHAMMAD YAKUB *v.* BECHU AHIR. 65 I. C. 251 = L. R. 3 All. 21.

———S. 202—*Applicability—Holding must be agricultural.*

In order that S. 202 of the Act may apply, it is not enough if the defendant claims that he is the tenant of the plaintiff but the holding must be agricultural also. (*Mears, C. J. and Banerji, J.*) RANI DHANDEI *v.* CHHOTU LAL. 64 I. C. 605 = 19 A. L. J. 890.

———S. 202—*Time granted for institution of suit in Revenue Court cannot be extended.*

When a defendant has been ordered in writing to institute within three months a suit in the Revenue Court for the determination of the question of tenancy and fails to institute such a suit within three months of the order, the Court must decide the question against him. The Court has no authority to extend time. (*Stuart, J.*) RUP NARAIN *v.* PARTAB PATHAK. 64 I. C. 491 (A.).

———S. 202—*Jurisdiction—Civil and Revenue Courts—Suit for ejectment—Trespasser—Civil Court—Plea of necessity.*

A suit to eject an alleged trespasser is cognisable by a Civil Court and not by a Revenue Court. If in such a suit deft. pleads he is a tenant the procedure laid down in S. 202 of the Act should be followed. (*Tudball and Ryves, JJ.*) RAGHUNATH *v.* GANESHI. 42 A. 222 = 54 I. C. 381 = 2 U. P. L. R. (H. C.) 79 = 18 A. L. J. 214.

———S. 202—*Suit in Civil Court as trespasser—Defence of tenancy—Suit referred to Revenue Court—Objection to jurisdiction—Appeal to Dt. Judge—Jurisdiction.*

Deft. being sued in the Civil Court in ejectment as a trespasser raised the plea that he was a tenant of the plff. The Civil Court referred the deft. to the Revenue Court under S. 203 of the Tenancy Act, and a suit was instituted by the deft. under S. 95 of the Tenancy Act for a declaration of the nature of the tenancy. An objection on the score of jurisdiction was overruled by the Revenue Court. The Revenue Court having made a decree, an appeal was preferred to the Dt. Judge. *Held*, that no appeal lay to him, an objection on the score of jurisdiction under the circumstances being absolutely untenable. (*Richards, C. J. and Banerjee, J.*) DEO NARAIN SINGH *v.* SITLA BAKSH SINGH. 40 All. 177 = 47 I. C. 891 = 16 A. L. J. 590.

———S. 202—*Suit in a Civil Court—Part relating to agricultural holding.*

S. 202 of the Tenancy Act must be applied to so much of a suit as relates to the agricultural holding. A suit against a servant, discharged from service, for articles in his possession is not one for agricultural holding though the servant sets up a tenancy. (*Piggott and Walsh, JJ.*) DHAN DEI *v.* CHOTU LAL. 39 All. 254 = 38 I. C. 828 = 15 A. L. J. 227.

AGRA TENANCY ACT (II of 1910), S. 202.

———S. 202—*Suit for occupancy holding—Suit for holding, a grove, in a Civil Court*—Res-judicata.

The decision of a Revenue Court in respect of a holding could not operate as *res judicata* in a Civil suit against the same defendant in respect of his possession of a grove, as the latter is not an 'agricultural holding' to be triable by the Revenue Court. S. 202 does not apply. (*Banerjee and Piggott, JJ.*) MIZAJI LAL *v.* HARI LAL. 34 I. C. 162 (A.).

———S. 202—*Groves.*

S. 202 of the Agra Tenancy Act is applicable only to agricultural holdings and not to groves. (*Rafique, J.*) NATHA MAL *v.* ROSHAN LALL. 30 I. C. 48 (A.).

———S. 202—*Ejectment—Defence of existing tenancy—Appeal—Time allowed to file suit in Revenue Court—No suit filed—Effect.*

In a suit to eject a tenant the Civil Court gave time to the deft. tenant to get a declaration of his alleged tenancy right in a Revenue Court under S. 202 of the Agra Tenancy Act. The deft. having failed to do so, the Civil Court thereupon decreed the suit. On appeal, the Judge held that the deft. was a tenant of the plffs. and dismissed the suit. *Held*, that the Judge was not competent to entertain the question. The deft. having pleaded that the land in question was his agricultural tenancy could not plead on appeal that it is not his tenancy. (*Piggott, J.*) NARAIN SARUP *v.* NANDA. 28 I. C. 568 = 13 A. L. J. 249.

———S. 202—*Ejectment—Dismissal by Revenue Court.*

Where a suit in ejectment was dismissed by the Revenue Court on the ground that the deft. was an occupancy tenant and the plff. thereupon instituted a suit for possession in a Civil Court on the ground that the decision of the Revenue Court was obtained by fraud. *Held*, that it was unnecessary for the Civil Court to refer the matter again to the Revenue Court. (*Tudball and Ryves, JJ.*) SARJU MISSIR *v.* BENDESRI PRASAD, 20 I. C. 917 = 11 A. L. J. 691.

———S. 202—*Scope of—Mortgage unregistered.*

In a suit for redemption of an unregistered mortgage for Rs. 100 S. 202 has no application. (*Griffin, J.*) GAURI RAM *v.* MANOHAR TELI. 17 I. C. 520 = 10 A. L. J. 513.

———S. 202—*Revenue Court's decision during pendency of civil suit.*

A decision of a Revenue Court establishing tenancy during the pendency of a civil suit in which tenancy is pleaded is binding on the Civil Court. (*Richards, C. J. and Banerjee, J.*) SHIAM LAL *v.* ANANT RAM. 17 I. C. 302 (A.).

———S. 202—*Deft.'s plea in a Civil Court that he is a tenant—Decision by Revenue Court against Deft.—If can be questioned again in Civil Court.*

The deft. in a civil suit for possession having raised the plea that he was a tenant, the suit was tried by a Revenue Court and the latter came to the conclusion that the deft. was not a tenant. *Held*, that the deft. could not again plead in a Civil Court that the Revenue Court was wrong in its decision. 33 All. 15 dist. (*Piggott, J.*) SURAJ GHULAM SINGH *v.* CHAB LAL SINGH. 14 I. C. 347 (A.).

AGREEMENT.

See (1) CONTRACT.
(2) CONTRACT ACT.

AGRICULTURAL.

Holding.

See (1) LANDLORD AND TENANT.
(2) LEASE.

Lease.

See (1) LANDLORD AND TENANT.
(2) LEASE.
(3) T. P. ACT, Ss. 107, 108, 116, 117.

Purposes.

See (1) LANDLORD AND TENANT.
(2) LEASE.
(3) LOCAL TENANCY ACTS.
(4) T. P. ACT, S. 117.

Tenant.

See (1) LANDLORD AND TENANT.
(2) LEASE.

AGRICULTURISTS LOANS ACT (XII of 1884).

———S. 5—*Claim arising out of Revenue does not lie in Civil Court—U. P. Land Revenue Act (III of 1901), S. 233 (m.)*

A claim arising out of the collection of a sum of money which is under S. 5 realizable as Revenue, is not cognizable by Civil Court by virtue of S. 233 (*m.*) (*Tudball, J.*) NIHAL CHAND *v.* KANHAI. 19 A. L. J. 360=62 I. C. 544=3 U. P. L. R. (All.) 66.

AHMEDABAD TALUKDARS ACT (VI of 1862).

———S. 6—*Applicability of Kasbatis.*

Kasbatis holding under patta in the nature of a lease are not governed by the Act. (*Lord Atkinson.*) SECRETARY OF STATE *v.* BAI RAJBAI, 39 Bom. 625=42 I. A. 229=19 C. W. N. 1087=13 A. L. J. 953=(1915) M. W. N. 563=29 M. L. J. 242=18 M. L. T. 179=2 L. W. 731=17 Bom. L. R. 730=30 I. C. 303=23 C. L. J. 1 (P. C.). [O. A. from 11 I. C. 948=13 Bom. L. R. 609].

AIR AND LIGHT.

See EASEMENTS ACT.

AJMERE MUNICIPALITIES REGULATION (III of 1877).

———Ss. 6 and 9—*Pre-emption—Right of, may arise even in the absence of sale deed.*

There is a right of pre-emption where the vendee pays the price and obtains possession of the property sold though no sale deed has been actually executed. The decision in 16 A. 344 is applicable to cases arising in Ajmere Merwara. (*Piggott and Walsh, JJ.*) RAM SUKH *v.* MRS. L. E. O'NEAL. 20 A. L. J. 59=65 I. C. 103=L. R. 3 A. 45=44 A. 239=1922 A. 46.

———Ss. 85 and 141—*Notice by plff.—No action by Municipal Committee within time—Suit—Maintainability of.*

On a notice by the plff. to the Municipal Board of Ajmere of his intention to re-erect his house no action was taken by the Board within the month provided by the law. The Board then served a notice upon him to stop building and to submit a fresh notice and a fresh plan. He stopped work and brought this suit for damages in the Civil Court. *Held*, that the Municipal Committee having failed to issue any directions within the month provided by the law had no authority to take action under S. 85. S. 141 of the Regulation did not oust the jurisdiction of the Civil Court where the Municipality was doing an act under cover of the Regulation which it had no right to do. (*Chamier and Piggott, JJ.*) MUNICIPAL COMMITTEE, AJMERE *v.* KIFAYAT ULLAH. 37 All. 220=28 I. C. 143=13 A. L. J. 291.

ALLEGATION.

See (1) C. P. CODE.
(2) PLEADINGS.
(3) PRACTICE.

ALIEN.

See ALIEN ENEMY.

ALIENATION.

See (1) CUSTOM—PUNJAB.
(2) HINDU LAW—ALIENATION.
(3) MAHOMEDAN LAW—ALIENATION.

ALIEN ENEMY.

See also C. P. CODE, S. 83.

———*Commercial Domicile.*

A neutral subject having a *commercial* domicile in an enemy country and with no intention of removing that domicile to a neutral country is an alien enemy. Authorities discussed. (*Macleod, C. J.*) THE KARADENIZ. 53 I. C. 372=21 Bom. L. R. 934.

———*Interest on debt.*

A debtor indebted to an alien enemy is not entitled to suspension of interest on his debt from the outbreak of hostilities to the date on which the enemy firm obtained a license to trade. (1918) A. C. 239 Ref. (*Scott, C. J. and Hayward, J.*) VALLI MOHAMED ABU *v.* BERTHELD REIF. 44 Bom. 1=52 I. C. 522=21 Bom. L. R. 785.

———*Commercial intercourse with enemies ordinance—(VI of 1914).*

Commercial intercourse with enemies ordinance is not retrospective. 'Destined' means intended for in the proclamation. The mica ship of the accused bound for Germany was sold in London beyond which she did not proceed owing to outbreak of war. Letters were exchanged before and after the Ordinance VI of 1914 between the accused and his agent but on the English firm's refusal to export mica, the mica was not sold to the German firm. *Held*, that goods did not acquire an enemy destination. The accused having shipped mica before and sold it after the declaration of the war and the enemy ordinance was held guilty. *Per Greaves, J., Contra*—Unless the accused has actually and in fact done one of the acts thereby forbidden he is not guilty. Goods must be in actual existence to constitute an offence.

Ordinarily a master not liable for wrongful acts of his agent. Per *Beachcroft, J.*:—Trading includes any 'commercial transaction, transfer of goods by purchase, sale, barter or exchange.

ALIEN ENEMY.

Goods need not be in physical possession of one of the parties. (*Woodroffe, Beachcroft and Greaves, JJ.*) INDRA CHAND *v.* EMPEROR.
19 C. W. N. 1239=33 I. C. 289=
17 Cr. L. J. 113=42 Cal. 1094.

———*Right to complain—Crime.*

An alien enemy residing in British India by license of the King can complain against crimes committed against his person or property and the High Court can entertain an application for revision at his instance. (*Kumaraswami Sastri, J.*) MELLOR *v.* MUTHIA CHETTY. 35 M. L. J. 518=
20 Cr. L. J. 101=48 I. C. 981=9 L. W. 113.

———*Permission to alien subjects to remain in British territory.*

Express or implied permission to remain in British territory granted to enemy subjects resident therein enable them to contract, such permission being presumed with regard to aliens who, not being ordered to remove themselves within a fixed period, remain in British territory, having been residing there already before the outbreak of war. (*Srinivasa Iyengar, J.*) WUTHRIK *v.* DAVID.
31 M. L. J. 860=(1917) M. W. N. 73=
37 I. C. 957=5 L. W. 275.

———*Test of—Domicile—Commercial domicile.*

When considering questions arising with an alien enemy it is not the nationality of a person but his place of business during the war that is important. (1916) 1 K. B. 284; (1915) 1 K. B. 857; (1902) A. C. 484 Ref. (*Hallifax, A. J. C.*) MOHANLAL *v.* BISHESHWARDAS DAGA.
70 I. C. 344=1923 Nag. 121 (2).

———*Trading with—Accepting bill of exchange.*

Accepting a bill of exchange drawn against goods coming from another country and payment of their price after proclamation forbidding any trade with that country are acts of trading with enemy. (*Fox, C. J.*) CAMA & Co. *v.* K. K. SHAH.
33 I. C. 96=9 Bur. L. T. 99.

ALIENS.

———*Military service—British protection.*

When by the crown are enlisted lawfully in its forces, aliens along with British subjects, and from them are required the same service, loyalty and allegiance, as are the duties of the British enlisted subjects, to them is also extended the same protection in a foreign country, where all are serving together in the armed forces of His Majesty. (*Lord Sumner.*) IBRAHIM *v.* EMPEROR.
18 C. W. N. 705=15 Cr. L. J. 326=
23 I. C. 678=1 L. W. 989 (P. C.).

ALIMONY.

See DIVORCE ACT, S. 36.

ALIYASANTHANA LAW.

See also MALABAR LAW.

———*Pattam properties in name of one member—Junior members of family are not entitled to any right therein—Conversion into family property is illegal.*

The Kulur Bidu Pattam is an office and its duties are defined and entails expenses out of the income derived from the land forming the emoluments of the office. A junior member of the family to which the holder of the pattam belongs cannot claim any interest in the pattam properties nor is he entitled to get maintenance out of the income of the properties. *Per Spencer, J.*:—An agreement or a settlement converting the *pattam* properties into family properties is illegal and is not valid even for the life-time of the settlor *pattam* holder. Nor is he estopped from repudiating the validity of the transaction. (*Sadasiva Iyer and Spencer, JJ.*) NAGA RAYA *v.* DEVE RAJA.
41 M. L. J. 340=14 L. W. 310=67 I. C. 84=
(1921) M. W. N. 626.

———*Succession—Nearest branch and not nearest relation succeeds.*

Under the Aliyasanthana Law the property of an individual member of the family goes on his death to all the members of the nearest branch and not merely to nearest individual relation or relations. 7 Mad. 575, expl. (*Sadasiva Iyer and Napier, JJ.*) NANJAPPA AJRI *v.* MARUDEV HENGUSU. 39 Mad. 12=32 I. C. 165=
30 M. L. J. 204.

———Ejaman—*Removal of—Grounds for—Alienation Charge.*

Where the conduct of the *Ejaman* is inconsistent with the interests of the family, he is liable to be dismissed. 34 Mad. 481 Foll. The portion of the consideration for an alienation by the *Ejaman*, found to be binding on the family, is a charge on the family property. (*White, C. J. and Seshagiri Aiyar, J.*) KUNHANA SHETTY *v.* TIMMAJU.
24 I. C. 246=27 M. L. J. 60.

———*Adoption of male—Bali of adopted son defferent from that of adoptee.*

Under the Aliyasanthana Law and Custom, males can be solely adopted; it is not necessary that the person adopted should belong to the same bali as the adopter, since the religious motive characteristic of adoption under Hindu Law is absent. (*White, C. J. and Tyabji, J.*) SECRETARY OF STATE *v.* SANTARAJI CHETTY *alias* BOJAPPARASA BINNANI. 25 M. L. J. 411=
14 M. L. T. 348=21 I. C. 432=
(1914) M. W. N. 333.

ALLAHABAD HIGH COURT RULES.

———R. 80—*Fee certificate.*

Rule 80 prescribes that the Court shall be satisfied that the fee is paid to the pleader at or before the commencement of the suit also as to the delivery to the *Munsarim of* a certificate signed by the legal practitioner certifying the amount of fee actually paid to him. The proviso merely empowers the Court to exercise a discretion as to whether or not it will accept a certificate presented after the commencement of the first hearing and does not admit of exercise of discretion as to allowance of fee not paid at the commencement of the suit. (*Stanley, C. J. and Banerji, J.*) BANK OF BENGAL, CAWNPORE *v.* KALKA DAS.
33 All. 374=9 I. C. 422=8 A. L. J. 109.

———Rr. 457 and 461—*Land Acquisition case—Pleader's fee.*

Proceedings under the Land Acquisition Act in the District Court are not suits for money or land

ALLAHABAD HIGH COURT RULES.

within Rule 457 of the High Court and a pleader's fee in such proceedings should be calculated according to Rule 461 of the Rules. (*Griffin and Chamier, JJ.*) KANHAIYA LAL *v.* SECRETARY OF STATE. 14 I. C. 214 (A.).

———Ch. IV, R. 9—*Suit for profits as Legal Representative of deceased person—Right denied—Duty of Court.*

Where a person sues in Revenue Court to recover profits due to certain deceased persons on the ground that he is their legal representative and his right is denied, the Court under S. 199 should decide the question of title as a Civil Court or refer the parties to a Civil Court by an order in writing. (*Banerji, J.*) SYED MADAD ALI *v.* SHEIKH SHAMSHER ALI.
63 I. C. 103 (All.)=4 U. P. L. R. (A.) 9.

———Ch. IV, R. 9—*Decree transferred to Collector for Execution—Jurisdiction, Civil Court.*

The Collector held a sale of property under a decree transferred to him for execution and accepted the highest bid but coming to know later on that the property is worth much more, proclaimed a resale on condition that the highest bid in the first sale would be accepted if no higher bid was made in the second sale. The auction-purchaser sued in the Civil Court against the proclamation of resale, *held*, that R. 9 barred the suit. (*Knox and Ryves, JJ.*) CHULHI *v.* BADRI. 62 I. C. 672=19 A. L. J. 232.

———Ch. XXI, R. 1—*Costs—Certificate of fees filed after decision cannot be accepted.*

Under Ch. XXI, R. 1 of the High Court Rules pleader's fees can only be allowed if the Judge is satisfied that it was paid before the commencement of the hearing and that a certificate of fees by the pleader was filed. The Court has no discretion to accept a certificate filed after the commencement of the hearing. (*Ryves and Gokul Prasad, JJ.*) MAGAN LAL *v.* MAHOMMAD ZIA-UD-DIN.
61 I. C. 804 (All).

———Ch. XXI, R. 1—*'Authorised'—Meaning of—Fees certificate—Affidavit by—Karinda.*

The word 'authorised' in Ch. XXI, R. 1 of General Rules for Subordinate Courts is redundant. If the legal practitioner admits the receipt and Karinda of the client admits payment of fees, the fee should be allowed under Ch. XXI, R. 1 of General Rules for Subordinate Courts. (*Richards, C. J. and Banerjee, J.*) GUDDAR MAL *v.* HET RAM.
41 All. 246=50 I. C. 87=17 A. L. J. 270.

———Ch. XXI, R. 1(1)—*Pleader's fee—Certificate.*

In view of Rule I, Cl. (1) of Chapter XXI certificates of fees must be tendered to the proper officer of the Court on or before the day first fixed for the hearing of the case, whether in fact on that day the case is reached or adjourned. (*Mears, C. J. and Piggott, J.*) RAM NATH *v.* HUB NATH. 18 A. L. J. 638=2 U. P. L. R. (A.) 234=57 I. C. 203=42 A. 542.

———Ch. XXI, Rr. 21 and 25—*Pleader's fee—Plaint returned for presentation to proper Court.*

Pleader's fee is to be calculated under R. 21 when a question of jurisdiction, being raised by the defts. was decided after contest and the plaint was returned to be filed in the proper Court.

ALLUVION AND DILUVION.

(*Tudball and Raoof, JJ.*) GAURI SAHAI *v.* A. C. BAHREE. 40 All. 515=45 I. C. 985=16 A. L. J. 426.

———Part II, R. 26—*Pleader—Carrying on family business.*

The carrying on of a long existing family business by a Vakil does not amount to entering into trade or business. Before a Vakil embarks on commercial transactions he should give notice and obtain the permission of the High Court. (*Banerjee and Piggott, JJ.*) RAM SARUP *v.* TIKA RAM. 17 A. L. J. 1147=52 I. C. 638=1 U. P. L. R. (H. C.) 139.

ALLOTMENT.

See (1) HINDU LAW.
(2) JOINT FAMILY—PARTITION.

ALLOWANCE TO BANKRUPT.

See INSOLVENCY ACT.

ALLUVIAL AND DILUVIAL LANDS.

See ALLUVION AND DILUVION.

ALLUVION AND DILUVION.

See also BENGAL ALLUVION AND DILUVION REGN. (XI OF 1825).

———"*Gradual, slow and imperceptible—Principles how for applicable in India.*

The principle of English law is that an accretion must be formed by gradual, slow and imperceptible degrees. The words "slow" and "imperceptible" are only qualifications of the word "gradual" and the test laid down is relative to the conditions to which it is applied. The actual rate of progress necessary to satisfy the rule when used in connection with English rivers is not necessarily the same when applied to the rivers of India on account of the different conditions in India and in England. (*Lord Carson.*) THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* RAJA OF VIZIANAGARAM. 45 Mad. 207=42 M. L. J. 589=26 C. W. N. 348=15 L. W. 389=20 A. L. J. 438=L. R. 3 P. C. 105=35 C. L. J. 463=30 M. L. T. 112=(1922) M. W. N. 381=67 I. C. 1=49 I. A. 67=1922 P. C. 105 (P. C.).

———*Public navigable river—Accretion—Submersion.*

The bed of a public navigable river is the property of the Government though the banks may be the subject of private ownership. If there be slow accretion to the land on either side due for instance, to the gradual accumulation of the silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made. If private property be submerged and subsequently again left bare by the water it belongs to the original owner. 13 M. I. A. 467, Ref. (*Lord Buckmaster.*) HARADAS ACHARYA CHAUDHURI *v.* THE SECRETARY OF STATE FOR INDIA.
22 M. L. T. 438=26 C. L. J. 590=(1918) M. W. N. 28=43 I. C. 361=20 Bom. L. R. 49 (P. C.).

———*Reformation of chur—Patni tenure—Right to chur—Accretion—Bengal Regulation XI of 1825, S. 4.*

ALLUVION AND DILUVION.

Lands washed away and afterwards reformed in *situ* are not lands gained by increment within S. 4 of Beng. Reg. XI of 1825 and could not be claimed as accretions either by the landlord or tenant. Where the diluviated lands form part of a permanent heritable and transferable tenure, until it could be established that the holder of the tenure had abandoned his right to the submerged lands, the tenure remains intact, and the tenure-holder by claiming or accepting remission of rent in respect of lands washed away from time to time by the action of the river, does not abandon his right to the lands when they reformed in *situ*: *Held*, that the *chur* so reformed formed part of the patni tenure and that the zemindar was not entitled to *khas* possession of them. 18 All. 290 approved. 4 Cal. 894, disappr. (*Ameer Ali*). ARUNCHANDRA SINGH *v.* KAMINI KUMAR.

41 Cal. 683=41 I. A. 32=18 C. W. N. 369=(1914) M. W. N. 175=15 M. L. T. 182=26 M. L. J. 251=12 A, L. J. 243=22 I. C. 317=19 C. L. J. 272=16 Bom. L. R. 323 (P. C.).

———*Submersion of land.*

Land belonging to the plff. which had submerged under a river reappeared on its old site and was sufficiently identified to be the plff's. land. It had not come out by gradual accretion nor by sudden cutting off by the action of the river, *held*, the plff. was entitled to the land and that S. 4 did not apply to the case. (*Stanley, C. J. and Banerji, J.*) BHAGWAN RAI *v.* GOPI RAI.

10 I. C. 311 (A.).

———*Reformation* in situ—*Need not be slow and imperceptible.*

If lands are reformations *in situ* the question whether the accretion was slow and imperceptible does not arise. (*Chatterjee and Pearson, JJ.*) NAZIR AHAMAD CHOWDHURY *v.* THE SECRETARY OF STATE FOR INDIA.

26 C. W. N. 913=35 C. L. J. 580=69 I. C. 74=1922 Cal. 337.

———*Suit by Government—Lands appertaining to defendant's estate—Want of title of Government—Cause of Action—Appellate stage—Declaratory decree—Act XXXI of 1858—Act IX of 1847.*

The Government sued to recover certain alluvial lands on the allegation that it was their property and was dispossessed by the defendants. It was proved that the deft. and not the Government had right to the lands as proprietor. The lands accreted in the deft's. estate, and the right of the Government to assess revenue upon them was declared long ago. The lands were converted into separate estates and temporary settlement in respect of them were made by the Government with the defts. *Held*, that as the Government could not claim these lands as proprietor and therefore the suit of the Govt. must fail both by reason of defect of title and from the absence of all causes of action, that the Court ought not in the appellate stage of the case, to change the entire form of the suit and to make a declaratory decree in favour of the Govt. so as to enable it to take hereafter the necessary steps for assessment and settlement if the Court should be of opinion that the lands appertained to the Govt.'s Estate.

ALLUVION AND DILUVION.

(*Norris and Prinsep, JJ.*) SARDA PRASAD *v.* SECRETARY OF STATE. **11 I. C. 718=14 C. L. J. 98.**

———*Submersion—Re-appearance of submerged land—Right of occupancy tenant and landlord.*

In a suit for declaration of occupancy rights it was alleged on behalf of the landlord (deft.), plff. had lost his right on account of submersion, according to custom of the district and then the suit was barred as mutation has taken place in favour of deft. From the *wajib-ul-arz* it was clear that the action of the river began in 1879 but the occupancy right dated from a prior date. *Held*, that the deft. had failed to establish a custom by which diluviated occupancy land on submersion becomes the property of the landlord. The alleged custom being propounded for the first time in 1879 was not ancient and could not have the force of law. The custom was *prima facie* inequitable as rights granted long before river action, could not be subject to rules obtaining in neighbouring villages and the suit was not barred by the reason of the mutation as the land though submerged was in the possession of the plaintiff until the defendant took possession of it on its re-appearance which took place a short time before the suit. (*Le Rossignol, J.*) MAHOMED YAR *v.* PIRAN. **37 P. R. 1917=41 I. C. 394=124 P. W. R. 1917.**

———*Customary due—Ala Malik—Custom—Wajib-ul-arz—Entry in.*

Where the entry in the Wajib-ul-arz is to the effect that if lands are washed away but subsequently reappear and are indefiable the original proprietors are entitled to recover the same on payment of certain fixed dues to the Ala Maliks. (*Raltigan, J.*) ISAR DAS *v.* GHULAM HAIDAR.

31 P. L. R. 1912=14 I. C. 799 (1)=118 P. W R. 1912.

———*Lankas—Right of adjoining proprietors—Crown.*

Per Burn, J.—Though the formation of lankas might have been greatly helped and accelerated by the artificial means employed and the operations carried on by the river conservancy staff of the Public Works Department they do not thereby lose their character of accretions belonging to the owners of the adjacent lands and the Government having entered upon them under statutory authority for the purpose of river conservancy only could not claim such accretion as its own property. (*Sadasiva Aiyar and Burn, JJ.*) THE SECRETARY OF STATE FOR INDIA *v.* VENKATANARASIMHA NAIDU.

27 M. L. T. 147=(1920) M. W. N. 209=58 I. C. 689=11 L. W. 256.

———*Accretion—Non-tidal and non-navigable rivers—Accretions—Right to—Common law of India—Submersion—Effect of.*

Accretions in non-tidal and non-navigable rivers in India belong to the riparian landlords. It is part of the Common Law of India that the ownership of riverbeds *usque admedium filum aque* is presumed to vest in the riparian owners. But the presumption is capable of being rebutted. 41 Mad. 840 and 42 Mad. 239 Ref. A person does not lose his title to land by its mere submersion under water so long as the land is identifiable. Non-resistance to *vis major* such as flood which causes

ALLUVION AND DILUVION.

the change of a river course, cannot be treated as evidence of acquiescence, or of abandonment of rights by a riparian owner. (*Spencer and Krishnan, JJ.*) OLAPPAMANANNA NANAKAL *v.* SECRETARY OF STATE FOR INDIA. 55 I.C. 770 (M.).

———*Law in India—English law—Applicability of.*

In adopting the law as to alluvion in India, the Courts should be guided by local and physical conditions. The principles of Bengal Regulation (XI of 182?) affords the best guide in applying the law of accretion to the case of large Indian views. Under that regulation, all that is necessary is that the accretion should be by gradual alluvial process and it need not be imperceptible nor slow. The fact that the original boundary is known or is ascertainable does not render the law of accretion inapplicable. There is no reason for giving the mud and sand deposited in large quantities in the bed of a river, which belongs to the Crown in trust for the public, to the adjoining owner simply because the deposit is also adherent to the adjoining land so long as such deposits are distinguishable from the adjoining land. The principle of identity is applicable only to derelict lands exposed by the sudden recession of the sea or change of river's course. Under Common Law, land formed by gradual imperceptible degrees is accretion. (*Ayling and Srinivasa Aiyangar, JJ.*) SECRETARY OF STATE *v.* RAJAH OF VIZIANAGARAM.
40 Mad. 1083=40 I. C. 896=22 M. L. T. 57.

———*River—Land adjoining that of a private owner.*

Where a strip of land in a river suddenly formed into an island and by subsequent drying up joined with the main land of the plff. the piece does not belong to the owner of the main land but to the Government. Accretions to private property must be gradual and imperceptible. The land belongs to the Government if it is sudden and perceptible. (*Ayling and Spencer, JJ.*) RAJA OF PITTAPURAM *v.* THE SECRETARY OF STATE FOR INDIA. 36 Mad. 57=12 I. C. 398=(1911) 2 M. W. N. 261.

———*Change in river course—Land washed away and placed adjoining another's land—Right to, remains with owner.*

The mere fact that a change in a river's course has placed land belonging to A in contiguity to the lands of B could never deprive A of the lands and transfer them to B. 27 C. 738, Rel. Whoever has land, wherever it is, whatever may be the accident to which it has been exposed, the ground remains the property of the owner. (*Simpson and Wazir Hasan, A. J. Cs.*) BALBHADDAR PRASAD *v.* NARAYAN DAS. 9 O. L. J. 518=73 I. C. 727=1923 O. 102.

———*Acceptance of remission—If amounts to abandonment—Intention.*

Where there is division the mere fact of non-payment of rent or claiming or accepting remission is not proof of abandonment and until abandonment is proved, the right to the lands remains un-impaired. The question is one of intention to be determined according to the circumstances of each case. (*Jwala Prasad and Ross, JJ.*) RAMNANDAN SAHEY *v.* JAIGOBIND PANDAY. 2 P. 839=75 I. C. 955=1924 P. 213.

ANCIENT LIGHTS.

———*Occupancy rights—Limitation.*

Occupancy rights in an alluvial accretion to a non-occupancy holding arise only by 12 years' continuous cultivation of that accretion. (*Baillie, S. M.*) GANESH *v.* SAHIB-UN-NISSA BIBI.
29 I. C. 37.

ALTERATION.

See (1) DEED.
(2) NEG. INSTR. ACT, S. 87.

ALTERATION OF LAW.

See (1) SPECIAL POWERS.
(2) STARE DECISIS.
(3) STATEMENT OF OBJECTS AND REASONS.
(4) STATUTORY POWER.
(5) SURPLUSAGE.
(6) TECHNICALITY.

ALTERNATIVE—Claims.

See (1) C. P. CODE, O. 6., PRACTICE.
(2) PLEADINGS.

Pleadings.

See (1) C. P. CODE, O. 6.
(2) PLEADINGS.
(3) PRACTICE.

Pleas.

See (1) C. P. CODE, O. 6.
(2) PLEADINGS.
(3) PRACTICE.

AMBIGUITY.

See (1) DEED—CONSTRUCTION OF.
(2) EVIDENCE ACT, S. 93.
(3) INTERPRETATION OF STATUTES.

AMBIGUOUS DOCUMENTS.

See AMBIGUITY.

AMENDMENT.

See (1) C. P. CODE, S. 151 and O. 6, RR. 17 and 18.
(2) DECREE.

Of Decree.

See C. P. CODE, SS. 151, 152 and 153.

Of Pleadings.

See (1) C. P. CODE, O. 6, R. 17.
(2) LIM. ACT, S. 13.
(3) PRACTICE.

ANCESTRAL PROPERTY.

See (1) CUSTOM—PUNJAB.
(2) HINDU LAW.

ANCIENT LIGHTS.

See (1) EASEMENTS.
(2) EASEMENTS ACT.

ANCIENT MONUMENTS PRESERVATION ACT (VII of 1914).

———S. 21—*Compensation—How determined.*

S. 21 of the Ancient Monuments Preservation Act, 1914, applies to the purchase of moveable antiquities or relics and the compensation which may have to be paid for incidental damages caused by the removal or protection of such objects of historic interest or art value. In ascertaining the market value of such moveable antiquities and the amount of compensation to be paid to adjacent owners for acts done under the Act, such acts being clearly indicated and by implication defined in S. 20, only the provisions of Land Acquisition Act enumerated in S. 20 are to guide the Court. (*Beaman and Heaton, JJ.*) VISNU *v.* THE DISTRICT DEPUTY COLLECTOR, KOLABA. 42 Bom. 100 = 43 I. C. 480 = 19 Bom. L. R. 937.

ANIMALS.

———*Property in—Wild animals.*

An animal *ferœ naturæ* may become the property of a person if there is a complete capture reducing the animal completely into possession. Mere pursuit will not do and so long as it is possible for it to escape it does not become any one's private property. Where a dog overtakes the animal and pulls it down that is not enough to reduce it to possession as it can escape even then. (*Piggott, J. C. and Lindsay, A. J. C.*) RAGHUNANDAN *v.* EMPEROR. 15 I. C. 972 = 13 Cr. L. J. 556 = 15 O. C. 183.

———*Ownership of—Test of.*

Nobody has any absolute property in animals which are *ferœ naturæ*. At best they are only capable of being the subject-matter of qualified ownership or proprietary right. A wild animal is the property of the person in whose forest it happens to be for the time being. So long as it is in the forest or on the land of such person he is entitled to take it and to kill it but when it chooses to quit his land and go into the land of another, then he ceases to have any property in it and such wild animal becomes the property of that other person upon whose land it chooses to make its temporary abode. (*Mullick and Atkinson, JJ.*) RAJA KISORE CHANDRA MARDARAJ *v.* RODHA GOBIND DAS. 49 I. C. 198 = 1918 Pat. 232.

———*Wild animals—Elephants—Property in—Capture—Escape—Effect of.*

When a wild animal, *e. g.*, an elephant has escaped from captivity and pursuit of it has been given up, the property which a man may have formerly had in it ceases and it becomes open to any one else to reduce the animal to his possession, and then it will, for the time become his property. An animal which has gone away and may be supposed to be likely to return to a state of captivity ceases to be a wild animal. 35 C. 413, Foll. (*Higginbotham, J.*) MAUNG YAUNG SHWE *v.* MAUNG SIN. 64 I. C. 831 = 11 L. B. R. 71.

ANIMUS POSSIDENDI.

See (1) ADVERSE POSSESSION.
(2) LIMITATION ACT, ARTS. 142 AND 144.

ANNUITY.

See (1) C. P. CODE, S. 60.
(2) HINDU LAW, MAINTENANCE,
(3) T. P. ACT, Ss. 6 and 100.

APPEAL.

ANOMALOUS MORTGAGE.

See T. P. ACT, Ss. 58, 98, ETC.

ANTECEDENT DEBT.

See (1) CUSTOM—PUNJAB.
(2) HINDU LAW—(1) ALIENATION, (2) DEBT, (3) JOINT FAMILY.

ANTICIPATION—Restraint on.

See HUSBAND AND WIFE.

ANTICIPATORY ATTACHMENT.

See ATTACHMENT.

ANTE-NUPTIAL AGREEMENT.

See CONTRACT ACT, Ss. 23 AND 25.

APOSTACY.

See (1) CASTE DISABILITIES REMOVAL ACT.
(2) HINDU LAW—(*a*) MARRIAGE, (*b*) SUCCESSION.
(3) MAHOMEDAN LAW.

APPEAL.

See also C. P. CODE, Ss. 96 TO 105, O. 41 AND O. 43, R. 1.

Amendment.
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See C. P. CODE, O. 22.

Additional Evidence.

See C. P. CODE, O. 41, R. 27.

Against Award.

See C. P. CODE, S. 104 AND SCH. II, PARA 16

Against dead Person.

See C. P. CODE, O. 22, R. 6.

Against preliminary Decree.

See C. P. CODE, S. 97.

Amendment.

———*Amendment of—If can be treated as one against decree of different date.*

An appeal against an order passed on one date cannot be treated as one against a decree passed on a different and prior date. (*Sadasiva Aiyar and Napier, JJ.*) SUBRAMANIA AIYAR *v.* VENKATARAMIER. 31 I. C. 4 (M.).

———*Amendment of plaint—Power of court—*Bona fide *mistake—Objection taken in trial court—Effect.*

Appellate Court can allow amendment where plff. has omitted to seek amendment in the trial court due to a *bona fide* mistake. (*Mullick and Bucknill, JJ.*) SHEOPAYAN RAI *v.* MAHARAJA BAHADUR KESHO PRASAD SINGH. 2 Pat. 919 = 1924 P. 310.

Competency.

———*Competency of—Declaratory decree—Impertinent intervenor.*

Where the Court below granted a decree for possession against three defts., an appeal by one of the defts. who admits that he has no title to the property is not sustainable. The appellant is an impertinent intervenor in the proceedings, after such admission. (*Sir John Edge.*) CHANDRIKA BAKSH SINGH *v.* BIKRAM SINGH. 38 All. 440=43 I. A. 179=20 C. W. N. 1149=20 M. L. T. 164=(1916) 2 M. W. N. 120=4 L. W. 288=31 M. L. J. 505=14 A.L.J. 1024=18 Bom. L. R. 846=24 C. L. J. 291=19 O. C. 141=35 I. C. 958=4 O. L. J. 4 (P.C.) [O. A. from 11 I. C. 676=14 O. C. 170.]

———*Competency—Offer by a party to be bound by the decision of the trial court—Offer not accepted by the opposite party.*

Even though the defendants in a suit offered to be bound by the decision of the trial court arrived at on inspection of the locality, their right of appeal is not affected when there is nothing to show that the plaintiff agreed to it. In such a case they are not estopped from questioning the correctness of the trial court. The case is different where there is an agreement of the parties agreeing to be bound by the decision of the trial court. 43 All. 266 referred to. (*Gokul Prasad, J.*) GHULAM HUSAIN *v.* GANESH LAL. 75 I. C. 619=1923 A. 373.

———*Competency of—Decree imposing conditions—Conditiions not complied with.*

Failure to comply with the conditions attached to the court's decree resulted in the dismissal of claims would not dis-entitle the appellant to appeal against the terms imposed by the court. (*Beachcroft, J.*) EPASAN ALI *v.* RAM KUMAR DE. 55 I. C. 375 (C.).

———*Competency of—Decree passed without urisdiction.*

Per Mookerjee, J.—A decree made without jurisdiction possesses nonetheless the qualities of a decree as between the parties thereto, and if there is a statutory appeal from decrees made in suits of that character the decree does not become unassailable because it has been made without jurisdiction; and where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction. (*Sanderson, C. J. and Mookerjee, J.*) GANGADHAR KARMAKAR *v.* SHEKHARBASINI DASYA. 20 C. W. N. 967=35 I. C. 348=24 C. L. J. 235.

———*Competency of—Appeal against an order fully carried out—No stay asked for—Appeal infructuous.*

An appeal against an order becomes infructuous if the order has already been fully carried out by the party in whose favour it was made, unless, before the filing of the appeal the objector-appellant has obtained a timely order for stay. (*Sanderson, C. J. and Woodroffe and Mookerjee, JJ.*) RAMESWARI CHAUDHURANI *v.* K. B. DUTT. 33 I. C. 685=23 C. L. J. 310.

———*Competency of—Order without jurisdiction.*

Where jurisdiction is usurped by a Court in passing an order, against which an appeal can be instituted if it had been passed with jurisdiction, an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction. 15 C. W. N. 725 Foll. (*Mookerjee and Carnduff, JJ.*) 16 C. L. J. 77=16 I. C. 940=17 C. W. N. 116.

———*Competency of—Review—Decree set aside in, during pendency of appeal.*

Where during the pendency of an appeal by one deft. the decree is set aside on review at the instance of another deft. the decree ceases to exist and the appeal cannot therefore be heard. (*Smith and Broadway, JJ.*) BASHESHSWAR NATH *v.* RAM KRISHNA DAS. 54 I. C. 966=140 P. R. 1919 (L.).

———*Competency of—Redemption decree—Redemption money not paid as per order of Lower Court—Effect.*

An appeal from a redemption decree may be heard though the redemption money has not been deposited as ordered by the Lower Court. 161 P. R. 1890 appr.; 23 All. 88; 31 All. 328; 23 Mad. 521 dist. (*Shadi Lal and Le Rossignol, JJ.*) THAKUR DAS *v.* RADHAKISHEN. 37 I. C. 125=99 P. R. 1916 (L.).

———*Competency—Agreement by parties to be bound by the decisions of a Court on local inspection does not exclude right of appeal.*

Where the parties to a suit agreed to the matter being decided by the Court according to the opinion which it may entertain upon a local inspection without going into any further evidence in the suit such an agreement does not preclude any party from appealing against any decree that the Court may pass after such local inspection, excepting on the points of fact decided by the Court on its local inspection.

It is only in cases where an agreement between the parties results in the Court assuming jurisdiction which otherwise it would not have or involves the Court in going so far outside its ordinary course of procedure that it is impossible for the Appellate Court properly to review its decision, that parties are not entitled to appeal against the decision of that Court.

The right of appeal is a very important right and the Court will not imply a term to give up that right unless it is driven to that conclusion.

The right of appeal will not be taken away when the parties agreed to mere deviations from the ordinary procedure of Courts. L. R. 5 P. C. 516; (1896) A.C. 133 followed. 26 Mad. 76; 37 M.L. J. 100 dissented from. (*Schwabe. C. J. and Wallace, J.*) SANKARANARAYANA PILLAI *v.* RAMASWAMI PILLAI. 44 M. L. J. 258=17 L. W. 303=72 I. C. 149=(1923) M. W. N. 154=1923 Mad. 444.

———*Competency—Decree for joint possession—One of the plaintiffs not made respondent—Bringing him on record after the death of another—Appeal is not maintainable.*

APPEAL—Competency.

The defendants appealed against a decree for joint possession in favour of five plaintiffs to High Court but only four plaintiffs had been made respondents, *Held*, the appeal could not be heard because the decree was one for joint possession so that even if the appeal were successful it would be infructuous because the plaintiff who was not made a respondent would still be able to execute the decree. Where after the death of one of the respondents the plaintiff, who had been omitted from the category of respondents was, after the period of limitation, substituted in his place. *Held* the appeal could not be maintained. 19 C. W. N. 290 Foll. (*Coutts and Das, JJ.*) TEJ NARAIN SAHU *v.* DAL RAMSAHU. 1 P. 699=4 P.L.T. 170=69 I. C. 624=1922 P. 606.

In Conversion to Revision.

See (1) C. P. CODE, S. 115.
(2) PRACTICE.

Effect.

———*Effect of—Original decree.*

The mere filing of an appeal is not operative to suspend or interrupt the operation of original decree, until reversal by the Appellate Court. (*Sir Lawrence Jenkins.*) HUKUMCHAND BOID *v.* PIRTHI CHAND LAL CHOUDHURY.
46 Cal. 670=17 A. L. J. 514=36 M.L.J. 557=23 C. W. N. 721=21 Bom. L. R. 632=(1919) M. W. N. 258=30 C. L. J. 71=26 M. L. T. 131=50 I. C. 444=10 L. W. 416 (P.C.).

———*Effect on—Lower Court's power of review.*

An Appellate Court cannot direct the Lower Court to review its decree, when it is merged in the Appellate decree. (*Mookerjee and Beachcroft, JJ.*) ASITA MOHAN GHOSE *v.* SHAH HABIBUR RASUL.
22 I. C. 801=19 C. L. J. 9.

Evidence.

———*Evidence—Stamp duty on document—Later validation of a document.*

Plff. should be given an opportunity of getting a document validated by the Collector and if no such opportunity be given and the document validated after the decision of the first Court be rejected the plaintiff has a good ground for appeal. (*Stanyon and Skinner, A. J. Cs.*) TUKARAM *v.* SOMAJI. 10 I. C. 702=7 N. L. R. 26.

Forum.

———*Forum—Jurisdiction of Court—Amendment of plaint.*

For purposes of appeal the value of the subject-matter shall be deemed to be the value put upon it on amendment. (*Mears, C. J. and Banerjee, J.*) ABDUR RASHID *v.* QUDRATUNISSA BIBI.
57 I. C. 134=18 A. L. J. 741=2 U. P. L. R. (A.) 316

———*Forum—Suit filed in Subordinate Judge's Court but heard by Munsiff—Appeal to Subordinate Court.*

Where a suit was first filed in the Court of the Subordinate Judge but was subsequently transferred to the Court of the Munsif who tried and decided it, the Subordinate Judge from whose file it was transferred to that of the Munsiff is competent to hear the appeal therefrom, especially when the suit was never tried by the Subordinate Judge. (*Richards, C. J. and Banerjee, J.*) WILAYAT ALI KHAN *v.* GHANI KHAN.
27 I. C. 874=13 A. L. J. 290.

APPEAL—Forum.

———*Forum—Transfer of territory to Foreign State.*

An appeal from a conviction for an offence committed within the family domains of Maharaja of Benares was made to the Sessions Judge at Mirzapore who heard it on the 31st March, 1911, and ordered a re-trial on 3rd April, 1911. The Benares State came into existence on the 1st April, 1911, and the place of offence was transferred to that State. On a reference, the High Court held that the order was perfectly valid. (*Tudball, J.*) EMPEROR *v.* SAHEB DIN.
12 Cr. L. J. 470=11 I. C. 1006=8 A. L. J. 705.

———*Forum—Jurisdiction—Suit for specific performance—Prayer for cancellation of bond.*

An appeal lies against decree in a suit for specific performance of a contract of sale, even if the plaintiff asks for an incidental relief such as cancellation of the bond, to the District Judge provided the value of the main claim is within his cognizance. (*Richards, C. J. and Banerjee, J.*) NITYANAND *v.* BISHANLAL. 33 All. 634=11 I. C. 934=8 A. L. J. 660.

———*Forum—Suit for declaration—Declaration and injunction in respect of other properties—Appeal to High Court.*

A suit brought in the Court of the First Class Subordinate Judge of Belgaum covered two subjects; property in the custody of the Collector, of the value of more than Rs. 5,000 and property in the plff.'s possession of the value of less than Rs. 5,000. Plff. asked for a bare declaration as to the former; as to the latter he asked for a declaration with consequential relief valued at Rs. 5. The property in suit was outside the ordinary territorial jurisdiction of the Subordinate Judge but was within his special jurisdiction. The Subordinate Judge tried the suit under his special jurisdiction by which he was empowered to hear suits exceeding Rs. 5,000 in value: *Held*, that the value of the suit exceeded Rs. 5,000, that the case was within the special jurisdiction of the Sub-Judge and that, therefore, an appeal from his decree was open to the High Court and not to the District-Court (*Chandavarkar, A. C. J. and Batchelor, J.*) SHIDAPPA *v.* RAHCAPPA.
36 Bom. 628=16 I. C. 1005=14 Bom. L. R. 747.

———*Forum—Execution proceedings—Suit for more than 5,000 Rupees.*

Where a decree is passed by the High Court on a first appeal in a suit valued at more than Rs. 5,000 an appeal from an order in execution of such a decree lies to the High Court and not to the District Court and if the appeal is heard and decided by the District Judge the High Court will on second appeal set aside the order of the Dt. Judge and direct the appeal to be presented to itself. 16 C. L. J 77 Ref. (*Mookerjee and Panton, JJ.*) KUMUDINI RAY *v.* KAMALA KANTO SEN.
35 C. L. J. 106=68 I. C. 575=1922 Cal. 247.

APPEAL—Forum.

———*Forum—Execution of decree for over Rs. 5,000—Appeal from order.*

An appeal from an order in execution of a decree for over Rs. 5,000 lies to the High Court. (*Le Rossignol, J.*) MOHIB-UD-DIN *v.* PARTAB MAL.

86 P. W. R. 1918=85 P. L. R. 1918=
46 I. C. 584=44 P R 1919 (L.).

———*Forum—Appeal heard by a Judge who tried the case partly—Decision not invalid.*

A Judge heard an appeal in a case, which he had himself tried partly, but the judgment was passed by another Judge. The decision in appeal is not invalid as there is no statutory disqualification to that effect. (*Sadasiva Aiyar and Spencer, JJ.*) VENKATAPATHI NAYANIVARU *v.* MOHOMED SAHIB. 30 I. C. 430=38 Mad. 531.

———*Forum—Suit for accounts—Valuation—Jurisdiction.*

The value of a suit for accounts both for original trial and for appeal is the value stated in the plaint by the plff. and the Court in such a suit does not lose its jurisdiction because the amount found due on enquiry exceeds the jurisdiction of the Court. (*Batten and Stanyon, A. J. Cs.*). OLPHERTS *v.* ARJUNDAS.

20 I. C. 928=9 N. L. R. 112.

Judgment.

———*Judgment—Contents.*

The original court among a number of suits for enhancement enquired into the evidence and the details of each suit or their collection individually. The Court of appeal did not do so while reversing the judgmeat. *Held* that the judgment is improper. (*Das and Kulwant Sahay, JJ.*) NAND LAL CHAUBE *v.* KESHO PRASAD SINGH.

1923 Pat. 339=1924 P. 245.

New Case.

See PRACTICE.

New Plea.

———*New plea—If can be allowed.*

An appellant should not be allowed to put forward for the first time in appeal a plea not taken in the trial court, and which therefore the respondent had no opportunity to contradict. (*Mookerjee and Chotzner, JJ.*) BHUBANMOHINI DASI *v.* KUMUDCALA DASI. 28 C. W. N. 131=
39 C. L. J. 140=1924 Cal. 467.

———*New plea—Plea of adverse possession if can be raised for the first time.*

Where a plea of adverse possession though referred to in the pleadings is not fought out in the Courts below. It is not allowable for the first time in second appeal. (*Chatterjee and Cuming, JJ.*) ANIL KUMAR BISWAS *v.* RASH MOHAN SAHA. 28 C. W. N. 46=
1924 Cal. 245.

———*New plea of jurisdiction—Facts not in dispute.*

A question of jurisdiction which depends on no disputed facts can be raised for the first time in appeal. (*Mookerjee and Rankin, JJ.*) RAJENDRA NARAIN CHOWDHURY *v.* SATISH CHANDRA CHOWDHURY. 50 Cal. 948=1924 Cal. 233.

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———*New plea—Limitation—Plea of, cannot be raised for the first time.*

A plea of special limitation under Sch. III Art. 2 to the Bengal Tenancy Act cannot be raised for the first time in appeal. (*Ghose, J.*) SHEIKH HAJI SADAKALI KHAN *v.* JAKIANATH SINGH ROY.

69 I. C. 194.

———*New plea—Evidence—Objection to admission cannot for the first time be raised in appeal.*

A defendant could not, in appeal, for the first time object to the admission of a document by the lower court on the ground that the plaintiff did not list it with the plaint. (*Drake-Brockman, J. C.*) LAHANU *v.* MOTIRAM.

63 I. C. 968 (Nag.)

———*New plea cannot be raised for the first time.*

Where an objection to the validity of a notice was taken for the first time in appeal, *Held* that the failure to take the objection in the trial court amounts to a waiver and cannot be allowed to be raised for the first time in appeal. 18 B. 110. Dist.; 19 Ch. Div. 419, Ref. (*Robinson, C. J. and Macgregor, J.*) THE PUNJAB MOTOR CO. *v.* SHAIK JUMAN. 70 I. C. 834=1 Bur. L. J. 87=
1923 R. 13.

Order as to costs.

———*Costs—No appeal unless question of principle involved.*

An appeal raising a question of costs only, where no question of principle is involved, is incompetent. (*Fletcher and Cuming, JJ.*) UMESH CHANDRA DUTT *v.* BIBHUTI BHUSHAN PAL CHOWDHURY. 56 I. C. 334=47 Cal. 67.

[See also 21 C. W. N. 339 and 44 I. C. 690.]

Question of fact.

———*Question of fact—Witness—Opinion as to.*

In an appeal on a pure question of fact sufficient weight should be given to the opinion of trial judge as regards the demeanour, intelligence, position and character of the witnesses who are brought before him. He is in a better position to form a judgment on the points than the appellate judge who has no advantage of seeing the witnesses. (*Lord Wrenbury*) BANU BAI FRAMJI COMMISSARIAT *v.* MANILAL JUGALDAS. 45 M.L.J. 242=
(1923) M. W. N. 580=18 L. W. 148=
L. R. 4 P. C. 147=1923 P. C. 62 (P. C.)

Right of.

———*Right of—None unless given expressly by statute.*

There is no right of appeal unless specifically given by statute. (*Lord Macnaughten.*) RANGOON BOTATOWNG CO. LTD. *v.* COLLECTOR, RANGOON.

40 Cal. 21=39 I. A. 197=
16 C. W. N. 961=12 M. L. T. 195=
(1912) M. W. N. 781=16 C. L. J. 245=
23 M. L. J. 276=14 Bom. L. R. 833=
10 A. L. J. 271=5 Bur. L. T. 205=
16 I. C. 188=6 L. B. R. 150 (P. C.)

———*Right of—Order of Court to be taken as it stands.*

The right of appeal does not depend on what the Court ought to have done but on what it actually did. Where what it actually did was to pass a decree on the merits though the appellant

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did not appear against such a decree the law allows an appeal. When the appeal comes up for decision the appellate court has then to decide whether the order passed was the proper order and one which the Court below had jurisdiction to pass. If it decides this question in the negative, it will set the order aside. (*Ryves and Daniels, JJ.*) NASIK KHAN *v.* ITWARI. 21 A. L. J. 667 = 74 I. C. 905 = L. R. 5 A. 26 = 45 A. 669 = 9 O. & A. L. R. 645 = 1924 All. 144.

———*Right of—Decree—Duty of Court to draw up—Pratice, right to.*

It being the duty of a Court to draw up a decree in pursuance of a judgment, a party is not required to ask a Court to do so, and an omission by him in that respect will not give rise to any inference adverse to his right of appeal. (*Heaton and Shah, JJ.*) KALURAM *v.* GANGARAM.
38 Bom. 331 = 23 I. C. 605 = 16 Bom L. R. 67.

———*Right to—Transferee can appeal against decree against transferor.*

The transferee of a tenancy interest can maintain an appeal against a decree passed against his transferor, when the legality of his purchase has been questioned. (*Mookerjee and Chotzner, JJ.*) RAGHUPATHI CHATTERJEE *v.* NRISINGHA HARI DAS.
36 C. L. J. 491 = 71 I. C. 1 = 1923 Cal. 90.

———*Right of—Party dismissed from record—Prejudice.*

A suit was brought for recovery of compensation for short delivery of goods against A and B. The suit was dismissed with costs. On a petition being filed by the plff. in the lower court to make C, a party deft. in place of B, B was ordered to be removed from the record and the suit was remanded for trial *de novo*. B was given costs in the primary court, but no cost was awarded to him in the lower Appellate Court. B appealed to the High Court: *Held*, that B was competent to question the propriety of the order by way of appeal even though he is not competent to question the propriety of the order so far as it directed C to be made a party, as the order of the lower Appellate Court was to deprive him of the costs allowed by the first Court. (*Mookerjee and Panton, JJ.*) AGENT, B. N. W. RAILWAY CO. *v.* JAGANNATH AGARWALLA. 66 I. C. 903 = 34 C. L. J. 475.

———*Right to—Statute.*

No Court can entertain an appeal which it is not expressly authorised by law to hear. (*Mookerjee and Beachcroft, JJ.*) BANDIRAM MOOKERJEE *v.* POORNA CHANDRA ROY. 45 Cal. 926 = 43 I. C. 758 = 27 C. L. J. 115.

———*Right of—Person not adversely affected by the decree has none.*

A stakeholder who is not personally interested in the subject of the suit has no right of appeal from the decree passed therein in favour of one of the contending parties. (*Le Rossignol and Campbell, JJ.*) THE ALLAHABAD BANK, LTD. *v.* LENA MACDONALD OF DELHI. 67 I. C. 868 (L.).

———*Right to—Suit to establish right to property and sold in execution of decree—Sale of property by plff.*

Where a person sues for a declaration that a certain vacant site is not liable to attachment and

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sale in execution of a decree she is not disentitled from appealing by the mere fact of the decree-holder having parted with her interest in the property by the sale in favour of the auction purchaser. The decree-holder was aggrieved by the decision which rendered the sale effected at her instance and in execution of her decree liable to be set aside. The decree-holder would be liable to make good the purchase-money to the auction-purchaser and in order to avoid this possibility she was fully entitled to appeal from the decree of the first Court. (*Rattigan, C. J.*) RUPA *v.* UTTARAM SINGH. 2 Lah. L. J. 158.

———*Right of—Persons not parties.*

An appeal is a stage in and part of the proceedings in a suit and therefore no person can appeal unless he is a party to the suit. (*Chevis and Scottsmith, JJ.*) RUSTONJI *v.* THE OFFICIAL LIQUIDATOR OF THE PEOPLE'S AND AMRITSAR BANKS, LTD. 79 P. R. 1919 = 49 I. C. 381 = 12 P. W. R. 1919 (L.).

———*Right of—Ex-parte decree.*

A defendant can impugn an *ex-parte* decree even in appeal where he has not moved the Court under O. 9, R. 13. (*Oldfield and Devadoss, JJ.*) BAVA LEVVAI SAHIB *v.* AMMEENAMMAL.
45 M. L. J. 805 = 1924 M. 107.

———*Right to—Statutory provision for.*

A party has an inherent right to institute a suit though he may not have that right to a particular forum. But the right of appeal is a creature of the statute and there is no right of appeal, unless it is conferred on the party. (*Ayling and Seshagiri Iyer, JJ.*) MADHAVA IYER *v.* MUTHIA CHETTIAR.
5 L. W. 168 = 38 I. C. 818 = 21 M. L. T. 77.

———*Right of—No inherent right.*

There is no right of appeal unless created by statute. (*Sadasiva Aiyar and Spencer, JJ.*) MAHARAJAH OF JEYPORE *v.* HARI KRISHNA PATRO.
32 I. C. 226 = 29 M. L. J. 730.

———*Right to.*

A party who is not adversely affected in any way by the decision in the suit or by any finding necessarily implied therein cannot appeal. (*Ayling and Spencer, JJ.*) SECRETARY OF STATE *v.* SAMINATHA GOUNDAN. 37 Mad. 25 = 21 M. L. J. 947 = 10 M. L. T. 291 = 12 I. C. 167 = (1911) 2 M. W. N. 303.

———*Right of—Party aggrieved.*

A person has a right of appeal only when he is affected by it though not passed against him. (*Dalal, A. J. C.*) RAJA SURAJ BAKSH SINGH *v.* MUNNU LAL. 10 O. L. J. 229 = 9 O. & A. L. R. 577 = 1924 O. 52.

———*Right to be given by statute.*

No right of appeal exists unless given by the statute. (*Stuart, A. J. C.*) SUNDER LAL *v.* MOHAMMAD FAIQ. 18 I. C. 122 = 16 O. C. 36.

———*Right to prefer—Stranger.*

Where a person was no party to the suit, nor the decree was passed against him, he has no right to appeal from the decree, though his name was brought on record after the passing of the decree on the ground that he was the real owner

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of the property in dispute. (*Miller, C. J. and Coutts, J.*) GOVIND RAM *v.* BADRI NARAIN.
1 P. L. T. 159=55 I. C. 881=5 P. L. J. 256 (P.).

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———*Test of—Appealability of order depends upon the substance of the order.*

It is the substance and not the form of the order that should be kept in view in order to determine whether an order is appealable or not. (*Sadasiva Aiyar and Coutts-Trotter, JJ.*) KANDOTH PUTHIYADATH CHENGARU CHANDU *v.* PUTHIYADATH CHENGARA RAMAN NAIR.
(1921) M. W. N. 390=63 I. C. 961=
14 L. W. 15.

———*Test for.*

In deciding whether an appeal is competent the substance of the order and not the provision of law quoted by Court should be looked at. 31 Cal. 737 Foll. (*Benson and Sundara Iyer, JJ.*) SADMALAPALLI MANGAYYA *v.* SAMALAPALLI SRIRAMULU.
13 M. L. T. 347=24 M. L. J. 477=
19 I. C. 448=(1913) M. W. N. 382.

APPELLATE COURT.

See APPEAL.

APPELLATE ORDER.

See (1) APPEAL.
(2) C. P. CODE, O. 41.

APPLICATION.

See (1) C. P. CODE.
(2) PRACTICE.

APPOINTED DAUGHTER.

See HINDU LAW.

APPOINTMENT.

See WILL.

APPORTIONMENT.

See (1) LEASE.
(2) MORTGAGE.
(3) T. P. ACT.

APPROPRIATION.

See (1) ACCOUNTS.
(2) CONTRACT ACT, S. 60.

ARBITRATION.

See ARBITRATION ACT.
Also C. P. CODE, SCH. II.

———*Award—Validity of—Error of law apparent on the face of the record—Clause of reference—Interpretation of.*

The question whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of reference and is to be decided by the court. An arbitrator is constituted the sole and final judge of all questions of law and fact referred to him and the only exceptions are cases where there is corruption, fraud, or an error of law apparent on the face of the award. In the latter case the award must have been based upon some erroneous legal proposition. *Hodkinson* v. *Fernie*, 3 C. B. N. S. 189; *British Westinghouse Co.* v. *Underground Electric Railways & Co.*, (1912) A. C. 673 foll. (*Lord Dunedin.*)

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CHAMPSEY BHARA & Co. *v.* THE JIVRAJ BALLOO SPINNING & WEAVING CO. LTD.
47 Bom. 578=44 M. L. J. 706=
25 Bom. L. R. 588=38 C. L. J. 130=
(1923) M. W. N. 596=33 M. L. T. (P. C.) 419=
73 I. C. 436=50 I. A. 324=L. R. 4 P. C. 99=
1923 P. C. 66 (P. C.).

———*English Law—Action on award—No objection on ground of irregularity can be raised.*

The Indian law as to arbitration is irrelevant where the parties agreed in referring to an arbitration to be bound by English law and procedure and under that law an objection to the award on the ground of irregularity cannot be pleaded in answer to an action on the award. Such an objection must be taken by a motion to set aside or remit the award. An action upon the judgment recovered on an award of an arbitration cannot be maintained if the judgment had been entered in default of appearance and the action had not been tried upon its merits. (*Viscount Cave.*) L. OPPENHEIM AND CO. *v.* MAHOMED HANEEF.
45 M. 496=26 C. W. N. 642=16 L. W. 33=
30 M. L. T. (P. C.) 291=4 U. P. L. R. (P. C.) 36=
(1922) M. W. N. 396=43 M. L. J. 422=
24 Bom. L. R. 1245=74 I. C. 616=
L. R. 3 P. C. 185=49 I. A. 174=
36 C. L. J. 444=1922 P. C. 120 (P. C.).

———*Award—Application for filing—Correction of mistakes—Execution proceedings.*

The decision of the arbitrators is final. If there is on the face of the award, a patent inconsistency such as a flat contradiction in measurement, or a mistake of arithmetical calculation, it is open to the Court to which application is made for filing the award on a patent error of that sort being pointed out, to send the award back to the arbitrators to correct it before a decree is passed in accordance with it. But anything of this kind cannot be done in execution proceedings. (*Walsh and Kanhaiya Lal, JJ.*) HAR PRASAD *v.* RAGHUBAR DAYAL. 21 A. L. J. 541=L. R. 4 A. 553=
74 I. C. 817=45 A. 628=1924 A. 62.

———*Agreement to refer—Subsequent suit on contract is not maintainable.*

Plffs. brought a suit to recover a certain sum of money alleged to be due in respect of a contract which was entered into on 12-9-1918 for the delivery by 18-11-1918 of a bale of dhoties at a certain rate. The date fixed for payment was 27-11-1918. The goods were delivered to the defendant on the date in question but the price therefor was not paid on the due date. After this latter date, inasmuch as there had been much speculation in this class of goods, a committee of the cloth merchants of Jhansi assembled and brought out a plan by which claims for breach of contract of delivery of those goods or for failure to pay the price due in respect of these goods were to be settled. The plaintiffs and the defendant submitted to what might be called the award of the arbitrators and agreed that the claim which the plaintiffs had against the defendant should be settled on this basis. The plaintiffs subsequently sued on the basis of the old contract for damages. *Held* that the suit was

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not maintainable. (*Lindsay and Daniels, JJ.*) RAM NATH *v.* MANNU LAL.
45 A. 472=21 A. L. J. 380=L. R. 4. A. 216=72 I. C. 615=1923 A. 518.

———*Reference—Not signed by party but by son and pleader and ratified by party, is valid.*

The arbitration award in a case, in which the reference was not signed by the party himself but by his son and his pleader, and the party subsequently appeared in the proceedings, is valid and binding, the party having by his appearance ratified the act of his son and his pleader. (*Walsh and Kanhaiya Lal, JJ.*) PARBHU LAL *v.* FIRM SHEO DIAL MAL RAM SARAN DAS.
L. R. 4 A. 472.

———*Abortive award if prevents fresh reference—Court's power to decide if there was a valid contract.*

According to a contract between the parties all disputes were to be referred to arbitration, one arbitrator to be appointed by each party within a certain time. Disputes having arisen the vendors appointed an arbitrator and gave notice to the vendees to do the same. The latter refused and an award was made, which however was set aside by Court, as it was completed within the period of time allowed to the other side to nominate an arbitrator. The vendors again referred the matter to a fresh arbitration and on an application being made to enforce it, the other party objected that the prior reference having proved ineffective, the arbitration clause had spent itself. *Held*, the fact that the prior proceedings had proved ineffectual, did not stand in the way of a proper arbitration proceeding. Per *Walsh, J.*—Questions of fact and law upon which the jurisdiction of the arbitrators depends are for the Courts. (*Piggott and Walsh, JJ.*) SASHIL CHANDRA DAS *v.* SAKHAMAL BANSIDHAR.
20 A. L. J. 377=L. R. 3 A. 277=44 All. 472=67 I. C. 487=4 U. P. L. R. (A.) 69=1922 All. 219.

———*Legal flaw—Party securing flaw, cannot take advantage of it.*

General principles of law must be applied to arbitration matters as to all others. The failure of an arbitrator to sign the award is a legal flaw, but when his refusal to sign was at the instance of one of the parties though he had agreed to the award, that party cannot take advantage of the flaw. (*Walsh and Stuart, JJ.*) RAM SUNDER TEWARI *v.* MT. KULWANTI. 20 A. L. J. 392=L. R. 3 A. 299=66 I. C. 499=1922 All. 233 (b.).

———*Agreement making it obligatory to refer claims within a fixed time—Failure to do so bars any relief—Court, when can consider—Validity of award.*

Where parties had contracted to refer all disputes to arbitration, and also not to recognise any claim or dispute that had not been made in writing in 60 days, the failure to do the latter disentitled the party in default to any relief from the arbitrators. When a Court is asked to file an award, it is not sitting as aCourt of appeal from the arbitrators; but the Court can certainly decide if

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the award sought to be filed is the production of a tribunal duly constituted under the terms of a contract binding on both parties. Per *Walsh, J.*—An arbitrator cannot give himself jurisdiction by arriving at a conclusion when there is no evidence to support it or when the parties had contracted themselves out of all reliefs under certain circumstances. (*Piggott and Walsh. JJ.*) KEDAR NATH MOTI LAL *v.* SUKHAMAL BANSIDHAR. 44 A. 481=20 A. L. J. 385=L. R. 3 A. 289=66 I.C. 691=4 U. P. L. R. (A.) 64.

———*Notice not given—Award is illegal.*

An award given in the absence of one of the parties and without any notice as to the time or the place where the arbitrators would sit to decide the dispute, is illegal. (*Scott-Smith and Abdul Qadir, JJ.*) RAJA RAM PUNAM CHAND *v.* JOGAL KISHORE RAM RICHPAL.
65 I. C. 577=L. R. 3 A. 81.

———*Award beyond reference but with consent of parties is valid—Arithmetical error does not vitiate award.*

In distributing the assets of a joint family business, an arbitrator recorded a finding that those assets were subject to a liability in favour of a third person, apparently with the full consent of the parties and that portion of the award was separable from the rest. *Held*, that the award is not open to any valid objection on the ground of the arbitrators having determined a matter not covered by the agreement of reference. An award is not invalid within the meaning of paragraph 15 (l) (C) of Schedule II of the Civil Procedure Code because it contains a palpable arithmetical mistake. (*Piggott and Walsh, JJ.*) SHYAM LAL *v.* PURSHOTTAM DASS. 18 A.L.J. 241=2 U.P.L.R. (A) 104=58 I.C. 585 (2)=42 A. 277.

———*Award as to division of testator's property is not invalid by reason of the pendency of probate proceedings.*

Disputes as regards the division of a testator's property were referred to arbitration without the intervention of the Court when proceedings for obtaining a probate of the will were pending. The arbitrators made an award giving each of the parties certain portions of the estate and on that award being filed in court a decree was passed thereon. On a question arising as to the validity of the award. *Held* that the arbitrators did not in any way oust the juriisdiction of the Court in which the probate proceedings were pending and that the award and decree thereon were perfectly valid. There was nothing whatever to prevent the parties going to arbitration with regard to the division of the estate, leaving the Court to decide whether or not probate should be granted of the will. That was a question entirely outside the functions of the arbitrators, while the actual questions regarding the division of properties in dispute between the parties could be properly referred to them. The test would be to consider what would have happened if the parties had waited until porbate had been issued to refer to arbitration the question how the properties of the deceased should be divided. It could not possibly be said then that the submission to arbitration would be illegal. The mere fact that it was

entered upon before the probate proceedings had come to an end cannot possibly affect the question of its legality. (*Macleod, C. J. and Crump, J.*) SHANKAR RAMCHANDRA *v.* RAMCHANDRA ANNAJI.
25 Bom. L. R. 437=
73 I. C. 415=1923 Bom. 365.

———*Appointment of fresh arbitrators—Effect.*

An application to court to appoint fresh arbitrators amounts to an abandonment of the previous proceedings. (*Macleod, C. J. and Coyajee, J.*) KHIMCHAND NAROTHAMDAS *v.* BHOGILAL HIRACHAND SHAH.
46 B. 854=67 I. C. 913=
24 Bom. L. R. 361=1922 B. 436.

———*Award—Validity of*—Ex-parte *procedure of arbitrators—Prejudice—Interest on amount found due.*

Arbitrators should give notice of their intention to proceed *ex-parte* if one of the parties should not appear. Where the arbitrators are alleged to have proceeded *ex-parte* without giving special notice of their intention to do so and the award is attacked on that ground the true test is, has the complainant who has taken exception to the validity of the award been in fact, prejudiced by the omission of the arbitrators to serve the special notice on him? If it is established that notwithstanding such warning, he would not have appeared before the arbitrators, he has really no grievance and cannot invite the Court to set aside the award on the ground of the alleged defect in procedure. Arbitrators do not exceed their authority when they allow interest after the date of the award. The arbitrators have authority to make a decree for such damages as might have been ascertained by the Court. (*Mookerjee and Fletcher, JJ.*) BHOWANIDAS RAMGOBIND *v.* HARSUK DAS BALKISHEN DAS.
27 C. W. N. 933=1924 Cal. 524.

———*Award is valid until set aside.*

As between the parties and their privies an award is entitled to that respect which is due to the decision of a Court of last resort. The award is in fact a final adjudication by the Court of the party's own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an award which is, on the face of it regular is binding. If an award is valid, it is operative, even though neither party has sought to enforce it by a regular suit or by the summary procedure. (*Mukerjee and Chotzner, JJ.*) BAIDYANATH CHOTTOPADYA *v.* PANCHANENI DASSEE. 28 C. W. N. 140=
72 I. C. 128=37 C. L. J. 542=
1924 Cal. 72.

———*Award—Contract— Arbirtation clause—Reference lo arbitration before commencement of suit —Effect.*

Where an action has been commenced upon a contract which contains a provision for reference to arbitration then even if a reference to arbitration has taken place before the suit is instituted and if no application is made to stay the suit pending the arbitration, the award is of no effect. The law will not enforce the specific performance of an agreement to refer to arbitration but

if duly appealed to, it has the power, in its discretion, to refuse to a party the alternative of having the dispute settled by a Court of law and thus to leave him in the position of having no other remedy than to proceed by arbitration. If the Court has refused to stay an action or if the defendant do so not ask it to do so, the Court has seisin of the dispute and it is by its decision alone, that the rights of the parties are settled. It follows that in the latter case, the private tribunal, if it has ever come into existence, is *functus officio* unless the parties agree *de novo* that the dispute shall be tried by arbitration, and that the action itself shall be referred. There cannot be two tribunals each with jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. This is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted. (*Mookerjee and Fletcher, JJ.*) RAM PRASAD SURAJMULL *v.* MOHAN LAL LUCHMINARAIN.
38 C. L. J. 67.

———*Institution of suit makes arbitrators* functus officio

As soon as a suit is instituted the arbitration lose their authority. If the defendant still desires that the controversy should be decided by arbitration, he must obtain a stay of the suit by an appropriate application under para 18 of the 2nd Sch. of Civil Pro. Code. If the arbitrators have made an award after the institution of the suit the award is not valid one. (*Mookerji and Chotzner, JJ.*) SARAT CHANDRA *v.* RAJAKUMAR.
26 C. W. N. 967=69 I. C. 863=
35 C. L. J. 482=1923 Cal. 135 (2).

———*Decree on award—Fresh suit on same cause of action does not lie.*

A decree under S. 526 of the old C. P. Code has the same effect as regards execution as a decree under S. 522. Consequently a decree upon an award stands precisely in the same position with regard to its execution as any other decree of court. A fresh suit does not lie on the same cause of action, 21 W. R. 248 foll. (*Woodroffe and Ghose, JJ.*) LALIT MOHAN MOITRA *v.* RAJA SISI SEKHARESWAR.
70 I. C. 300=1922 Cal. 73.

———*Award—When to be remitted—Arbitrator, powers of.*

An arbitrator has a wide discretion in the conduct of the proceedings. His award will not be set aside merely because his opinion differs from that of the Court. But where there are irregularities which affect the decision, it will be remitted to him for a fresh decision. In arbitration proceedings, both sides have to be heard in the presence of the other. An arbitrator should not examine a party or his witness in the absence of the other and failure so to do, is an irregularity which necessitates the remitting back of the proceedings to him for fresh consideration. (*Mookerjee and Fletcher, JJ.*) HARI SINGH *v.* KANKINARAH & CO., LTD.
66 I. C. 389=
34 C. L. J. 39.

———*Award—Grounds not exclusively within the jurisdiction of arbitrators—Award is void.*

Where an award, by arbitrators are based on grounds, some which did not justify the exercise

of their jurisdiction, and the Court cannot hold with certainty that the arbitrators were exclusively within their jurisdiction, the award is null and void. (*Mookerjee, C. J. and Fletcher, J.*) HURMUKHROY *v.* JAPAN COTTON CO.,
66 I. C. 342=34 C. L. J. 253.

———*Reference implies dispute.*

The existence of a "dispute" is essential to the validity of a reference to arbitration under the terms of a contract. A dispute involved the assertion of a right by one party and its denial by the other. Where the parties do not reach that stage and the vendors merely refuse to comply with the request of the buyer prior to the sale regarding incidental matters, there is no "dispute" within the meaning of the arbitration clause in the contract. (*Mookerjee and Fletcher, JJ.*) CHANDMULL GONESHMULL *v.* NIPPON MUNKWA KARBUSHIKI. 64 I. C. 798=33 C. L. J. 545.

———*Clause in contract for—Award in the absence of, is illegal.*

A contracted to purchase 30 bales of cloth from a firm B; the contract contained a clause as to arbitration. A then sold the same bales to C under a contract as follows:—We sold the goods as were bought by us of B, *Bhatta* (allowance), chafage, all terms according to *Bahar* (importing firms, godown dues according to *Bazaar* interest, cooly hire, according to *Bhitor*,) (*Bazar*). A then sued C in respect of 27 bales, on the ground that C wrongly refused to take delivery and referred the matter as regards the remaining 3 bales to arbitration and got an award in his favour. C then applied to cancel the award. His application was refused; he then challenged the validity of the award. *Held*, that the arbitration clause contained in the contract between A & B, was not incorporated in the contract between A & C, and so the award was without jurisdiction, and that his reference as regards the remaining 3 bales only was invalid supposing that the arbitration clause was so incorporated. (*Mookerjee and Fletcher, JJ.*) CHATURBHUJ CHUNDUNMALL *v.* BASDEO DAS DAGA.
47 Cal. 799=33 C. L. J. 145=60 I. C. 909=
25 C. W. N. 928.

———*Agreement to refer to—Arbitrators can decide what are the terms of contract.*

Where a contract *viz.*, an Advice Note—provided that disputes arising on or out of the contract should be referred to arbitration under the Rules of the Bengal Chamber of Commerce for decision, the Arbitrators, can, on a submission made to them, decide what the terms of the contract are and whether or not a particular term was included in the contract when originally made. (*Greaves, J.*) BAIJNATH KALOORAM AND ALIBHOY MAHOMED, *in the matter of an arbitration between.* 59 I. C. 439=24 C. W. N. 567.

———*Award not in accordance with terms of reference—Decree on, is binding, if void*—Res judicata.

A decree on an award which is not strictly in accordance with the terms of reference, is not thereby void for want of jurisdiction and the decree will operate as *res judicata* in a subsequent suit on the same cause of action.

(*Newbould, J.*) SIBNATH SAHA *v.* MOHESH CHANDRA SAHA. 59 I. C. 89 (2) (Cal.)

———*Stay of—Contract impeached for fraud and misrepresentation.*

An arbitration proceeding is to be stayed when a plff. impeaches a contract on equitable grounds. 23 C. W. N. 534 foll. (*Sanderson, C. J. and Fletcher, J.*) G. M. BIRLA & Co. *v.* JOHURMULL PREMSUKH. 55 I. C. 817=31 C. L. J. 158.

———*Dispute—Existence of—Withholding payment as of right—Whether dispute.*

Where arbitration is demanded it is essential that there shall be existing a dispute between the parties. Withholding of payment under claim to do so by a party signifies a 'dispute' between the parties. (*Rankin, J.*) UTTEAM CHAND SALIGRAM *v.* MAHMOOD JEWA MAMOOJI.
46 Cal. 534=54 I. C. 285=
23 C. W. N. 704.

———*Decree on award—No appeal lies on the ground of misconduct of arbitrator.*

No appeal lies against the decree passed in accordance with an award, on the ground that arbitrator was guilty of misconduct or failed to carry out certain things while performing his duty. (*Harington and Carnduff, JJ.*) RAM BHAJAN PANDAY *v.* UDIT PANDAY.
19 I. C. 405 (Cal.).

———*Bengal Chamber of Commerce—Rules of—Strict compliance, necessary.*

Under the rules of the Bengal Chamber of Commerce which are strict the umpire must be nominated before the arbitrators enter upon the reference; but where the arbitrators have agreed upon their award and there is no necessity for the intervention of an umpire, the omission to nominate an umpire would not render the award invalid. According to those rules, the names of the arbitrators should not ordinarily be given out. The arbitrators should first expressly permit the parties to appear before them and before this permission the parties should not appear nor even ask for permission. (*Chitty, J.*) BOMBAY CO., LTD. *v.* NATIONAL JUTE MILLS CO., LTD. 16 I. C. 153=39 Cal. 669.

———*Judge as arbitrator—Decision final—No appeal.*

A decision of a Judge as an arbitrator with the consent of the parties is binding on the parties as if it were an award of an arbitrator, even though the Judge, as such, had no jurisdiction over the matter in controversy. But this doctrine cannot apply where the Judge was chosen as arbitrator not voluntarily but under great judicial pressure. (*Mookerjee and Carnduff, JJ.*) SUBHADRA KOER *v.* DHAJADHARI GOSSAIN.
15 C. L. J. 142=13 I. C. 898=
16 C. W. N. 444.

———*Reference as per clause in contract—Parties are bound by award.*

The contract in question was in writing and contained a clause providing that any claim or dispute of any sort whatever in connection therewith, unless an amicable settlement could be arrived at, must be referred to arbitration.

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Upon a claim being made for non-delivery of a portion of the goods contracted for, the defendants referred the matter to arbitration under provisions of this clause. The plaintiffs, however, refused to attend the arbitration, and alleged as their reason for such refusal that arbitrators are invariably a prejudiced tribunal and that such proceedings are always subject to much delay. The arbitration, thereupon, proceeded in the absence of the plaintiffs and ultimately an award was made dismissing the claim. In a suit by the plaintiffs for damages. *Held* that in the events which have happened the arbitration clause in question was clearly applicable. The parties had, by agreement, selected their own tribunal and must be bound by its decision unless it can be impeached upon any of the well-known grounds upon which such a decision can be challenged. (*Scott—Smith and Fforde, JJ.*) FIRM OF GHAMANDI LAL *v.* CHURANJI LAL.

4 Lah. 168=5 Lah. L. J. 146=73 I. C. 459=1923 Lah. 453.

———*Provision for decision of other matter.*

An agreement to refer to arbitration is not bad merely for the reason that it included disputes other than that before the Court, if there was a distinct clause to the effect that the arbitrators would only report to the court their decision on the subject-matter of the suit. (*Broadway, J.*) MANSA RAM *v.* KARTA RAM. **76 I. C. 1007=1923 Lah. 411.**

———*Decision beyond terms—Objections disallowed by Court—Revision.*

Plaintiff filed a suit against the defendant for recovery of land in the Court of a Munsiff who referred the matter to an arbitrator. The arbitrator decreed the claim in favour of the plaintiff in his capacity as a trustee of the temple. The plaintiff objected on the ground that the arbitrator had travelled beyond the terms of the reference. The Munsiff overruled the objection. *Held*, as the Munsiff had jurisdiction to decide the objections, the High Court has no power to interfere, even if the Munsiff has come to a wrong conclusion on a question of law or fact if he cannot be said to have acted illegally or with material irregularity. (*Abdul Raoof, J.*) SHEO NATH *v.* BEG RAJ.

73 I. C. 558=1923 Lah. 194 (1).

———*Cancellation of reference by Original Court—Appellate Court cannot look into reference.*

Where the court below had cancelled the reference to arbitration on account of the delay in making the award, it is not competent to the appellate court to look into the award or treat it as if it were the report of a commissioner. (*Chevis, A. C. J.*) ARUR CHAND *v.* AHMAD.

4 Lah. L. J. 48=1922 Lah. 194 (2).

———*Legality and binding nature of award—Opportunity to prove case to be given to the parties.*

Before a party can be held bound by an award it must be shown that it was a valid award and that all the requirements of the law with respect to the appointment of an arbitrator and with regard to the actual reference to arbitration had been duly fulfilled. The proceedings of the arbitrators must also be above board, and it must be shown that the arbitrator had given full opportunities to both parties to appear and represent their case to him. (*Broadway and Moti Sagar, JJ.*) FIRM OF MANSA RAM GORDHAN DAS *v.* FIRM OF MANGAL SAIN DUNI CHAND.

65 I. C. 497=1922 Lah. 149.

———*Decision of arbitrator on broad principles cannot be impeached.*

Where a dispute relating to joint family property is referred to an arbitrator who has special knowledge of the circumstances of the family, without any stipulation that he should decide according to any custom if Hindu Law, his decision on broad principles, cannot be impeached as arising from any misconduct. (*Chevis and Scott-Smith, JJ.*) DWARKA DAS *v.* KISHAN KISHORE. **2 Lah. 114=61 I. C. 628=3 Lah. L. J. 349.**

———*Award Independent compromise deed signed by arbitrators is not an award.*

An application to file in Court, a deed drawn in the form of a compromise, settling the differences independently of arbitrators, after their appointment, and signed by the parties and the arbitrators, cannot be granted inasmuch as such a deed does not amount to an award. (*Scott-Smith, J.*) KISHEN NARAIN *v.* PURAN CHAND.

48 P. L. R. 1915=28 I. C. 298=238 P. W. R. 1915.

———*Award—Legality of—Ministerial act—Notice to parties—Necessity for—Statement of arbitrators as to what transpires before them—Conclusiveness of.*

In case the parties are at variance on the question as to what took place before the arbitrators, the proper course is to take the statement of the arbitrators as to the facts as *prima facie* representing the true state of affairs as to what took place at the time of the enquiry unless there is very strong reason for doubting the accuracy of the statement of the arbitrators as regards the facts which took place before them and within their competence. Where an act judicial in its character is to be performed, the arbitrators are bound by the same rules as bind the courts. The arbitrators are not entitled to decide or to give their award in the absence of one or more parties to the arbitration and without notice to them. But when an act done is not of a judicial nature but merely ministerial in character it is competent to one of the arbitrators or all the arbitrators to have the act performed in the absence of one or more parties. On an application to set aside an award on the ground of misconduct on the part of the arbitrators the facts found were that both the parties did not turn up together, the petitioner turned up and the arbitrators asked him to state his case and file his documents and he gave a written statement stating what his case was and filed such documents as he had in his possession. While he was doing this the counter-petitioner turned up and the arbitrators sent for him, asked the petitioner to remain outside, and took from the counter-petitioner a written statement setting out his case and received his exhibits,

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Then the arbitrators having gone through these statements and exhibits called in both the parties and began the enquiry. *Held*, that the acts performed by the arbitrators before the enquiry were ministerial in character and that the absence of one of the parties at the time did not nullify the award of the arbitrators. (*Kumaraswami Sastri, J.*) *In the matter of the* ARBITRATION ACT.
17 L. W. 648=75 I. C. 850=1924 Mad. 274.

———*Misconduct of Arbitrator.*

An award passed on reference by a guardian, when the arbitrator acted upon information received in the absence of parties or on his own knowledge of facts, is vitiated by legal misconduct and would therefore be invalid. Ordinarily, an award based on information received in the absence of the parties or on the arbitrator's own knowledge of the facts in regard to the matters in issue between the parties would be invalid. But parties who are *sui juris* may agree to a reference that the arbitrator shall decide the dispute on his own knowledge or that there is no need for him to take any evidence; and they will be bound by such a reference and no legal misconduct can be imputed to the arbitrator, if he based his award on such materials. 42 A. 185 followed. (*Spencer and Venkatasubba Rao, JJ.*) CHINTALAPUDI SANYASI *v.* CHINTALAPUDI VENKATARAO.
44 M. L. J. 263=73 I. C. 470=
32 M. L. T. (H C.) 32=(1923) M. W. N. 7=
17 L. W. 71=1923 Mad. 301.

———*Time for filing award cannot be extended by arbitrators themselves—Arbitration Act, S. 12..*

An award is bad if arbitrators extend, having no power to do so, the time for passing of the award, when once the time for the award has expired, because under S. 12 of the Arbitration Act, the Court alone has got the power for extending the time even though the award has been completed. (*Schwabe, C. J. and Wallace, J.*) LOUIS DREYFUS CO. *v.* RAJAGOPALA AIYAR.
16 L. W. 657=70 I. C. 353=
1923 Mad. 222.

———*Award—Arbitrator getting private information—Communication to other arbitrators—Effect—Revision.*

Where a private information got by an arbitrator was, in the presence of the parties communicated to the other arbitrators, an award by them is not invalid. Courts proceed very warily in allowing revision in awards. (*Odgers, J.*) SHEIK MOHIDIN SAHEB *v.* RAMASAMI CHETTI.
14 L. W. 394=65 I. C. 676=
41 M. L. J. 276=(1921) M. W. N. 509.

———*Reference to Judge—Award—Appeal.*

A reference of a suit to the presiding Judge must be held to be altogether *extra cur sum curial.* and not the less so, when two others are joined with him. The decree passed in accordance with their decision is a consent decree, and is not subject to the provisions of the second schedule. (*Wallis, C. J. and Seshagiri Iyer, J.*) CHINNA VENKATASAMI NAICKEN *v.* VENKATASAMI NAICKEN.
36 M. L. J. 291=25 M. L. T. 397=
(1919) M. W. N. 221=51 I. C. 827=42 Mad. 625.
[Also 37 M L.J. 100=52 I.C. 569 also 26 I.C. 355].

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———*Reference—Petition to Court to act as arbitrator.*

An application to the Court to act as an arbitrator is not an application to make a reference. The award of the Court is a decree and no objections can be raised except by way of appeal. (*Sadasiva Iyer, J.*) *In re* NIMNAGADDA PEDDA NAGANNA.
26 I. C. 355 (M.).

———*Reference to contents of.*

Only matters in dispute between the parties to a litigation which affect private rights can be referred to arbitration. (*Kotwal, A. J. C.*) GANOBA *v.* NARAYAN.
6 N. L J. 7=72 I. C. 1016=
1923 Nag. 112.

———*Reference—Construction of.*

A reference to arbitration with regard to old debts whether due under mortgage bonds or other deeds does not cover a lease or usufructuary mortgage the consideration for which is old debts. (*Mitra, Offg. A. J. C.*) RAM DAYAL *v.* MOTI RAM.
24 I. C. 863=10 N. L. R. 74.

———*Powers of arbitrator—Partition—Provision for maintenance can be made.*

If the arbitrators have authority to make a partition, they have authority to determine everything incidental or consequential with reference to the mode in which the partition is to be effected and the rights of the female members of the family cannot be disregarded. Where in an award, provision for the maintenance of the female ladies of the family was made with the consent of the parties, it is not open to them to resile from the arrangement to which they had agreed when the award was made. (*Kanhaiya Lal, J. C.*) MURLI DHAR *v.* MOOLCHAND.
10 O. L. J. 226=
9 O. & A. L. R. 875=73 I. C. 39 (2)=
1924 Oudh 54.

———*Arbitrators not acting together—Award not legal.*

An agreement of reference to arbitration provided for the settlement of disputes by 4 arbitrators and an umpire acting together. There was no provision that in case of difference of opinion amongst the arbirators, the opinion of the majority was to prevail. All the 5 arbitrators entered into the reference but the award made was signed by only 4 of them. The 5th man did not sign because he did not concur in the award. *Held* that the award, as filed, was invalid. On a reference to several arbitrators together when there is no clause provided for an award made by less than all being valid, each of them must act personally in performance of the duties of his office, as if he were the sole arbitrator; for as the office is joint, if one refuse or omit to act, the others can make no award. (*Kanhaiya Lal, J. C.*) NAND KISHORE *v.* KISHORI LAL.
10 O. L. J. 29=9 O. & A. L. R. 545=
74 I. C. 299=26 O. C. 350=1923 Oudh 181

———*Decision of majority only is invalid.*

Where a reference to arbitration by four named persons without the intervention of Court, provides for a decision by all the arbitrators and not merely by a majority of them, the refusal of any of the arbitrators to take part in the arbitration, invalidates the award. The submission to

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arbitration no longer remains in force and cannot be pleaded as a bar to a suit with reference to the subject-matter of the arbitration. (*Daniels, J., C.*) LACHMAN PRASAD *v.* PRAN NATH.
8 O. L. J. 585=65 I. C. 339=1922 Oudh 108.

———*Award—Misapprehension of rights—Effect.*

The principles under which the validity of an arbitration should be judged, are more rigid than those which apply to a case of family agreement. Where the parties to it were under a misapprehension as to their legal position and right, the award is bad. (*Bucknill and Ross, JJ.*) RAM BAHADUR SEN *v.* GANESH BHAGAT.
2 Pat. 554=73 I. C. 542=1924 P. 49.

———*Award—Validity of—Parties to reference—Subject-matter—Parties interested in—Award—Partly valid—Enforcement of.*

Where there were a number of matters in difference between the plaintiffs and the various defendants to the suit, it can hardly be suggested that the submission to arbitration is bad on the ground that it does not refer to arbitration all the matters that may be in dispute between the parties. Sch. II, para 1, C. P. Code, in terms provides that where all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may apply to the Court for a reference, and sub-cl. (2) provides that the application shall state the matter sought to be referred. It may well be that some of the parties are interested in certain of the matters in dispute only, whilst others are interested in other matters and there is no reason why all the parties interested in one or other of the matters in difference between them, should not agree to refer their disputes, if there are other matters still to be determined in the suit. Where the arbitrators, however, made an award not only in respect to the matters properly referred but in respect to the matters in dispute between the plaintiffs and the two minors which were not validly referred at all, it cannot be said then that the whole award is bad merely because the arbitrators have dealt with matters outside the terms of the reference; the award is valid in so far as the reference was legal and binding. The rules in the schedule clearly contemplate a case where the arbitrators in making their award have gone outside the legitimate subject-matter of the reference. If that part of the award which deals with matters outside the reference can be separated from the other part, without affecting the decision on the matters referred, the Court may in such a case modify or correct the award. (*Miller, C. J. and Kulwant Sahay, J.*) RAGHUNATH SUKUL *v.* RAM RUP RAUT.
2 Pat. 777=1923 Pat. 225=76 I. C. 2=2 P. L. R. 76=1924 P. 33.

———*Award partly bad—Not valid.*

Where an arbitration is made without the intervention of a Court and an application is made to file the award, then if the award is good in part, the Court cannot remit to the arbitrator for amendment or declare valid the part to which no exception is taken even if it is separable from the bad part. 19 C. W. N. 476 and 4 P. L. J. 394 Foll. (*Mullick and Bucknill, JJ.*) JALDHARI RAI *v.* MAHOMED ABDUL KABIR.
4 P. L. T. 669=74 I. C. 649=1923 P. 470.

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———*Agent can be authorised to refer.*

A principal can authorise his agent to refer a dispute to arbitration. The authorisation need not be in writing, but must be proved. (*Pipon, J. C.*) FATEH MAHOMED KHAN *v.* MT. WAFA BEGUM.
73 I. C. 609 (Pesh.).

———*Agreement to abide by majority alone acting—Award if valid.*

When the arbitration was to consist of five members but those who actually took part were three, the decision was not binding. (*Po Han, J.*) SHEIKH ABDULLA *v.* M. V. R. S. FIRM.
2 Bur. L. J. 229=1924 R. 153.

———*Reference to arbitration—Suit impeaching contract—Injunction restraining arbitration when granted.*

It is within court's jurisdiction on equitable grounds to restrain the defts. from proceeding to arbitration when an action brought impeaches the instrument containing the agreement for reference. (*Raymond, A. J. C.*) FIRM OF KIRPALDAS KALIANDAS *v.* FIRM OF GAJANMAL.
70 I. C. 864=15 S. L. R. 5

———*Objection to Jurisdiction—Party to submission*—Ex-parte—*Propriety.*

It is highly improper for a party to sign a submission to arbitration and then allow the arbitrators to proceed *ex parte*; if the party objects to the jurisdiction of the arbitrators, the proper procedure is for him to make a protest and go on with the case. (*Pratt, J.C. and Hayward, A. J. C.*) KEWALRAM *v.* DONALD GRAHAM & Co.
11 I. C. 274 (S.).

———*Procedure—Rule as to joinder of claims.*

The provisions of the C. P. C. as to joinder of claims cannot be strictly applied to arbitration proceedings. (*Cohen, A. J. C.*) GRAHAM & Co. *v.* KEWAL RAM.
9 I. C. 712=4 S. L. R. 196.

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———*Award attacked—Duty of umpire not to refuse hearing.*

An Umpire has to make his award within a month of his appointment and where he does not extend the time or make his award within such time, his award is worthless. Where questions of fact under the Arbitration Act as to the conduct of arbitrators or the Umpire, the procedure adopted and the instructions and so forth are raised, the Court should have evidence properly brought before it, as in the trial of a suit which was deliberately withdrawn or abandoned by the parties raising the objection to enable the appellate Court to consider whether there really has been any grievance in the matters disposed of by it. Such questions of fact are determined upon hearing the evidence. Where a party wishes to show that the Umpire had gone contrary to the established principles of justice and refused him hearing, the onus is upon him to call evidence, to establish the fact in answer to the application to file the Umpire's award. The party who makes an objection must prove that he objected at the time to the Umpire's proceedings in making final

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award without hearing his witnesses. Where such a party had the opportunity of doing so and no reasonable opportunity was refused to him of doing so, his conduct amounts to acquiescence in the procedure adopted and he cannot, in law, be allowed to question the regularity, if there was any. Decision upon merits, that is to say, from the interests on the record, as to controversy arising out of a claim for damages between the parties as a matter entirely between the arbitrators and the Umpire. All Courts, even Arbitration Courts, must act according to the principles of natural justice and not deliberately refuse a hearing or take evidence from one side behind the back of the other. *Prima facie* the duties of an Umpire are the same as those of the arbitrators. The Umpire must hear the evidence of the parties and their witnesses, if application is made to him to do so by either party notwithstanding that the same evidence had already been adduced before the arbitrators. The Umpire is not justified in the face of an objection by either party in taking any part of the evidence from the notes of the arbitrators unless there are specific provisions in the submission permitting him to do so. (*Walsh and Ryves, JJ.*) FIRM SITA RAM NATHU MAL *v.* FIRM SUSHIL CHANDRA DAS.
64 I. C. 706=3 U. P. L. R. (All.) 60.

———*Number of Arbitrators may be allowed by parties.*

The Act does not limit the number of arbitrators nor does it prevent the parties to alter the number by common consent. An award made by two original and four additional arbitrators and one Umpire, is good, if no objection is raised before the four additional arbitrators entered upon their duties. (*Walsh and Ryves, JJ.*) ABDUS SHAKUR *v.* MOHAMMAD YUSUF. 43 All. 456=
19 A. L. J. 348=62 I. C. 426=
3 U. P. L. R. (All.) 2.

———*Applicability.*

The Indian Arbitration Act does not apply to arbitrations in the course of litigation. (*Rankin, J.*) AMAR CHAND CHAMARIA *v.* BANWARI LALL RAKSHIT. 69 I. C. 808=49 Cal. 608=
1922 Cal. 404.

———*Reference—Dispute.*

A reference to arbitration shows dispute. (*Mittra, Offg. A. J. C.*) RAM DAYAL *v.* MOTI RAM.
24 I. C. 863=10 N. L. R. 74.

———*Provisions are not subject to C. P. C.*

The Arbitration Act is an independent act and has no connection with rules relating to appeals under C. P. C. (*Duckworth and Po Han, JJ.*) SAYA PYE v. U KUNDINNYA.
2 Bur. L. J. 193=76 I. C. 525 (2)=
1 R. 661=1924 Rang. 47.

———S. 2—*Application to file an award—Cause of action—Jurisdiction.*

A trader entered into a contract at Multan with the agents of a Karachi Firm. The contract was to be completed in Karachi and the money was made payable at Karachi: *Held*, that the cause of action arose in part in Karachi, and that the Karachi Court had jurisdiction to file an award

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based on a reference contained in the contract. (*Crouch, A. J. C.*) G. W. WILSON *v.* MESSRS. VOLKART BROTHERS. 27 I. C. 129=
8 S. L. R. 107.

———Ss. 4 and 19—*Reference to—Suit, institution of, effect—Bengal Chamber of Commerce.*

After a reference is made to the Bengal Chamber of Commerce, the private tribunal comes into existence, and therefore the effect of the institution of the suit subsequently is that from that very moment the arbitrators become incapable of acting within Rule VIII of the Rules of the Tribunal of Arbitration of the Bengal Chamber of Commerce. If the suit is stayed the Chamber can substitute and appoint new arbitrators. But the institution of the suit cannot retrospectively affect the validity of the reference when it was made or the portion of the arbitration proceedings before the suit. (*Mookerjee and Fletcher, JJ.*) JOKIRAM KAYA *v.* GHANESHAMDAS.
47 Cal. 849=61 I. C. 380=25 C. W. N. 62.

———Ss. 4 and 19—*Contract to refer—Suit on contract—Award pending suit is ineffective.*

Where a contract provides for reference to arbitration, and a suit is filed on the basis of the contract, the award made on such arbitration, though commenced before the suit, is ineffective unless the suit is stayed pending arbitration. If the Court refuses to stay or the deft. abstains fron asking for it, the decision of the Court alone binds the parties and not the award. (*Mookerjee and Fletcher, JJ.*) RAM PRASAD SURAJMAL *v.* MOHANLAL LACHMINARAYAN. 60 I. C. 895=
47 Cal. 752.

———S. 4—*Contract to refer—Claim of right—Award of interest.*

Held, on the construction of a contract for the sale of goods containing a clause for reference of disputes to arbitration by the Bengal Chamber of Commerce, that as the petitioner was withholding payment under a claim of right, there was a dispute between the parties. Further the award of the arbitrators allowing interest on the moneys withheld, is not invalid. (*Rankin, J.*) UTTAM CHAND *v.* MAMOOD JEWA MAMOOJI.
46 Cal. 534=54 I. C. 285=23 C. W. N. 704.

———Ss. 4 and 8 (2)—*Compromise—Reference to arbitration—Order under S. 1 (2) of the Act—Appeal.*

The definition of submission in S. 4 of the Arbitration Act covers a contract to refer as well as the reference, the reference amounting to delegation of authority to the arbitrator. 35 I. C. 536 Ref. *Held*, on the facts of the case that the petition of compromise in a suit for accounts amounted to a submission to arbitration within the meaning of S. 4 of the Arbitration Act. (*Broadway and Abdul Quadir, JJ.*) HAJI BAKSH JLAHI *v.* HAJI ABDUL RAHMAN. 71 I. C. 817 (L.).

———S. 4—*Submission—Signature of parties—Strict rules of proof.*

The requirements of S. 4 of the Arbitration Act are duly complied with, if the submission is in writing and is binding on both the parties

as their agreement or as the equivalent in law to an agreement between them. Their actual signatures are not essential. Arbitrators are not bound by strict rules of evidence and in commercial causes are entitled to act on evidence which would satisfy a reasonable and impartial merchant. (*Crouch, A. J. C.*) LYON LORD & CO., LTD. *v.* FIRM OF CHAPSI UMERSI. 49 I. C. 135= 12 S. L. R. 55.

———S. 4—*Submission—Meaning of—Procedure, where valid.*

The definition of submission in S. 4 covers what is ordinarily termed an arbitration clause as well as what is commonly called a reference. 7 S. L. R. 1 Ref. (*Crouch, A. J. C.*) DHANPAT MAL DIWANCHAND *v.* KISHINLAL INDRAJ. 35 I. C. 536=10 S. L. R. 1.

———S. 4—*Agreement to refer, not signed—Assent need not be on same paper.*

A document embodying the terms of an agreement to refer to arbitration, which is not signed by or on behalf of both parties is not a submission as defined in S. 4. It is not necessary that the assent of each party should be on the same piece of paper. It is sufficient if each party signs a separate document, provided each contains the complete terms of the agreement. The words offlce *dhara* (office terms) do not constitute a written agreement to submit differences to arbitation. They are used merely as symbols to denote that such an agreement had been made and the use of such symbols does not justify the Court in accepting oral evidence of the agreement. (*Crouch, A. J. C.*) LENZ *v.* LAL CHAND. 19 I. C. 925=6 S. L. R. 278.

———Ss. 4 and 12—*Arbitration—Award—Validity of.*

Unless the parties submit to arbitration, there can never be a valid award. The Court can extend time for making the award under S. 12 of the Arbitration Act even before the award. (*Pratt, J. C. and Crouch, A. J. C.*) HARIDAS *v.* OOTOMAL. 16 I. C. 861=6 S. L. R, 89.

———Ss. 4 (a) and 19—*Suit filed by party to reference—Order for stay of suit—Forum.*

Per Pratt, J. C.—An application under S. 19 of the Arbitration Act for stay of a suit should be made to the Court trying the suit. *Per Crouch, A. J. C.*—An application under S. 19 of the Arbitration Act to stay a suit pending in a Subordinate Court must be made to the Dt. Court to which such court is subordinate. *Per Hayward, A. J. C.*—The power of granting or refusing stay of a suit is vested not in the Court before which the suit is pending but in the Dt. Court specially described as the Arbitration Court under the Arbitration Act. (*Pratt, J. C., Crouch and Hayward A. J.Cs.*) THE FIRM of RATANCHAND RAM KRISHANDAS *v.* SAHIRAM DUNICHAND. 52 I. C. 139=13 S. L. R. 23.

———Ss. 4 (a) and 19—*Reference—Suit regarding subject-matter of reference—Subsequent award—Validity—Stay of suit.*

The mere filing of a suit does not invalidate a pending arbitration. If, however, an order under Section 19 of Act IX of 1899 to stay the suit is refused or if the party applying under that section

has by pleading in the suit waived arbitration, the arbitration proceedings are invalidated and the Court alone is seized of the dispute. *Semble.*—If no stay of the suit is obtained, an award made after suit filed is invalid. An order for stay of the suit is good although made after the award. An order under Section 19, Act IX of 1899, can be made both before and after reference or award. It is the Court in which the suit is filed which has power to stay the suit under Section 19.

Per Hayward, A. J. C.—It is the arbitration Court as defined in Section 4 (a) of the Act that is vested with the jurisdiction to stay suits under S. 19. 31 Bom. 236 Ref. (*Pratt, J. C. and Hayward. A. J. C.*) KHILOORAM *v.* LOUIS DREYFUS & Co. 52 I. C. 130=13 S. L. R. 8.

———S. 4 (b)—*Submission to Arbitration—What amounts to.*

Where an association, at the instance of and on a claim by one member against another member, lays the matter before arbitrators and the latter member in his own hand and over his signature sent an answer to the claim, the document constituted a written agreement to submit their difference to arbitrators within Sec. 4 (b) of the Arbitration Act. (*Piggott and Walsh, JJ.*) NEINSUKH DAS *v.* GAJANAND. 43 All. 348= 61 I. C. 269=19 A. L. J. 132.

———S. 4 (6)—*Submission—Inference from documents—Clause fixing time for appointment of arbitrator—Waiver.*

A submission is a written agreement signed by both parties to submit differences to arbitration and this agreement may be collected from a series of documents even though connected by parol evidence. Where on the indent from it was shown that disputes arising between the vendor and the vendee would be referred to arbitrators one appointed by each party. *Held*, the submission was binding on them. Where the purchaser refused to make the appointment of an arbitrator, denying there was a submission whereupon the sole arbitrator appointed by the seller passed an award before the period of 20 days had elapsed. *Held*, that the failure to give requisite number of days for the appointment was fatal to the award of the sole arbitrator who had no jurisdiction to pass it. The refusal and failure to appoint an arbitrator did not amount to the waiver of his right by the purchase as the period of 20 days had not elapsed and the awards made by the sole arbitrator was bad in law. When a Court is asked to file an award, it has to see whether it is enforceable in the same way as a decree would be enforceable if it were a decree. (*Piggott and Walsh, JJ.*) SUKHAMAL BANSIDHAR *v.* BABU LAL KHEDIA & Co. [42 All. 525=2 U.P.L.R.(A) 243= 59 I. C. 75=18 A. L. J. 652.

———Ss. 5 and 8—*Refusal of arbitrator to act—Reference, if revocable—Procedure.*

Once a valid submission has been made to an arbitrator it is irrevocable without the leave of the Court under S. 5 of the Act and if the arbitrator refuses or neglects to act, the procedure under S. 8 of the Act should be followed. (*Crouch, A.J.C.*) DWARKAPRASAD *v.* DISPCHANDA PARSHRAM. 44 I. C. 360=11 S. L. R. 101

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———S. 5—*Reference—Single arbitrator.*

The ordinary rule is to refer to a single arbitrator. An intention to refer to more than one arbitrator must be plain and clear. (*Pratt, J. C. and Fawcett, A. J. C.*) BAYMAL THIAMAL BISHIN DAS *v.* SANDAY PATRICK & CO. 12 I. C. 662=5 S. L. R. 97.

———S. 5—*Arbitrators—Inquiry about signature of party to submission—Names of partners of a party partnership—Jurisdiction—Legality of order refusing to set aside award based on evidence in Court—Misjoinder.*

An arbitrator has jurisdiction to inquire and decide whether a party to the submission has signed it or whether the signature is that of a partnership and if so, who the individual partners are. An order refusing to set aside an award based purely on evidence recorded by court itself is not bad in law. Misjoinder of parties and causes of action in arbitration proceedings does not, like a regular trial, involve a question of jurisdiction; but any objection taken to such misjoinder ignored by the arbitrator, may be urged before the Court charging the arbitrators with misconduct and the decision of the Court on such objection is not open to revision. (*Pratt, J. C. and Hayward, A. J. C.*) KEWALRAM *v.* DONALD GRAHAM & CO. 11 I.C. 274 (S.).

———Ss. 7 and 11 to 15—*Scope—Arbitrator when becomes* functus officio—*Indian and English Law.*

There is no express provision in the English law as to what is to happen to an award, when it is made, with the single exception of the section which enables the party to enforce it as though it were a judgment. The reason for that is, that the machinery is so familiar and habitual that no provision on the subject is necessary. Either party, on receiving notice from the arbitrator that the award has been made, can take it up from him. Once the arbitrator has parted with it, he is *functus officio* and he cannot exercise the power given to him by S. 7 of Act IX of 1899; nonetheless the Court is able to remit to him if satisfied that an honest mistake has been made. There are express provisions to be found in S. 11 of the Act as to what is to be done by an arbitrator, if he has made his award. When the question, when an arbitrator in India becomes *functus officio* comes to be decided, the line will have to be drawn somewhere in the procedure which is laid down in S. 11 for getting the award into Court. It is difficult to hold that an arbitrator is *functus officio* while there are still express statutory duties laid upon him by the Act. The procedure laid down by the Act seems to be that the various stages to be found in Ss. 11 to 15 are to be followed in the same chronological order as the numerical order of the sections and that an application to set aside is not as a rule within the jurisdiction of the Court, until some application or attempt has been made to file the award or some other similar step is taken to enforce it. (*Walsh and Ryves, JJ.*) FIRM OF RAM KISHAN DASS BRIJ MOHAN *v.* FIRM OF SUSHIL CHANDRA DASS. 1923 A. 31.

———Ss. 8, 9 and 19—*Scope of—Refusal by arbitrators—Court's power to appoint.*

ARBITRATION ACT (IX of 1899), S. 10.

The Court has no power to appoint new arbitrators in place of those who declined to proceed further in a case submitted to them, when the number of arbitrators is more than two. The Arbitration Act is an amending Act and must be construed strictly because it confers special powers of interference not otherwise inherent in Court. S. 8 (1) (b) does not apply to the case of independent appointments of two arbitrators. Any vacancy is to be filled up by original appointer as mentioned in S. 9. (*Scott, C. J. and Hayward, J.*) GOPALJI KUVERJI *v.* MORARJI JERAM. 50 I. C. 411=21 Bom. L. R. 308.

———S. 9—*Provision in a contract to appoint—Arbitrators—Misconduct.*

S. 9 does not apply where the parties by their contract provide that a different course should be adopted if one of the parties fails to nominate an arbitrator as provided in the contract, and if in such a case the arbitrators appointed by one party refuse to give adjournment to move the High Court to have their appointment set aside, their refusal does not amount to misconduct. (*Wallis, C. J. and Ramesam, J.*) SHAW WALLACE AND CO. *v.* K. M. SUBBIER AND SONS. 40 M. L. J. 166=(1921) M. W. N. 148=29 M. L. T. 245=62 I. C. 205=14 L. W. 42=44 Mad. 406.

———S. 9 (b)—*One party not appointing arbitrator—Decision by the other arbitrator alone is illegal.*

Where the agreement between the parties contained a term that on the default of either party to appoint an arbitrator in time, the chairman of the Trade Association was to appoint one on behalf of the defaulter, *held* that S. 9 (b) would not apply and an award made by one arbitrator alone, who was appointed by one of the parties, was without jurisdiction. (*Viscount Cave.*) SASSOON AND CO. *v.* RAMDUTT RAMKISSEN DAS. 49 I. A. 366=70 I. C. 777=18 L. W. 537=50 C. 1.=32 M. L. T. 19=37 C. L. J. 336=44 M. L. J. 758=27 C. W. N. 660=(1923) M. W. N. 372=1922 P. C. 374 (P. C.).

———Ss. 10 and 12—*Private reference—Commission—Power of Court to issue commission for the examination of witnesses.*

Civil Courts have no power to issue a summons or commission to a witness to give evidence in a private arbitration. Consent of parties cannot confer this power. (*Martin J.*) RE: S. S. MARITIME JAMES MACKINTOSH AND CO. *v.* THE SCINDIA STEAM NAVIGATION CO. LTD., 75 I. C. 221=47 B. 250=24 Bom. L. R. 853=1922 B. 444.

———S. 10—*Umpire—Statement of case to the High Court—Not obligatory—Interest after date of award.*

It is in the discretion of an umpire to state a special case for the opinion of the Court and if he refuses to do so and decides the point of law himself, his refusal does not amount to misconduct. An umpire is not entitled to award interest on the damages awarded by him and if he does so, the award should be returned to him for re-consideration. (*Greaves, J.*) SEWDUTRAI NARSARIA *v.* TATA SONS, LTD. 27 C. W. N. 494.

———S. 10—*Remission of award—Error of law is no ground for.*

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It is necessary that Courts should be very cautious in interfering with awards and the grounds on which the Court will remit the matter for reconsideration are:—(1) that the award is bad on the face of it, (2) that there has been misconduct on the part of the arbitrator, (3) that there has been an admitted mistake and the arbitrator asks that the matter may be remitted to him, (4) where additional evidence has been discovered after the making of the award. Mere errors in law unless distinctly appearing on the face of the award or from any document accompanying or forming part of the award are not sufficient ground for remitting an award. (1893) 1 Q. B. 405; (1898) 78 L. T. 406; (1905) 2 K. B. 184; (1912) A. C. 673 Rel. (*Sanderson, C. J. and Richardson, J.*) U. M. CHOWDHURY & Co. *v.* JIBAN KRISHNA GHOSE. 69 I. C. 995= 49 Cal. 646=1922 Cal. 447.

———S. 10—*Disagreement between arbitrators—Umpire, duties of.*

Where an umpire is appointed owing to disagreement between arbitrators, he must re-hear the evidence if he is applied to, to that effect and if he fails to do so, he would be guilty of misconduct but if no application is made to that effect, he can proceed with the case and decide it on the evidence already produced. (*Raymond, A. J. C.*) MILLER *v.* FIRM OF DHANA SINGH RAMLAL. 63 I. C. 141= 15 S. L. R. 68.

———Ss. 10, 11 and 14—*Umpire—Award—No hearing—Order for costs.*

An award of an umpire without hearing parties is against principles of equity and justice. Award of costs without mentioning the amount, is bad, for uncertainty and the umpire can award costs only for the reference and award. The costs of obtaining an order from the Court is at the discretion of the Court. (*Crouch, A. J. C.*) JAMES FINDLAY AND CO. *v.* FIRM OF ASUDAMANI. 12 I. C. 637=5 S. L. R. 89.

———Ss. 11 and 15—*Enforceability of award—Notice of filing is not necessary*—Ex-parte *procedure without notice is bad.*

An award becomes enforceable as soon as it is filed in Court and it is not necessary before it is enforced to show that notice of filing was given to the parties by the arbitrator. Where an arbitrator proceeds *ex-parte*, he should give notice to the parties before he so proceeds; otherwise his award is liable to be set aside. (*Mookerjee and Fletcher, JJ.*) UDAICHAND PANNA LAL *v.* DEVIBUX JEWANRAM. 60 I. C. 987= 47 Cal. 951.

———Ss. 11, 13, 14 and 15—*Rules under*—Ultra vires—*Filing of award.*

A rule framed by the Court under, but not in accordance with, the Arbitration Act will not be given effect to. The filing of an award in an act to be done at the instance of the arbitrator and when it is filed the result is not that there is a suit in which a decree has been passed but that there is an award enforceable as if it were a decree. (*Jenkins, C. J. and Woodroffe, J.*) BAIJNATH *v.* AHMED MUSAJI SALEJI. 40 Cal. 219=18 I. C. 978=17 C. W. N. 395.

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———S. 11—*Award not signed by one arbitrator.*

Where a third arbitrator resigned because there was a majority against his view and did not sign the award; *held* that it did not affect the validity of the award. (*Broadway, J.*) MANSA RAM *v.* KARTA RAM. 76 I. C. 1007= 1923 Lah. 411.

———S. 11—*Fees of arbitrators—Taking fees before entering upon their duties—Effect of.*

Where the arbitrators take a reasonable fee for their services before entering upon their duties with a view to avoid the necessity of suing the parties in Court, their conduct in so doing, does not amount to misconduct and does vitiate the award. There is nothing in S. 11 of the Arbitration Act which precludes the arbitrators from either fixing the fee or receiving the fee beforehand. All that the section requires is that in case the award is given the arbitrators shall state in the award what amount is payable to them for their fee. (*Kumarasawmi Sastri, J.*) IN THE MATTER OF THE ARBITRATION ACT. 17 L. W. 648= 75 I. C. 850=1924 Mad. 274.

———S. 11—*Jurisdiction—Award—Application to file—Sale of goods.*

Where a Cawnpore firm sold to a Karachi firm some bags of linseed on "Karachi Pass Terms" under which the goods were to be delivered at Cawnpore Ry. Station and a receipt obtained in the name of the buyers and the goods were subject to inspection at Karachi and to rejection on certain terms, if not according to the contract. The sellers having failed to make any delivery, the buyers sought an arbitration and applied to file the award in the Karachi Court. *Held* that the Karachi Court had jurisdiction to entertain the application. 5 S. L. R. 97 doubted. (*Kemp, A. J. C.*) C. H. PENNY *v.* ATRAUSS & Co. 15 S. L. R. 74=64 I. C. 674=1922 S. 532.

———S. 11—*Stamp Act, S. 14—Appointment of second arbitrator before acceptance by 1st arbitrator.*

The appointment of a certain person as arbitrator is not complete, until such person has accepted the reference and consented to act. A dispute was referred to a sole arbitrator but before he had accepted the reference, the name of a co-arbitrator was added. *Held*, the addition was not a second instrument within S. 14 of the Stamp Act and the two arbitrators were competent to make an award. Any one of the arbitrators can legally file the award, the filing being a purely ministerial one. (*Crouch, A. J. C.*) SHAMDAS TEUMAL *v.* KHIMANMAL CHANDUMAL. 29 I. C. 602=8 S. L. R. 302.

———Ss. 11, 13, 14 and 15—*Firm as one party—Arbitrators have no jurisdiction over a person who is not a party to the contract.*

When a party to arbitration is a firm, the arbitrators can decide whether a person is a partner of the firm, but their decision is open to correction by the Court. If the arbitrator had powers under the C. P. Code, personal service on the person might make him personally liable. Where some persons admit liability as members of the firm while others deny their partnership, the arbitrators may determine liability of the firm leaving the personal liability to be determined in

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execution or by appropriate suit. Denial of partnership raises a question outside the award. (*Crouch and Hayward, A. J. Cs.*) POKARDAS JASHWAL *v.* FORBES CAMBELL CO. LTD. 19 I. C. 363 = 6 S. L. R. 127.

———Ss. 11 (2) and 15—*Order refusing to set aside award, if appealable—Letters Patent, Cl.* 15—*C. P. C., S.* 104 (*f*).

An order refusing to set aside an award is a judgment within Cl. (15) of the Letters Patent and is therefore appealable. There is no right of appeal against such an order under S. 104 (f), C. P. C., which has no application to the filing of an award under S. 11 Cl. (2) of the Arbitration Act. (*Sanderson, C. J. and Woodroffe, J.*) CAMPBELL R. CO. *v.* JESHRAJ GIRDHARI LALL. 46 I. C. 687 = 45 Cal. 502.

———S. 11 (2)—*Appeal—Order setting aside award.*

No appeal lies unless it is given by law. There can be no appeal from an order setting aside an award. (*Fox, C. J. and Hartnoll, J.*) RIPLEY *v.* NAHAPIET. 5 Bur. L. T. 155 = 17 I. C. 902 = 6 L. B. R. 88.

———Ss. 12 and 13—*Extension of time for making award—Jurisdiction. C. P. Code, O.* 41, *R.* 33—*Appeal.*

Under S. 12 of the Arbitration Act, the Court has power to extend the time though the time for making the award is over. The Appellate Court can extend the time under O. 41, R. 33 of the C. P. Code. (*Sanderson, C. J. and Woodroffe, J.*) JAMUNDAS *v.* B. NATHMAL AND CO. 54 I. C. 668 = 46 Cal. 1059.

———S. 12—*Extension of time.*

Power of extending time rests with the court and not with the arbitrators themselves. (*Schwabe, C. J. and Wallace, J.*) LOUIS DREYFUS & CO. *v.* RAJAGOPALA AIYAR & BROS. 16 L. W. 657 = 70 I. C. 353 = 1923 M. 222.

———S. 12—*Extension of time—Grant of.*

Before extending the time under S. 12 of the Arbitration Act, the Court is bound to consider whether the case is a fit one for the grant of the indulgence asked for and is not confined merely to the consideration of the question whether or not, the arbitrator had been diligent. (*Piggott, J. C. and Fawcett, A. J. C.*) PAMAN MAL *v.* HOTANBHAI. 28 I. C. 85 = 8 S. L. R. 269.

———S. 12—*Extension of time.*

The court can enlarge the time for making an award under S. 12, even after the allotted time. (*Pratt, J. C. and Hayward, A. J. C.*) GHULAM HUSSAIN *v.* SAKINABAI. 19 I. C. 374 = 6 S. L. R. 146.

———Ss. 13 and 14—*Award set aside—Legal misconduct.*

An arbitrator who does not give a party an opportunity to put his case before him and does not decide all points of dispute, is guilty of legal misconduct. When the award is set aside for legal and not moral misconduct, it can be remitted to the same arbitrator for further consideration. (*Chaudhari, J.*) CROMPTON AND CO., LTD. *v.* MOHAN LAL. 25 I. C. 391 = 41 Cal. 313.

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———S. 13—*Remitting an award of grounds.*

Ordinarily an appellate court will not interfere with the discretion of the first Court in declining to remit an award, but the discretion being a judicial one, the appellate court will interfere where no grounds have been shown why the award should be not be remitted to the arbitrators. In the absence of anything to show that the umpire was either prejudiced or was otherwise unfitted to hear and determine the case, the Court ought to remit the award to the arbitrators. (*Schwabe, C. J. and Wallace, J.*) MESSRS. LOUIS DREYFUS AND CO. *v.* R. K. RAJAGOPALA AIYAR AND BROS. 70 I. C. 353 = 16 L. W. 657 = 1923 Mad. 222.

———Ss. 13 (1), and 14—*Award, when remitted and when set aside—Misconduct.*

Irregularities in procedure which amount to no proper hearing of the matters in dispute, may amount to misconduct enough to vitiate the award. The Court may remit an award when the arbitrator has been guilty of misconduct in a technical sense, *i.e.*, of such a nature as does not disqualify him from acting or render it impossible for the Court to trust him. When the misconduct is one justifying the removal of the arbitrator, the Court will not remit the award but will set it aside. (*Mookerjee and Fletcher, JJ.*) HARI SINGH *v.* KANKINARAH CO., LTD. 63 I. C. 389 = 34 C. L. J. 39.

———S. 13 (1)—*Remand order for making fresh award—Not appealable.*

Order by a Court to arbitrators to make an award anew, is equal to refusal to file an award and is not appealable either under the C. P. Code or the Arbitration Act. (*Duckworth and Ho Han, JJ.*) SAYA PYE *v.* U KUNDINNYA. 2 Bur. L. J. 193 = 76 I. C. 525 (2) = 1 R. 661 = 1924 Rang. 47.

———S. 14—*Suit to set aside award when lies.*

Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought no doubt to be taken by motion to set aside the award; but where it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought for that purpose. (*Viscount Cave.*) SASSOON AND CO. *v.* RAMDUTT RAMKISSEN DAS. 49 I. A. 366 = 18 L. W. 537 = 50 C. 1 = 32 M. L. T. 19 = 39 C. L. J. 336 = 44 M. L. J. 758 = (1923) M. W. N. 372 = 27 C. W. N. 660 = 70 I. C. 777 = 1923 P. C. 374 (P. C.)

———S. 14—*Suit to set aside award.*

Where an award is challenged on the ground that there was no submission to arbitration by the parties, the remedy lies in a regular suit and not in an application under S. 14 of the Arbitration Act. (*Mookerjee and Fletcher, JJ.*) MATULAL DALMIA *v.* RAM KISSENDAS. 69 I. C. 568 = 47 Cal. 806.

———S. 14—*Award—Ground of attack—Suit to impeach award when maintainable.*

When an award under the Act has been made and filed, a party affected thereby can maintain a suit to impeach it on grounds not included within S. 14. Especially when a ground of attack goes to the root of the matter a suit is maintainable

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for the investigation and determination of the controversy according to the procedure prescribed by law. (*Mookerjee and Fletcher, JJ.*) RADHA KISEN KHETTRY *v.* LAKHIMI CHAND JHAWAR.
31 C. L. J. 233=56 I. C. 541=24 C. W. N. 454.

———S. 14—*Suit to set aside award does not lie.*

A suit in Civil Court for declaration that the award is not binding on one of the parties, is not maintainable under S. 14 of the Arbitration Act. (*Le Rossignol and Campbell, JJ.*) THE FIRM OF HIRANAND MURLIDHAR *v.* THE FIRM OF FLEMING SHAW AND CO. 4 Lah. L. J. 12 (1)=68 I. C. 187=1922 L. 26.

———S. 14—*Misconduct—Acting without notice to parties is.*

Award is vitiated by the legal misconduct of the umpire, if he proceeds with the reference without giving any notice to the parties of the enquiry by him. (*Schwabe, C. J. and Wallace, J.*) MESSRS. LOUIS DREYFUS AND CO. *v.* R. K. RAJAGOPALA AIYAR AND BROS. 70 I. C. 353=16 L. W. 657=1923 Mad. 222.

———S. 14—*Arbitration—Contract for reference—Stay of suit—Discretion.*

In case of an agreement to allow the disputes to be tried by another tribunal, the Court will take into consideration all those grounds as in a case of submission to arbitration. A clause in a bill of lading that all disputes shall be settled by the British Consul at the port of destination is similar to a submission to arbitration. Where the plff.'s residence, place of contract, and inspection of the ship all these happen to be in one place, there are no grounds for staying the suit or refusing to entertain it at that place. (*Couch, A. J. C.*) KURESHI AND SONS *v.* SOOMAR HAJI. 15 S. L. R. 88.

———S. 14—*Contract Act, S. 28—Clause in the submission not to dispute award, not binding.*

An agreement that neither party shall take objection to the award or file an appeal cannot control the unrestricted discretion vested in a Court by statute to set aside the award when it is sought to be filed. The question is not whether a party shall be compelled to carry out the terms of the contract but whether the Court would be exercising a proper discretion in conferring on the award the efficacy of its own decree. *Tullis v. Johnson*, (1892) 3 Ch. 441 dist. (*Crouch, A. J. C.*) SETH NARAIN DAS *v.* KEVALRAM.
42 I. C. 706=11 S. L. R. 43.

———S. 14—Ex-parte *award—Setting aside—Grounds for.*

A party to an arbitration can get an *ex-parte* award passed against him, set aside by a Court if he shows sufficient cause for non-appearance. (*Crouch, A. J. C.*) H. C. WHITEHOUSE *v.* MESSRS. KAHN KAHN AND CO. 27 I. C, 135=8 S. L. R. 110.

———S. 14—*Submission—Matter of difference.*

Under the Arbitration Act, there must be a submission on matters in difference and a reference. Failure to pay claims is itself a "matter in difference." A general reference to arbitration is enough to bind the parties and it need not state

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the exact points for determination. If one party declines to appear before the arbitrator the matter must proceed against him *ex-parte*. *Held*, that in this case it was a valid award and it could not be set aside. (*Hayward, A. J. C.*) DONALD GRAHAM AND CO. *v.* ASUMAL. 12 I. C. 187=5 S. L. R. 7 (Note).

———S. 14—*Injunction to restrain arbitration.*

When an agreement to refer to arbitration is impeached, an injunction may be issued to restrain arbitration proceedings. But when the agreement is not impeached and a suit covering the matter referred to arbitration is pending, injunction ought not to be issued. 1 S. L. R. 255. expl.; 1 S. L. R. 129 Ref. If an injunction has been issued to restrain arbitrators from proceeding, in case they ignore it, the award would be deemed to be improperly procured. But where no injunction has issued, it cannot be said the award was improperly procured merely because of the pending suit. (*Cohen, A. J. C.*) MACDONALD AND CO. *v.* GEORGE DE' EMDEN. 9 I. C. 707=4 S. L. R. 187.

———S. 15—*Scope of—Execution of award—If bars suit.*

The fact that an award has been enforced by execution under S. 15 is not a bar to a suit to have it declared void and for consequential relief. S. 15 does not enact that award, when filed is to be deemed a decree of Court, but only that it is to be enforceable as if it were a decree. (*Viscount Cave.*) SASSOON AND CO. *v* RAMDUTT RAMKISSEN DAS. 18 L. W. 537=49 I. A. 366=50 C. 1=32 M. L. T. 19=37 C. L. J. 336=44 M. L. J. 758=27 C. W. N. 660=70 I. C. 777=(1923) M. W. N. 372=1922 P C. 374 (P. C.)

———S. 15—*Provisions of C. P. Code, if apply.*

When the legislature provided under S. 15 of the Arbitration Act that an award on being filed was enforceable as if it were a decree of Court, its intention was that all the provisions of the C. P. Code applicable to the execution of decrees should apply to an award so filed. (*Greaves, J.*) GLADSTONE WYLLIE & CO. *v.* JOOSUB PEER MAHOMED & CO.
27 C. W. N. 666=1924 Cal. 117.

———S. 15—*Award—Filing of—Effect of.*

Though the filing of an award is the act of the arbitrators, the award does not become enforceable as if it were a decree of the court immediately on presentation to the court. The court allows an opportunity to the parties adversely affected by it to move to have it set aside or remitted to the arbitrators, and if, within the period allowed, no application is made to the court for either of these purposes, the award is enforceable as if it were a decree of the court. The objections to an award cannot be dissociated from the petition to file the award. (*Raymond, A. J. C.*) FIRM OF JAI NARAIN BABU LAL, IN THE MATTER OF.
66 I. C. 796=1922 S. 6.

———S. 15—*Execution of award is not execution of order under Dek. Agri. Relief Act, S. 22.*

S. 15 makes an award directly enforceable as a decree of Court, and therefore an application

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to execute the award is not an application in execution of an order within S. 22 of the Dek. Agri. Relief Act. (*Fawcett, J. C. and Kennedy, A. J. C.*) UDHAV DAS *v.* UKAMAL FATAMAL.
60 I. C. 942=14 S. L. R. 217.

——S. 15—*Enforcement of award.*

Order of Court on an award declaring shares only, though actual partition was to be effected appointing a Commissioner for partition does not mean enforcement. (*Pratt, J. C. and Hayward, A. J. C.*) SHEO KARAN *v.* MAHADEO SINGH.
19 I. C. 374=6 S. L. R. 146.

——S. 15—*Appeal—C. P. Code, Ss. 104, 106 and 115.*

No appeal lies against an order under the Arbitration Act as the orders are neither decrees nor appealable orders under Ss. 104 and 106 of the C. P. C. There can only be a revision under S. 115 of the C. P. C. A proceeding under the Arbitration Act is not a suit and does not end in a decree. The Act does not provide for the Court making an order filing or refusing to file an award. The award is filed by the arbitrators, under S. 11 and unless it is remitted to them under S. 13 (1) or set aside under S. 14, it becomes enforceable as if it were a decree of Court". The order of a Court in whatever terms it may be expressed under the Act is one setting aside or refusing to set aside an award. (*Pratt, J., C. and Hayward, A. J. C.*) KEWAL RAM *v.* DONALD GRAHAM & Co.
10 I. C. 211=5 S. L. R. 61.

——S. 19—*Agreement to refer to arbitration—Omission to plead in bar of trial—Effect of.*

Where a defendant does not plead at the early stages of a trial a subsisting agreement to refer to arbitration but submits to the jurisdiction of the court and allows the trial to proceed, he cannot afterwards raise the plea. (*Piggott and Walsh, JJ.*) KHARIDAR KAPARA CO., *v.* RUKMANAND RAMDEO. 20 A. L. J. 975=L. R. 4 A. 22=
71 I. C. 144=1923 A. 139.

——S. 19—*Waiver.*

Institution of suit after reference to arbitration by one of the parties and omission on the part of the other to apply for stay of suit amounts to waiver of right to arbitration. (*Piggott and Walsh, JJ.*) CHIUMAN LAL PASLI MAL *v.* FIRM PHOOLCHAND FATEHCHAND. L. R. 3 A. 96=
44 A. 292=20 A. L. J. 128=65 I. C. 795=
1922 A. 48.

——S. 19—*'Court,' meaning of—Finality of order.*

'Court' in S. 19 of the Act is the one in which the proceedings or other attempts to bring a suit, are in fact instituted. Where the parties to a suit, refer their disputes to arbitration, the Court, has under S. 19, power to stay the suit absolutely and such stay is final and sufficient to dispose of the suit. (*Walsh and Ryves, JJ.*) SITA RAM *v.* SUSHILCHANDRA. 43 All. 553=63 I. C. 813=
19 A. L. J. 495.

——S. 19—*Order staying suit is a final one.*

An order staying a suit is a permanent one unless otherwise provided in the order itself and

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an order staying suit where the subject-matter was referred to arbitration and a decree was passed in terms of the award, is sufficient to finally dispose of the suit. (*Piggott and Walsh, JJ.*) STRAUSS & CO., LTD. *v.* RAGUBAR DAYAL.
43 A. 279=19 A. L. J. 19=59 I. C. 784=
2 U. P. L. R. (All.) 387.

——S. 19—*Submission to three arbitrators—Submission to which the Act applies—Stay of suit—Jurisdiction of Court.*

Under S. 19 the Court can stay a suit where there is an agreement between the parties to refer a matter to three arbitrators, as a submission providing for a reference to three arbitrators is not outside the scope of the Act. The words "a submission to which this Act" in S. 19 provided for the case where a suit is filed in an up-country Court in an area to which the Act has not been applied though part of the cause of action has arisen in a Presidency Town. That Court has power to stay the suit, if the suit could with leave or otherwise have been filed in a Presidency Town. 31 Bom. 236, diss. (*Pratt, J.*) BABALDAS KHEMCHAND, *in re.* 22 Bom. L. R. 842=
57 I. C. 997=45 B. I.

——S. 19—*Stay of suit.*

A stay of suit can be made under S. 19 of the Act, only if the suit was instituted in respect of a matter agreed to be referred. (*Mookerjee, C. J. and Fletcher, J.*) JNANENDRA KRISHNA *v.* SINCLAIR MURRAY & Co. 66 I. C. 741=34 C. L. J. 173.

——S. 19—*Reference—Suit—Stay of suit, when to be granted—Burden of proof.*

A contract to refer a dispute to arbitration is no bar to a suit in respect of the dispute; but the opponent may apply to the Court to stay the suit in the exercise of its discretion so as to leave the plaintiff no other remedy than to proceed to arbitration and the burden of showing that sufficient reason exists why the matter should not be referred to arbitrations is upon the person opposing the application. (*Mookerjee and Fletcher, JJ.*) JOHIRAMKAYA *v.* GHANESHAMDAS.
47 Cal. 849=61 I. C. 380=25 C. W. N. 62.

——S. 19—*Stay of proceedings—Discretion—Appeal.*

It is largely in the discretion of the Court, to make an order staying proceedings in a matter and when the discretion has been exercised, the Appellate Court will interfere only when a strong case is made out. Before an order staying proceedings can be made, it must be proved that there is a valid submission, that there is no sufficient reason why the matter should not be referred according to the submission and that the applicant was and is ready to all things necessary to the proper conduct of the arbitration. (*Mookerjee and Fletcher, JJ.*) KEDARNATH BABULAL *v.* SUMPATRAM DOOGUR. 60 I. C. 951=47 Cal. 1020.

——S. 19—*Contract for sale of goods—Short delivery—Award—Subsequent suit—Bar.*

Where there is an arbitration clause in a contract for the sale of goods providing that any claim or dispute of any sort whatever in connection therewith must be referred to arbitration

the clause applies to a case of short delivery of goods as much as to a case of non-delivery. (*Scott-Smith and Ford, JJ.*) FIRM OF GHAMANDILAL *v.* FIRM OF CHIRANJI LAL. 4 Lah 168 = 5 L. L. J. 146 = 73 I. C. 459 = 1923 Lah. 453.

———S. 19—*Stay pending arbitration—Omission to object to long threatened litigation is no ground for refusing stay.*

Where legal proceedings were for a long time threatened against a person in respect of a contract which provided for all settlement of disputes by arbitration, and when instituted that person applied for a stay of suit pending arbitration, he can claim it as a matter of right. His failure to object to the litigation is no ground for refusing stay. (*Schwabe, C. J. and Krishnan, J.*) ANGLO PERSIAN OIL CO. *v.* PANCHAPAKESA IYER. 45 M. L. J. 653 = 18 L. W. 752 = 33 M. L. T. 103 (H. C.) = (1923) M.W.N. 772 = 47 Mad. 164 = 1924 Mad. 336.

———S. 19—*Suit not arising out of contract—Application for stay does not lie.*

Per Kincaid, J. C.—Where the misrepresentation or fraud alleged was something quite distinct from and previous to the contract. *Held*, that an application for the stay of suit does not lie. Plaintiff alleged that the defendants deliberately forged an interpolation in the acceptance memo after plaintiff had signed it. As that forgery could not have occurred before the completion of the contract but after, it is clearly a dispute which arises out of the contract itself. That a party misread the acceptance memo and believed it to be something different from what it was, would not vitiate the contract. Authority to decide disputes arising out of a contract necessarily confers authority to decide what were the terms of that contract. It would be impossible for any judge or arbitrator to determine whether any particular dispute arose out of a contract unless and until he knows what the contract is. (1916) A. C. 314; 24 Cal. W. N. 567, Foll. *Per Madgavakar, A. J. C.*:—An application by the defendant for the stay of the suit must, in law, be clearly distinguished from an application for a stay of the arbitration proceedings in which a different set of considerations would arise involving equitable grounds and permitting perhaps a *prima facie* view of the dispute. If the cause of action is definite misrepresentation to avoid the contract set up by the opposite party, such a dispute is not a dispute arising out of the contract within the submission clause in the contract and the court has no power to stay. (*Kemp, A. J. C.*) SODAWATERWALA *v.* VOLKART BROS. 1923 Sind 25.

———S. 19—*Clause for arbitration in contract—Suit to impeach is not barred.*

Where a contract contains a clause for arbitration in case of disputes and a party thereto brought a suit to impeach the clause. *Held*, that as the object of the suit was to impeach the validity of the clause and not in respect of any matter agreed to be referred to arbitration. S. 19 of the Act does not apply. (*Kemp, A. J. C.*) ATMARAM *v.* GAJANMAL. 61 I. C. 141 = 14 S. L. R. 123.

———S. 19—*Stay of proceedings—Wagering contract.*

In a suit on a cross contract by a party, merely for the determination of the amount payable by one to the other, the deft. has no right to ask for the stay of the proceedings pending the reference to arbitration as S. 19 of the Act applies only to the contracts which on the face of them, have delivery of the goods as the true object. (*Kemp and Raymond, A. J. Cs.*) JELLIA LAL KALLIANJI *v.* PARASRAM KHEMAN DAS. 58 I. C. 799. (S.).

———S. 19—*Repudiation of contract—Effect.*

The repudiation of a claim to refer a case to the arbitration, embodying a contract, by a party, does not permit him to rely upon a subsidiary term in the contract and consequently does not allow him to demand arbitration. (*Kemp and Raymond, A. J. Cs.*) JIVRAJ LAKHAMSI *v.* TAHKANDAS MOHANDAS. 58 I. C. 790 (S.).

———S. 19—*Breach of contract—Suit—Reference to arbitration—Custom inconsistent with contract—Arbitrator—Power of, to decide as to custom.*

In a suit for breach of contract, the matters were referred to arbitration and the suit was stayed under S. 19. On objection being raised that an alleged custom was inconsistent with the contract and that the arbitrators cannot go into the question, *held*, that the arbitrators had the power. (*Fawcett, J. C. and Kincaid, A. J. C.*) GOBINDRAM SHIVALDAS *v.* ECWART RYRIE & CO. 58 I. C. 506 (S.).

———S. 19—*Reference before suit—Award after.*

A suit is not barred by a reference to arbitration made before, but the award in which is delivered after the suit.

Per *Kemp, A. J. C.*—The case would be different if by a reference and award before the suit the rights and liabilities of the parties had been determined at the date of the suit. (*Kemp and Raymond, A. J. Cs.*) RAMCHAND GURUDASMAL *v.* GOBIND RAM. 56 I. C. 150 = 13 S. L. R. 193.

———S. 19—*Stay of suit—Onus on party objecting.*

In an application for stay of suit it is the duty of the Court to stay the suit and the plaintiff must show why he should not be bound by his agreement to refer. Arbitrators can decide questions of law and the occurrence of a difficult or complicated question of law is not a sufficient ground to take the matter out of the arbitrator's hands. 12 S. L. R. 34 Foll. (*Fawcett, J. C. and Kincaid, A. J. C.*) HAJI ABDULLAH HAROON *v.* MESSRS. E. D. SASOON & Co. 56 I. C. 76 = 13 S. L. R. 201.

———S. 19—*Stay of suit—Grounds for—Appearance—Meaning of onus.*

An appearance for the purpose of making a stay application may be treated as an appearance

ARBITRATION ACT (IX of 1899), S. 19.

in the suit. The expression "after appearance" in S. 19 of the Arbitration Act is merely directory and the section is intended to prevent a party from filing an application after he has attorned to the jurisdiction of the Court. In an application for stay of a suit the onus is on the plff. to show why he should not be bound by his agreement to refer to arbitration. Under the Arbitration Act the arbitrators are competent to decide questions of law and fact and the fact that a difficult question of law is involved is not ordinarily a good ground for refusing stay. (*Pratt, J. C. and Crouch, A. J. C.*) MESSRS. KODUMAL KALUMAL *v.* MESSRS. VOLKART BROS.
48 I. C. 434=12 S. L. R. 34.

———S. 19—*Reference—Stay of suit—Probability of bias of umpire.*

Per *Pratt, J. C.*—An arbitration tribunal in which the ultimate decision rests with the nominee of a class having a particular interest is not an impartial tribunal. When a Court finds that the agreement for reference to arbitration provides for the appointment of an umpire who will most certainly tilt the scales against one party, the Court should retain its jurisdiction to try the suit. An order for stay ought to be restricted by a time limit. Per *Fawcett, A. J. C.*—The Court should exercise its discretion refusing to stay a suit in a sparing and cautious manner and should not do so unless the applicant can establish that there is good ground for apprehending that there will be a failure of justice if the reference to arbitration is allowed to proceed. (*Pratt, J. C. and Fawcett, A. J. C.*) MESSRS. GOVERDHANDAS VISHINDAS *v.* RAMCHAND MANJIMAL.
47 I. C. 783=12 S. L. R. 41.

———S. 19—*'Step in the proceedings'—Meaning of.*

Any application to the Court, even one for time is a "step in the proceedings" within S. 19 of the Act. Even a mere acquiescence in a proceeding initiated by the other party in an order made on his separate application is a 'step in the proceedings. (*Pratt, J. C.*) FLEMING SHAW & Co. *v.* HAJI YUSIF ELLIAS. 40 I. C. 81=
10 S. L. R. 190.

———S. 19—*C. P. Code, S. 151—Inherent power to stay.*

Where one of the parties to a reference files a suit in respect of the same subject-matter the proceeding in the suit cannot be stayed under S. 19 of the Arbitration Act but under S. 151 of the C. P. Code if it be necessary for the ends of justice. The Court should either adjourn the trial of the suit until an award is complete or insist on the plff. obtaining leave of the Court to revoke the reference. So long as the authority delegated to an arbitrator is not revoked he has the power to make an award and there would be no impropriety of conduct on his part in proceeding with the reference after a suit is filed unless he has notice that there has been an application for leave to revoke the authority conferred on him to some competent Court. Though it appears desirable to have the matter tried in Court the proper course is not to ignore

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the arbitration but to direct the deft. to take, necessary steps to revoke the submission. (*Crouch A. J. C.*) DHANPATMAL DIWANCHAND *v.* KISHIN INDRAJ. 35 I. C. 536=10 S. L. R. 1.

———S. 19—*Insolvent guarantee broker—Claim for damages—Suit to recover guarantee deposit—Arbitration.*

A suit by an Official Receiver of the property of an insolvent guarantee broker against the employer for the balance of the guarantee deposit after setting off the amount of damages settled in insolvency proceedings as due to the employer cannot be referred to arbitration under S. 19 without the leave of the Court under S. 16 (2) of the Prov. Ins. Act. (*Hayward, J. C.*) JAMES FINLAY & Co. *v.* V. E. RAYMOND.
27 I. C. 138=8 S. L. R. 60.

———Ss. 19 and 14—*Jurisdiction of Court—Not ousted by arbitration clause—Institution of suit—Award after—Submission, irrevocable.*

An arbitration clause in a contract does not oust the jurisdiction of the Court in case of its breach. If a suit is instituted ignoring the arbitration, the defendant can sue for damages for breach of the contract to refer or indirectly enforce it by applying for stay of proceedings. He cannot after suit and without stay of proceedings nominate arbitrators; if he does so and gets an award he will be offending S. 14. Where there is a valid reference to named arbitrators, the submission is irrevocable except by leave of Court. (*Crouch, A J C.*) SAWYER *v.* LOUIS DREYFUS & Co. 20 I. C. 504=7 S. L. R. 1.

———Sch. I, Cl. (3)—*Delay in giving award when valid.*

Where the arbitrators delivered an award more than three months after the date of a notice calling on them to act but within three months of the day when they began to hear the reference, the award is perfectly valid. (1899) 2 Ch. 80; L. R. 2 Q. B. 523 Ref. (*Piggott and Walsh, JJ.*) FIRM OF SARDAR MAL HARDAT RAI *v.* SHEO BAKSH RAI SRI NARAIN. 44 All. 432=
66 I. C. 907=20 A. L. J. 272=
L. R. 3 A. 227=1922 All. 106.

ARMY ACT (1881).

———Ss. 136 and 151—*Salary of officer.*

The salary of an offieer of his Majesty's Regular forces cannot be attached. 24 Cal. 102; 25 Mad. 402 Ref. (*Knox and Karamat Husain, JJ.*) LECKY *v.* BANK OF UPPER INDIA LTD.
33 All. 529=9 I. C. 1023=8 A. L. J. 487.

ARREARS.

See (1) MESNE PROFITS.
(2) LANDLORD AND TENANT.
(3) C. P. CODE, S. 60.
(4) HINDU LAW—MAINTENANCE.

ARREST.

See CIV. PRO. CODE, SS. 55 TO 59 AND 134–136.

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See LEGAL PRACTITIONER.

ARTICLES.

See COMPANY.

ARTIZAN.

See (1) WORKMAN'S BREACH OF CONTRACT ACT
(2) C. P. CODE, S. 60.
(3) WORDS AND PHRASES.

ASCETICS.

See (1) HINDU LAW.
(2) SUCCESSION TO RELIGIOUS PERSON.

ASSAM FOREST REGULATION (VII of 1891).

———Ss. 5, 6, 15 and 17—*Reserved forests—Notification—Objection disallowed by Forest Settlement Officer—Remedy of objector—Notification if impeachable.*

If an objection made to a notification of Local Government under the Regulations for reserving a certain plot of land, is disallowed by the Forest Settlement Officer the remedy of the objector is by appeal to the Commissioner and if the appeal is not preferred, the Notification cannot afterwards be impeached. (*Sanderson, C. J. and Walmsley, J.*) KHANDKAR HIDAYATULLA *v.* EMPEROR.
24 C. W. N. 645=58 I. C. 338=
21 Cr. L. J. 754=47 C. 889.

ASSAM LABOUR AND EMIGRATION ACT (VI of 1901).

———Ss. 2 (1), (e) and 164—*Emigrate—Recruits to emigrate.*

S. 2 (1), (e) does not aim at defining the word 'emigrate' but simply describes what emigration may mean, and is intended to avoid repetition, in the main provisions of the Act, of the various points of the departure from, and destination to which it desired to restrict emigration. To constitute emigration within the Act all that is necessary is (1) that departure should be from any part of the territories in which the Act for the time being is in force and the destination should be a labour district, (2) that the emigrant should be 16 years of age or upward, and (3) that the emigrant is to labour for hire in a labour district otherwise than as a domestic servant. Clause (3) does not mean that in order to constitute emigration within S. 164, the person recruited must be intending when he is recruited, to go to a labour district to work there for hire. 1 Pat. L. J. 388, not foll.. 37 Cal. 27, dist. To constitute an offence under S. 64 the purpose for which the recruiter was recruiting, *viz*, emigration, must be present in his mind. (1913) A. C. 107, Ref. (*Chapman, Mullick and Atkinson, JJ.*) MANICK RAM AHIK *v.* EMPEROR.
2 Pat. L. J. 91=2 Pat. L. W. 357=
18 Cr. L. J. 404=38 I. C. 964=1917 Pat. 89.

———Ss. 2 (n) and 161—*Illegal recruitment of coolies—Employer asked to defray costs of repatriation—No allegation of coercion or undue influence.*

A Sub-Deputy Magistrate who was not appointed under the Act, acquitted a person accused of illegal recruiting and directed the employer to whose garden the coolies were being conveyed to deposit the expenses of repatriation. No notice under S. 161 was given nor was there any indication of coercion or undue influence. *Held*, that the order for repatriation was bad. (*Holmwood and Sharfuddin, JJ.*) EMPEROR *v.* RITU CHAMARR.
18 C. W. N. 1143=15 Cr. L. J. 195=22 I. C. 979.

ASSAM LAND AND REVENUE REGULATION (I of 1886), S. 6.

———S. 91—*Cancellation of license.*

A District Magistrate cancelled the license of an agent of the Assam Labour Supply Association for failure to exercise due supervision and closed the depot to recruiting. The first order was valid under S. 91 of the Act but the second order was *ultra vires*. (*Wallis, J.*) A. M. ROSS *v.* SECRETARY OF STATE.
37 Mad 55=24 M. L. J. 429=
19 I. C. 353=(1913). M. W. N. 158.

———S. 164—*Keeping recruiting house without license.*

A person keeping recruiting house without license or certificate, and using a licensed recruiter as a mere figure is guilty under S. 164. (*Knox, J.*) MAHABIR SINGH *v.* EMPEROR.
36 I. C. 479=17 Cr. L. J. 511=
14 A. L. J. 784.

———S. 164—*Emigration—Meaning of.*

Emigration within the meaning of the Act must be with the idea that the object to be attained or kept in view by the emigrant is arrival in a labour district and labouring there. The accused induced coolies to leave Sambhalpur under a promise of domestic employment in Chittagong but they were in fact taken to the labouring District of Assam. No offence under the section is committed. (*Roe and Jwalaprasad, JJ.*) MANIKRAM AHIR *v.* EMPEROR.
1 P. L. J. 388=18 Cr. L. J. 284=
38 I. C. 316=2 P. L. W. 355.

———S. 167—*Offence under.*

A person carrying a recruiting concern without license is punishable but not one who for remuneration helps an authorised person under the Act. (*Walsh, J.*) QUASIM ALI *v.* EMPEROR.
17 Cr. L. J. 407=35 I. C. 967=14 A. L. J. 1222.

ASSAM LAND AND REVENUE REGULATION (I of 1886).

———Ss. 6 and 71—*Scope of—Ejectment—User for agricultural purpose—Test of.*

Section 71 of the Assam Land and Revenue Regulation does not entitle a purchaser to ejeet a tenant having a right of occupancy under the Rent Law for the time being in force, or to enhance the rent of any such tenant unless authorised by that law.

Cultivators holding an entire tract for a period of more than 12 years, and using a portion for grazing purposes, the remainder being still covered by jungle are *raiyats* within S. 6 of the Assam Land and Rev. Regn. The user of the land for grazing purposes entitles them to claim a right of occupancy; for the true test is to determine whether the user of the land has been for an agricultural purpose.

A *raiyat* who has occupied and cultivated land for more than 12 years under a landlord who had no title to the land nevertheless acquires a right of occupancy. (*Mukerji and Roe, JJ.*) BROJA BASI KOER *v.* RAM SANKAR DAS.
29 I. C. 834=23 C. L. J. 638.

ASSAM LAND AND REVENUE REGULATION (I of 1886), S. 12.

———S. 12—*Rules framed by Chief Commissioner under S. 12, R. 57—Settlement—Previous settlement holder—His rights—Collector, powers of, to exclude previous holder—Civil Court, its jurisdiction.*

Under R. 57 of the rules framed by Chief Commissioner under S. 12, the Collector has powers to settle land with any persons, but preference should ordinarily be given to the previous settlement holder. A Civil Court has power to decide whether there has been a compliance with the provisions of the rule, and in cases under the third paragraph of the rule, if there has been no compliance it may pass a decree as between the parties to the suit, but it cannot go into the correctness of the Collector's decision. (*Chatterjee and Panton, JJ.*) JOY GOBINDA *v.* HAZIRA BIBI. 54 I. C. 307=24 C. W. N. 149.

———Ss. 23 and 154—*Boundary dispute—Power of Deputy Commissioner to settle—Jurisdiction of Civil Court.*

To give a Settlement Officer jurisdiction under S. 23 of the Assam Land Revenue Regulation there must be report by the Survey Officer concerning a boundary dispute that has come to his knowledge in the course of his survey. Where the order of the Deputy Commissioner deciding a boundary dispute was passed after the termination of the settlement proceedings on the application of a party and the order did not purport to be passed under S. 23 the Civil Court has jurisdiction to entertain a suit regarding the dispute. (*Newbould, J.*) RAM KUMAR *v.* CHANDRA KANTA CHAKRABARTY. 53 I. C. 529 (C.).

———S. 28 (2) and (4)—*Right of Government—Barred by limitation.*

The Law of Limitation bars the Government's right to assess revenue after the property has been held without assessment and payment for sixty years. (*Chatterjee and Beachcroft, JJ.*) ANAND KUMAR *v.* SECRETARY OF STATE. 43 Cal. 973=32 I. C. 774=20 C. W. N. 576.

———Ss. 35 and 36—*Suit, maintainability of—Registration refused—Declaration of title—Decree for possession.*

Suit by plffs. who were out of possession, and whose application to the revenue authorities to register their names was refused, for declaration of title and for recovery of possession, is maintainable. The mere fact that defts. obtained a renewal of the Settlement from the Revenue authorities did not create in them a right which they did not possess. Ss. 35 and 36 have no application to cases of refusal of Settlement by the Revenue authorities. (*Mookerjee and Richardson, JJ.*) ASKAR MIAN *v.* SAHEDALI. 22 C. L. J. 328=31 I. C. 424=23 C. W. N. 540.

———Ss. 63, 70 and 71—*Auction sale—What passes.*

What is sold at an auction sale under S. 70 of the above Act is the estate, to which the buyer is entitled as against defaulting proprietors. A person who has acquired by adverse possession a good title to a portion of the estate sold at the

ASSAM LAND AND REVENUE REGULATION (I of 1886), S. 97.

time of a revenue sale under S. 70 of the above Regulation is a defaulter according to S. 63 of the Regulation and cannot have a good title against the buyer as an unrecorded proprietor. (*Mookerjee and Richardson, JJ.*) AFTAR ALI *v.* BROJENDRA KISHORE ROY. 37 I. C. 252=24 C. L. J. 60.

———Ss. 67 and 70—*Defaulter.*

Persons holding land adversely for more than 12 years before suit for arrears of revenue are defaulters under S. 67 and the land or part of land as the case may be, is liable to be sold under S. 70. (*Sanderson, C.J. and Mookerjee, J.*) MOHIM CHANDRA DEB CHOWDHURY *v.* PYAN LAL DAS. 44 Cal. 412=25 C. L. J. 99=39 I. C. 213=21 C. W. N. 537.

———Ss. 70, 79, 80 and 85—*Value of entry in sale certificate.*

As regards the question of the date of confirmation of sale, the Court is not bound by an entry in a sale certificate, and S. 80, sub-section (2) and S. 85, sub-section (3) of the above regulation remain unaffected by such entry, which is no conclusive evidence under S. 85. The date of the sale becoming final under S. 80 is the date of the vesting of title to the property bought at a sale under the above Regulation, and adverse possession is to be reckoned from that date, and not from the date of delivery of possession to the purchaser. No one can be treated as a defaulting proprietor at the time of sale whose adverse possession has not at the time become ownership. *Quære.*—Is the above article applicable in the case of a suit to recover from a trespasser possession of a portion of the estate sold at a Revenue sale on the purchaser's declaration of title? (*Mookerjee and Walmsley, JJ.*) JITENDRA KUMAR PAL CHOWDHURY *v.* MOHENDRA CHANDRA SARMA. 37 I. C. 239=24 C. L. J. 62.

———S. 70—*Sale—Adverse possession—Whether an incumbrance.*

Adverse possession is an incumbrance for a sale under S. 70 of the Regulation. (*Carnduff and Richardson, JJ.*) APTAR ALI *v.* BROJENDRA KISHORE. 23 I. C. 119=20 C. L. J. 210.

———S. 86—*Purchase by a member of a joint Hindu family with family funds—Suit against purchaser.*

The application of S. 86 of the Assam Land and Revenue Regulation must be restricted to a suit brought in a Civil Court against the certified purchaser on the ground that the purchase was made on behalf of another person and not on behalf of the certified purchaser. The provisions of the section do not affect the rights of the members of a joint Hindu family who are entitled by operation of law and not by virtue of a contract, are entitled to treat as part of their common property an acquisition, however made, by a member of the family in his sole name, if made by the use of the family funds. (*Mookerjee, A. C. J. and Fletcher, J.*) PHAINDHAR SARMA *v.* JIBAKRISTA SARMA. 64 I. C. 260.

———S. 97—*Partition of estate—Lands joint with those of other estates—Jurisdiction of Revenue Court—Imperfect partition*—Modus operandi *of partition.*

ASSAM LAND AND REVENUE REGULATION (I of 1886), S. 97.

Plffs. brought a suit for a declaration that the order for the partition of an estate made by the revenue authorities was without jurisdiction and was consequently inoperative in law on the ground that some of the lands of the estate sought to be partitioned were joint with the lands of other estates, and the revenue authorities were not competent under the Assam Land and Revenue Regulation, 1886, to effect a partition of lands included in several estates. *Held*, that S. 97 of the Regulation confers upon every recorded proprietor of a permanently settled estate, subject to the qualifications specified therein, the right to claim a partition of the estate. It makes no reference directly or by implication, to the mode in which the lands of the estate are held. The duty is imposed upon the Revenue Court to effect a partition of an estate on an application by a person competent to claim partition under S. 97. The first step in the performance of that duty is to ascertain the lands which constitute that estate. To carry out this preliminary step, it may conceivably be necessary to have recourse to an auxiliary measure, namely, to effect a partition of the joint lands of the several estates and thereby to ascertain the lands which belong to the estate under partition. It is a well-known rule of interpretation of statutes that where a statute confers jurisdiction, it impliedly grants also the power to do such acts, adopt such measures and employ such means, as are essentially necessary to its execution. 23 C. 514 and 24 C. 751 Ref. 46 C. 256 Ref. It cannot be maintained that the joint lands should first be divided by a Civil Court, as then the result would follow that the Civil Court would in essence be called upon to constitute an estate for the purpose of partition under S. 97 and consequently to deal with a matter which affects the Government revenue and is excluded from its jurisdiction by S. 154 (1) (f) of the Regulation. 32 C. 1036 dist. (*Mookerjee and Panton, JJ.*) YASIN ALI MIRDHA *v.* RADHAGOBINDA CHOWDHURY.
26 C. W. N. 381=69 I. C. 814=1922 Cal. 118.

———S. 97—*Partition of portion of estate—Application for can be entertained only by a Revenue Court.*

A Revenue Court alone has jurisdiction to entertain an application for partition of a portion of a revenue paying estate, when the applicant has no interest in the remainder. S. 97 of Regulation does not require that the applicant should be in actual physical possession. The provisions of the section are sufficiently complied with if at the time of the application, the interest of the applicant had not been transferred or otherwise lost. (*Woodroffe and Walmsley, JJ.*) BIRENDRA KISHORE MANIKYA *v.* KRISHNA CHANDRA DEB.
65 I. C. 83 (C.).

———S. 97—*Mode of partition—Civil or Revenue Court.*

Civil or Revenue Court estimates as to the mode of partition of a whole estate under the Assam Land and Rev. Regn. must be raised before the Revenue authority. 23 Cal. 514; 24 Cal. 751 Rel. on. (*Teunon and Richardson, JJ.*) BROJENDRA KISHORE *v.* KALI KUMAR. 46 I. C. 967=46 Cal. 236.

ASSAM REGULATION (III of 1884).

———Ss. 97 (3), (b) and 96—*Partition—Lands included in the estate joint with lands of several estates.*

A Revenue Court has jurisdiction under S. 97 of the Act to effect a partition of an estate when the lands of that estate in whole or in part, are joint with lands of other estates; 32 Cal. 1036 dist. An estate does not cease to be an estate within the Regulation merely because its lands are held jointly with the lands of other estates provided it fulfils the requirements of the definition given in S. 3. A partition of an estate which affects the distribution of the revenue, should be effected not by a Civil Court but by appropriate Revenue Court. (*Mookerjee and Panton, JJ.*) YASIN ALI MIRDHA *v.* RADHA GOBINDA CHAUDHARI.
30 C. L. J. 489=55 I. C. 180=47 Cal. 354.

———S. 154—*Suit for partition of definite plot—Civil Court can entertain.*

S. 154 Assam Land and Revenue Regulation does not bar a civil court from trying a suit for partition of definite plot of land merely because it is included in a revenue paying estate. (*Mookerjee and Rankin, JJ.*) RAJENDRA NARAIN CHOWDHURY *v.* SATISH CHANDRA CHOWDHURY.
50 Cal. 948=1924 Cal. 233.

———S. 154—*Suit by co-sharer for declaration—Civil Court.*

S. 154 of the Assam Land and Revenue Regulation which provides that no Civil Court shall exercise jurisdiction in the distribution of land or allotment of revenue on partition is no bar to an unrecorded co-sharer who was not allowed to intervene in partition proceedings before the Revenue authorities, instituting a suit for a declaration of his title to a share of the estate and for confirmation of possession, when the partition proceedings before the Revenue Officer had not yet been completed. (*Mookerjee and Roe, JJ.*) HABIRAM DAS *v.* HEM NATH SARMA.
30 I. C. 690=19 C. W. N. 1068.

———S. 154—*Declaratory suit—Plffs. land wrongly included in defendants' settlement.*

Notwithstanding S. 154 of the Act, a suit is maintainable for declaration that certain plots of land of plff. had been wrongly included in plots settled with defendant. A misdescription in the plaint as to the number of the defendants' plots said to include the plaintiffs' land is not a fatal defect. (*Carnduff and Chapman, JJ.*) NASIR MEA *v.* ARMAN ALI MEA. 18 I. C. 745=17 C. L. J. 118.

———S. 154 (1)—*Scope of.*

S. 154 (1) should be read along with S. 39 and controlled by the latter. (*Mookerjee and Richardson, JJ.*) ASKAR MIAN *v.* SAHEDALE BARA.
22 C. L. J. 328=31 I. C. 424=23 C. W. N. 540.

ASSAM REGULATION (III of 1884).

———*Garo Hill—High Court—Jurisdiction—Compensation.*

In Garo Hill, Assam, petty Magistrates known as Laskars can grant compensation in cases of petty complaints and the High Court cannot deal with the matter. (*Holmwood and Sharfuddin, JJ.*) DARSINGH NAKMA *v.* EMPEROR.
12 Cr. L. J. 10=9 I. C. 114=13 C. L. J. 444.

ASSAULT.

See TORT.

ASSETS.

See (1) INSOLVENCY ACTS.

(2) C. P. CODE, Ss. 50, 53, 73.

ASSIGNMENT.

———*Chose in action.*

An assignment of policy moneys by way of charge requires a writing for its validity. (*Lord Moulton.*) MULRAJ KHATU *v.* VISHWANATH.
37 Bom. 198=(1912) M. W. N. 1247=12 M. L. T. 652=11 A. L. J. 7=24 M. L. J. 60=17 C. W. N. 209=15 Bom. L. R. 9=17 C. L. J. 162=17 I. C. 627=40 I. A. 24 (P. C.).
[On Appeal from 11 I.C. 964=13 Bom. L.R. 590.]

———*Consideration—Mortgagee, if can question.*

Where a mortgagor's sons sell the property after his death and the purchaser brings a suit for redemption of the mortgage impleading the mortgagee's sons and the vendors, the mortgagee's sons cannot object to it on the ground of absence of legal necessity for sale. (*Banerjee and Walsh, JJ.*) DURGA PRASAD *v.* BHAJAN.
42 All. 50=17 A. L. J. 947=58 I. C. 487=2 U. P. L. R. (A.) 406.

———*Consideration for—Stranger—Right to queetion—Assignor denying—Effect of.*

As a general rule where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration for the assignment but the rule is not invariable and does not apply where the transferor being the party to the litigation does not admit the assignment but on the contrary pleads that it was fictitious and without consideration. (*Knox, J.*) MANGAL PRASAD *v.* NABI BAKSH.
43 I. C. 74 (A.).

———*Consideration—Mortgagor not to question.*

In a suit by the assignee of a mortgage the mortgagor is not entitled to question the consideration for the assignment. The non-mention of any necessity for the transaction is no evidence of its being fictitious. (*Tudball and Rafique, JJ.*) MAHOMED HAMID ALI *v.* MAHOMED ASHGAR ALI.
28 I. C. 825 (A.).

———*Consideration—Stranger cannot question.*

In a suit by the assignee of a promissory note to recover the amount due, the executant is bound to pay on satisfying himself that the plaintiff is the legal holder of the note and able to give him a good discharge. He cannot question whether consideration was paid or not paid by the assignee. (*Richards, C. J. and Banerjee, J.*) BALDEO SAHAI *v.* BEHARI DAL. 37 All. 99=27 I. C. 509=13 A. L. J. 19.

———*Consideration—When a third party can challenge it.*

Ordinarily the law is that an assignment admitted by the assignor cannot be impugned by a third party. But he can do so if he shows that it is colourable and entered into with an intention to defraud him. (*Griffin, J.*) JWALA PRASAD *v.* BHARAT SINGH. 10 I. C. 226 (A).

ASSIGNMENT.

———*Government revenue—Rights of assignee.*

Assignee of Government revenue since he takes subject to right of Government cannot recover the portion remitted by Government from the Zemindars. (*Banerjee and Griffin, JJ.*) BENI MADHO *v.* BHAGWAN DIN. 33 All. 556=10 I. C. 144=8 A. L. J. 534.

———*Consideration—Debtor not to question.*

The existence or adequacy of consideration for assignment of a decree is a matter between the assignor and assignee and cannot be questioned by the debtor. 35 C. 420. P. C. foll. (*Chatterjee and Walmsley, JJ.*) PRASANNA KUMAR *v.* ASHUTOSH ROY. 20 I. C. 685=18 C. W. N. 450.

———*Rights of assignees—Suit for royalty and commission—Plff. jointly entitled with deft.*

A plaintiff as assignee was entitled to recover royalty and commission jointly with his assignor who asserted that he had received the sums claimed by the plff. The plff. was not bound to sue with his assignor as co-plff. and he need not sue for the recovery of the entire sum. (*Mookerjee and Beachcroft, JJ.*) PEARY LAL SAW *v.* MADHOJI JIBAN. 19 I. C. 865=17 C. L. J. 372.

———*Contract—Rights under—Breach—Refund of earnest money.*

Where the assignor cancels the contract before assignment. An assignee of a contract to supply goods has a right to the refund of the earnest money and the amount paid by him on account of the profit, from the assignor. (*Le Rossignol, J.*) NARAIN DAS *v.* HAR BHAGWAN KANAI LAL.
22 P. L. R. 1917=7 P. W. R. 1917.

———*Mistake bonafide.*

In a suit to recover money due on a promissory note, the assignee has all the rights to make good any mistakes in calculation of interest. (*Schwabe, C. J. and Wallace, J.*) SECRETARY OF STATE *v.* RADHIKA PRASAD. 44 M. L. J. 685=74 I. C. 785=46 M. 259=18 L. W. 210=1923 M. 667.

———*Equitable—Authorization to collect and pay himself out of collections.*

Deft. authorized plff. to collect moneys due under certain decrees and pay himself out of the proceeds. *Held*, that this was an equitable assignment of the decree in plff's favour. An agreement between an assignor and an assignee that a debt shall be paid out of the specified fund or an undertaking to pay over to another, moneys to be received from a particular source amounts to an equitable assignment. (*Abdur Rahim, Offg. C.J., Seshagiri Iyer and Phillips, JJ.*) RAMA AIYAR *v.* PARTHASARATHY CHETTY.
43 I C. 385 (M.).

———*Fund—Benefit society subscriber Bonus—Member's right to nominate beneficiary in accordance with rules—Right of nominee.*

If under a contract between the member and the society, the society undertakes to pay a particular person, that person is entitled to the money though the member may have the power to select any person he chooses and though the

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member at his entire discretion can change the nomination or even make the fund his own, by merely observing the formalities prescribed by the rules. 37 B. 477; 35 M. 162; 18 C. W. N. 133 Dist. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) FLORINA MORTIS *v.* PINTO.
33 M. L. J. 476=42 I. C. 677.
But see 39 M. L. J. 391.

———*Right to demand reconveyance.*

Where by a compromise, the right to demand reconveyance of the property after a particular period of time was recognized, such a right is capable of being assigned in law to others. (*Coutts Trotter and Seshagiri Iyer, JJ.*) NOCHAT KIZPAKKE MADATHIL VENKATESHWARA IYER *v.* KALLOOR ILLATH RAMAN NAMBUDRI.
3 L. W. 435=33 I. C. 696=19 M. L. T. 329.

———*Direction to pay debt—Revocation of.*

A direction in an assignment deed that the assignor should out of the consideration for the assignment pay off certain debts of the assignor, may be revoked by the latter at any time before the debts are paid if the debts are unsecured but not if they are secured. (*Sadasiva Iyer and Hannay, JJ.*) GOPALA IYER *v.* RAMA VENKATASUBBA IYER. 26 I.C. 223=1 L. W. 977.

———*Consideration—Want of—If can be pleaded by mortgagor.*

In a suit on a mortgage, by the assignee of the mortgage, it is not open to the mortgagor to plead non-payment of consideration for the assignment as a defence. (*Wallis, Offg. C. J. and Kumaraswami Sastri, J.*) ADIKULAM CHETTI *v.* SUBBAN CHETTI. (1914) M. W. N. 684=16 M. L. T. 279=26 I. C. 35=27 M. L. J. 621.

———*Mortgage—Assignee to be paid the mortgage debt.*

A mortgagor receiving notice of an assignment by the mortgagee of his rights under the bond to another is entitled to treat the assignee as the person to whom payment should be made unless before payment, the assignment has been cancelled. (*Sadasiva Iyer and Tyabji, JJ.*) VENKATASUBBA AIYAR *v.* SUBBARATHNAM AIYAR.
1 L. W. 419=15 M. L. T. 331=23 I. C. 607=27 M. L. J. 134.

———*Consideration—Failure of—Effect of—Stranger not to question.*

Non-payment of consideration would not necessarily invalidate the transfer; but the assignor can maintain a suit for recovery of consideration. A mortgagor cannot question the consideration for an assignment in a suit by the assignee of the mortgage to enforce it. He has to see if there is a valid assignment. (*Piggott, J. C. and Sabonadiere, A. J. C.*) NAND KISHORE *v.* MANGAL DIN. 21 I. C. 8 (Oudh).

———*Consideration for—Third party, if can question.*

An assignment admitted by the assignor cannot be impugned by a third party except on the ground that the whole transaction was a colourable transaction. 35 Cal. 420 foll. (*Rigg, J. C.*) HORMASJI *v.* PO HAYIN.
51 I. C. 530=12 Bur. L. T. 9.

ATTESTATION.

———*Right of suit—Assignee of portion of estate of deceased person—Right to sue for declaration of title during pendency of administration suit.*

An assignee of a portion of the estate of a deceased person is competent to sue a third person for a declaration of title during the pendency of a suit for the administration of the estate of the deceased 10 Cal. 718, dist. (*Parlett and Ormand, JJ.*) MAUNG AUNG MYAT *v.* MAUNG SIN. 43 I. C. 539 (Bur.).

ASSOCIATION.

See (1) COMPANY.
(2) COMMUNITY.

ASURA MARRIAGE.

See HINDU LAW—MARRIAGE.

ATTACHABLE PROPERTY.

See (1) ATTACHMENT.
(2) C. P. CODE, S. 60-64.

ATTACHMENT.

See C. P. CODE, S. 60, O. 21, Rr. 46, 63 O. 38, R. 5.

ATTESTATION.

See also (1) EVIDENCE ACT, Ss. 68 AND 115.
(2) HINDU LAW.
(3) ALIENATION.
(4) TRANSFER OF PROPERTY ACT, Ss. 59 AND 123.

———*Consent—Evidence.*

Independent evidence of consent is essential for an estoppel. (*Lord Buckmaster.*) PANDURANG KRISHNAJI *v.* MARKANDEYA TUKARAM.
26 C. W. N. 201=65 I. C. 954=30 M. L. T. 249=49 C. 334=49 I. A. 16=18 N.L R. 1=42 M.L.J. 436=24 Bom. L.R. 557=35 C. L. J. 409=15 L. W. 486=20 A. L. J. 305=5 M. L. J. 6=1922 P. C. 20.

———*Effect of—Reversioner—Alienation.*

Attestation by a reversioner of a conveyance by a Hindu widow does not import knowledge of the contents of the deed. Consent to the transaction should not be imputed to the attestor nor does it operate as an estoppel. (*Lord Chancellor.*) NANDALAL *v.* JAGAT KISHORE ACHARIYA.
44 Cal. 186=20 M. L. T. 335=31 M. L. J. 563=(1916) 2 M. W. N. 336=4 L. W. 458=18 Bom. L. R. 868=14 A. L. J. 1103=24 C. L. J. 487=1 Pat. L. W. 1=21 C. W. N. 225=10 Bur. L. T. 177=36 I. C. 420=43 I. A. 249 (P.C.).

———*Effect of.*

It is doubtful whether attestation is sufficient evidence of consent by a son to his father's alienation. (*Piggott, J.*) PACHKAURI RAUT *v.* RAM KHELAWAN CHAUBE. 29 I. C. 749 (A.).

———*Effect of.*

The fact of a person witnessing a document which affected his interest, raises a strong presumption that he was aware of the nature of

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the transaction witnessed by him: (*Banerjee, J.*) ISMAIL JOLAHA *v.* JAGANNATH. 19 I. C. 255 (A.).

———*Effect of.*

Attestation of a deed does not necessarily import consent to an alienation effected thereby nor even knowledge of its contents. (*Mookerjee, J.*) UPARDA NATH *v.* BINDESHRI PRASAD. 20 C. W. N. 210=32 I. C. 468=22 C. L. J. 452.

———*Effect of—Assent.*

Whether attestation of a document implies assent to the transaction is a question of fact depending on the facts of each case. (*Sharfud-din and Richardson, JJ.*) DINO NATH DAS *v.* KOTISWAR BHATTACHARYA. 21 I. C. 367 (C.).

———*Effect of—Knowledge.*

Per Sadasiva Iyer, J.:—Estoppel by attestation will arise when the attestor to the document has an existing interest in the property dealt with in the document and not otherwise. Attestation raises a *prima facie* presumption that the attestor knows the contents and acquiesces in the disposition of property. 23 M. L. J. 301 foll., 12 W. R. 47 P. C. ref. 10 W R Cir Ref. 293 rel on. (*Sankaran Nair and Sadasiva Iyer, JJ.*) NARAYANA IYER *v.* RAMA IYER. 38 Mad. 396=(1913) M. W. N. 588=14 M. L. T. 89=20 I. C. 625=25 M. L. J, 219.

———*Knowledge of contents not implied.*

The mere fact of a person's attestation of a document does not lead to the inference that he knew the contents of the deed. 49 Cal. 334 followed. (*Kotwal, A. J. C.*) ANAND RAO *v.* DADA. 71 I. C. 43 (Nag.)

———*Effect of—Consent of attestor.*

If an adult man of full mental capacity and having an interest in property affected by a deed, knowingly attests the deed, the attestation is proof of his consent. (*Drake-Brackman, J. C.*) GURU DAYAL DAS *v.* NATHU. 50 I. C. 274 (N.).

———*Effect of—Knowledge of contents of deed if imputed to attestor.*

The attestation of a document does not involve the withness in any knowledge of the contents of the document nor is he affected with notice of any of its provisions. 44 Cal. 186 (P. C.), 37 All. 350 foll. (*Lyle, A. J. C.*) DURGA PRASAD *v.* DEBI PRASAD. 51 I. C. 621. (Oudh).

———*Notice of contents.*

The attestation of a document is no evidence of notice of its contents. (*Lindsay, J. C.*) AZIA-UL-HAK *v.* MARIAN BIBI. 17 O.C. 157=24 I. C. 45=1. O. L. J. 225.

———*Effect of.*

Attestation does not imply knowledge or consent. (*Lindsay and Rafique, A. J. C.*) MATHURA PRASAD *v.* JAGAT BAHADUR SINGH. 18 I. C. 289 (Oudh).

———*Notice of contents—Attestation by superior proprietor.*

Mere attestation of a deed does not amount to notice of its contents but where a superior proprietor of land attests a gift deed being aware of its provisions and recognizing the donee as transferee, the only inference to be drawn is that he gave his consent to the transfer. (*Evans, J. C. and Lindsay, A. J. C.*) WAZIR MOHAMMAD *v.* HAR PRASAD. 13 I. C. 613=15 O. C. 67.

———*Effect—Estoppel.*

A party to a document cannot avail himself of attestation as creating an estoppel against an attesting witness unless he is deceived by such action of the person attesting. The burden of proving such deception would lie on the person pleading such estoppel. (*Twomey, J.*) MAUNG THA *v.* MAUNG SHWE. 12 I. C. 891=4 Bur. L. T. 132.

ATTESTING WITNESS.

See (1) ATTESTATION.
(2) EVIDENCE ACT, S. 115.
(3) T. P. ACT, S. 59.

ATTORNEY.

See (1) LEGAL PRACTITIONER.
(2) POWER OF ATTORNEY.

ATTORNEY'S CLERK.

See (1) LEGAL PRACTITONER.

ATTORNMENT.

See (1) LANDLORD AND TENANT.
(2) LESSOR AND LESSEE.
(3) T. P. ACT, S. 116.

AUCTION-PURCHASER.

See (1) C. P. CODE, O. 21, Rr. 62, 66, 90-93.
(2) EXECUTION SALE.

AUCTION SALE.

———*Bid—Nature of—Acceptance—Withdrawal of bid.*

Every bid at an auction is an offer on the one side which is not binding on the other side till it is assented to and a bidder may therefrom withdraw his bid before its acceptance. (*Mookerjee and Beachcroft, JJ.*) KENARAN *v.* KAILASH CHANDRA. 19 I. C. 904=18 C. L. J. 53.

———*Bids.*

Withdrawal of bid before property is knocked down has not the effect of binding the offerer. (*Coutts-Trotter and Ramesam, JJ.*) JORAVARMULL CHAMPA LAL *v.* JEYGOPALDAS GANSHAMDAS BY HIS AGENT MUGDUTH. 43 M. L. J. 132=70 I. C. 977=(1922) M.W.N. 564=16 L. W. 816=31 M. L. T. 401=45 M. 799=1922 M. 486.

———*Bids—Nature of—Acceptance subject to approval—Benamidar—Bids by.*

Where an agent holding an auction accepts the highest bid on behalf of his principal subject to the assent of the principal there is a valid and enforceable contract on the assent being given. In the absence of a condition to the contrary a Benamidar can bid at an auction sale. ((*White, C. J, and Sankaran Nair, J.*) CHITIBABU ADINNA *v.* GARMALLA JAGGARAYUDU. 29 I. C. 12=28 M. L. J. 617.

AUDITOR.

See COMPANY.

AUTHORIZED AGENT.

See (1) PRINCIPAL AND AGENT.
(2) CONTRACT ACT, CH. X.

AWANS.

See CUSTOM, PUNJAB.

AWARD.

See (1) ARBITRATION.
(2) ARBITRATION ACT.
(3) C. P. CODE, O. 23, R. 3 AND SCH. II.
(4) LAND ACQUISITION ACT.

AWARD—Registration.

See REGISTRATION ACT, S. 17 (2).

AZIAS.

See (1) MAHOMEDAN LAW—WAQF.

BABUANA.

See (1) GRANT.
(2) HINDU LAW.
(3) IMPARTIBLE ESTATE.
(4) MAINTENANCE.

BAI-BIL-WAFA.

See (1) MORTGAGE—CONSTRUCTION.
(2) T. P. Act, Ss. 53 AND 98.

BAILMENT.

See (1) CARRIER.
(2) CONTRACT ACT, S. 148.
(3) RAILWAYS ACT.

BAIRAGIS.

See HINDU LAW—ASCETICS AND SUCCESSION.

BALANCE OF ACCOUNT.

See (1) ACCOUNTS.
(2) LIMITATION ACT.

BALCONY.

See MUNICIPAL ACTS.

BALLAVACHERVA GOSWAMI.

See HINDU LAW—CUSTOM.

BANDHUS.

See HINDU LAW—SUCCESSION.

BANK.

See BANKER AND CUSTOMER.

BANKER AND CUSTOMER.

———*Knowledge of trust—Customer's moneys paid into bank—Bank when put on notice.*

A bank is not affected with knowledge of the ownership in trust of moneys paid into the account of their customers by the mere form of the signature on the negotiable instruments by which such instruments are transferred. (*Lord Buckmaster.*) TEXAS CO. *v.* BOMBAY BANKING CO.
46 I. A. 250=54 I. C. 121=
24 C. W. N. 469=26 M. L. T. 370=
30 C. L. J. 446=(1920) M. W. N. 70=
2 U. P. L. R. 21=11 L. W. 320 (P. C.).

———*Negligent payment of forged draft—Contributory negligence of customer—Relative effect—Estoppel.*

A Banker making payment of a draft under an authority so to pay, is liable, when the draft is found to be a forged one, to make good the loss occasioned to the customer; the fact that the forgery was due to the negligence of the customer though it may contribute to the deception, is not a proximate cause of the loss to estop the customer from claiming the same. Per *Batchelor, J.*:—In order that the customer's negligence should in law have the effect of depriving him of money paid by the banker on a forged draft it is requisite, first that the negligence should have occurred in the very first transaction itself not in some collateral act and secondly the negligence should have been the proximate cause of misleading the banker. "Where one of two innocent parties must suffer for the fraud of a third, that party should suffer whose negligence facilitated the fraud." (*Scott, C. J. and Batchelor, J.*) PUNJAB NATIONAL BANK, LTD. *v.* MERCANTILE BANK OF INDIA, LTD.
36 Bom. 455=12 I. C. 257=13 Bom. L. R. 835.

———*Banker as trustee "A person collecting money for another"—When a trustee.*

A person who is asked to collect and remit the money collected, to another, is in a fiduciary position towards the other and is a trustee, and the money collected being for a specific purpose, does not pass in insolvency to the agent's trustee in bankruptcy. But when he is asked simply to repay on demand, it is no trust and the *cestui que* trust can follow trust property though mixed up with other property (*Rattigan and Shadi Lal, JJ.*) ALLIANCE BANK OF SIMLA, LTD. *v.* AMRITSAR BANK.
79 P. R. 1915=31 I. C. 215=
171 P. W. R. 1915.

———*'Bank'—Meaning of.*

The word 'Bank' connotes the business of utilizing money received for purposes of profit. The treasury receiving money from the District Board and respecting their orders does not constitute a bank. (*Oldfield and Seshagiri Iyer, JJ.*) RANGASAWMI PILLAI *v.* SANKARALINGAM IYER.
43 Mad. 816=(1920) M. W. N. 428=
12 L. W. 367=58 I. C. 893=
39 M. L. J. 377.

———*Relationship.*

The banker is but a debtor of the customer but where the customer directs the banker to use it or collect rents for him on similar terms, banker becomes a trustee and the customer is entitled to the amount out of the assets of the banker, where the banker has committed a breach of trust. (*Ayling and Napier, JJ.*) SUBRAMANIA CHETTIAR *v.* KADIRESAN CHETTIAR. 39 Mad. 1081=
30 M. L. J. 245=3 L.W. 168=19 M. L. T. 129=
32 I. C. 965=(1916) 1 M. W. N. 186.

———*Banker as Secretary and Treasurer—Fiduciary relation—Mixing up of moneys.*

A and Co. were Secretaries and Treasurers of the plff. Co. and as such held moneys belonging to the plff. Company in order to purchase Government Pro-notes. A and Co., purchased the pro-notes and soon after presented a petition for insolvency and a vesting order was made

BANKER AND CUSTOMER.

in a suit by the plff. Company against the Official Assignee. *Held*, that A. & Co. held the money not as bankers of the plff. Company but as trustees. Per *Abdur Rahim*, *J.*—The mere fact of their having mixed up the Company's money with their own, does not amount to misappropriation on the part of A and Co. Even otherwise there was no voluntary payment in the circumstances. (*Munro and Abdur Rahim*, *JJ.*) RAMSAY AND CO. *v.* THE OFFICIAL ASSIGNEE OF MADRAS. 35 Mad. 712=21 M. L. J. 920=11 I. C. 769=10 M. L. T. 124.

———*Bank Note—Transfer of property, if passes by delivery.*

Property in Bank Note passes by delivery and a party taking it *bona fide* for value can retain it as against a former owner from whom it has been stolen. (*Pratt*, *J. C. and Crouch*, *A. J. C.*) BODOMAL KISHAN CHAND *v.* EMPEROR. 13 I. C. 213=13 Cr. L. J. 21=5 S. L. R. 153.

BANKRUPTCY.

See INSOLVENCY ACT.

BANKRUPTCY ORDINANCE, STRAITS SETTLEMENTS (1882).

———S. 30 (4)—*Hindu law—Joint family—Father—Son's liability to pay father's debts.*

A Hindu son is not jointly bound with his father to pay the debts of the latter within S. 30 (4) of the Ordinance. The son's liability is not joint and several liability as ordinarily understood in English Law. In India the adjudication and assignment of the bankrupt's property under the Straits Settlement Ordinance is not an assignment of immoveables or even moveables. (*Ayling and Srinivasa Aiyangar*, *JJ.*) NARAYANAN CHETTY *v.* VIRAPPA CHETTY. 40 Mad. 581=31 M. L. J. 386=20 M. L. T. 318=(1916) 2 M. W. N. 271=35 I. C. 913=4 L. W. 422.

BARKI SERVICE.

See (1) GRANT.
(2) INAM.

BARRISTER.

See LEGAL PRACTITIONER.

BARRISTER'S CLERK.

See LEGAL PRACTITIONER.

BENAMI.

Burden of Proof.
Consideration.
Contracts.
Doctrine of.
Effect of.
Estoppel.
Evidence of.
Fraudulent Transfer.
Marriage Settlement.
Meaning of.
Nominal and Sham Transfer.
Onus of proof.
Plea of.
Presumption.
Test.

BENAMI—Effect of.

Burden of Proof.

———*Burden of proof.*

The burden of proving that a grant made in terms to a certain person was made benami for another lies on the person alleging it. (*Lord Atkinson.*) ARAB ALI KHAN *v.* MOHMUD ALI KHAN. 43 M. L. J. 104=20 A. L. J. 545=35 C. L. J. 554=24 Bom. L. R. 951=67 I. C. 444=31 M. L. T. 94=1922 P. C. 84 (P. C.)

Consideration.

———*Consideration—Part-payment.*

The fact that a part of the consideration recited in the sale deed is true and real is sufficient to rebut the presumption as to the *Benami* nature of a sale. (*Wallis*, *C. J. and Phillips*, *J.*) RAGHUNATHA CHARI *v.* ARAVAMUTHU AIYANGAR. 34 I. C. 617 (M.).

Contracts.

———*Contracts—Benefit of transfer intended for a person other than transferee does not render the transfer* benami.

The word "*benami*" does not apply to contracts where the only question can be whether a person entered into the contract on his own behalf or on behalf of another as his agent. Though the benefit of a conveyance is intended for the wife of the transferee, the transfer does not become *benami* in the name of the transferee. (*Abdur Rahim and Srinivasa Iyengar*, *JJ.*) KALIYAMMAL *v.* KOLANDAVELA GOUNDER. 38 I. C. 188=5 L. W. 228.

———*Contracts—Pro-note—Assignment.*

No assignment can be made in favour of a benamidar. (*Kanhaiya Lal*, *J. C.*) RAM SINGH *v.* MT. RAGHU BANSA. 26 O. C. 201=9 O. & A. L. R. 29=72 I. C. 877=1923 Oudh 3.

Doctrine of.

———*Doctrine of—Resulting trust.*

A *benami* purchase has the same incidents as if it were a resulting trust in favour of the person from whose funds the purchase is made. (*Miller and Sadasiva Aiyar*, *JJ.*) ABDUL RAHIMAN NACHIYAL *v.* MIRATHAYAR AMMAL. 24 I. C. 10=1 L. W. 451.

Effect of.

———*Effect of—Suit for declaration that a portion of a transaction is genuine and the rest* benami.

Benami transactions are generally effected in order to conceal some fraud or in order to support some object of a discreditable nature. But though the Courts have in the past recognized that the ostensible owner in a *benami* transaction can be ordered to restore the property to its original owner, it is not advisable to extend that doctrine and to hold that a transaction can be partly genuine and partly unreal, unless there are very strong reasons for obliging the Court to come to such a conclusion. (*Macleod*, *C. J. and Shah*, *J.*) APPA *v.* BABJI. 64 I. C. 364=23 Bom. L. R. 873.

BENAMI—Effect of.

———*Effect of—Evidence.*

When once a transaction is found to be *benami* it becomes a question of evidence as to who is the real purchaser. The fact of one man posing as agent of the *benamidar* is not conclusive proof that the purchase money belonged to the *benamidar*. (*Parlett and Twomey, JJ.*) ABDUL RAHMAN KHAN LANDIE *v.* MA KYE. 26 I. C. 102= 8 Bur. L. T. 87.

Estoppel.

———*Estoppel.*

It is only parties to a *benami* transaction that are estopped from showing that it is otherwise than *benami*. 31 M. 425 dist. (*Ayling and Hannay, JJ.*) YERRAGUNTLA SESHACHARLU *v.* MUKUMALLA CHINNIAH. 25 I. C. 721 (M.).

Evidence of.

———*Evidence—Proof of—Suspicions—Not sufficient.*

To prove a *benami* purchase there must be affirmative evidence in the case and mere suspicion is insufficient. (*Lord Phillimore*). RAI RADHA KRISHNA *v.* BISHESHWAR SAHAY.
16 L. W. 190=3 Pat. L. T. 529= 31 M. L. T. 209 (P. C.)=67 I. C. 914= 49 I. A. 312=1922 P. C. 336 (P. C.).

———*Evidence.*

Where plff. sued to recover certain property and deft. pleaded that under a certain partition deed between plff. and deft. was *benami* and plff. used to hold the land in dispute only as deft's. benamidar, *Held* that on evidence it was clear that the deed was acted upon, that it was not *benami* and that plff. was entitled to a decree. (*Lord Atkinson.*) ARAB ALI KHAN *v.* MAHMUD ALI KHAN.
43 M. L. J. 104=20 A. L. J. 545= 24 Bom. L. R. 951=35 C. L. J. 554= 67 I. C. 444=31 M. L. T. 94= 1922 P. C. 84 (P. C.).

———*Evidence—Proof of—Onus.*

In regard to *benami* transactions Courts of law should not approach them with that scrupulous rigour which in other systems of jurisprudence may demand the existence of the clearest positive evidence that the *ex facie* owner of a property is a trustee for or holds the same for the interest of another. But it is essential to take care that the decision of the court rests not upon suspicion, but upon legal grounds established by legal testimony. *Benami* transactions are very familiar in Indian practice and even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose; still such a transfer cannot be considered as nothing and the person who impugns its apparent character must show something or other to establish that it was a *benami* or sham transaction. (*Lord Shaw.*) MUHAMMAD MAHBUB ALI KHAN *v.* BHARAT IMON.
(1919) M. W. N. 507=53 I. C. 54= 23 C. W. N. 321 (P. C.).
[O. A. from 31 I. C. 586].

———*Evidence of—Purchase by Mahomedan husband in wife's name—Lease by* benamidar—*Mortgage by lessee—Effect.*

A Mahomedan purchased certain property in the name of his wife who on his death leaving another (co-widow, two sisters and a brother as

BENAMI—Evidence of.

his heirs, granted a *mokrari* to two of the heirs, who in their turn mortgaged the *mokrari*. The mortgagee sued on his mortgage got a decree, bought the property himself and sued for possession. *Held*, that the purchaser was *benami*, the *mokrari* grant by the widow was effective, only to the extent of her share and also the mortgages by the heirs were effective to the extent of their shares. (*Viscount Cave.*) BASAR KHAN *v.* LEAKAT HOSSEIN. 50 I. C. 678= 23 C. W. N. 841 (P. C.).

———*Evidence—Husband and wife—Mortgage.*

In a suit by the husband on a mortgage in the name of his wife making her a deft. no objection was taken by her: *Held* the inference that the plff. was the true owner (as between the two) was correct. (*Richards, C.J., and Kafique, J.*) DUJAI *v.* SHYAM LAL. 38 All. 122= 33 I. C. 954=14 A. L. J. 30.

———*Evidence of—Evidence Act, S. 92.*

If a transaction is truly *benami, i. e.*, where a person is a nominal purchaser, there is no difficulty in settling the dispute between them, because of the absence of writing. But if the real object is to shield the property from creditors, oral evidence is inadmissible to show the real nature of the transaction but it is admissible to show the want of consideration. (*Beaman, J.*) LAXMI BAI *v.* KESHAV ANNAJI.
33 I. C. 396=18 Bom. L. R. 134.

———*Evidence of—Source of purchase-money—Old transaction—Evidence of possession.*

Benami transactions are familiar in India and even a slight quantity of evidence to show that a transaction is *benami* may suffice. But the person who impugns the apparent character of a transaction must not rely solely on probabilities, but must show something definite to establish that it was a sham transaction, on the principle that the burden of proof lies on the person who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things. The most important test in these cases is the source whence the consideration came. Where however from the lapse of time, direct evidence of a conclusive or reliable character is not forthcoming, as to the payment of consideration, the case must be dealt with on the reasonable probabilities and legal inferences arising from proved or admitted facts. Cases reviewed. (*Mookerjee and Chotzner, JJ.*) PROMODE KUMAR ROY *v.* MADAN MOHAN SAHA. 36 C. L. J. 396= 27 C. W. N. 305=70 I. C. 555=1923 C. 228.

———*Evidence—Suspicion—Surrounding circumstances.*

The burden of proving that a certain conveyance standing in the name of one person is *benami* for another under whom a third person claims, lies on the person who so raises the plea of *benami*. The Court must however rest its decision not on suspicion but on legal evidence though it need not approach the transaction with that scrupulous rigour which, in other systems of jurisprudence, may demand the existence of the clearest positive evidence that the *ex facie* owner of a property holds the same for the

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interest of another. The most important test to find out the beneficiary is the source whence the consideration came. In addition to this the court should take into consideration the question of possession and the surrounding circumstances; 25 C. L. J. 581; 23 C. W. N. 321; 43 C. 606; 37 A. 557; 18 C. W. N. 428; 3 M. I. A. 229; 6 M. I. A. 53; 21 C. W. N. 280, Rel. (*Mookerjee and Cuming, JJ.*) JASODA LAL PAL CHAUDHURI *v.* BALARAM PODDAR. 69 I. C. 67=35 C. L. J. 589=1922 C. 488.

———*Evidence.*

Direct evidence of a *benami* transaction cannot be expected; the whole object of such a transaction is to suppress evidence of the real facts but the real facts can be proved by circumstantial evidence. (*Cox and Imam, JJ.*) BAHURIA SAMBHO KOER *v.* HARIHAR PRASAD.
41 Cal. 1092=24 I. C. 276=18 C. W. N. 1071.

———*Evidence of—Proof of advancement of minor son—No* benami.

Where there is evidence that a purchase by a father of immoveable property had been made in the name of his minor son with a view to his advancement, the mere fact that leases of the property were executed in the name of the father as manager of the family, is not proof that the purchase was *benami*. (*Shah Din and Chevis, JJ.*) NATHA MAL *v.* JIWAN RAM. 33 I. C. 733=77 P. W. R. 1916.

———*Evidence of—Ostensible vendee paying off debts.*

Where an ostensible vendee pays off the debts due by the transferor and makes an advance of ready cash payment on the date of the sale, there is a strong persumption that the transaction is not *benami*. The burden lies heavily on the party who alleges that the transaction is *benami* to prove it. (*Wallis, Offg. C. J. and Seshagiri Aiyar, J.*) VAITHINATHA AIYAR *v.* VAITHINATHA SWAMI AIYAR. 29 I. C. 970 (M.).

———*Evidence of—Facts warranting inference.*

The facts that no consideration, passed, that the price was not proper, and the possession of the property did not pass to the vendees, etc., are facts which warrant an inference that a particular transaction is *benami*. (*Sadasiva Iyer and Seshagiri Iyer, JJ.*) PERIYA KRISHNASWAMI NAIK *v.* AIYAPPA NAIK. 24 I. C. 924=1 L. W. 376.

———*Evidence of—Obtaining of a Collector's Certificate—Collection of rent by wife if evidence of exclusive possession against the husband.*

The obtaining, by a person, of a Collector's Certificate in his wife's name is no evidence of a recognition by him of his wife antecedent title to the property. The mere fact of collection of rent by the wife, from property which was admitted to belong to the husband is no evidence of exclusive possession by the wife as against the husband. (*White, C. J. and Oldfield, J.*) MEENAKSHI AMMAL *v.* MANICKA CHETTY.
24 I. C. 918=1 L. W. 360.

BENAMI—Fraudulent Transfer.

———*—Evidence—Admission of vendor.*

The onus of proving that a sale deed did not really convey an interest is on the person alleging it. The admission of the vendor that he received the sale price is not conclusive proof of the reality of the sale, though strong evidence of it may be adduced. (*Miller and Abdur Rahim JJ.*) SRINIVASA *v.* KRISHNASAMY. 18 I. C. 274 (M.).

———*Evidence—Purchase in the name of one member of joint family—Hindu Law.*

A purchase in the name of a member of a joint Hindu family is presumed to be a *benami* transaction especially when he is not the manager. (*Mitra, A. J. C.*) NARHAR *v.* NARAIN.
56 I. C. 386 (N.).

———*Evidence of—Legal presumption.*

When the plff. gives satisfactory evidence about the advance for purchase, there is a rebuttable presumption that the transaction is *benami* for plff. (*Stuart, A. J. C.*) SITARA BEGAM *v.* MUHAMMAD ISHAK KHAN. 32 I. C. 365=2 O. L. J. 584.

———*Evidence of—How determined—Test of.*

The position and relation of the parties to a transaction, the motive therefor, the possession of the property and the title deeds, the source and adequacy of consideration, and the conduct of the parties, afford valuable data determining the character of the transaction. 13 W. R. (P. C.) 1 ref. to. (*Kanhaiya Lal, A. J. C.*) ALMADI BEGAM *v.* RAJA UDIT NARAIN SINGH.
25 I. C. 164=17 O. C. 173.

———*Evidence—Questions to be considered.*

The questions to be considered in finding whether a transaction is *benami* are:— Was there any motive for a *benami* transaction or was the alleged *benamidar* so connected with the alleged principal as to render it probable that he should be selected as a *benamidar*. (2) In whose possession was the document of title? (3) Who was in possession, and who paid the consideration? (*Chapman and Roe, JJ.*) KALISAHU *v.* KEDARMAL. 38 I. C. 561 (P.).

Fraudulent Transfer.

———*Fraudulent transfer—Distinction between.*

The difference between a *benami* and a fraudulent transfer is distinct though often slurred. Where the transferor owes debts in lieu of which he transfers property, there can be no question of a *benami* transfer. (*Sir Lawrence Jenkins.*) MINA KUMARI BIBI *v.* BEJOY SINGH.
44 Cal. 662=40 I. C. 242=1 P. L. W. 425=5 L. W. 711=32 M. L. J, 425=21 C. W. N. 585=21 M. L. T. 344=15 A. L. J. 382=25 C. L. J. 508=19 Bom. L. R. 424=(1917) M. W. N. 473=44 I. A. 172 (P. C.).

———*Fraudulent transfer—Right of transferor to recover—Evasion of rules for the conduct of Government servants.*

Where a person acquired property *benami* in the name of another with a view to conceal the fact of his purchase, he being a public servant; *held* that his conduct did not amount to fraud.

BENAMI—Fraudulent Transfer.

He is not therefore precluded from recovering the property from the benamidar. (*Mookerjee and Chotzner, JJ.*) DHIRENDA KUMAR BOSE *v.* CHANDRA KANTA ROY. 36 C. L. J. 82= 68 I. C. 648=1923 C. 154.

———*Fraudulent transfer—Suit by fraudulent grantee for recovery of property—Fraudulent purpose carried out—Whether suit maintainable.*

One S. executed a mortgage in favour of D. This transaction was ascertained to be fictitious, and the conveyance was never intended to pass title and the mortgage was effected solely with a view to delay, if not to defeat the creditors of S. The fraudulent purpose was accomplished: D obtained a decree on the mortgage and became purchaser. The successors of D. commenced the present action for a declaration of their title by purchase at auction sale and for recovery of possession from the successors of S. *Held* the plaintiff must fail. The rules that guide the Court in the matter of fraudulent conveyances are as follows:— (1) When recovery of property is claimed by the fraudulent grantor from the grantee, the modern rule is that although where intended fraud has been carried into effect, the Court will not help the owner to recover the property which he has once cast of in order to defraud others, yet if he has not defrauded any one, the Court will not punish his intention by giving his estate away to another whose retention of it is an act of gross fraud. *Jaylore v. Bowers*, 1 Q. B. D. 291 Ref. (2) Where recovery of property is sought by the fraudulent grantee against the grantor, the rule is:—If a Benamidar, who has used a fraudulent transfer to defeat an execution levied by his ostensible transferor, were to seek the assistance of Court to obtain possession from the latter, the Court might well allow the transferor to plead the real facts, even though the plea involved a declaration by the defandant of his own turpitude. (20 Mad. 326, p. 332.) This is allowed, not for his own sake but on grounds of public policy. 31 Bom. 405; 37 Bom. 217 not followed. Case Law discussed. (*Mookerjee and Chotzner, JJ.*) RAGHUPATI CHATTERJE *v.* NRISHINGHA HORI DAS. 36 C. L. J. 491=71 I. C. 1=1923 Cal. 90.

———*Fraudulent Transfer—Plff. when can succeed.*

Where the purpose of a *benami* transaction is fraudulent, a party trying to avoid the transaction must show that the purpose did not go beyond the stage of mere intention, otherwise the maxim *In pari delicto* will apply. (*Mittra, Offg. A. J. C.*) ISMAIL *v.* WASUDEO. 59 I. C. 285=16 N. L. R. 129.

Marriage Settlement.

———*Marriage settlement—Purchase by Muhamadan in the name of adopted daughter.*

Where a Muhamadan brought up a daughter of his wife's relative as his own child got her married, bought property in her name and treated it as belonging to her till her death. *Held*, the purchase was really for the benefit of the girl and not merely *benami* and that the transaction amounted in effect to a marriage settlement by way of gift of the money for

BENAMI—Presumption.

which the property was purchased. (*Kensington and Shah Din, JJ.*) INAMULLAH *v.* AISHA BI. 41 P. L. R. 1913=18 I. C. 705= 21 P. W. R. 1913.

Meaning of.

———*Meaning of.*

The word '*benami*' does not ordinarily show the transaction to be *sham* and ineffectual, but that the actual executant has lent his name to the person who is really a party to the contract. (*Abdur Rahim and Spencer, JJ.*) VYRECHERLA VEERABHADRARAJU *v.* DASIRAJU VERESALACHELAPALI. 57 I. C. 689 (M.).

Nominal and Sham Transfer.

———*Nominal and sham transfer—Distinction between.*

A nominal transfer is distinct from a sham one. In the latter, there is no intention to transfer at all. In the former there is an intention to transfer to one's nominee so that he might hold the property for himself openly but secretly for the transferor using the document as a cloak to save it from his creditors. (*Ayling and Krishnan, JJ.*) SECRETARY OF STATE FOR INDIA *v.* DADI REDDI NAGIAH. 25 M. L. T. 12=9 L. W. 22= 50 I. C. 593=36 M. L. J. 180.

Onus of Proof.

———*Onus of proof.*

The burden of proving that a certain conveyance standing in the name of one person is *benami* for another under whom a third person claims, lies on the person who so raises the plea of *benami*. (*Lord Sumner.*) MOTILAL *v.* KUNDAN LAL. 32 M. L. J. 468=15 A. L. J. 329= 1 P. L. W. 490=25 C. L. J. 581= 19 Bom. L. R. 471=21 C. W. N. 929= 20 M. L. T. 10=(1917) M. W. N. 464= 39 I. C. 964=6 L. W. 92 (P. C.).

Plea of.

———*Plea of—Real nature of transaction, if can be pleaded—Title—Onus.*

Parties to a *benami* transaction can always show the real nature thereof in the absence of fraud. (*Pratt, J. C. and Crouch, A. J. C.*) NUR MAHOMED *v.* KESSUMAL. 20 I. C. 523= 7 S. L. R. 11.

Presumption.

———*Presumption—Advancement—Purchase in the name of wife and children.*

Owing to the widespread and persistent practice which prevails among the natives of India, whether Mahomedan or Hindu, for owners of property to make grants and transfers of it *benami* for no obvious reason or apparent purpose, without the slightest intention of vesting in the donee any beneficial interest in the property granted or transferred, as well as the usages which these natives have adopted and which have been protected by statute, no exception has ever been engrafted on the general law of India negativing the presumption of the resulting trust in favour of the person providing the purchase money, such as has by the Courts of Chancery in the exercise of their equitable jurisdiction, been engrafted on the corresponding law in England,

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in those cases where a husband or father pays the money and the purchase is taken in the name of the wife or child. In such a case there is under the Indian Law no presumption of an intended advancement as there is in England. But the English Rule might be applied among persons born of British parents and resident in India. The determination of which rule of law is in any given case to apply in India does not entirely depend on race, place of birth, domicile or residence; the widespread and persistent usages and practice of the native inhabitants are more important. 6 M. I. A. 53; 13 M. I. A. 232 Ref. (*Lord Atkinson.*) KERWICK *v.* KERWICK.
48 Cal. 260=47 I. A. 275=23 Bom. L. R. 730=
13 L. W. 455=(1920) M. W. N. 738=
39 M. L. J. 296=1 Bur. L. J. 4=
28 M. L. T. 194=32 C. L. J. 490=
57 I. C. 834 (P. C.)=2 U. P. L. R. 153
[On Appeal from 47 I. C. 376.]

———*Presumption—Purchase in name of wife.*

Where a person against whom a mortgage decree is passed in pursuance of which property mortgaged is sold, raised money on mortgages just before sale and the property was purchased by his wife, who is not shown to be of any private means. *Held* that the purchase was made with his money and consequently he is the owner of the property. (*Richards, C. J. and Rafique, J.*) BHARAT INDU *v.* MAHOMMAD MAHBUB ALI KHAN.
31 I. C. 586 (A.).
[O. A. 53 I. C. 54=23 C. W. N. 71 (P. C.)]

———*Presumption—Advancement.*

The law that where a purchase is made in the names of children, it should be presumed that payment made by the real owner was made by way of advancement, does not apply to India. (*Shadi Lal and Broadway, JJ.*) ABDUL HAMID *v.* MAHOMED SHARFI. 2 Lah. L. J. 353.

———*Presumption—Purchase in son's name—Advancement—No* benami.

When a purchase is made by a father in the name of his minor son with a view to make an advancement in his favour, the purchase is not *benami*. (*Shah Din and Chevis, JJ.*) NATHA MAL *v.* JIWAN RAM. 33 I. C. 733=77 P. W. R. 1916.

———*Presumption—Purchase in the name of wife and son.*

Where a property is purchased in the name of the wife and the son, *prima facie*, the presumption is that the person intended it for both. (*Sankaran Nair, J.*) THANIKACHALA MUDALIAR *v.* ALAMELU AMMAL.
25 I. C. 153=16 M. L. T. 26.

———*Presumption—Purchase in name of wife and child.*

Where properties are purchased in the name of the wife and the daughter, there is a strong presumption of gift to them and the onus of proving the contrary lies on the person asserting it. (*Miller and Sadasiva Aiyar, JJ.*) ABDUL RAHIM NACHIYAL *v.* MIRATHAYAR AMMAL.
24 I. C. 10=1 L. W. 451.

BENAMI—Test.

———*Presumption—Property in wife's name.*

Where property is brought in the name of the wife and neither party gives evidence to show who paid the purchase money, no presumption arises that the purchase was made by the husband *benami* for his wife. Where the wives are not necessarily co-parceners of their husband, there is no presumption that every property standing in the name of the wife was joint property in which in the absence of other evidence the husband would have a share. (*Mullick and Jwala Prasad, JJ.*) DURGA PRASAD SINGH *v.* PRAN KRISHNA SINGH.
39 I. C. 530=3 P. L. W. 341.

———*Presumption—Burden of proof.*

When a person makes a purchase in the name of his son the presumption is that it was *benami* and the son must prove that he is solely entitled to the legal and beneficial interest in the purchased property. Whenever the rights of creditors are in issue in such a transaction, the burden of proof lies with more than the ordinary weight on the person alleging that the purchase was intended for the benefit of the son. (*Saunders, A. J. C.*) NGA TIN GYI *v.* NGA TWE AUNG.
35 I. C. 12=9 Bur. L. T. 35.

Test.

———*Test of—Source of purchase money—Surrounding circumstances.*

Where it is asserted that an assignment in the name of one person is really for the benefit of another, the real test is the source whence the consideration came. But where owing to distance of time, evidence is not forthcoming one way or the other, the case must be dealt with on the reasonable probabilities and legal inferences arising from proved or admitted facts. The property in question was purchased in the name of the wife. There was no evidence that the wife had money of her own. The husband though involved had money and the motive of the purchase in the name of the wife could have been to shield the property from creditors. The income of the property was treated exactly like the income of other admitted family properties and applied to family purposes. *Held*, the irresistible inference was that the purchase in the name of the wife was *benami*. (*Ameer Ali.*) SRIMATI NRITYAMONI DASSI *v.* LAKHAN CHUNDERSEN.
43 Cal. 660=30 M. L. J. 529=
20 M. L. T. 10=(1916) 1 M. W. N. 332=
3 L. W. 471=20 C. W. N 522=
24 C. L. J. 1=33 I. C. 452=
18 Bom. L. R. 418 (P. C.).

———*Test of—Purchase of property by Hindu in the name of Mahomedan Mistress—Advancement.*

Dealing by way of *benami* is common to Hindus and Mahomedans alike and much in use in India and is quite unobjectionable. It has a curious resemblance to the English Law that the trust of the Legal Estate results to the man who pays the purchase money. The exception obtaining in English Law by way of advancement in favour of wife or child does not apply in India, but the relationship is a circumstance taken into account in determining whether a transaction is *benami* or not. 6 M. I. A. 53, rel. The criterion in the

absence of all other relevant circumstances, is to consider from what source the purchase money comes. *Held*, on the facts, that the purchase of a bungalow in the name of his Mahomedan mistress, by a Hindu talukdar, who had already provided for her and her sons, was a *benami* transaction. (*Sir George Farewell.*) MUSSAMMAT BILAS KUNWAR *v.* DEORAJ RANJIT SINGH.
37 All. 557=42 I. A. 202=19 C. W. N. 1207=
29 M. L. J. 335=2 L. W. 830=
18 M. L. T. 248=13 A. L. J. 991=
17 Bom. L. R. 1006=22 C. L. J. 516=
30 I. C. 299=(1915) M. W. N. 757 (P. C.)

———*Test of—Onus of proof.*

A court's decision as to the *benami* character of a transaction must rest not upon suspicion but upon legal grounds established by legal testimony. The court must consider circumstances such as source of purchase-money, possession of property, custody of title deeds, adequacy of consideration and like facts and the person who claims against the tenor of the deed must prove it. (*Mookerjee and Rankin, JJ.*) ABDUL LATIF KAZI *v.* ABDUL HUQ KAZI. 28 C. W. N. 62=1924 C. 523.

———*Test of—Evidence—Probabilities.*

Benami transactions being common in India slight evidence may show a transaction was of that nature. A conclusion however cannot be based on mere probabilities. The person who claims contrary to the tenor of the deed must prove and the source of the consideration is always an important test. If from lapse of time, direct evidence is not forthcoming, reasonable probabilities as are deducible from surrounding circumstances can be made the basis of decision. (*Mookerjee and Holtzner, JJ.*) BHUBANMOHINI DASI *v.* KUMUDBALA DASI. 28 C. W. N. 131=
39 C. L. J. 140=1924 C. 467.

———*Test—Source of purchase money—Possession—Other evidence.*

In the case of *benami* transactions in India the court need not approach them with that scrupulous rigour which in other systems of jurisprudence, may demand the existence of the clearest positive evidence that the *ex facie* owner of a property holds the same for the interest of another. 23 C. W. N. 321 Ref. In addition to considering the source from which the purchase money came and the person in possession, the court may also take into consideration the surrounding circumstances. 43 C. 660; 37 A. 557, Ref. (*Mookerjee and Holtzner, JJ.*) LALIT MOHAN SEN *v.* MANORANJAN GHOSH CHAUDHURI.
36 C. L. J. 208=72 I. C. 698=1923 C. 13.

———*Test of—Source of purchase money.*

The familiar test to apply to find out whether the ostensible purchaser, is also the real purchaser, is to find out the source of the purchase money. In a case of gift, however, when it is alleged that the transaction was fictitious this test fails and the court must rely upon other aspects of the matter, namely, the surrounding circumstances contemporaneous with the gift and the subsequent conduct of the parties concerned. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) MARIAN BIBEE *v.* MUHAMMAD IBRAHIM. 48 I. C. 561=28 C. L. J. 306.

———*Test of—Source of purchase money—Motive and subsequent conduct—Possession of property—Purchase of property in the name of daughter-in-law—Benefit of the family.*

In order to determine *benami* nature, reliance must be placed not only upon the surrounding circumstances and the position of the parties and their relations to one another but also upon the motives which could govern their actions and their subsequent conduct. The two principal tests of *benami* are the source of the purchase money and possession of the property. (*Mookerjee and Beachcroft, JJ.*) UPENDRA NATH NAG *v.* BUPENDRA NATH NAG.
32 I. C. 267=21 C. W. N. 280.

———*Test of—Purchase of property—Transferee having notice of benamidar's title—Estoppel.*

Where a father purchases a property in the name of one of his sons, the ordinary presumption is that it is a *benami* transaction and that it is not an advancement in favour of that son. 13 M. I. A. 232 (P. C.) Ref. Where the father supplied the purchase money of the site, was in possession of the title deed and produced it, was in possession of the property, erected a building on it at his own expense, and received rent for the part of the building. *Held*, that the sale was really *benami*. (*Scott-Smith and Shadi Lal, JJ.*) GHULAM DASTGIR *v.* TEJA SINGH.
73 P. R. 1918=47 I. C. 367=159 P. W. R. 1918.

———*Test of—Source of purchase-money—Possession of real owner.*

The source of the purchase money is a very important factor in determining the question whether the transaction is *benami* or not actual possession or receipt of rent of the property is another criterion. When the real owner has all along remained in possession and was in enjoyment of the property, that circumstance is constructive notice of the *benami* nature of the transaction. (*Shadi Lal, J.*) RAM SARUP *v.* MAYA SHANKAR. 46 P. R. 1918=
45 P. L. R. 1918=43 I. C. 556=
33 P. W. R. 1918.

———*Test—Source of purchase money—Onus of proof of* benami.

The real test for determining whether a transaction of sale is *benami* is to see the source of the purchase money, the onus of proof of *benami* lies on the person alleging it. The fact that the father of an infant vendee paid the purchase money is not sufficient of itself to show that the infant was a *benamidar* only. (*Johnstone and Shah Din, JJ.*) HABIBULLAH KHAN *v.* NAYAB KHANAM.
22 I. C. 536=74 P. L. R. 1914.

———*Test of—Purchase in the name of wife.*

No presumption can be drawn that the purchase of property made by a husband in his wife's name is *benami* for the former. The test of ownership is, who paid the consideration for the purchase. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) CHELLAMUTHU *v.* MUTHUDAYAR SERVAI.
17 I. C. 740 (M.).

———*Test of—Source of purchase money—Possession.*

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The source of purchase money is a very important fact in the case of *benami*. Actual possession or receipt of rents is more important. The fact that a Muhammadan joins his grandson's name in a purchase, his son being alive, is not enough to presume that the purchase was for the benefit of the grandson. Mere omission to enter the name of the minor joint purchaser in the mutation is immaterial against him. (*Batten, A. J. C.*) ABID ALI *v.* ASGAR ALI. 12 I. C. 721 = 7 N. L. R. 159.

———*Test of—Consideration, a debt actually due.*

A transfer in consideration of a debt which is actually due cannot be regarded as *benami*. (*Coutts and Macpherson, JJ.*) MUSSAMMAT BIBI SAIRA *v.* BIBI SALIMAN. 63 I. C. 111 = 2 Pat. L. T. 577.

———*Test.*

One test to find out whether a transaction is *benami* is to find out the source of purchase money and another is the inference arising from the fact of possession of the property in question. (*Kincaid, J. C. and Raymond, A. J. C.*) PEWANDBAI *v.* CHETANLAL. 62 I. C. 1002 = 15 S. L. R. 84.

BENAMIDAR.

Compromise.
Decree.
Position of.
Real Owner.
Right to Execute Decree.
Right to Sue.
Transfer of Property.

Compromise.

———*Compromise—Effect.*

A compromise with a *benamidar* cannot operate as an assignment, as the *benamidar* has no interest to assign. (*Stephen and Mullick, JJ.*) RAMLAL PAHARI *v.* BABULAL BARIK. 25 I. C. 555 (C.).

Decree.

———*Decree—Binding on real owner.*

A *benamidar* can sue in his own name to recover property vested in him as such. In a proceeding by or against a *banamidar* the person beneficially entitled is fully affected by the rules of *res judicata*. It is open to the latter to be joined in the action, but whether he is made a party or not, the result is fully binding on him. (*Mr. Ameer Ali.*) GUR NARAYAN *v.* SHEOLAL SINGH. 46 Cal. 566 = 17 A. L. J. 66 = 36 M. L. J. 68 = 9 L. W. 335 = 49 I. C. 1 = 23 C.W.N. 521 = 1 U. P. L. R. 1 (P. C.) [O. A. from 7 I. C. 218.]

———*Decree—Real owner bound.*

Where despite the plea of the deft. that she is only a *benamidar*, a decree is passed against her as real owner, the real owners are not barred by *res judicata* from bringing a subsequent suit. (*Piggott and Rafique, JJ.*) MATA PRASAD *v.* RAM CHARAN SAHU.
36 All. 446 = 25 I. C. 381 = 12 A. L. J. 701.

———*Decree—Binding on real owner.*

A proceeding against *benamidar* and its ultimate result is fully binding on the beneficial owner. It

BENAMIDAR—Real Owner.

is not necessary to add the real owner of the mortgaged property as a party to a suit on a *benami* mortgage. (*Chatterji and Duval, JJ.*) ABDUL RAHMAN *v.* MOHENDRA CHANDRA GHOSH.
54 I. C. 633 (C.).

———*Decree against—Binds real owner—Estoppel.*

Though the real owner may be bound by a money decree against his *benamidar* he is not necessarily bound by a sale of his property in execution. But in a suit by the real owner for recovery of possession of the property from the purchaser at the sale he may be met by a defence of estoppel. (*Richardson and Beachcroft, JJ.*) SATISHCHANDRA SARKAR *v.* BROJO GOPAL DUTTA. 46 I. C. 104 = 22 C. W. N. 807.

———*Decree—Binding on real owner.*

A suit instituted by a *benamidar* should be presumed in the absence of any evidence to the contrary, to have been instituted with the full authority of the beneficial owner. A decision made in such a suit is as much binding upon the real owner as if the suit had been brought by the real owner himself. (*Mookerjee and Beachcroft, JJ.*) KIRTIBASH DAS *v.* GOPALJEE THAKUR.
18 C. W. N. 814 = 27 I. C. 136 = 19 C. L. J. 193.

———*Decree—Binding on real owner.*

In the absence of evidence to the contrary the presumption in a suit by a *benamidar* is that it is instituted with the full consent of the real owner and the latter would be bound by the judgment. 10 Cal. 697 foll. (*Mookerjee and Beachcroft, JJ.*) RASH BEHARI SARKAR *v* MOHENDRA NATH GHOSE.
21 I. C. 979 = 19 C. L. J. 34.

———*Decree—Real owner, whether bound by result of litigation by* benamidar.

A real owner is represented in a suit by or against the *benamidar* and is bound by a decree obtained by or against the *benamidar* (*Mittra, A. J. C.*) NARHAR *v.* NARAIN.
56 I. C. 386 (N.).

Position of.

———*Position of—Trustee—Heirs of* benamidar *affected.*

A *benamidar* is a trustee for the real owner and his heirs are liable as trustees on his death. (*Lord Dunedin.*) JAGGANNATH PRASAD SINGH *v.* ABDULLAH. 45 Cal. 909 = 45 I. A. 97 = 16 A. L. J. 576 = 5 P. L. W. 83 = (1918) M. W. N 406 = 22 C. W. N. 891 = 8 L. W. 163 = 24 M. L. T. 62 = 28 C. L. J. 192 = 20 Bom. L. R. 851 = 35 M. L. J. 46 = 45 I. C. 770. (P. C.).
[Also 46 Cal. 566 = 49 I. C. 1 = 36 M. L. J. 68. (P. C.)]

Real Owner.

———*Real owner—Rights of—Mortgage suit by mortgagee—Previous statements by plff. affirming ownership in* Benamidar—*Estoppel*—Benamidar *entering no defence—Maintainability of suit.*

A suit by a mortgagee is maintainable on behalf of a *benamidar* even though in a previous suit against the plff., the plff. had stated that the money belonged to the *benamidar* really and as such the

property was not his, because the person really interested *i,e.*, the *benamidar* did not contest the action. (*Richards, C. J. and Rafique, J.*) DUJAI *v.* SHYAM LAL.
38 All. 122=33 I. C. 954=14 A. L. J. 30.

———*Real owner—Money paid in preserving the estate.*

A Benamidar court auction purchaser who had paid money to save and preserve the estate, can, when the sale is set aside for irregularity recover it from the judgment debtor. (*Fletcher and Teunon, JJ.*) SATYA CHARAN MUKERJEE *v.* DINA NATH BISWAS. 42 I. C. 516=21 C. W. N. 1130.

———*Real owner—Rights of.*

A real purchaser of immoveable property does not require a conveyance of title from his *benamidar* in order to enable him to sue for possession. (*Chatterjee and Mullick, JJ.*) BRIJ NANDAN SINGH *v.* KAILASH TEWARY.
24 I. C. 17 (C.)

———*Real owner—Suit for possession under—Deft. can set up true facts.*

Plff. could not say that as the deft.'s sole object in making the sale was to deceive creditors he should not be allowed to rely upon his own fraud. For the Maxim *memo allegans suam turpiludinem audiendus est* gives way to the maxim *in pari delicto patior est condition possidentis.* (*Shadi Lal and Le Rossignal, JJ.*) NAND LAL *v.* JETHU MAL.
21 P. R. 1916=33 I. C. 255=107 P. W. R. 1915.

———*Real owner.*

Payment to *benamidar* binds real owner, if made without notice and objection by him. (*Krishnan and Odgers, JJ.*) ANTHAYA HEGADE *v.* MANJAYA SHETTY. 14 L. W. 371=41 M. L. J. 393=(1921) M. W. N. 642=69 I. C. 642=45 M. 84.

———*Real owner—Rights of—Suit for rent—Payment to real owner.*

Payment of rent to the real owner absolves the tenant from liability to the *benamidar.* (*Seshagiri Aiyar, J.*) MUTHUSAMY AIYAR *v.* SOLAI KONAN.
25 I. C. 679=26 M. L. J. 597.

———*Real owner—Liability under lease in favour of* benamidar.

Where a lease is taken in the name of a *benamidar*, the plff. lessor is entitled to bring his suit for the *thika* rent either against the beneficial owner or his *farzidar*, and it is not necessary that the plff. should be aware at the date of the inception of the tenancy of the interest of the beneficial owner in order to maintain his suit against him. (*Coutts and Macpherson, JJ.*) MALIK THARAT KARIM *v.* MUSST BAL KUART.
64 I. C. 515=2 P. L. T. 740.

Right to Execute Decree.

———*Right to execute decree.*

The principle in which a *benamidar* has been allowed to maintain a suit applies equally to the execution of a decree. (*Chamier and Piggott, JJ.*) KAMTA PRASAD *v.* INDOMATI.
37 All. 414=29 I. C. 593=13 A. L. J. 557.

———*Right to execute decree.*

A *benamidar* decree-holder cannot apply for execution of a decree and such an application will

not be a step-in-aid of execution for the real decree-holder's application. 9 O. C. 63 Foll. 20 C. 388 dist. (*Stephen and Mullick, JJ.*) RAMLAL PAHARI *v.* BABULAL BARIK. 25 I. C. 555. (C.).

———*Right to execute decree.*

A *benamidar* assignee of a preliminary decree can apply for final decree and for execution. (*Chatterjee and Walmsley, JJ.*) PRASANNA KUMAR *v.* ASUTOSH ROY. 20 I. C. 685=18 C. W. N. 450.

———*Right to execute decree—Assignee.*

Where it is practically admitted that the real beneficial owner of a decree purposely assigned the decree in the name of another in order to enable the latter to execute the decree for the benefit of the former, the latter *benamidar* would be entitled to execute the decree, the assignment constituting him a trustee. for the former. (*Sadasiva Iyer and Bakewell, JJ.*) CHELLAM CHETTI *v.* SEENI CHETTI. (1918) M. W. N. 226=43 I. C. 801=7 L. W. 201.

Right to Sue.

———*Right to sue—Decision*—resjudicata—*Relationship between* benamidar *and real owner.*

A system of acquiring and holding property and even carrying on business in names other than those of the real owner, usually called the *benami* system is common in India and so long as *benami* transaction does not contravene the provisions of the law, the Courts are bound to give effect to it. The *benamidar* has no beneficial interest in the business or property that stands in his name; he represents the real owner and is a mere trustee for him. A *benamidar* can therefore sue in his own name to recover property vested in him as such. In a proceeding by or against the *benamidar* the person beneficially entitled is fully affected by the rules of *res-judicata.* It is open to the latter to be joined in the action, but whether he is made a party or not, the result is fully binding on him. 16 C. 364; 25 C. 98; 30 C. 265; 30 M. 245; Overruled, 37 A. 557 (P. C.) rel. (*Mr. Ameer Ali.*) GURNARAYAN *v.* SHEOLAL SINGH. 46 Cal. 566=17 A. L. J. 66=36 M. L. J. 68=9 L. W. 335=23 C. W. N. 521=49 I. C. 1=1 U. P. L. R. 1 (P. C.).
[O. A. from 7 I.C. 218].

———*Right to sue—Ejectment.*

A *benamidar* can sue for ejectment for property standing in his name. 18 All. 69; 21 All. 380; 17 A. L. J. 165, Foll. (*Stuart, J.*) SHAFI-UDDIN *v.* MT. HORMAT. 70 I. C. 849=1923 A. 10.

———*Right to sue—Mortgagee.*

A person named in the mortgage deed as a mortgagee is entitled to sue upon it even if he is a *benamidar.* 21 A. 380 foll. (*Richards, C. J. and Banerjee, J.*) PARMESHWAR DAT *v* ANARDAN DAT. 37 All. 113=26 I. C. 507=13 A. L. J. 24.

———*Right to sue—Ejectment.*

A *benamidar*, purchasing property for the mortgagee at a Court Sale under a mortgage decree, can sue for recovery of the property without joining the mortgagee as party. (*Shah and Hayward, JJ.*) RAMCHANDRAVITHAL BHAT *v.* GAJAMAN NARYAN DESHMURKI. 22 Bom. L. R. 296=56 I. C. 349=44 Bom. 352.

BENAMIDAR—Right to Sue.

———*Right to sue.*

A *benamidar* has no right to bring a suit claiming title and for possession when he is suing in effect the beneficial owner. 23 Cal. W. N. 521 Dist. (*Sanderson, C. J. and Ghose, J.*) DAMODAR MANDAL *v.* KARAMAT ALI. 1923 Cal. 536.

———*Right to sue.*

A *benamidar* can maintain a suit for recovery of possession. (*Newbould, J.*) MAFIZUDDIN HOWLADAR *v.* MAHOMED ISLAM CHOWDHURY.
67 I. C. 741=1923 Cal. 281.

———*Right to sue—Obstruction to light and air.*

A suit by a *benamidar* for the removal of an obstruction to access of light and air in a house, is maintainable 46 Cal. 566 Ref. (*Mookerjee and Panton, JJ.*) PANCHU GOPAL CHATTERJEE *v.* MATANGINI DEBI. 64 I. C. 581=35 C. L. J. 43.

———*Right to sue.*

A *benamidar* mortgagee, is entitled to sue on the mortgage even though he has not added the beneficial owner as a party to the suit. (*Mookerjee and Buckland, JJ.*) KRISHNAJIBAN *v.* MAHAMMAD.
63 I. C. 244=33 C. L. J. 369.

———*Right to sue—Beneficial owner impleaded as Co-deft.—Decree.*

A suit by a *benamidar* to recover money will not be decreed where the beneficial owner of the money is before the Court as a party, but the Court might, by making the beneficial owner, a co-plff. decree the suit. In the absence of evidence that the money does not belong to the *benamidar*, the Court will give him a decree. (*Fletcher and Cuming, JJ.*) KANAI LAL KHAN *v.* TOOLSI MANJURI DASI. 54 I. C. 21 (C.).

———*Right to sue—Ejectment—Addition of real owner.*

A *benamidar* cannot maintain a suit for possession. Where the addition of the real owner as party would necessitate a complete alteration of the plaint, he will not be added as a party. 5 C. L. R. 102; 18 W. R. 140; 24 C. 34 Ref. (*Mookerjee and Walmsley, JJ.*) SURENDRA NATH GHOSE *v.* KALI GOPAL MOZOOMDAR.
45 Cal. 920=42 I. C. 431=26 C. L. J. 333=
22 C. W. N. 367.
[This view is no longer law—See 46 C. 566=
49 I. C. 1 (P. C.)].

———*Right to sue—Partition and money claim.*

A *benamidar* could not ask for a partition of joint immoveable property. The Calcutta High Court maintains the right of *benamidar* to enforce a money claim by a suit while denying the right to suits for land under which category falls partition of immoveables. Enforcement of money claim even when such claims are associated with land bear no analogy to partition though there is no *consensus* of judicial opinion as regards mortgages and leases. (*Mookerjee and Newbould, JJ.*) ATRABANNESSA BIBI *v.* SAFTULLAAH MIA.
43 Cal. 504=31 I. C. 189=22 C. L. J. 259.
[The distinction drawn here is no longer law.
See 46 Cal. 566=49 I. C. 1 (P. C.)]

———*Right to sue—Appeal—Ejectment—Appeal by party found to be* benamidar.

BENAMIDAR—Right to Sue.

In an ejectment suit against several defts. it was found that one of them was a *benamidar* of several others. The lower court passed a decree in favour of the plffs. making all the defts. liable for mesne profits and costs. Upon an appeal having been preferred by the *benamidar* deft. alone against the whole decree, *held* that the appeal was maintainable and as the ground was common to himself and to the other defts. so far at least as the question of mesne profits was concerned the whole case came under review in appeal inasmuch as there could be no decree for mesne profits without one for possession. (*Chatterjee and Walmsley, JJ.*) MOOTOOKHDHARI SHUKUL *v.* JUGDIP NARAIN SINOH. 19 C. W. N. 1319=28 I. C. 343=
21 C. L. J. 261.

———*Right to sue—Ejectment.*

A *benamidar* cannot bring a suit for possession of immoveable property. 30 C. 265; 24 C. 34; 24 C. 644; 12 C. W. N. 409 foll. (*Mullick, J.*) JAGAT TARA DEBYA *v.* NAMADA KANTA BANERJI.
24 I. C. 801 (C).
[This is no longer law—See 46 Cal. 566=
49 I. C. 1 (P. C.)]

———*Right to sue—Mortgagee—Suit without making beneficial owner, a party.*

A *benamidar* mortgagee is entitled to sue on the mortgage without making the real owner a party to the suit and the decision in such a suit is binding upon the real owner as the suit must be presumed to have been instituted with the full authority of the real owner. *Semble*—A *benamidar* cannot sue for recovery of possession of immoveable property. 30 C. 265 dist., 24 C. 644; 17 W. R. 192 Fol. 1 I. C. 522; 22 W. R. 413; 10 C. 697 rel. (*Mookerjee and Beachcroft, JJ.*) KIRTIBASH DAS *v.* GOPAL JEO.
19 C. L. J. 193=20 I. C. 499=
18 C. W. N. 814.

———*Right to sue—Ejectment—Purchase at Revenue sale—Right of suit.*

A *benamidar* purchaser at a revenue sale cannot sue for possession of the lands comprised in the sale certificate. 30 C. 265 rel. on. (*Coxe, J.*) RAM RATAN PUROHIT *v.* SIKDAR ALI.
14 I. C. 10 (C.).
[This is no longer law—See 46 Cal. 566=
49 I. C. 1 (P. C.)]

———*Right to sue—Ejectment.*

A *benamidar* cannot sue or recover possession of property of which he is merely a *benamidar* and had himself no interest in the property. 30 C. 265 foll. (*Chatterjee, J.*) BROJONATH *v.* UDAY CHANDRA. 9 I. C. 487 (C).
[This is no longer law—See 46 Cal. 566=
49 I. C. 1 (P. C.)]

———*Right to sue—Real owner not implea ded.*

So long as the transaction does not offend any provision of law, a *benamidar* can sue in respect of property or debt standing in his name even without impleading the beneficial owner. (*Scott-Smith and Martineau, JJ.*) BHANA MAL *v.* BELI RAM. 62 I. C. 799 (Lah.).

———*Right to sue*—Benamidar *not to be guilty of fraud or accessory thereto.*

BENAMIDAR—Right to Sue.

A *benamidar* can sue in his own name in certain cases but he must come into Court with a clean case. The parties cannot be allowed to keep changing their positions and must be bound down by the case set up originally in the plaint. (*Chevis, Offg. C. J.*) BELI RAM *v.* BHANA MAL. 55 I. C. 836 (L.).

———*Right to sue—Real owner not a party.*

A *benamidar* represents the real owner and an action can be maintained in his name in respect of the property although the beneficial owner is no party. 46 Cal. 566 (P. C.) foll. A *benamidar* mortgagee can sue for possession of the mortgaged property. (*Broadway, J.*) RURA *v.* ABDUL MAJID. 55 I. C. 431 (L.).

———*Right to sue—Mortgage.*

An assignee of a mortgage, though a mere *benamidar* is entitled to sue on the mortgage. 36 M. L. J. 68 (P. C.) foll. 30 M. 245 overruled. (*Wallis C. J., Oldfield and Seshagiri Iyer, JJ.*) VAITHEESWARA IYENGAR *v.* SRINIVASARAGHAVA IYENGAR. 42 Mad. 348=36 M. L. J. 296= 50 I. C. 309=9 L. W. 362=25 M. L. T. 351= (1919) M. W. N. 299 (F. B.).

———*Right to sue—Promissory note—Promisee* benami *for one of the promissors.*

Where two persons executed a promissory note to the plaintiff *benami* for one of themselves the executants, it was held that the promisee of a note of which he is in part the promissor cannot maintain the suit and therefore the plaintiff who was his *benamidar* also cannot maintain the suit. The *benamidar* cannot be in a better position than the real owner. (*Ayling and Seshagiri Aiyar, JJ.*) RAMAN CHETTY *v.* PASUPATHY IYER. 49 I. C. 41=24 M. L. T. 502.

———*Right to sue— Mortgagee.*

A *benami* mortgagee can sue on the mortgage though the beneficial owner is not added as a party to the suit. 19 C. L. J 193; 37 A. 113 foll. *Spencer and Seshagiri Iyer, JJ.*) SINGA PILLAI *v.* AYYANERI GOVINDA REDDI. 43 I. C. 905= 41 Mad. 435=(1918) M. W. N. 107.

———*Right to sue—Extent of.*

The observations of the Privy Council in some cases that the *benamidar* has no title must be confined to cases where the *benamidar* sets up a title as against the real owner so as not to allow a third person to delay or evade performing his own undoubted obligations to the real owner of a right to the *benamidar* who is suing to enforce the right, even where the suit is an ejectment by the *benamidar* for possession of immoveable property. (*Sadasiva Iyer and Bakewell, JJ.*) CHELLAM CHETTI *v.* SEENI CHETTI. 7 L. W. 201=43 I. C. 801= (1918) M. W. N. 226.

———*Right to sue—Ejectment.*

It is not open to a *benamidar* transferee to sue for ejectment. (*Miller and Abdur Rahim, JJ.*) SRINIVASA IYER *v.* KRISHNASAWMY IYENGAR. 18 I. C. 274 (M.)
[This view is no longer law.—See 46 C. 566= 49 I. C. 1 (P. C.)=42 M. 348 (F. B.)]

———*Right to sue—Execution of decree.*

BENAMIDAR—Right to Sue.

A *benamidar* can neither sue nor execute a decree on the basis of an assignment in his favour. (*Krishnaswami Iyer, J.*) IN RE MUTHU KUMARA ASARI. (1911) 1 M. W. N. 5= 9 I. C. 40=9 M. L. T. 137.
[This is no longer law.—See 46 Cal. 566 (P. C.)= (1918) M. W. N. 226—Ed].

———*Right to sue—Relation to real owner—Enforceability of benami transactions.*

It is clear that benamidar can sue. 46 C. 566 42 M. 348; 13 C. P. L. R. 33 Ref. This system under which property is acquired and held in names other than those of the real owner is a common practice in this country and if a *benami* transaction does not contravene the provisions of law, courts are bound to give effect to it. It has been held that a *benamidar* though he has no beneficial interest in the property represents in fact the real owner and as far as their relative position is concerned is a mere trustee for him. (*Prideaux, A. J. C.*) BALKRISHNA *v.* LAKHU. 68 I. C. 191=1922 Nag. 233.

———*Right to sue—Mortgage.*

A *benamidar* mortgagee is entitled to sue in his own name on the mortgage. (*Lindsay, J. C.*) NIHAL SINGH *v.* DULAR SINGH. 33 I. C. 615=18 O. C. 363.

———*Right to sue—Redemption.*

A *benamidar* can sue for redemption in his own name, and the beneficial owner is bound by the decision in the suit, though he was not a party. (*Jwala Prasad, J.*) BISUDHANAND *v.* ISRI SINGH. 56 I. C. 599 (P.).

———*Right to sue—Ejectment.*

A *benamidar* is entitled to maintain an action for recovery of possession of immoveable property in his own name, without joining the beneficial owner as a party to suit. 46 C. 566, (P. C.) Rel. (*Miller, C. J. and Adami, J.*) GOIYAN DHANGAR *v.* SHEIKH DONDAR. 52 I. C. 324 (P.).

———*Right to sue—Pauper.*

To allow a *benamidar* to sue as pauper would contravene O. 33, R. 5 (e) C P. C. and it is therefore not permissible. (*Mullick and Jwala Prasad, JJ.*) CHARU SILA DASI *v.* HARAN CHANDRA. 50 I. C. 520=1919 Pat. 232.

———*Right to sue—Ejectment.*

A *benamidar* cannot maintain a suit for possession of immoveable property. 43 C. 504 Ref. (*Imam, J.*) GUYAN DHANGER *v.* GONDER. 45 I. C. 794 (Pat.).
[This is no longer law.—See 46 Cal. 566= 49 I. C. 1 (P. C.)]

———*Right to sue—Ejectment.*

A *benamidar* has no interest in the land conveyed to him and according to the long string of decisions of the Calcutta High Court he cannot maintain a suit for possession. (*Chamier and Jwala Prasad, JJ.*) BEGAM KUER *v.* JHARI MAHTON. 40 I. C. 610 (Pat.).
[This view is no longer law.—See 46 C. 566= 49 I. C. 1 (P. C.)]

BENAMIDAR—Right to Sue.

———*Right to sue—Mortgagee.*

A *benamidar* has a right of suit on a mortgage of immoveable property in his favour and it is not open to the mortgagor to question his right to recover the mortgage debt. (*Fox, C. J.*) MA TUN *v.* MA WAING THA. 29 I. C. 892 = 8 L. B. R. 205 = 8 Bur. L. T. 240.

Transfer of Property.

———*Transfer of property.*

A *benamidar* who transfers property held by him in that character, *prima facie* transfers the interest of his principal and not his own status as a *benamidar*. The transferee takes the place of the true owner. (*Stanyon, A. J. C.*) MT SARJA *v.* MURALIDAR. 42 I. C. 715 = 13 N. L. R. 197.

———*Transfer of property—Estoppel.*

Where property held *benami* is disposed of by the ostensible owner to the prejudice of the real owner, the latter cannot object. But the owner can get rid of the alienation by showing that it was without his acquiescence and that the purchaser had notice. (*Parlett, J.*) MAUNG KYA U. *v.* P. L. U. N. FIRM.

23 I. C. 363 = 7 Bur. L. T. 8.

BENARES HINDU UNIVERSITY ACT (XVI of 1915).

———S. 20—*Probate.*

The Benares Hindu University as a juristic person is capable of obtaining probate of a will as an executor. (*Stuart and Kanhaiya Lal, A. J. Cs.*) BENARES HINDU UNIVERSITY *v.* KISENDAS.

23 O. C. 283 = 7 O. L. J. 203 = 56 I. C. 335 = 2 U. P. L. R. (J. C.) 81.

BENEFICIAL—Interest.

See (1) CONTRACT—STRANGER.
(2) TRUST.
(3) TRUSTS ACT.

Owner.

See (1) CONTRACT—STRANGER.
(2) TRUST.
(3) TRUSTS ACT.

BENEFICIARY.

See (1) CONTRACT—STRANGER.
(2) TRUST.
(3) TRUSTS ACT.

BENEFIT TO ESTATE.

See (1) GUARDIAN AND WARD, ETC.
(2) HINDU LAW—JOINT FAMILY—MANAGER.
(3) MINOR.

BENEFIT SOCIETY.

———*Refund of subscriptions—Conditions—Suit for.*

In a suit by a subscriber to a benefit society for refund of the subscriptions, *held*, that if it was plaintiff who refused to continue his subscription, plaintiff must prove that he has a right to a refund and if so when, but if the defendant is responsible for the breach, the burden of proving that refund is not claimable lies on the latter. (*Le Rossignol, J.*) GHULAM HAIDAR *v.* MUSSAMMAT BHAGAN.

77 P. R. 1918 = 157 P. W. R. 1918 = 47 I. C. 415 = 107 P. L. R. 1918.

BENGAL ALLUVION AND DILUVION ACT (IX of 1847), S. 3.

———*Deposit—Nomination of payee—Rights of payee.*

In the case of subscriptions to a benefit society, if under the contract between the member and the society, the society undertakes to pay a particular person, that person is entitled to the money though the member may have the power to select any person he chooses and though the nomination may be ambulatary in character so as to enable the member at the entire discretion to change the nomination or even to make the fund his own by merely observing the formalities prescribed by the rules. If there is an agreement for consideration paid, between the policy-holder and the nominee that has between the estate of nominator and the nominee the latter was to receive the policy, then he alone would be entitled. (*Abdur Rahim and Srinivasa Iyengar, JJ.*) FLORINA MARTIES *v.* PINTO.

42 I. C. 677 = 33 M. L. J. 476.

BENGAL ALLUVION AND DILUVION ACT (IX of 1847).

———*Accretions—Suit by Govt.—Lands appertaining to defendant's estate.*

Certain alluvial lands were converted into separate estates solely for assessment and settlement. They never lost their relation to the parent estate: *Held*, that each of these *Chur* estates was a separate estate within Act (XXXI of 1858); and consequently, if any of the alluvial lands disappeared by reason of submergence under the river, they could no longer be treated as constituent parts of those estates, and in the event of re-appearance they would have to be dealt with as new alluvial formations to which Act (IX of 1847,) applied. (*Norris and Prinsep, JJ.*) SARADA PRASAD *v.* SECRETARY OF STATE.

11 I. C. 718 = 14 C. L. J. 98.

———*Applicability.*

Lands covered by the original Decennial and Permanent Settlement aren ot within the scope of the Act. (*Jwala Prasad and Ross, JJ.*) RAMNANDAN SAHAY *v.* JAIGOBIND PANDAY.

2 Pat. 839 = 75 I. C. 955 = 1924 P. 213.

———Ss. 3 and 6—*Survey maps—Any such new map meaning—Comparison—Evidence—Accretion—Onus.*

The expression "any such new map" plainly refers to the "new map" made according to "new survey" as contemplated in Section 3. The section provides for periodical surveys at intervals of not less than ten years, after a revenue survey had been completed and approved. The object of the "new survey" is to ascertain the "changes" that may have taken place since the date of the last previous survey,—that is, changes by alluvion or direliction (not changes by possession). Section 6 then imposes upon the revenue authorities the duty to assess what may be called added land, whenever on inspection of the new map it appears that land has been added to an estate paying revenue directly to Government, There must consequently be a comparison between two maps, made at an interval of not less than ten years and each showing the revenue paying estate concerned. That estate must accordingly be in

BENGAL ALLUVION AND DILUVION ACT (IX of 1847), S. 3.

existence as a revenue paying estate if not before at least on the date of the first of the two maps taken as the basis for comparison. The true position is that the revenue survey map is taken as the basis of comparison; but the comparison of the map is not conclusive. The comparison sets the revenue authorities in motion, and they may, then, on the best materials they can procure, proceed to assess what land they deem to be assessable. What is liable to be assessed with revenue is, land not previously assessed, not land which has been formed since the revenue survey map. In the determination of the question, whether the land sought to be assessed is added land, we have to determine the land included in the estate at the time of its creation as a permanently settled estate. For this purpose, the revenue survey map is valuable but it is not conclusive evidence. (*Mookerjee and Rankin, JJ.*) SAUDAMINI DASSYA *v.* SECRETARY OF STATE FOR INDIA.

50 C. 822=38 C. L. J. 47=1924 Cal. 197.

———Ss. 3 and 6—*Assessment of revenue—Special surveys if necessary.*

S. 6 of Bengal Act IX of 1847 does not require that before an assessment of revenue is made under the Act, there must be a special survey carried out under S. 3. The result of a survey made for the purposes of settlement under the B. T. Act could be utilised for the purposes of an assessment under Bengal Act IX of 1847, 32 C.L.J. 402 Ref. (*Mookerjee, A. C. J. and Fletcher, J.*) SOUDAMINI DASYA CHOUDHURANI *v.* SECRETARY OF STATE.

65 I. C. 76 (C.).

———Ss. 3, 5, 6 and 9—*Exclusion of estates.*

To exclude estates from the operation of the Act it must be shown that the river-beds were included in the permanently settled estates. If the rivers were public tidal navigable river at the time of settlements it shows that their beds were not so included. (*Mookerjee and Walmsley, JJ.*) PRAFULLA NATH TAGORE *v.* SECRETARY OF STATE FOR INDIA.

31 C. L. J. 320=57 I. C. 29=24 C. W. N. 639.

———S. 6—*Churs—Assessment.*

All Churs in non-navigable river flowing through permanently settled estate are assessable to public revenue. (*Viscount Cave.*) SECRETARY OF STATE FOR INDIA *v.* MAHARAJAH OF BURDWAN.

49 Cal. 103=42 M. L. J. 61=26 C. W. N. 619=35 C. L. J 92=48 I. A. 565=67 I. C. 835=4 U. P. L. R. 1 (P. C.)=1922 P. C. 6.

———S. 6—*Imposition of a sessment—Lands must be 'added' lands.*

To entitle the Crown to impose an assessment under Bengal Act IX of 1847 it must be shown that the lands which are sought to be resumed and assessed with revenue are "added" lands within the meaning of S. 6 (*i. e,*) lands not included in the original assessment. (*Mookerjee and Cuming, JJ.*) SECRETARY OF STATE FOR INDIA *v.* UPENDRA NARAIN ROY. 36 C. L. J. 336=71 I. C. 849=1923 C. 247.

———S. 6—*Additional assessment—Newly added lands—Burden of proof on the Crown—Revenue and thak maps—Evidentiary value of.*

BENGAL ALLUVION AND DILUVION ACT (IX of 1847), S. 6.

The object of Bengal Act IX of 1847 was to enable the Crown to impose assessment on lands gained from the sea or by alluvion or dereliction from the rivers. The expression "any such new map" in S. 6 of the Act refers to the new map according to the new survey contemplated by S. 3. The object of the new survey is to ascertain the change that may have taken place since the date of the last previous survey that is changes by alluvion or dereliction (not changes by possession) 5 Pat. L. J. 681 Ref. S. 6 imposes upon the revenue authorities the duty to assess what may be called added land, whenever, on inspection of the new map, it appears that land has been added to an estate paying revenue directly to government. There must consequently be a comparison between two maps made at an interval of not less than 10 years and each showing the revenue paying estate. If not before, at least on the date of the first of the two maps taken as the basis for comparison. (*Mookerjee und Chotzner, JJ.*) RAJA SREENATH ROY *v.* SECRETARY OF STATE FOR INDIA.

50 Cal. 276=70 I. C. 510=36 C. L. J. 345=1923 Cal. 233.

———S. 6—*Notice—Amendment of.*

Notice served for the purposes of assessment under S. 7 of Act IX of 1847 can be amended. (*Mookerjee, A. J. C. and Fletcher, J.*) SOUDAMINI DASYA CHOUDHURANY *v.* SECRETARY OF STATE.

65 I. C. 76 (C.).

———S. 6—*Sunderban lands not paying revenue to Government—Beng. Regn. (XI of 1825) Rent—Diara proceedings for assessment of revenue—Suit for declaration in Civil Court.*

Under Act (IX of 1847) it must be shown that the land has been added to any estate paying revenue directly to the Government. Government as "owner" of the Sunderban granted a lease of certain lands for a certain period with a covenant for renewal on a progressive rental. There was no distinction between 'rent' and 'revenue' and the relation created by it was that of a lesser and lessee. The lessee was not allowed to claim an abatement of rent on the ground of diluvion. In addition to his lease hold interest his other properties moveable and immoveable were liable to be sold in the event of the accrual of the arrears of the *jama* reserved by the lease. The lessee in the present case was not the holder of an "estate paying revenue directly to the Government" and as such Act (IX of 1847) was not applicable. The relation between the parties was regulated by the contract between them subject to Regn. (XI of 1825). The entire proceedings confirmed by the Board of Revenue assessing the lands with Revenue in the present case under S. 6 of Act (IX of 1847) were a nullity. The suit being one for a declaration that the proceedings under Act (IX of 1847) were a nullity, it could not be dealt with as if it were a regular appeal from the decision of the Board of Revenue under S. 10 Cl. (3) of Regn. (III of 1828.) (*Fletcher and Ghose, JJ.*) THE SECRETARY OF STATE FOR INDIA *v.* JATINDRA NATH CHAUDHURY.

58 I. C. 778=24 C. W. N. 737.

BENGAL ALLUVION AND DILUVION REGULATION (XI of 1825.)

———*Submersion and reformation in* situ—*Accretion to the neighbouring land.*

Defts. held certain land as reformation in *situ* of which land they held under the Government in a Government *Khasmahal*. The land was submerged in 1872 and re appeared in 1906. The land diluviated in the very same year that the tenants (defts) obtained a lease of the land from the Government. The defts. did not pay any rent during the period of submergence. *Held*, that though the defts. had no right to the land at the time when it re-appeared, the plff. was not entitled to the land as an accretion. As the defts. were entitled to set up the rights of the Government, the plff's. suit was not maintainable. 4 Cal. 894 ref., 41 Cal. 683 dist. (*N. R. Chaterjea and Panton, JJ.*) AMINADDI *v.* TARINI CHARAN MONDAL.

24 C. W. N. 211=52 I. C. 673=
29 C. L. J. 564.

———*Riparian owners in Fyzabad Dt.*—Iqrarnamas—*How for binding as to custom of* Dhardhura.

Iqrarnamas containing the declaration of the riparian owners in Fyzabad Dt. accepting the custom of *dhardhura* in the villages on either side of the Gogra are not adequate proof of the custom, in the absence of an entry to that effect in the Record of Rights prepared at the time of the settlement of 1865. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) JANKI KUNWAR *v.* NARENDRA BAHADUR PAL SINGH. 23 I. C. 224 (Oudh.)

———S. 3—*'Changes' means changes brought about by the action of river or sea.*

The word 'changes' in S. 3 of the Act means changes brought about by the action of the river or the sea and not changes by the act of one proprietor in annexing to his estate the property of another proprietor. Therefore a map prepared under S. 3 can never be said to be a map according to possession of parties. (*Das and Adami, JJ.*) BIBI WAKILAN *v.* DEO NANDAN PROSAD.

5 Pat. L. J. 681=59 I. C. 298=
2 Pat. L. T. 81.

———S. 4—Chur *land—Reformation in* situ—*Section not applicable.*

Where certain lands forming part of a patni tenure became submerged by river action but subsequently reformed *in situ*, they are not lands gained by increment within S. 4 of the Bengal Regulation (XI of 1825) and could not be claimed as an accretion either by the zemindar or the *patnidar*. (*Ameer Ali.*) ARUN CHANDRA SINGH *v.* KAMINI KUMAR. 41 Cal. 683=
22 I. C. 317 (P. C.)=41 I. A. 32=
18 C. W. N. 369=(1914) M. W. N. 175=
15 M. L. T. 182=26 M. L. J. 251=
12 A. L. J. 243=19 C. L. J. 272=
16 Bom. L. R. 323.

———S. 4—*Gradual accretion.*

Gradual means slow and imperceptible. (*Mears, C. J. and Tudball, J.*) SHORAT SINGH *v.* GHULAM EZID. 55 I. C. 366=18 A. L. J. 195.

———S. 4—*Accretion—Slow process—Onus.*

BENGAL ALLUVION AND DILUVION REGULATION (XI of 1825), S. 4.

Where the villages are small in area and their common boundary but short in length, and the river a small one, shallow and fordable liable to sudden seasonal floods cutting away portions from the small estates, *held* the accretion of a few *bighas* per annum can hardly be said to be by gradual slow and imperceptible means. The burden of proof is on the party who claims the accretion to show that the accretion to the tenure has been of the nature contemplated by Regn. (XI of 1825). (*Tudball and Rafique, JJ.*) BALDEO THAKURAI *v.* UGRA NATH. MISRA. 29 I. C. 278 (All.)

———S. 4—*Submersion of land under water—Re-appearance on its old site—Identification—Ownership.*

Land belonging to the plff. which had submerged under a river re-appeared on its old site and was sufficiently identified to be the plff.'s land. It had not come out by gradual accretion nor by sudden cutting off by the action of the river, *held*, that the plff. was entitled to the land and that S. 4 had no application in the case. (*Stanley, C. J. and Banerji, J.*) BHAGWAN RAI *v.* GOPI RAI. 10 I. C. 311 (All.).

———S. 4—*Accretion—Tenure—Title—Lease of accretion by Landlord.*

Under S. 4 of the Regulation, where land is added by gradual accession it becomes an accretion to the tenure of the person to whose estate it is added. When it becomes added to an under-tenant, the subordinate tenure-holder gets a title to it and the superior landlord cannot lease such accession of land to a third party. All that he is entitled to is to an increment of rent. (*Mookerjee, C. J. and Fletcher, J.*) KARIM *v.* AFAJUDDI.

64 I. C. 805=33 C. L. J. 531.

———Ss. 4 and 5—*Churs in non-navigable rivers—Resumability.*

Churs formed in non-navigable rivers forming part of permanently settled estates are not liable to further assessment of Government revenue. (*Fletcher and Shamsul Huda, JJ.*) MAHARAJA OF BURDWAN *v.* SECRETARY OF STATE FOR INDIA.

46 Cal. 390=46 I. C. 305=22 C. W. N. 872.

———S. 4—*Accretion—Chur in river—Right of tenant.*

Lands which have gradually accreted to a *mokarari* holding forming a *chur* in a small shallow river cannot be claimed by the Zemindar as forming a portion of his *khaspatit* but belongs to the tenant subsequent to payment of additional rent therefor. (*Fletcher and Hula, JJ.*) GOBINDA HOTA *v.* KRISTAPADA SINGHA BABU.

45 I. C. 929 (Cal.)

———Ss. 4 and 5—*Dispute between Government and proprietor—Law applicable.*

S. 4 of the Bengal Regulation (XI of 1825) applies also to cases in which the dispute is between the Government as the owner of the bed of the river and a proprietor whose land abuts on the river. S. 5 can have no application to cases of accretions made owing to recession of rivers. 13 M. I. A. 467 ref. (*Lindsay, J. C.*) SECRETARY OF STATE FOR INDIA *v.* JAGADAMBA DEBI. 27 I. C. 509=18 C. C. 26.

BENGAL ALLUVION AND DILUVION REGULATION (XI of 1825), S. 4.

———S. 4—*Diluvion—Accretion to estate—Liability to pay revenue.*

On account of a change in the course of the Ganges, lands lying on one bank became diluviated and gradually reformed on the other bank. They were sold for arrears of revenue and in default of purchasers the Government purchased it and brought a suit for declaration of title and possession against the Zemindar, who claimed it as accretion and revenue free. *Held*, even as an accretion, it is liable for revenue assessment, and the Zemindar cannot claim to hold it as part of his permanently settled estate. If a case of abandonment by the prior proprietors is set up and proved and then there is an accretion it must be reassessed before revenue can be demanded. (*Miller C.J. and Foster, JJ.*) MAHARAJA KESHAV PRASAD SINGH *v.* SECRETARY OF STATE FOR INDIA.
74 I. C. 881 (Pat.).

———S. 4—*Scope of.*

Where land, once washed away but reformed on the same site is shown to be recognizable and identifiable as land belonging to the owner of the site, the Regulation does not apply. So far as the land submerged its possession is deemed to be with the owner at the least when the owner can show that he was in possession at the time of diluvion and is not shown to be dispossessed within twelve years before suit. (*Das and Adami, JJ.*) GAJADHAR PRASAD SAHOO *v.* DALHIB GHULAN KOER.
5 Pat. L. J. 632=57 I. C. 744=2 P. L. T. 59.

———S. 4—*Land submerged and reformed—Possession—Presumption—Limitation.*

S. 4 of the Regulation does not apply to land which has been washed away and which reformed on its old site and is identifiable and recognizable as land belonging to the owner of the site. During the period of submersion possession of lands remains with the proprietor. (*Das and Adami, JJ.*) GAJADHAR PRASAD *v.* DULHIN GULAB KUER. 5 Pat. L. J. 632=57 I. C. 744=2 Pat. L. T. 59.

———S. 4—*Accretion—Riparian right—Boundary between estates—Deep stream.*

After recession and encroachment by the Ganges the land washed away and afterwards reformed on the old ascertained site, is not land gained by increment, within S. 4 of Reg. (XI of 1825). 13 M. I, A. 467; 18 W. R. 113; 24 C. 489 (P. C.) Rel. In the Shahabad Dt. there is no custom by which the deep stream of the river is recognised as the boundary between estates on each side of the river. (*Coutts and Das, JJ.*) LALA LACHMI NARAYAN LAL *v.* MAHARAJA BAHADUR KESHO PRASAD SINGH. 5 P. L. J. 1=52 I. C. 147=1920 Pat. 102.

———S. 4—*Alluvion land—Accretions—Proof—Onus.*

Where a party can show that *chur* land is in fact reformation *in situ* of land identifiable as his own he is entitled to that land though it may have been for a period submerged. It is not sufficient for such a claimant to show that the accretion is *in situ* of a river-bed which has been settled with him: it is necessary for him to show that the land claimed had previous existence and was reformed. S. 4 of the Regulation 1825, as a whole, was not intended to apply to land which has been previously in existence as the property of individuals, S. 5 was intended to apply to such lands. The bed of a large and navigable river would not be settled with a private owner. 13 M. I. A. 467, 4 M. I. A. 403, 3 Cal. 795, 27 All. 685 Ref. (*Chapman and Roe, JJ.*) NANDKISHORE JAGATI *v.* NIDHI BEHARA. 3 Pat. L. J. 438=1918 Pat. 261=47 I. C. 102=5 Pat. L. W. 194.

———S. 4—*Applicability of.*

S. 4 also applies to rivers, the beds of which are private property. (*Mullick and Atkinson, JJ.*) PURI DAS *v.* KAHLU BEHARA.
38 I. C. 135=1 P. L. J. 536.

———S. 4 (1)—*Accretion.*

Where the land in dispute formed an accretion to rent free tenure it was held that in a suit for a declaration of title to it and recovery of mesne profits that the plff. was entitled to possession but that he could hold it only on payment of rent to the *patnidar* that as he had not paid rent to the *patnidar* he was not entitled to mesne profits and that the plff. could not claim to eject a *bona fide* tenant put in by the superior holder. (*Mookerjee and Beachcroft, JJ.*) RAJENDRA NATH ROY *v.* NANDA LAL GUHA. 18 C. W. N. 1206=26 I. C. 977=19 C. L. J. 595.

———S. 4 (1)—*Alluvion—Accretion—Claim to—Original boundary ascertainble.*

S. 4 of the Regulation requires that the accretion should be gradual and not that it should necessarily be slow and imperceptible. All accessions by gradual alluvion are treated alike irrespective of the rate of formation. The fact that the original boundary is *Kuam* or ascertainable does not make a difference. (*Batten, Offg. J. C.*) GOVIND RAO *v.* GANAPATHI.
45 I. C. 425=14 N. L. R. 97.

———S. 4 (1)—*Gradual accretion—Meaning of.*

The question as to what amounts to gradual accretion under S. 4 (1) of the Regulation, must depend upon the nature of the river, the manner of the accretion, and the quantity of the land thrown on each year. It need not be imperceptible. (*Jwala Prasad, C. J. & Das, J.*) KHUBI MAHTON *v.* LACHMI DAS. 63 I. C. 704=2 Pat. L. T. 599.

———S. 4 (1)—*'Gained'—Meaning of—Gradual accession.*

The word 'gained' in S. 4 (1) does not mean land washed away and afterwards identified as having reformed on its old site. A case under the said clause is not made out where the land in dispute is shown to have reformed on its old identifiable site. (*Das and Adami, JJ.*) BRAHMANAND SINGH *v.* DUND BAHADUR.
1 P. L. T. 229=56 I. C. 344=1920 Pat. 245=2 U. P. L. R. (P.) 111.

———S. 4, C. (1) and (4)—*River-beds, right in.*

The beds of small and shallow rivers are the property of zamindars subject to assessment of revenue when dried up. When a river dries

BENGAL ALLUVION AND DILUVION REGULATION (XI of 1825), S. 4.

up, a neighbouring talukdar cannot treat it as an accretion to his taluq. When a taluqdar grants a lease of a river bed when it is under waters, the lessee cannot hold it as a raiyat as against the proprietor when the bed dries up and the lessee cannot be a lessee in good faith. (*Holmwood and Chapman, JJ.*) RAMJAN ALI *v.* MAHARAM ALI KHONDKAR. 26 I. C. 406 (Cal.).

———S. 4, Cls. (1) and (2)—*Gradual accession—What is sudden change in course of river—Vertical accretion.*

It cannot be assumed that what is not sudden is gradual. For, an accretion to be 'gradual' under the Regulation it must be slow and imperceptible so as to render identification practically impossible. What is called 'vertical accretion' does not fall within the scope of the Regulation. 13 M. I. A. 467; 27 All. 655 ref. 28 All. 647 rel. (*Harrington and Carnduff, JJ.*) ABDUL HUQ *v.* SUBAJAN. 18 I. C. 855 (Cal.).

———S. 4 (3)—*Chur land—Question of title.*

The question of title to a chur thrown up in a large navigable river, must be determined with reference to the condition of things at the time when the chur was first formed and the terms of S. 4 (3); but before applying this section the Court must determine whether the bed of the river in which the chur is formed belongs to the public or to some individual. (*Mukherji, A. C. J. and Fletcher, J.*) SURENDRA NATH MITRA *v.* SECRETARY OF STATE. 60 I. C. 395 (Cal.).

———Ss. 4 and 5—*Applicability—Effect—Alluvial land—Accretions—Proof—Onus—Quantam.*

On proof that *Chur* land is a reformation in *situ* of land identified as his own the party is entitled to it although it was submerged for a time. S. 4 does not apply to lands previously in existence but S. 5 applies in such cases. A small and shallow river is one as opposed to a large and navigable one. The bed of the latter would not be settled with a private owner. (*Chapman and Roe, JJ.*) NANDA KISHORE JAGATI *v.* NIDHI BEHARA.
3 P. L. J. 438=5 P. L. W. 194=47 I. C. 102=1918 Pat. 261.

BENGAL ALLUVION AND DILUVION REGULATION (IX of 1847).

———Ss. 6 and 10—*Scope of.*

The expression "Estates paying revenue directly to the Government" does not include the lands let on lease by the Government without any distinction between "rent" and "revenue" under S. 6 of the Bengal Alluvion and Diluvion Act. Hence the new acquisition to such land is not separately assessable under the Act. A civil suit for the declaration of the proceedings under Bengal Alluvion and Diluvion Act confirmed by the Board of Revenue as a nullity is not an appeal under S. 10, Cl. 3 of Regulation (III of 1828.) (*Fletcher and Ghose, JJ.*) SECRETARY OF STATE *v.* JATINDRA NATH. 58 I. C. 778=24 C. W. N. 737.

BENGAL CESS ACT (IX of 1880), S. 5.

BENGAL ALLUVIAL LAND SETTLEMENT ACT (XXXI of 1858.)

———S. 1—*Alluvial land—Settlement—Effect.*

Where alluvial land has been settled as a separate estate with jama, it ceases to have any manner of connection with the original estate. (*Mookerjee and Rankin, JJ.*) SAUDAMINI DASYA *v.* SECRETARY OF STATE. 50 Cal. 822=38 C. L. J. 47=1924 Cal. 197.

———S. 2—*Alluvial accretion—C. P. Code, S. 103.*

Certain lands were formed by gradual accretion by recession of a river and the lands so formed were resumed by the Government and settled with the plaintiff. The land was held by the deft. under a lease granted by plff. co-sharer proprietor to the extent of 23rd share and other co-shares. In a suit by the plff. for recovery of rent, *held*, that in respect of the share, plff. was bound by the lease and could realise rent at the rate mentioned therein and that in respect of the rest, the plff. was in the position of a stranger and could realise rent at the rate assessed by the settlement authorities as payable by the under-tenure holder of the original estate. As the settlement authorities did not determine the fair rent payable by the tenure-holder the fair rent was assessed by the High Court acting under S. 103, C. P. Code. The co-sharers of plff. were not necessary parties to the suit. (*Mookerjee and Beachcroft, JJ.*) MUKHTAKESHI DASI *v.* SRINATH DAS.
19 C. L. J. 614=26 I. C. 215.

BENGAL CESS ACT (IX of 1880).

———Ss. 4 and 41—"*Holder of tenure*" *whether includes a raiyat.*

Under this Act, a raiyat may be a tenure-holder. S. 41 draws a distinction between the holder of a tenure and a cultivating raiyat but not between raiyat and the holder of a tenure. (*Jenkins, C. J. and Chatterjee, J.*) PEARY MOHAN ROY *v.* SARAT KUMARI DEBI.
14 I. C. 177=15 C. L. J. 428.

———S. 4—*Annual value.*

Under the Act annual value of a tenure is the rental on which the cess at half-an-anna in the rupee is to be calculated. (*Coutts and Das, JJ.*) ABBAS *v.* PREMSUKH DASS.
58 I. C. 878=1 P. L. T. 455.

———Ss. 5, 41, 52 and 64—*Arrears of cess—Sale of holding—Prior encumbrances are not affected—Rent free tenure—Liability to pay cess—Notice—Presumption.*

Where a holding is sold in execution of a decree for cess the purchaser obtains only the right, title and interest of the tenant. The purchaser does not hold the property free of encumbrances created by the tenant prior to the sale nor could he annul the encumbrance. 25 C. 179 ref. The liability to pay road cess does not by itself create a charge on the property. It is a personal

BENGAL CESS ACT (IX of 1880), S. 6.

liability enforceable under the Public Demands Recovery Act by the sale of the judgment-debtor's interest. 30 Cal. 778 foll. In the case of a rent free tenure the liability to pay cess to the superior landlord arises only when the requirements of Chap. IV of the Act are complied with by the publication of the extract from the valuation roll. There is no presumption under S. 114 illustration (*c*) of the Evidence Act with respect to notices prescribed by S. 52 of the Cess Act. The onus is on the person claiming the right to the payment of the cess to prove that the formalities prescribed by the Act have been complied with. 13 Cal. 19; 25 Cal. 727; 15 Cal. 327 foll. (*Jwala Prasad and Ross, JJ.*) PITAMBER CHOWDHURY *v.* RAHMAT ALI. 1922 Pat. 167=1 Pat. 218=3 Pat. L. T. 282=65 I. C. 138=1922 P. 303.

———Ss. 6 and 72—*Object of—Mines—Royalty—Annual profits—Assessment.*

The policy of Bengal Act (IX of 1880) is that all persons who benefit by the maintenance and construction of "roads" and other means of communication or "works of public utility" out of the cesses, should bear the liability of paying the same. The liability for cess lies on both "occupier" and "owner" of mines. On the true construction of S. 6, the term "annual net profits" has reference to the property and not to the individual. The royalty or the percentage on the profits of a mine payable by mine owners to the proprietor of the land in which the mine is situate, is assessable to cess under S. 6. (*Mr. Amir Ali.*) MANINDRA CHANDRA NANDI *v.* SECRETARY OF STATE FOR INDIA. 38 C. 372=38 I. A. 31=15 C. W. N. 201=8 A. L. J. 140=13 C. L. J. 124=9 M. L. T. 196=13 Bom. L. R. 82=21 M. L. J. 365=9 I. C. 311=(1911) 2 M. W. N. 53 (P. C.). [On Appeal from 34 Cal. 257.]

———Ss. 14 and 20—*Suit for rent under* kabuliyat *not under the Act.*

S. 14 of the Act does not apply to a suit by a landlord for recovery of rent under a *kabuliyat* and so S. 20 does not bar a Court from giving the plff. landlord a larger amount than is shown in the cess return. (*Fletcher and Teunon, JJ.*) SHRIMANTES LALMAITY *v.* SIBU RAUL. 37 I. C. 755 (Cal.).

———S. 20—*Statement in road cess return.*

A statement made by a landlord in a road cess return is more than an admission under S. 20 of the Cess Act and there is a statutory bar to recovering rent at a rate higher than that shown in the cess return. (*Newbould, J.*) PRASANNO KUMAR *v.* SIB KRISHNA SINGH SARMA. 53 I. C. 202 (Cal.).

———S. 20—*Zerait land in occupation of tenant—Entered as* Zerait *in cess return—Suit for the cess.*

S. 20 of the Bengal Cess Act (IX of 1880) does not deprive a proprietor who by a mistake enters a piece of land in wrong part of his return, of his right to claim rent. The object of the Cess Act is that no land within the estate should escape assessment. It is immaterial for this purpose whether *Zerait* land is entered as in the possession of a tenant or *Khas* possession or the *Zamindar*. The *Zamindar* will be liable to punishment only if he enters land of one class in another class. *Mullick, J.*) SIR NARAIN SINGH *v.* SABHOOL KHAN. 27 I. C. 304 (Cal.).

BENGAL CESS ACT (IX of 1880), S. 20.

———S. 20 and Sch. A, Part I—*Tenant's name not entered—Suit for rent.*

In cess return under part I of Sch. A of the Act, a landlord put down the names of his bataijot raiyats. Subsequently he brought rent suits against them. *Held*, the return should have been made under part II or part III of the schedule and the names of the raiyats or tenure-holders should have been mentioned. There was therefore no proper return within the Act. (*Woodroffe and Richardson, JJ.*) SAMDAIN *v.* KAMALA KANT JHA. 15 I. C. 424 (Cal.).

———S. 20—*Road cess return—Right of landlord to recover rent at a higher rate—B. T. Act, Ss.* 105 *and* 109 *A.*

S. 20 of the Cess Act, 1880, is not a bar to the landlord recovering rent at the rate settled in a proceeding under S. 105 of the Bengal Tenancy Act, 1885, when the road cess return showing a lesser rate was filed prior to such proceeding. *Coutts and Ross, JJ.*) NAZIR RAI *v.* MAHARAJA KESHO PRASAD SINGH BAHADUR. 6 Pat. L. J. 622=65 I. C. 3=3 Pat. L. T. 141=4 U. P. L. R. (Pat.) 23=1922 Pat. 57=1922 P. 55.

———S. 20—*Entry in part I, Sch. A—Error in—Suit for rent.*

Where a holding is wrongly entered in part I, Sch. A in the returns made under the Bengal Cess Act, instead of in part II, the entry does not bar a suit for rent in respect of the holdings under S. 20 A of the Cess Act. 27 I.C. 304 foll. 41 I.C. 404 not foll. (*Chamier, C. J. and Sharfuddin, J.*) RAMGOVINDA CHAUDHRI *v.* THAKUR DAYAL JHA. 2 Pat. L. W. 41=43 I. C. 501=2 Pat. L. J. 653.

———S. 20—*Land entered as* zerait *in road cess return—Suit for rent.*

Where a tenant land was described as *zerait* in the road cess return owing to a dispute at the time between landlord and tenant. *Held*, that as there was no wilful or dishonest misdescription and as the land was mentioned in the road cess return though not as *khas*. S. 20 of the Beng. Cess Act was no bar to suit for rent in respect of the land ultimately proved to be cessed. (*Harrington and Newbould, JJ.*) JOGESHWAR SINGH *v.* RAMOO SINGH. 43 I. C. 497=2 P. L. W. 42 (foot-note).

———S. 20 (*a*)—*Land entered as malik land in part I of the return—Rent, suit for.*

When any holding, estate or tenure in respect of which a return has been made, is entered by the maker thereof in Part I of the Return the maker is precluded from suing for any rent whatsoever in respect of any land holding or tenure forming part of the estate which the return relates, unless the holding or tenure, the rent of which is sought to be recovered was created after the lodging of such return. (*Atkinson, J.*) JUGAL KISHORE SAHAI *v.* HANUMAN MAHTON. 41 I. C. 404=2 Pat. L. W. 38.

———S. 20 (b)—*Applicability to* bhaoli *holdings—Road cess return—Right of landlord.*

BENGAL CESS ACT (IX of 1880), S. 41.

S. 20 (b) of the Act does not apply to *bhaoli batai* holdings and the landlord is entitled to recover rent at a higher rate than that mentioned in the road cess return. (*Chamier, C. J. and Mullick J.*) UPENDRA LAL MISRA *v.* MOTI THAKUR. 1918 Pat. 166=41 I. C. 61= 2 Pat. L. W. 35=2 Pat. L. J. 617.

——S. 41—*Patni lease.*

Parties can contract themselves out of the provisions of S. 41 of the Cess Act. (*Richardson and Suhrawardy, JJ.*) RAJA BHUPENDRA NARAYAN SINHA *v.* MIDNAPORE ZEMINDARI CO., 68 I. C. 937=1922 Cal. 300.

——S. 41—*Lands held on payment of rent in kind—Liability to pay cess.*

Irrespective of whether rent is payable in cash or in kind, cess is payable in respect of all lands held by a cultivating raiyat. (*Brett, J.*) JOGESH CHANDRA ROY *v.* ANNADA CHARAN CHOWDHURY. 68 I. C. 662=26 C. W. N. 368.

——S. 41—*Cesses—Liabilities, if can be modified by contract.*

The liabilities of landlords and tenants in respect of cesses under S. 41 must be determined according to the statute unless a clear provision to the contrary is made in the lease. (*Mookerjee and Roe, JJ.*) GOVINDA CHANDRA *v.* LALIT MOHAN. 33 I. C. 352=22 C. L. J. 571.

——S. 41—*Contract to pay cess is not illegal.*

Neither S. 41 nor any other section of the Act prohibits or renders illegal a contract to pay cess. 3 C. L. J. 337 foll. (*Jwala Prasad and Ross, JJ.*) PITAMBAR CHOWDHURY *v.* RAHMAT ALI. 3 Pat. L. T. 282=1 Pat. 218=65 I. C. 138= 1922 Pat. 167=1922 P. 303.

——S. 44—*Apportionment of cesses.*

A co-proprietor can get apportionment of cesses basis other than that of Land Revenue by an objection under S. 44, after a separate account for payment of Land Revenue is opened. (*Richardson and Mullick, JJ.*) NARENDRA NARAIN SINGH *v.* GOPISUNDARI DASYA. 25 I.C. 366 (Cal.).

——S. 44—*Apportionment of cess between co-sharers—Separate accounts—Opening of.*

After the opening of separate accounts for the purpose of the payment of the Land Revenue, the only way in which a co-proprietor can obtain an apportionment of his cesses payable to him on any basis other than the basis of the amount of land revenue to which he is liable, is by preferring an objection in accordance with S. 44 of the Act. The Civil Court has no jurisdiction to alter the apportionment. (*Richardson and Mullick, JJ.*) NARENDRA NARAIN SINGH *v.* GOPISUNDARI DASYA. 20 I. C. 152 (Cal.).

——S. 44 (2)—*Annual rent—Cess.*

Amount to be recovered as cess every year from raiyat by landlord, is to be calculated on the amount of rent of the particular year. (*Chamier, C. J. and Sharfuddin, J.*) SHEOPRASAD SINGH *v.* LAL BABU. 39 I. C. 505=1 Pat. L. W. 677.

BENGAL CESS ACT (IX of 1880), S. 54.

——S. 47—*Scope of.*

As laid down in S. 47, the procedure for levy of cess is the same as that for recovering arrears of rent. The expression "in the same manner and under same penalties as if the same were arrears of rent" refers only to the procedure to be adopted and the consequences to follow in the recovery of rent that is to say the remedy would be by suit and the penalties would possibly be the sale of the holding or damages at 25 per cent. under S. 68 of the Bengal Tenancy Act. The provisions of S. 47 of the Act are not controlled by any special contract as to payment of interest in arrears of rent between the landlord and tenant and so the waiver of a claim to demand interest on arrears of rent by the landlord in virtue of a contract with the tenant will not absolve his liability to pay interest on the cess. (*Chitty and Walmsley, JJ.*) RADHIKA MOHAN ROY *v.* MANMOTHA NATH. 23 C. L. J. 603= 34 I. C. 111.

——S. 48—"*Interest,*" *meaning of.*

"Interest" means one which can be entered in land register and the section implies that the several share-holders should pay the amount of cess according to their respective shares. The expression refers to the share of the estate held by the shareholder and not the valuation of that share or the income derived therefrom. The section gives a right to the shareholder paying more than his share of the cess, to recover the excess from other co-sharers. (*Richardson and Mullick, JJ.*) NARENDRA NARAIN SINGH *v.* GOPI SUNDARI DASYA. 25 I. C. 366 (Cal.).

——S. 48—'*Interest*'—'*Proportionate to his own interest*'—*Scheme of Act.*

The words 'proportionate to his own interest' in S. 48 of the Act refers to the share of the estate held by the share-holder and not to valuation of that share or the income which he derives from it. The word 'interest' in that section means an interest of a kind capable of being entered in a land Register. The scheme of the Act is that until a separate appointment is obtained by a share-holder under the Act the extent of his liability for cesses as between himself and his co-sharers is the extent of his share or the extent of his liability for land revenue. (*Richardson and Mullick, JJ.*) NARENDRA NARAIN SINGH *v.* GOPI SUNDARI DASYA. 20 I. C. 152 (Cal.).

——Ss. 54 and 56—*Road cess on basis of re-valuation—No notice under S. 54.*

Plff. sued to recover arrears of road cess payable under the re-valuation of 1907 in respect of certain rent free lands held by the defts. within plff.'s tenure. *Held*, that the notice required by S. 54 not having been published by the plff. the defts. were not bound to pay the cesses upon the basis of their valuation of 1907. (*Richardson and Beachcroft, JJ.*) BARANASHIBASI MUKERJEE *v.* HARI KRISHNA SHAHA. 44 I. C. 32 (Cal.).

——S. 54—*Notice under, is a condition precedent to recovery of cess.* (*Ross, J.*) MURLI MANOHAR *v.* RAJA NAND SINGH. 72 I. C. 1 (P.).

BENGAL CESS ACT (IX of 1880), S. 95.

———S. 95—*Road cess returns—Entry in, if admissible against tenant.*

An entry in a road cess return made by a landlord behind the back of a tenant cannot operate to take away the tenant's title, although under S. 95 of the Bengal Cess Act, it is admissible in evidence as against the landlord or any one claiming under him. (*Walmsley, J.*) RAM KOMAR GOPE *v.* RADHA CHARAN GOPE.
49 I. C. 736 (Cal.).

———S. 95—*Returns—Admissibility.*

The words as to signature and address in S. 95 of the Act are only directory and the fact that a wrong address is given, will not make the return admissible in evidence in favour of the person by or on whose behalf it was filed. (*Fletcher and Richardson, JJ.*) RAJANI BALA DASHY *v.* BHAJA HARI KOLEY.
26 I. C. 126=18 C. W. N. 1076.

———S. 95—*Return of valuation by co-sharer.*

Under S. 95 the return of valuation submitted by a co-sharer to the Collector is admissible against him and not in his favour and therefore in a suit to recover the excess amount of cess from his co-sharers the burden of proving correctness of the return lies upon him. (*Richardson and Mullick, JJ.*) NARENDRA NARIN SINGH *v.* GOPI SUNDARI DASYA. 25 I. C. 366 (Cal.).

———S. 95—Teiskhana *register, if public document—Proof—Road cess return.*

A *Teiskhana* register prepared under the rules framed by the Board of Revenue under Regulation (XII of 1817) in Zamindar's office by a *Patwari* approved by the Collector is not a public document but is admissible in evidence if properly proved to have been kept in due course by the registered Patwari, S. 95 of the Bengal Cess Act is not exhaustive. A road cess return may be admissible against persons other than the one who made it. (*Mookerjee and Carnduff, JJ.*) CHALHO SINGH *v.* JHARO SINGH.
18 I. C. 61=39 Cal. 995.

———S. 95—*Evidence Act, S. 21—Admissibility of road cess return.*

Because of an admission of a road cess return in a suit other than a rent suit, on behalf of a tenant against his landlord, the latter does not get any right to produce it successfully on his behalf in a subsequent rent suit. The road cess return is not admissible in evidence under S. 95 of the Act in favour of either the person filing it or of one who gets it filed by another or any one claiming through him or his representative in interest, but it is admissible if filed by a *ticadar* or temporary lessee, in favour of his zamindar as he will not be the person precluded from getting its benefit. The one made by a predecessor in interest of the tenant deft. has a considerable evidentiary value in favour of the plff. landlord and against the tenant. The provisions of S. 95 of the Bengal Cess Act although not exhaustive, limit the application of S. 21, Evidence Act, excluding Road Cess Returns from their admission in evidence in favour of person filing them or for whom they have been filed. (*Mookerjee and Carnduff, JJ.*) MOHENDRA NARAIN SINGH *v.* AJODHYA PRASAD SINGH.
15 I. C. 284=39 Cal. 1005.

BENGAL CHOWKIDARI ACT (VI of 1870), S. 1.

———S. 95—*Absence of Party's name in Road Cess Return—If evidence against him.*

The absence of the name of a party from the list of tenants mentioned in a Road Cess Return is evidence against him. 10 Cal. 1024, 7 C. L. R. 356, dist. and diss. (*Mookerjee and Carnduff, JJ.*) IMRIT CHAMAR *v.* SRIDHAR PANDEY.
15 C. L. J. 7=13 I. C. 120=17 C. W. N. 108.

BENGAL CHOWKIDARI ACT (VI of 1870).

See also CHOWKIDARI CHAKRAN LANDS.

———*Patni lease, construction of—Resumption and settlement of.*

A patni lease provided that if any land or jama be excluded from the patni taluk under any law or order of the Court, the patnidar shall not be able to raise any objection to the payment, of the stipulated jama on that account. *Held*, that the provision would not be applicable to lands resumed by the Collector under the Chaukidari Act. (*Newbould, J.*) DEBENDRABALA DASI *v.* LALIT MOHAN GHOSE. 33 I. C. 593 (Cal.)

———*Scope of.*

The Act applies to Simanadari lands in Thana Indas Dist., Bankura, granted to Simanadars for performing the duties mentioned in S. 1 of the Act. (*Jenkins, C. J. and Holmwood, J.*) LALU DOME *v.* BEJOY CHAND. 43 Cal. 227=
33 I. C. 553=20 C. W. N. 404.

———*Applicability.*

The Chowkidari Act does not apply to the lands of the Zemindari of Kilah Sukunda in Orissa which was held at a fixed Jama in perpetuity under a sanad confirmed by S. 33 of Regulation (XII of 1805). The land subject to the Act is that assigned by Govt. at the date of settlement (such settlement not being temporary) and which has therefore been taken into account through excluded from assessment in the settlement of the Land Revenue assessed for the whole estate. (*Woodroffe and Caspersz, JJ.*) HARI CHAND *v.* SECY. OF STATE.
9 I. C. 688=15 C. W. N. 300.

———S. 1—"*Assigned*"—*Meaning of—Right of Govt. to resume lands in Zemindari.*

The word "assigned" in S. 1 of the Village Chaukidari Act, 1870, means "assigned by Govt. or appropriated by its authority or with its permission and the provisions of the Act do not authorise a claim by Govt. for resumption of Chaukidari Chakran lands in a Zemindari granted by the zemindar himself and which had not been excluded from assessment as Chaukidari lands at the time of settlement." (*Mr. Ameer Ali.*) SECRETARY OF STATE *v.* KRITHIBAS BHUPATHI CHANDAN MAHAPUTRA. 42 Cal. 710=
42 I. A. 30=19 C. W. N. 65=2 L. W. 11=
17 M. L. T. 1=21 C.L. J, 31=17 Bom. L. R. 32=
26 I. C. 676=28 M. L. J. 457 (P. C.).

———S. 1—*Service tenure-holder—Nature of service.*

S. 1 of the Chaukidari Charkran Act does not govern cases in which there might be definite and conclusive evidence to satisfy the Court as to what was the nature of the services required

BENGAL CHOWKIDARI ACT (VI of 1870), S. 1.

from the service tenure-holder. (*Fletcher and Panton, JJ.*) SATISH CHANDRA BANDO PADHYA *v.* NATABAR DOME. 28 C. L. J. 281=48 I. C. 362.

——S. 1—*Applicability of—Chaukidari Chakran lands—Definition and meaning—Assignment.*

Chaukidari Chakran lands are lands, which having been assigned by Government at the time of the settlement have not been taken into account in the assessment of land revenue. For the application of Act VI of 1870 B. C. it must be shown that the lands which have been dealt with are Chaukidari Chakran lands within the definition given by the Act. (*Woodroffe and Caspersz, JJ.*) BIRBAR NARAYAN *v.* SECRETARY OF STATE. 11 I. C. 899=14 C. L. J. 151.

——S. 48—*Choukidari Chakran lands—Jurisdiction of Collector to settle with one of several Zamindars.*

Under S. 48 of the Act the Collector has no power to settle village Choukidari Chakran land with only one of several zemindars. (*Jwala Prasad, J.*) MUHAMMAD ABU ZAFAR *v.* RAM PERSHAD KUMAR. 37 I. C. 937 (Pat.).

——Ss. 50 and 51—*Zemindar—Estate of, in resumed Choukidari Chakran lands.*

Where before resumption the Zemindar has entered into contracts affecting his existing estate, the rights of third parties under the contract are preserved. If after resumption, the Zemindar settles lands with third persons, the latter acquires no right as against the Patnidar within whose patni the lands were originally included. (*Mookerjee and Walmsley, JJ.*) SURENDRA MOHAN *v.* RAJENDRA NATH ROY. 22 C. W. N. 660=46 I. C. 435=28 C. L. J. 160.

——Ss. 50 and 51—*Suit for possession by Patnidar—Limitation.*

Art. 144 of the Limitation Act applies to the suit brought by a Patnidar against the Zemindar for the recovery of possession of Choukidari Chakran Lands transferred to the latter under the Act. To ascertain when the Zemindari's possession became adverse, the Court must find when the lands were settled by the Zemindar with tenants and when those tenants took possession of the lands and whether such possession was to the knowledge of the patnidar, (*Woodroffe and Cuming, JJ.*) MANINDRA CHANDRA NANDI *v.* RANGLAL. 41 I. C. 728 (C.).

——S. 51—*Chaukidari Chakran lands—Right of patnidars when such lands are resumed by Government and transferred to Zemindar—Suit to enforce rights—Limitation Act, Arts.* 113 *and* 144.

The word 'contract' primarily means a transaction which creates personal obligations but it may, though less exactly, refer to transactions which create real rights. It is in this latter sense that it is used in S. 51 of Bengal Act VI of 1870, and the rights thereby reserved to patnidars and others on the transfer to the Zemindar of Chaukidari Chakran lands, comprehensively included in the word "Contract" are real rights, the enforcement of which is secured not by a suit for specific performance, but by a suit for possession. Where therefore a patnidar sues the zemindar to recover

BENGAL CHOWKIDARI ACT (VI of 1870), S. 60.

possession of such lands. *Held*, that Art. 144 and not Art. 113 of the Limitation Art is applicable. (*Lord Buckmaster*) MAHARAJAH RANJIT SINGH BAHADUR *v.* MAHARAJ BAHADUR SINGH. 46 Cal. 173=16 A. L. J. 964=25 M. L. T. 8=29 C. L. J. 193=1 U. P. L. R. (P. C.) 23=21 Bom. L. R. 506=10 L. W. 83=35 M. L. J. 728=23 C. W. N. 198=48 I. C. 262=45 I. A. 162 (P. C.).

——S. 51—*Choukidari Chakran lands situate in Zemindari—Rights of Zemindar.*

Patnidars and dar-patnidars are entitled to possession of Choukidari Chakran lands on resumption by Govt. and assessment of *jama*. (*Lord Parker.*) RANJ SINGH *v.* KALI DASI DEBI. 44 Cal. 841=21 C. W. N. 609=32 M. L. J. 565=15 A. L. J. 390=25 C. L. J. 499=19 Bom. L. R. 462=(1917) M. W. N. 459=6 L. W. 101=2 P. L. W. 1=22 M. L. T. 489=40 I. C. 981=44 I. A. 11 (P. C.).

——S. 51—*Patnidar—Liability.*

The patnidars are not liable to pay additional rent on resumption of Choukidari Chakran lands unless there is anything to the contrary in the patni lease. (*Fletcher and Teunon, JJ.*) NALINA KHAYA BASU *v.* BIJOY CHAND. 40 I. C. 395 (C.).

——S. 51—*Chaukidari Chakran lands—Ejectment of chaukidar—Occupancy rights—B. T. Act, S.* 181.

Chaukidari Chakran lands are held on condition of service and a chaukidar who occupies such lands is not entitled to a right of occupancy therein. A chaukidar while performing the duties of his office is not a trespasser and cannot be ejected from such lands. The title of a Zemindar to chakran land is always there and remains unaffected by the fact that such land is appropriated to the maintenance of an officer performing the duties of village watchmen. When such land is transferred to the Zamindar it is at his disposal, and may be treated by him as his *mal* land or *zerait* land but once he elects to treat the land as his mal he cannot afterwards treat it as *zerait* land. (*Das, J.*) KARMAN AHIR *v.* NIRMAL KUMAR. 52 I. C. 181 (Pat.).

——Ss. 58 and 61—*Commissioner's order—If may be reviewed by second Commissioner.*

An order under S. 61 of the Act by a Commissioner appointed under S. 58 of the Act is final and conclusive and cannot be reviewed by a second Commissioner, and if the latter does so, it would be *ultra vires* and contrary to law. (*Chitty and Teunon, JJ.*) SARADINDRA NARAIN ROY *v.* BINODI BEHARI MAHTO. 20 I. C. 644=18 C. W. N. 143.

——Ss. 60 and 61—*Evidence Act, S.* 114 (*e*).

If the proceedings under S. 61 are conducted according to Bengal Regulation VII of 1822 and after full notice to all parties, the order is final and binding on Civil Courts. If it is found that

BENGAL CHOWKIDARI ACT (VI of 1870), S. 61.

there was an order under S. 61, the presumption under S. 114 (e) would arise. Plff. claimed a land as Chaukidari Chakran and deft. as Lakiraj. If the deft. was not a party to the proceedings under S. 61, they are not evidence against him. (*Chatterjee, J.*) BAIKUNTH NATH SEN *v.* BISHU BHUSHAN JASH. 9 I.C. 322 (C.).

———S. 61—*Commissioner's report.*

The person who is not called in inquiry under Bengal Chowkidari Act is not entitled to notice and the report of the Commissioner under S. 61 is final. (*Holmwood and Iman, JJ.*) SARAT CHANDRA ROY *v.* SECRETARY OF STATE.
32 I. C. 545=21 C. W. N. 238.

BENGAL CIVIL COURTS ACT (XII of 1887).

See UNDER BENGAL N. W. P. AND ASSAM CIVIL COURTS ACT.

BENGAL COURT FEES (AMENDMENT) ACT (IV of 1922).

———*Grant of letters of administration—Property outside Bengal—Levy of fees—Legality.*

Under the provisions of S. 80 A. (1) of the Government of India Act, the Local Legislature has power to make laws for the peace and good government of the territories of the Province, and under S. 80 A. (2) the Local Legislature may, subject as therein mentioned, that is to say, subject to the limitations mentioned in (3), repeal or alter as to that Province any law made before or after the commencement of the Act by any authority in British India. The limitations imposed by S. 80 (3) relate (a) to the imposition of new taxes other than those set out in Sch. I of the Scheduled Taxes Rules. It is quite true that duties, which are collected by means of stamps are in a sense stamp duties, for instance in England, estate duty, probate duty and succession duty, are stamp duties because they are so collected; but it is doubtful whether a Court-fee becomes a stamp duty within the meaning of the Scheduled Taxes Rules, Sch. I because it is collected by means of stamps. The stamp duties referred to in Sch. I mean some such duties are imposed by the Indian Stamp Act, and do not comprise court-fees comprised in the Court Fees Act, even although in a sense they are stamp duties as being paid by stamps. The sum charged upon a grant of probate or of letters of administration is not a tax or duty levied upon the property upon which the probate or administration operates, and it is not charged thereon as is estate duty in England, but it is merely a fee levied by the Court issuing the probate or letters of administration for the work done in this connection. This is so in spite of the fact that the fee is levied upon the value of the property. Court fee on probate or letters of administration is rightly levied at the enhanced rate on the value of all assets whether in the province or outside. (*Greaves, J.*) GEORGE THOMAS WILLIAMS, IN THE GOODS OF.
50 Cal. 597=27 C. W. N. 812=
75 I. C. 466=1924 Cal. 115.

BENGAL COURT OF WARDS ACT (IX of 1879).

———Ss. 6 (a) and 27—*Declaration of owner as disqualified proprietor—Sale of property by Court of Wards—Suit by ward for possession.*

Where a person was declared a disqualified proprietor and his property was sold by the Court of Wards the period of limitation for a suit to set aside the sale runs from the taking of the possession by the purchaser though the management of the Court of Wards continued long after. Possession of the Court of Wards is possession of the ward for purposes of limitation. (*Sir Lawrence Jenkins.*) RANI KUAR MANLI SINGH MANDHATA *v.* NAWAB BAHADUR OF MURSHIDABAD.
46 Cal. 694=36 M. L. J. 210=
17 A. L. J. 202=23 C. W. N. 531=
29 C. L. J. 355=25 M. L. T. 341=
21 Bom. L. R. 611=1 U. P. L. R. (P. C.) 16=
50 I. C. 202=(1919) M. W. N. 318 (P. C.).

———Ss. 6 (a) and 51—*Suit to recover debt from widow without making manager of Court of Wards as her guardian, if maintainable, when whole state not taken over.*

The creditor of a deceased Zemindar sued his widow who had been declared a disqualified proprietor under S. 6 (a) for recovery of the debt from the assets left by her husband, without describing her as a Ward of the Court or as being represented by the manager of the Court of Wards as her guardian, as required by S. 51 of the Act. *Held*, that the suit was not maintainable even though one of her husband's properties had not been taken over by the Court until after the lower Court has passed a decree against the lady in the suit. 28 All. 570 P. C.; 5 C. L. J. 434; 8 Cal. 620 dist. (*N. R. Chatterjee, J.*) ANANDA KUMARI DEBI *v.* DURGA MOHAN CHUCKERBUTTY.
32 I. C. 1=20 C. W. N. 31=22 C. L. J. 522.

———S. 6 (e)—*Estate in hands of Court available for all creditors—Decree against Court.*

The estate of a ward in the hands of the Court of Wards is available, if the proper procedure is followed, for the satisfaction of all his creditors, and not for the satisfaction of such claims only as arise out of, or in relation to that estate. A tenant who is a ward of the Court of Wards can be sued for arrears of rent, only as represented by the Manager of the Court of Wards. The decree in such a suit must be so framed as to be binding on the Manager as such. (*Mookerjee and Beachcroft JJ.*) GOBIND SAHAI *v.* UDIT NARAIN SINGH. 20 I. C. 484=17 C. L. J. 601.

———Ss. 6 (e) and 51—*Suit on contract—Maintainability.*

Where a Court of Wards is in possession of the property of a disqualified proprietor, under S. 6 (e) of the Bengal Court of Wards Act, a suit upon a contract, or a suit for a declaration of title to or for recovery of possession of property not in the possession of the Court of Wards, may be prosecuted against the proprietor alone. (*Mullick and Thornhill, JJ.*) MAHAMED ABDUS SALAM *v.* KAMALMUKHI.
46 I. C. 316=5 Pat. L. W. 92.

BENGAL COURT OF WARDS ACT (IX of 1879), S. 10.

———Ss. 10 and 64 (a)—*Notice—Presumption—Non-presentation of claim to the Collector—Interest, loss of.*

The Bengal Court of Wards Act, 1879, does not require a Collector to give notice to the creditors entered in any list, but, it does require the issue of a general notice. If the provisions of Cls. (b) and (c) of S. 64 (a) of the Court of Wards Act are complied with in full and those of Cl. (a) only complied with partly, the Court may presume that all the notices required by the section were published. If a creditor does not submit his claim after the publication of the notice under the Act, the creditor loses his interest from that date. (*Griffin and Chamier, JJ.*) BARROW *v.* GAYA PRASAD. 15 I. C. 729 = 9 A. L. J. 558.

———Ss. 10 (a) and 10 (b)—*Admissibility of document not produced before the Court of Wards.*

If a document in the possession of a creditor is not produced by him as required by sub-section (1) of Section 10-B of the Act it is not admissible in evidence against the ward under sub-section (3). The omission on the part of the creditor will not destroy his rights or claims under the document. (*Mookerjee and Beachcroft, JJ.*) RAM BAHADUR *v.* DASURI RAM.
19 I. C. 840 = 17 C. L. J. 399.

———S. 10 (a)—"*Date of publication of notice*".

"Date of publication of notice" means the date of last publication under S. 64-A. (*Coxe, J.*) KRISHNA PRASAD *v.* UDIT NARAIN SINGH.
9 I. C. 621 (C.).

———Ss. 13 (a) and 51—*Execution sale—Application to set aside.*

When the estate of a judgment-debtor is under management of the Court of Wards under S. 13-A he has no right to apply to set aside an execution sale of his properties except through the manager of the Court. (*Chatterjee and Beachcroft, JJ.*) UMAKANTA SEN *v.* HIRALAL ROY. 34 I. C. 86 = 20 C. W. N. 852.

———S. 18—*Power to acknowledge debt.*

A Court of Wards has power to give an acknowledgment of a debt under S. 19 of the Limitation Act so as to give a fresh starting point of limitation but it is doubtful whether a Court of Wards has a power under S. 18 of the Act to direct the execution of a promissory note. (*Fletcher and Richardson, JJ.*) RASHBEHARI LAL *v.* ANAND RAM. 34 I. C. 205 = 43 Cal. 211.

———S. 18—*Powers of Court of Wards.*

The Court of Wards in possession of the estate of a disqualified proprietor has power to deal with it only in the manner provided by S. 18. (*Fletcher and Teunon, JJ.*) KAURAMANI SINGHA *v.* WARIF ALI MURZA. 28 I. C. 818 = 19 C. W. N. 1193.

———S. 40—*Manager appointed by Court of Wards—Powers of—Pre-emption suit.*

The Manager of disqualified proprietor appointed by the Court of Wards has a right to perform the preliminary formalities necessary for a pre-emption suit. (*Mr. Ameer Ali*). JADU LAL SAHU *v.* JANKI KOER. 39 Cal. 915 = 39 I. A. 101 = 16 C. W. N. 553 = 11 M. L. T. 361 = (1912) M. W. N. 486 = 15 C. L. J. 483 = 9 A. L. J. 525 = 14 Bom. L. R. 436 = 15 I. C. 659 = 23 M. L. J. 28 (P. C.)
[On Appeal from 35 Cal. 575.]

BENGAL COURT OF WARDS ACT (IX of 1879), S. 60.

———Ss. 51 and 55—"*Suit*"—*Meaning of.*

The word 'Suit' in Ss. 51 and 55 of the Act extends to miscellaneous proceedings. (*Chatterjee and Beachcroft, JJ.*) UMAKANTA SEN *v.* HIRA LAL ROY. 34 I. C. 86 = 20 C. W. N. 852.

———S. 54—*Notice—Mode of service.*

S. 54 of the Bengal Court of Wards Act requires that notices should be served upon the manager of a Ward's estate through the Collector and any notice served otherwise is void. (*Sharfuddin and Roe, JJ.*) JANKIKUER *v.* BANWAMALLE RAMANAUJEAR. 45 I. C. 404 = 3 P. L. W. 218.

———S. 55—*Institution of suit by manager to save limitation—Subsequent filing of the sanction of the Court of Wards.*

S. 55 of the Act is intended for the guidance of the managers. It is not a question of the jurisdiction of the Court in which the suit has been instituted but it seeks to control the action of the manager. To proceed with such a suit is not an assumption of jurisdiction which the trial Court does not possess but is at most an irregularity which does not vitiate the proceeding. 24 C. W. N. 419 Dist. The suit in the present case was a suit for arrears of rent and as such was excepted under S. 55 and was maintainable being authorized by the manager. The term 'rent' has a more extensive meaning than the definition given to it in the B. T. Act. (*Chaudhuri and Newbould, JJ.*) JOY CHANDRA DUTTA *v.* SARAJBALA DEBI.
55 I. C. 261 = 23 C. W. N. 876.

———S. 55—*Manager—Suit wtthout Court's sanction—Effect of.*

The Manager of a Court of Wards can file a suit in anticipation of sanction when the suit would otherwise be barred by limitation. Such a course should be adopted where there is very little time left to get the authority of the Court of Wards. If a suit be proceeded with without such order all proceedings taken subsequently to the filing of the plaint being without jurisdiction, should be set aside. (*N. R. Chatterjee and Richardson, JJ.*) DIGENDRA CHANDRA SEN *v.* NRITYA GOPAL BISWAS.
22 C. W. N. 419 = 43 I. C 184 = 27 C. L. J. 125.

———S. 55—*Right of ward to apply.*

The failure of the Court to institute the necessary proceedings by granting sanction to the manager to conduct the same under S. 55 will not give the ward a right to apply in his own name. (*Chatterjee and Beachcroft, JJ.*) UMAKANTA SEN *v.* HIRALAL ROY.
34 I. C. 86 = 20 C. W. N. 852.

———S. 60—*Relinquishment by Hindu widows—When prohibited.*

S. 60 of the Court of Wards Act constitutes a prohibition on the power of a Hindu widow to

BENGAL COURT OF WARDS ACT (IX of 1879), S. 64.

relinquish the estate in her possession without the concurrence of the Court of Wards under certain circumstances only. If the transfer is not really one of relinquishment but a voluntary act of transfer, then S. 60 will apply. (*Das and Kulwant Sahay, JJ.*) RAO BAHADUR MAN SINGH *v.* MAHARANI NAWALAKHBATI. 2 Pat. 607 = 4 P. L. T. 335 = 73 I. C. 822 = 1923 P. 492.

———S. 64-A—*Publication of notice.*

Under S. 64-A the notice must be published in the *Gazette*, the Judge's office as well as in several other ways and until that is done, it cannot be said to be complete. (*Coxe, J.*) KRISHNA PRASAD *v.* NARAYAN SINGH. 9 I. C. 621 (C.).

———Ss. 98 and 40—*Arbitration—Reference to, by Court of Wards—Approval of Court in writing—Part performance.*

There is no statutory rule which requires that the approval of the Court of Wards to a submission to arbitration should have been signified in writing. Although no previous sanction had been obtained if the submission was a good one and the Court of Wards had subsequently approved and ratified the action of the circle officer, it is bound by the results. The award having been carried into effect in part the plffs. were entitled to performance of the remainder. According to the provisions of S. 97 of the B. T. Act, the permission of the District Judge for a reference to arbitration by the Court of Wards is not required. (*Teunon and Richards, JJ.*) TWEEDIE *v.* JOGESH CHANDRA ROY. 51 I. C. 999 (C.).

BENGAL DISORDERLY HOUSES ACT (III of 1906).

———S. 2—*Proceedings under—Malicious prosecution—Damages—Libel—Limitation Act, Arts. 23 and 24.*

Proceedings under the Disorderly Houses Act cannot be said to be prosecutions and a suit for damages in respect of such proceedings is not a suit for malicious prosecution governed by Art. 23 of the Limitation Act but is one for compensation for libel governed by Art. 24 of the Limitation Act. 24 All. 368 rel. on. (*Mookerjee and Beachcroft, JJ.*) DHIRAJ BALA DASI *v.* GOPAL CHANDRA MUKERJEE. 20 I. C. 768 = 18 C. L. J. 352.

BENGAL DRAINAGE ACT (VI of 1810).

———Ss. 2, 42 and 50—*Rent-free holder—Payment by landholder—Recovery.*

A rent-free holder comes within a 'tenure-holder' in S. 1 of the Bengal Drainage Act. Under the Bengal Drainage Act the owner of an estate is primarily liable to the Collector for the apportioned sum in respect of the drainage costs. A landlord who has made any payment in respect of lands which are *held* by tenure-holders immediately under him is upon application to the Collector, entitled to recover the amount so paid. (*Chatterjee and Duval, JJ.*) PEARY MOHAN MUKHERJEE *v.* SARAT KUMAR ROY. 52 I. C. 832. (C.).

BENGAL DRAINAGE ACT (VI of 1810), S. 58.

———Ss. 36 and 36-A—*Non-payment of drainage dues—Liability of third parties.*

Where the drainage dues fell in arrears and the property was sold to third parties, the latter are not liable to pay them unless a revision of the certificate against the former has taken place under S. 36-A. of the Amending Act of 1902. (*Fletcher and Richardson JJ.*) NAGENDERA BALA CHOWDHURINI *v.* SECRETARY OF STATE. 18 C. W. N. 944 = 23 I. C. 782 = 19 C. L. J. 610.

———Ss. 37 and 38—*Drainage dues—Who are liable to pay—Purchaser.*

Where properties subject to payment of drainage dues under a bond executed in favour of Secy. of State under S. 37 were sold subject to such dues as a result of partition proceedings, the purchaser is not liable to pay them either under S. 38 of the said Act, or under S. 7 of the Public Demand Recovery Act. (*Fletcher and Richardson, JJ.*) NAGENDRA BALA CHOWDHURANI *v.* SECRETARY OF STATE. 18 C. W. N. 944 = 23 I. C 782 = 19 C. L. J. 610.

———Ss. 42 and 44—*Effect of—Right of landholder.*

S. 44 of the Act is merely permissive and does not control the right of a land-holder or a superior tenant to recover the instalments under Ss. 42 and 44. A mistake about the year of the instalment cannot save limitation. (*Fletcher and Teunon, JJ.*) MOHENDRA NATH *v.* NARENDRA KRISHNA. 29 I. C. 399 (C.).

———Ss. 42 and 44—*Suit under—Nature of—Notice, if necessary—Prov. Small Cause Courts Act, S. 8—Second Appeal.*

A suit under S. 42 (b) of the Drainage Act would come under S. 8 of the Prov. Small Cause Courts Act and would be excepted from the cognizance of a Small Cause Court. A second appeal will lie in such a case irrespective of the value of the suit. A notice under Section 44 (2) of the Act is necessary for the maintainability of a suit under S. 42 (b). The onus of proof which rests on the plaintiff-landlord in a suit under S. 42 of the Act, of showing that the land of the tenant defendant has been benefited by any scheme or work, is not discharged by the Report of the Commissioners under S. 32 of the Act in his favour and cannot shift the burden to the defendants. (*Banerjee and Geidt, JJ.*) BASANT KUMAR *v.* RAMCHANDRA. 20 I. C. 536 = 17 C. W. N. 499.

———Ss. 58 and 59—*Apportionment of costs—Applicability.*

Ss. 58 and 59 of the Act contemplate distinct areas receiving benefit in severalty, and the apportionment of costs referred to in the said sections therefore, applies only to cases of several areas covering distinct plots of land and not to an estate let out in its entirety. (*Chatterjee, J.*) JOGENDA NATH ROY *v.* NIL KANTA MUKERJEE. 11 I. C. 667 (C.).

BENGAL ELECTORAL RULES.

———R. 31—*Effect of—High Court's power under S. 45, Specific Relief Act.*

Rule 31 of the Bengal Electoral Rules which provides that no election can be called in question except by way of an election petition takes away the power of the High Court under S. 45, Specific Relief Act to direct the Returning Officer to do his duty as specified. (*Sanderson, C. J. and Richardson, J.*) S. N. HALDER *v.* S. N. MALLIK.

28 C. W. N. 127=1924 C. 454.

BENGAL EMBANKMENT ACT (II of 1882).

———Ss. 6, 76, 79 and 80—*Lease—Permission to erect embankment—Supercession of an existing embankment.*

The Act supercedes any previous stipulations in leases about embankments contrary to its provisions. "Existing embankments" mean embankments existing at the date of addition and not one existing at the date of notification under S. 6. The last clause of S. 6 of the Act is directory and not mandatory. (*Richardson and Shamsul Huda, JJ.*) LAKSHMIKANT *v.* EMPEROR.

46 Cal. 825=23 C. W. N. 572=20 Cr. L.J. 333=
50 I. C. 669=29 C. L. J. 323.

———Ss. 56 and 57—*Collector's power—Contract private.*

A contract between a Zemindar and a tenure-holder has no effect on a Collector's order. He is authorised to apportion embankment charges on tenures after due notice. (*Coxe, J.*) SHIVA PRASAD *v.* GOSSEIN DAS. 10 I. C. 192 (C.).

———S. 68—*Order of Collector for payment of lump sum without instalments is binding in Courts though erroneous.*

An order for apportionment was made by the Collector as between the proprietors on the one hand and the tenure-holders on the other. This order was made after due service of notice on the tenure-holders. The order was defective inasmuch as it specified merely the amount payable by the tenure-holder and the proprietors, but did not specify the instalments and the dates on which the sum included in each instalment was to be made payable. This final order was served upon the tenure-holder. It is remarkable that no exception was taken to this order, though it was manifestly erroneous whether by the proprietors or by the tenure-holders. The proprietors paid the amount due to the Collector in one instalment in accordance with that order. They then instituted the present suit for recovery of the amount from the tenure-holders. The tenure-holders objected that they were not liable to pay the entire amount in one instalment. The Courts below have made a decree in favour of the plaintiffs, only in respect of such sums as would have been payable by the tenure holders if an order of payment by instalments had been correctly made by the Collector under section 68. *Held the* Courts below had in substance replaced the actual order of the Collector by an order which should have been made by him and that it was not open to the court below to adopt this method of giving relief to the plaintiffs. (*Mookerjee and Chotzner, JJ.*) KUMAR ARUN CHANDRA SINHA *v.* MAN MOHAN SINHA ROY. 70 I. C. 784 (2)=37 C. L. J. 585=
1924 Cal. 154.

BENGAL ESTATES PARTITION ACT (VIII of 1876).

———Ss. 68 and 86—*Revision—Civil Court.*

Orders under S. 68 are final and the Civil Courts cannot modify or alter such orders. (*Coxe, J.*) SHEO PRASAD *v.* GOSSAIN DAS.

10 I. C. 192 (C.).

———S. 70—*Arrears of* phoolbandi *or embankment charges—Land Revenue—Sale for* phoolbandi *charges under Certificate Procedure (Act I of 1895)—Acceptance of arrears of revenue before sale by Collector.*

Under S. 6 of Bengal Act (XI of 1859) notifications were issued for the sale of certain land for arrears of land revenue. Subsequently a certificate was filed under the Public Demands Recovery Act (I of 1895) for arrears of *Phoolbandi* (embankment) charges, in respect of the land. The amount due for arrears of land revenue was paid before the sale but not the *Phoolbandi charges.* The Collector accepted the amount and ordered the sale to proceed in respect of *Phoolbandi* charges, without a notice as required by S. 5 of Act XI of 1859. *Held*, that the sale was invalid. Although no formal order of exemption had been made under S. 18 of Act XI of 1859, the Collector having acknowledged payment in full of the arrears of land revenue for which the sale was advertised and having elected to proceed under the Certificate Procedure for the *Phoolbandi* charges and directed a sale thereunder, he could not treat the arrear under the certificate as an arrear of land revenue without notice to the parties under S. 5. The sale was therefore without jurisdiction. (*Lord Dunedin.*) DHIRAJ CHANDRA BOSE *v.* SRIMATI HARI DAS DEBI.

42 Cal. 765=19 C. W. N. 507=
23 M. L. J. 480=2 L. W. 422=
29 I. C. 290=42 I. A, 58 (P. C.)
[On appeal from 7 I. C. 43=15 C. W. N. 33.]

———S. 74—Phoolbandi *charges—Agreement of* 1870 *that Zamindar was to pay* Phoolbandi *charges Suit for injunction.*

A suit for injunction restraining the Zamindar from realizing the *Phoolbandi* charges which the latter had agreed under an agreement of 1870 to bear himself is maintainable, as under Section 74 of the Act of 1882, the Zemindar can realize such charges without going to Court. (*Jenkins, C. J. and Mookerjee, J.*) SIBA PRASAD *v.* GGSAIN DAS.

41 Cal. 130=20 I. C. 488=18 C. W. N. 86=
18 C. L. J. 337.

———S. 76 (a) and (b)—*Scope of.*

There is no proviso to Cl. (b) as is attached to cl. (a) of S. 76. The only offence constituted by cl. (b) as distinguished from cl. (a) is the omission to obtain the sanction of the Collector to the addition to an existing enbankment within a prohibited area. (*Holmwood and Sharfuddin, JJ.*) RAMANATH *v.* EMPEROR. 38 Cal. 413=
9 I. C. 360=12 Cr. L. J. 65=13 C. L. J. 333.

BENGAL ESTATES PARTITION ACT (VIII of 1876).

———*Partition of holding—Consent—Sale by tenant—Abandonment, what is.*

A sale by a tenant of the entire plot that has been separated constitutes abandonment which

BENGAL ESTATES PARTITION ACT (VIII of 1876).

entitles the landlord to re-enter. There can be a partition of a tenancy into separate tenancies without the consent of the tenants. (*Mullick, J.*) RAM LOCHAN KOER *v.* JAGER NATH MISSER.
37 I. C. 440=1 P. L. J. 270=2 P. L. W. 440.

———*Batwara map—Evidence of.*

A Butwara Khasra map prepared in pursuance of a partition effected under the Partition of Estates Act., 1876, by a Collector, is a document of title and admissible in evidence under S. 13 of the Evidence Act. 5 C. 287, 16 C. W. N. 116 ref. (*Atkinson, J.*) AJODHYA PRASAD SINGH *v.* KAMAL NARAIN. 38 I. C. 491 (P.).

———Ss. 23, 25, 29, 45, 46 and 119—*Scope of.*

S. 25 of the Estates Partition Act does not bar a suit for a declaration that a third person posing as a tenant is in reality not a tenant in respect of any land in the estate. (*Mookerjee and Carnduff, JJ.*) LAKHI CHOWDHRANI *v.* AKLOO JHA.
13 I. C. 123=16 C. W. N. 639.

———S. 89—*Land of dwelling house of one proprietor allotted to another—Mistake in fixing rent—Effect of.*

Where in a partition proceeding, the land of the dwelling house of one proprietor was allotted to another and hence there was a mistake in fixing rent, the proprietor who was allotted that land cannot sue to eject the proprietor of the dwelling house as a trespasser but is entitled to a decree for rent. (*Mookerjee and Carnduff, JJ.*) RAZIUDDIN HUSSAIN *v.* TAHARAT HOSSAIN.
13 I. C. 498=16 C. L. J. 19.

BENGAL ESTATES PARTITION ACT (V of 1897).

———*Revenue Sale Law* (*II of* 1859).

The decision about revenue at Butwara proceedings under Partition of Estates Act will be preferred to that under the Revenue Sale Law. (*Chamier and Jwala Prasad, JJ.*) RAMASUMARAN PRASAD SHAHU *v.* SARBERAN CHOWDHRANI.
33 I. C. 721 (Pat.).

———Ss. 4 and 99—*Sale of*—Khamar *lands.*

Sale of *Khamar* lands by one co-sharer to another on condition of payment of Government Revenue by vendee to the seller, amounts to anomalous burden and not an incumbrance. The *batwara* authorities will take no notice of the vendee's interest in the absence of registration; but the vendee can get equivalent land from vendor or his heirs if the land transferred to him is taken by other co-sharers. (*Gaspersz and Chatterjee, JJ.*) BROJONATH SAHA *v.* DANESH CHANDRA NEOGI. 30 I. C. 418=21 C. L. J. 599.

———Ss. 4, 5, 26 and 27—*Partition—Party in possession of common as well as separate land—Increase in value—Compensation.*

The interest of a joint proprietor of an estate may consist of specific parcels of land and may therefore bear no proportion to the Revenue assessed on it originally. A co-sharer in possession of certain villages is entitled to have those villages assigned to him under S. 4 (2) though by the increase of value, their assets would be out of proportion to their revenue. The words "his

BENGAL ESTATES PARTITION ACT (V of 1897), S. 10.

interest in all the land and undivided shares held by him" in Sub-sec. (4) mean the sum of his interest in the lands and share of the estate and not interest proportionate to his liability to Government Revenue and so this sub-section does not proceed on a different principle from that of sub-sec. (2). A suit is maintainable for a declaration of the extent of interest of any party to a partition under Ss. 27 and 26 of the Act. (*Coxe and Imam, JJ.*) KALANAND SINGH *v.* KAMALANAND SINGH. 14 I. C. 225 (C.).

———Ss. 5 (3), 30 and 115—*Applicability of—Mode of partition—Right to share in entire estate and in specified* mouzas.

Sub-clause (3) of Section 5 applies only to cases where a proprietor, having an undivided share, held in common tenancy in specific *mouzas*, which formed part of the parent estate but where he has no interest which extends over the whole estate; in other words, it applies to proprietors who have an interest in some, out of the total number of villages which constituted the estate. If he has a share in the remainder also, then it follows that he has a fractional interest in the entire estate as well as a fractional interest in a part, the latter fractional interest being the difference between the larger and the smaller interest; that is to say if he has a half share in twenty *mouzas*, and a one-sixth share in fifty-four *mouzas*, it must be held that he has a one-sixth share in the entire estate and in the twenty *mouzas* a fractional interest represented by the difference of one-half and one-sixth. A proprietor of a *mahal* comprising of two *mouzas* and who possesses a fractional interest in each, is not entitled to claim an allotment in each *mouza* representing his assets in that *mouza*; such a construction would defeat the entire principle of compactness where there are many villages and when the proprietor holds a different fractional interest in each. (*Mullick and Ross, JJ.*) RADHAKANTO PARHI *v.* MATHURA MOHAN PARHI. 2 Pat. 403=1924 P. 187.

———S. 7.—*Collector—Civil Court—Partition.*

On an application under S.7 for perfect partition to Collector, he may or may not accept the partition effected by Civil Court. (*Maude, J.*) THAKUR SINGH *v.* JUGAL KISHORE SINGH.
38 I. C. 593=1 P. L. W. 51.

———S. 8 (8)—*Board of Revenue—Powers of—Regulation* (*II of 1793*), *S. 8* (*8*).

Per *Mullick, J.*—Powers of Revenue Boards under S. 8 (8) are limited by Estates Partition Act. Per *Atkinson, J.*:— The revisional powers of Revenue Boards under Regulation II of 1793 do not control its powers of revision conferred on it by Bengal Estates Partition Act. (*Mullick and Atkinson, JJ.*) BERABHADRA RUTH *v.* JANARDAN PROHARAH MOHAPARTA.
1 P. L. J. 491=38 I. C. 356=1 P. L. W. 313.

———Ss. 10, 11 and 12—*Revenue paying estate—Partition—Civil and Revenue Court—Jurisdiction.*

A Civil Court has jurisdiction to execute a decree for partition of a revenue paying estate provided that it does not assume jurisdiction to

BENGAL ESTATES PARTITION ACT (V of 1897), S. 12.

partition the liability for revenue. A Civil Court has no power except on an application for review to re-open a partition properly made under its decree. (*Chapman and Atkinson, JJ.*) DEBI SARAN SINGH *v.* RAJBANS NATH DUBEY.
5 P. L. W. 9=1918 Pat. 134=45 I. C. 895=4 P. L. J. 29.

——S. 12 (2)—*Decree of Civil Court—Transfer.*

Decree of Civil Court on application to partition an estate is no decree under S. 54 C. P. C. and cannot be transferred for execution to the Collector. (*Maude, J.*) THAKUR SINGH *v.* JUGAL KISHORE SINGH. 38 I. C. 593=1 P. L. W. 51.

——S. 21—*Powers of Collector.*

It is Dy. not the Collector but the Collector himself that should try objections raised after notification under S. 21. (*Maude, J.*) KALICHARAN SINGH *v.* DAMRI SINGH.
38 I. C. 833=1 P. L. W. 219.

——S. 23—*Scope of.*

S. 23 contemplates an objection relating to a question of right or title or extent of interest as between any applicant and any other person claiming to be a proprietor of the estate. (*Das and Kulwant Sahay, JJ.*) KULDIP SAHAY *v.* RAJKUMAR SINGH. 1 Pat. L. R. 386=4 Pat. L. T. 633=75 I. C. 1046=1924 Pat. 211.

——S. 25—*Suit for declaration of prior valid private partition is maintainable.*

Where, in proceedings before the Collector for partition, it was objected that a prior private partition had taken place, but was disallowed and the objectors filed a suit for a declaration that on account of the prior private partition a Revenue Court had no jurisdiction to grant the same. *Held*, the suit was not barred under S. 25 Estates Partition Act. (*Das and Kulwant Sahay, JJ.*) KULDIP SAHAY *v.* RAIKUMAR SINGH.
1 Pat. L. R. 386=4 Pat. L. T. 633=75 I. C. 1046=1924 Pat. 211.

——S. 25—*Applicability—Only to persons claiming right to parent estate.*

S. 25 of the Bengal Estates Partition Act is applicable only to suits by the persons claiming right or title to a parent estate, mentioned in S. 23. A case where plff. claims that the Collector had no jurisdiction to partition is not governed by it. (*Miller, C. J., and Mullick, J.*) NARSINGH THAKUR *v.* BISHUNPERGASH. 4 Pat. L. T. 629=1924 Pat. 21=75 I. C. 1036=1924 P. 209.

——S. 25—*Declaratory suit—Section does not apply.*

S. 25 of the Act has no application to a suit for declaration that there was such a partition as is contemplated by S. 7 of the Act and that the Collector be restricted from taking further action to make the partition. (*Jwala Prasad, J.*) NAR SINGH THAKUR *v.* BISHEN PARGASH SINGH.
1 Pat. L. R, 258=74 I. C. 642=1923 P. 441.

BENGAL ESTATES PARTITION ACT (V of 1897), S. 44.

——S. 25—*Order under S. 29—Suit to contest must be brought within 4 months.*

Under S. 25 of the Act, a suit to contest an order under S. 29, must be brought within four months of the date of the order. (*Das and Adami, JJ.*) BADRI NARAIN *v.* SUBHAKARAN MISSER.
6 P. L. J. 41=61 I. C. 90=2 P. L. T. 130.

——S. 26—*Whether a partition by Revenue Courts be re-opened by a decree in Civil litigation between two of the parties—Proper remedy.*

Where a partition of a *mahal* has been effected by a Revenue Board it cannot be re-opened by obtaining a decree in a Civil Court with regard to portion of the *mahal*. The proper remedy is to apply under S. 26 of the Act, for separation of the interest acquired by a Civil Court decree. (*Oldham, J.*) KRISHNA DAYAL GIR *v.* NILMALI.
39 I. C. 165=1 P. L. W. 277.

——Ss. 26 and 27—*Suit for declaration of interest.*

Sections 26 and 27 of the Estates Partition Act recognise a suit for declaration of interest and is not barred by S. 42 of the Specific Relief Act. (*Coxe and Imam, JJ.*) KALANAND SINGH *v.* KAMALNAND SINGH. 14 I. C. 225 (Cal.).

——S. 28—*Partition—Powers of Collector.*

Collector is not bound to recognize proceeding of Civil Court, partitioning an estate but taking no action under S. 28. (*Maude, J.*) THAKUR SINGH *v.* JUGAL KISHORE SINGH. 38 I. C. 593=1 P. L. W. 51.

——S. 29—*Partition by Civil Court.*

Wherever possible, partition under the Act should follow the Civil Court partition. (*Maude, J.*) KALI CHARAN SINGH *v.* DAMRI SINGH.
38 I. C. 833=1 P. L. W. 219.

——Ss. 43—*Order of Board of Revenue—Relevancy of.*

In a case before the Civil Court an order of the Board of Revenue directing that the partition should proceed does not constitute evidence, but the former should not make a decree in discordance with a decision of the Board without fully considering and giving all weight to the reasons advanced in the making of that decision. (*Roe and Imam, JJ.*) MANNO CHAUDHURY *v.* MUNSHI CHAUDHURY. 43 I. C. 393=3 P. L. J. 188=5 P. L. W. 97.

——S. 44—*Partition Collector—Assessment of rent—Entries in Batwara papers—Admissibility of.*

Under S. 44 of the Bengal Estates Partition Act, the Partition Deputy Collector has authority to assess rent. In a suit for rent, the entries in batwara papers prepared under the Bengal Estates Partition Act are some evidence of the existence of the relationship of landlord and tenant between the parties and also some evidence as to the rents payable by the defendant. (*Newbould, J.*) JOTINDRA NATH ROY *v.* ISOF GOLDER.
53 I. C. 19 (C).

BENGAL ESTATES PARTITION ACT (V of 1897), S. 44.

———S. 44—*Batwara papers—If evidence.*

Under Act V of 1897 the Batwara papers are admissible in evidence for proving the landlord's title against tenants who were parties to the Batwara proceedings. (*Chatterjee and Walmsley, JJ.*) PANCHANAN *v.* RAMENDRA SUNDER TRIBEDI. 37 I. C. 895 (C.)

———S. 46 (c)—*Khasra not prepared according to Batwara Act—Value.*

Khasra not prepared according to Batwara Act, is useless and hence it is no basis for determining the rent. (*Sharfuddin and Roe, JJ.*) GULAB CHAND *v.* SALEK HUSSAIN. 36 I. C. 513= 5 P. L. W. 6.

———Ss. 48, 49 and 50—*Record under is binding on landlord.*

A Record of Rights prepared under the Act, for purposes of partition is binding upon the landlord as the assets of all the lands in the estate under partition are taken into account in making equal and equitable partition. (*Jwala Prasad, J.*) DEBI LAL SAH *v.* RAM BIBEKI SINGH. 63 I. C. 194 (P.).

———S. 49—*Sairat Rent—Assets—Calculation of—Record of rights.*

In view of considerable difficulty and uncertainty in realising Sairat rent, the value of Sairat rent is not equivalent to the assets of ordinary rent. Acceptance by a co-sharer of the system of valuation before the papers were adopted under S. 49 does not operate as an estoppel. Equity could only be ensured by a reasonably approximate distribution of the risk. (*Morshead, I. C. S.*) MEGHRAJ MARWARI *v.* MUNSHI KALI SAHAI. 1 Pat. L. R. 259 (Cr.).

———S. 57—*Evidence of partition—Long possession and acquiescence is sufficient.*

Where it is shown that the parties have acquiesced in the result of a partition it must be presumed that they or their predecessors in interest were parties to the partition. Where the parties have been holding their estates in separate shares from time immemorial, the fact that the original partition proceedings were lost in antiquity is no reason for disturbing divisions which existed for a long period. Although no deed of partition can be produced and from lapse of time no direct evidence of partition could be given, yet very long possession and acquiescence in the separate holding of the lands in the estate are sufficient to prove that there was a complete partition. 3. P. L. J. 188 Foll. (*Jwala Prasad, J.*) NARSINGH THAKUR *v*, BISHUN PARGASH SINGH. 74 I. C. 642=1 Pat. L. R. 258= 1923 P. 441.

———S. 59 (2)—*Discrepancy between partition papers and map—Former must prevail.*

Where there is a discrepancy between the entries in the partition papers and the map, the former should be relied on, as the map can only delineate the allotments in the paper. (*Chatterjee and Cuming, JJ.*) ANIL KUMAR BISWAS *v.* RASH MOHAN SAHA. 28 C. W. N. 46= 1924 Cal. 245.

BENGAL ESTATES PARTITION ACT (V of 1897), S. 83.

———Ss. 64 and 65—"*Orchard or land*" *belonging to one proprietor—Meaning of.*

Under S. 65 a Deputy Collector may permit one proprietor to retain occupation of the land allotted to another upon agreeing to pay an annual rent. Otherwise the section is self-contained. It does not read "orchard or land" belonging to one proprietor as in Section 64. (*Chapman, J.*) BERHAMDEO NARAIN *v.* BADRI NATH. 41 I. C. 14 (P.).

———Ss. 65 and 119—*Partition—Powers of Deputy Collector.*

A Deputy Collector can pass an order under S. 65 during the progress of partition and before he has submitted the same for the sanction of the Collector. (*Das and Tudball, JJ.*) KESARI SAHAI SINGH *v.* HITNARAYAN SINGH. 56 I. C. 149= 1 P. L. T. 507.

———S. 77—*Zerait of* Bakasht *lands held by different proprietors—Power of Collector to allot—Questions of title between co-proprietors—Private purchaser from proprietor.*

The Collector has jurisdiction to partition the estate if there was no formal partition of all the lands as contemplated by S. 7 of the Estates Partition Act. S. 77 applies to tenanted lands held in severalty and its explanation implies that it does not apply to *zerait* or *bakasht* lands in direct possession of the proprietors and consequently, the Collector has jurisdiction to allot the disputed land to the *takhta* of the plff. and lower Appellate Court erred in law in dismissing her suit. 20 Cal. 825 diss., 21 C. L. J. 599 ref. A purchaser from a proprietor may enforce his purchase by an application of the principle of S. 99 against the lands allotted to his vendor. The Civil Court has jurisdiction to decide the question of title or extent of the interest not only between the proprietor and a stranger but also between the proprietors themselves even after a partition has been completed. (*Mullick and Sultan Ahmad, JJ.*) JANAKDULARI KOER *v.* BINDESHWARI GIR. 5 Pat. L. J. 456=57 I. C. 328= 1 Pat. L. T. 374=1920 Pat. 355.

———S. 82—*Order under does not bar jurisdiction of Civil Court.*

An order of a Revenue Commissioner, declaring that certain lands are not liable to partition under S. 82 of the Act, is no bar to partition by a Civil Court under the general law. (*Jwala Prasad, C. J. and Ross, J.*) JITABHANDAN *v.* SUDHA KUER. 63 I. C. 361=2 P. L. T. 342=1921 Pat. 342.

———S. 82—*Partition, scope of—Jethans.*

A revenue partition is concerned only with the assets or rent payable to the proprietors. A prayer for partition of property allotted to the eldest brother as Jethan cannot be granted by the Revenue Court. (*Maude, J.*) LAL BAHADUR LAL *v.* FAUJDAR SHALI. 42 I. C. 391= 2 P. L. W. 186.

———Ss. 83 and 119—*Order of Deputy Collector without jurisdiction—Suit for declaration.*

An order made by a Deputy Collector under S. 83 in respect of patni tenure created by one of the proprietors of the estate and not admitted by

BENGAL ESTATES PARTITION ACT (V of 1897), S. 88.

all the recorded proprietors of the estate to have been so created is without jurisdiction. S. 116 has no application to a case where the order of the Deputy Collector purporting to have been made under S. 83 was without jurisdiction and therefore wholly void. A suit for a declaration that the order was without jurisdiction is governed by Art. 120 and not by Art. 14 of the Lim. Act. (*Sanderson, C. J. and Panton, J.*) JITENDRA GOPAL ROY *v.* MATANGINI. 49 I. C. 965 (Cal.).

———Ss. 83 and 119—*Suit in Civil Court.*

In proceedings under the Act taken at the instance of the deft. (a co-sharer) no question under S. 83 was raised or decided, the objection by plff. (another co-sharer) being only to the mode of partition and not that more land was allotted to the estate than it was entitled to. His objection was disallowed and final order for partition was made. The plff. then sued for declaration that certain lands belonging to him alone were owing to the fraud of deft. partitioned as joint land. *Held*, that under S. 119 the plffs. were not persons aggrieved by an order under S. 88 and therefore had no right of suit in the Civil Court. *Per Fletcher, J.*—The plff. could not recover land allotted to deft. whilst retaining lands allotted to him by the same partition. *Per Richardson, J.*—If there is no dispute as to the amount of the interest each co-sharer has in joint lands, but the question is as to whether a particular piece of land is part of the joint lands or is the exclusive property of a co-sharer the question is not one under the proviso (1) to S. 119. (*Fletcher and Richardson, JJ.*) GURBAKSH PRASAD TEWARI *v.* KALI PRASAD NARAIN SINGH. 32 I. C. 167=19 C. W. N. 1322.

———S. 99—*Applicability of—Grant of tenure right—Private Partition—Partition under the Act.*

The main test of applicability of Section 99 is holding the land in severalty under a private arrangement. This arrangement need not be so complete or so formally made as to exclude partition on the application of some of the proprietors under Section 7. (*Newbould and Panton, JJ.*) PROSANNA KUMAR BEDANTA TIRTHA BHATTACHARJYA *v.* MADHU BADYA. 68 I. C. 500=1923 Cal. 279.

———S. 99—*Common Tenancy—Private arrangement—Effect of.*

To make S. 99 of the Act applicable it is essential that the estate should be held in common tenancy and not in severalty in pursuance of a private arrangement between the parties. 20 Cal. 285 foll. Where on a partition of the entire estate by the Collector lands held by the defts. as tenure holders under a co-sharer to whose exclusive share they had been assigned by private partition, were allotted to the plffs., the plffs. take the disputed lands subject to the tenure of the defts. and are not entitled to eject the defts. (*Mookerjee and Chapman, JJ.*) NOGENDRA MOHON RAY *v.* PEARY MOHAN SAHA. 30 I. C. 420=43 Cal. 103=20 C. W. N. 319=21 C. L. J. 605.

———S. 99—*Estate held in common tenancy.*

BENGAL ESTATES PARTITION ACT (V of 1897), S. 113.

"Estate held in common tenancy" is used as opposed to estate held in severalty by the proprietors *inter se* as by private arrangement and has no reference to the relations with the Govt. (*Chitty and Chatterjee, JJ.*) ABDUL LATIF MIAH *v.* AMANADDI PATWARI. 9 I. C. 539=15 C. W. N. 426.

———S. 99—*Mortgage of specific property—Section does not apply—T. P. Act, S. 68 (c).*

The mortgage granted in this case was a mortgage not of the mortgagor's share in the entire estate belonging to a joint Hindu family but of specific lands of which the mortgagors were in possession by an agreement with their co-sharers. *Held* that the provisions of S. 99 of the Estates Partition Act had no application to such a case. The section which governs in the case is S. 68 clause (c) of the Transfer of Property Act which provides that where the mortgagee being entitled to possession of the property the mortgagor fails to deliver the same to him or to secure possession thereof to him without disturbance by the mortgagor or any other person then in such a case the mortgagee has a right to sue the mortgagor for the mortgage money. Where after the partition the plaintiffs mortgagees were dispossessed of the property of which they were in possession under the Zarpeshgi, they could not resist that dispossession, and therefore they were bound to give up possession, and the result is that the mortgagors have failed to secure the possession of the property to the mortgagees and in such a case, the statute expressly provides that the mortgagees have a right to sue for the mortgage-money. (*Miller, C. J. and Kulwant Sahay, J.*) RAMNANDAN PARBAT *v.* DENI SAHAL. 1924 P. 91=74 I. C. 877=1 Pat. L. R. 366.

———Ss. 113 and 29—*Order under S. 29—Appeal.*

Under S. 113, no appeal lies from an order of a Commissioner, rejecting an appeal against the preliminary order of the Collector admitting a partition application, as such an order is not under S. 29. (*Walsh, J.*) ADIT PRASAD *v.* GANGA PRASAD. 38 I. C. 827=1 Pat. L. W. 120.

———S. 113—*Appeal.*

A Commissioner's order refusing to confirm partition submitted by Collector, is not appealable under S. 113 to the Board of Revenue. (*Mullick and Atkinson, JJ.*) BIRBHADRA RUTH *v.* JANARDAN PROHARAJ MOHAPATRA. 1 Pat. L. J. 491=38 I. C. 356=1 Pat. L. W. 313.

———S. 113 (c)—*Appeal "confirming or amending a partition"—Meaning of,*

An appeal will lie to the Board against an order making allotment only when a partition has been recast and confirmed by the Commissioner; the words "confirming or amending a partition" in Sec. 113 (c) must be taken to mean a definite amendment which disposes of the case. The amendment or re-arrangement must be carried out to sustain an appeal. (*Maude, J.*) KESHWAR SINGH, *In re.* 41 I. C. 580=2 Pat. L. W. 114.

BENGAL ESTATES PARTITION ACT (V of 1897), S. 114.

———Ss. 114 and 11 (c)—*Revisional jurisdiction of Board of Revenue—Powers and superintendence of.*

No revision lies to the Board of Revenue against Collector's order under S. 11 (c) dismissing an application for partition against Commissioner's order refusing to confirm partition submitted by Collector. (*Mullick and Atkinson, JJ.*) BERABHADRA RUTH *v.* JANARDAN PROHARAJ MOHAPATRA.
1 Pat. L. J. 491=38 I. C. 356=1 Pat. L. W. 313.

———S. 119—*Civil Court cannot question correctness of order in partition proceedings.*

(*Chatterjee and Cuming, JJ.*) ANIL KUMAR BISWAS *v.* RASH MOHAN SAHA.
28 C. W. N. 46=1924 Cal. 245.

———Ss. 119 and 49—*Suit for possession in Civil Court—Maintainability of.*

When the Survey Record of Rights showed the plffs. as in possession of the purchased holding under S. 22 (2) of the B. T. Act, and the batwara khatian, which was based upon it under S. 49 of the Estates Partition Act, also showed them as in possession, but the possession of the lands having been delivered over to the defendants and an order under S. 144, Cr. P. Code, having also been passed against the plffs. they brought the present suit. *Held*, that S. 119 of the Estates Partition Act was not a bar to the maintainability of the suit. 3 P. L. W. 226 dist. (*Jwala Prasad, A. J. C. and Das, J.*) NAND KISHORE SINGH *v.* MATHURA SAHU. **65 I. C. 586=3 P. L. T. 13=1922 P. 193.**

———Ss. 119 and 82—*Claim of rent free land overruled in Batwara proceeding—Subsequent suit does not lie.*

Where in a *batwara* proceeding an objection that a certain land is rent-free or *muafi* is raised and overruled, no subsequent suit lies to claim the same relief. (*Ross, J.*) LAL DAS *v.* RAM NARAIN SUKUL. **63 I. C. 2 (Pat.).**

———S. 119—*Partition—Suit by tenant for declaration of title to occupancy holding—Record of rights—Entry in—Presumption.*

The burden of proof that a partition concluded under the Act of 1897 was made under the Act of 1876, lies on the parties who allege it. S. 49 of the old Act allows a tenant to impugn the entries in the partition papers. A suit for a declaration of title to an occupancy holding allotted to the deft. on a partition, commencing under the old Act but concluded after the new Act is maintainable under S. 119 of the new Act. (*Mullick and Atkinson, JJ.*) BALDEO *v.* BRAGNANDAN. **3 Pat. L. W. 266=43 I. C. 359=1918 Pat. 164.**

———Ch. 6—*Zerait land—Holders paying neither rent nor revenue to Government—Record of rights—Rent fixed in—Liability for.*

The land in question in the suit belonged to an estate owned by two individuals. One of them mortgaged his zemindari rights to certain persons keeping his possession over 141 bighas of zerait land. Subsequently the mortgagees came to purchase the mortgage interest of their mortgagor and the 141 bighas of zerait land also came to be held by different persons by transfer. The defendants came to hold 4 bighas of the zerait land. The Government revenue of the entire estate used to be paid by the transferees of the zemindary interest, inasmuch as they got their names in register D of the Collectorate. The holders of the zerait land including the defendants did not pay any Government revenue or rent to the proprietors whose names were registered in the Collectorate. The entire revenue was used to be paid by the recorded proprietors, some of whom sued under the Estates Partition Act. *Held* that the holders of the zerait land were liable to pay the same rent as was payable for the lands of similar nature in the neighbourhood. The presumption raised by the Record of Rights in favour of the proprietor entitles him to claim a share and equitable rent. (*Jwala Prasad, J.*) BHOLA PANDEY *v.* RAM BILAS PANDEY. **71 I. C. 395=1923 P. 391.**

BENGAL FERRIES ACT (I of 1885).

———S. 11—*Subsidiary ferry not a public ferry.*

A District Magistrate has power to establish as many subsidiary ferries as he likes, provided they are within two miles from the public ferry. This subsidiary ferry is not a public ferry. (*Das and Adami, JJ.*) PARDIP SINGH *v.* SECRETARY OF STATE FOR INDIA. **1 Pat. L. T. 395=57 I. C. 516=5 Pat. L. J. 500=1920 Pat. 297=2 U. P. L. R. (Pat.) 181.**

———S. 16—*Limits of Ferry—Bengal Municipal Act (1885).*

The defining limits given in S. 16 are not the same as under Bengal Municipal Act and under Act I of 1866. (*Chatterjee and Richardson, JJ.*) KASIM ALI *v.* CHAIRMAN OF MUNICIPAL COMMISSIONER, CHITTAGONG. **21 C. W. N. 601=35 I. C. 782=25 C. L. J. 639.**

BENGAL FOOD ADULTERATION ACT (VI of 1919).

———S. 6—*Prosecution—Chairman of Municipality cannot sanction.*

Section 44 of the Bengal Municipal Act would not empower the Chairman of the Municipality to sanction prosecution under S. 6 of the Act VI of 1919. (*Newbould and Suhrawardi, JJ.*) RAGHUNATH MODI *v.* KURSEONG MUNICIPALITY.
76 I. C. 394=25 Cr. L. J. 170=1923 Cal. 561.

———S. 14 (2)—*Certificate not in form not admissible in evidence.*

Under S. 14 (2) of the Bengal Food Adulteration Act, the certificate of the Public Analyst is admissible in evidence only if it is submitted in the form prescribed in the Schedule. The certificate if written in the form of a letter would not be admissible without proof of the truth of the contents. (*Newbould and Suhrawardi, JJ.*) RAGHUNATH MODI *v.* KURSEONG MUNICIPALITY.
76 I. C. 394=25 Cr. L. J. 170=1923 Cal. 561.

BENGAL GHATWALI LAND REGULATION (XXIX of 1814).

See also LAND TENURE, GHATWALI.

———Ghatwali *Tenure—Sonthal Parganas—Liability for sale for arrears of rent—Distinction between* Ghatwals *subject to service under Govt. and* Ghatwals *subject to service under local Rajas—Bengal Regulation* (*XIV of* 1810), S. 4.

Ghatwali tenures are not necessarily exempt from sale in execution of a decree; *khargpur ghatwali* lands can be sold in execution of a decree for rent. Where a *ghatwali* renders services to Dy. Commissioner of the Sonthal Parganas, and is appointed by him, his land cannot be sold without the consent of Dy. Commissioner. When a *ghatwal* is appointed by a local Raja and none but Raja can claim his services, his *ghatwali* lands may be sold by the Raja. The only *ghatwals* within the jurisdiction of the Dy. Commissioner of the Sonthal Parganas are those who are subject to the provision of the Beng. Ghatwali Lands Regn. (XXIX of 1814). (*Sharfuddin and Roe, JJ.*) LAKSHMI NARAIN MAHTO *v.* SATYA NARAIN CHAKRAVARTI.
1 Pat. L. J. 197=36 I. C. 269=
2 Pat. L. W. 419.

BENGAL GHEE ADULTERATION ACT (I of 1917).

———S. 2 (2)—*Standard of genuineness—Commercial ghee—Adulteration of.*

The Bengal Ghee Adulteration Act lays down no standard of genuineness to detect adulteration; so each case must be decided on its own merits. Commercial ghee or buffalo ghee containing foreign fat was adulterated ghee within the meaning of S. 2 of the said Act. (*Chaudhuri and Newbould, JJ.*) GRANDE VENKATA RATHNAM *v.* CORPORATION OF CALCUTTA.
24 C. W. N. 388=21 Cr. L. J. 490=
56 I. C. 586=47 C. 633.

BENGAL INCUMBERED ESTATES ACT (VI of 1876).

———Ss. 3 (thirdly) (b), 5 and 6—*Decree against Manager—Notice of claim need not be given.*

In a decree against the Manager of an incumbered estate, the decree-holder need not notify his claim to the Manager as S. 3 (thirdly) (b) 5 and 6 does not apply to such decree. (*Dass and Ross, JJ.*) BURTON *v.* MIDNAPUR ZEMINDARY CO.
61 I. C. 902 (Pat.).

BENGAL IRRIGATION ACT (III of 1876).

———S. 47—*Scope of.*

S. 47 is directory and does not require registration of village canals. (*Atkinson, J.*) GHURA SINGH *v.* MANDI SINGH. 2 Pat L. W. 178=
18 Cr. L. J. 1004=42 I. C. 732=1917 Pat. 168.

———S. 93—*Scope.*

S. 93 applies to registered as well as unregistered canals. (*Atkinson. J.*) GHURA SINGH *v.* MANDI SINGH. 2 Pat L. W. 178=
18 Cr. L. J. 1004=42 I. C. 732=1917 Pat. 168.

BENGAL LANDLORD AND TENANT PROCEDURE ACT (VIII B. C. of 1869).

———S. 4—*Occupancy right—Under-raiyat.*

In cases governed by the Act occupancy rights are not acquired by under-tenants holding under-raiyats, as the under-tenants cannot become raiyats. (*Mookerjee, A. C. J., and Fletcher, J.*) KAMINI SUNDAR DASI *v.* PRASANNA KUMAR SIL.
53 I. C. 662=24 C. W. N. 685.

———S. 6—B. T. Act, Ss. 4 and 20—*Under-raiyat—Occupancy right by prescription.*

An under-raiyat who has remained in occupation of a certain plot of land and has cultivated it for more than 12 years can acquire a right of occupancy under S. 6 of the Bengal Act (VIII of 1869). The distinction between a raiyat and an under-raiyat was not recognised by Bengal Act (VIII of 1869). Under that Act the term "raiyat" included all classes of tenants who were actual cultivators of the soil. It was immaterial whether such a cultivator held his tenancy under a middleman or under a person who, though an occupancy raiyat originally had placed another tenant in possession of the lands of his tenancy for purposes of cultivation, unless such sub-lease, was "for a term year by year." Even under the B. T. Act an under-raiyat may by custom acquire a right of occupancy. (*Huda, J.*) PRASANNA KUMAR SIL *v.* KAMINI SUNDARI DASI. 55 I. C. 251 (Cal.).

———Ss. 14 and 29—*Notice of enhancement given more than three months before suit.*

The object of S. 14 of the Act is that a suit for enhancement should not be brought without at least three months' previous notice. When a notice under that section is once given, the suit for enhancement of rent can be brought two or three years afterwards. (*Newbould, J.*) ABHOYESWARI *v.* BANGASHRAM RAJBANSHI.
53 I. C. 52 (Cal.).

———S. 18—*Prevailing rate.*

"Prevailing rate" in S. 18 does not contemplate a rate brought into existence by the landlord pending disputes with the tenants regarding enhancement of rent. (*D. Chatterjee and N. R. Chatterjee, JJ.*) ASIR MAHAMED SHAIKH *v.* RAJA PROBHAT CHANDRA BARUA.
30 I. C. 1=21 C. L. J. 576.

———S. 21—*Registered Kabuliat—Interest of 300 per cent—Misrepresentation—Tenants imposed upon—No valid contract.*

Where the Court below found that the interest in the registered kabuliat at 300 per cent. per annum was extortionate and unconscionable and gave the plff. interest at 75 per cent. by way of compensation, finding at the same time there must have been some sort of imposition practised on the defts. *Held*, that there was no contract which as far as the interest was concerned, was capable of being enforced, and therefore it cannot be said that this was a matter provided for by a written agreement under S. 21 of Act (VIII of 1869). (*Woodroffe and Huda, JJ.*) JAGAT CHANDRA SAHA *v.* BIRENDRANATH DUTTA CHOUDHURY.
49 I. C. 805=23 C. W. N. 291.

BENGAL LANDLORD AND TENANT PROCEDURE ACT (VIII B. C. of 1862), S. 27.

———S. 27—*Limitation—Recovery of possession.*

Section 27 has no application to a suit for recovery of possession by a tenant ousted by a co-sharer landlord. (*Woodroffe and Coxe, JJ.*) GANDO PATTUNI *v.* SARAT PATTUNI.
32 I. C. 510 (Cal.).

———S. 52—*Transferee of non-transferable occupancy holding—Right to deposit—Rent decree—Execution.*

Where a landlord decree-holder seeks to eject the tenant of a non-transferable occupancy holding in execution of a rent decree, it is open to a third person claiming to be the transferee of a part of the holding to make the deposit so as to avoid the ejectment. (*Teunon and Cuming, JJ.*) KALI KISHORE DAS *v.* GOPAL RAM SAHA.
49 I. C. 766=23 C. W. N. 132.

———S. 52—*Extension of time.*

The first Court cannot extend time in execution after the refusal of the Appellate Court to do so in appeal. S. 52 has no reference to S. 66 (3), Bengal Tenancy Act. (*Chatterjee and Newbould, JJ.*) SHEIK HUNAI *v.* SARAT CHANDRA DUTTA.
38 I. C. 467=21 C. W. N. 749.

———S. 53—*Tenant holding over.*

A tenant who not being a cultivator with occupancy rights, holds over without the landlord's assent, acquires no interest in the land and can be ejected forthwith under S. 53 of the Act and the mere fact of the landlord's toleration of the tenant's holding over is not necessarily conclusive of acceptance of tenancy in future. (*Mookerjee and Roe, JJ.*) PARAMANANDA SINGH *v.* SYJO SINGH. 37 I. C. 201=24 C. L. J. 30.

———Ss. 59, 64 and 65—*Non-transferable holding—Execution, sale of—Sylhet.*

In execution of a decree for rent in a case in Sylhet governed by Bengal Act VIII of 1869, whether the decree is a decree for the co-sharer landlord's share of rent or a decree for the whole rent due on the holding which is non-transferable, the holding cannot be sold under S. 59 or 64 or 65 of the Act. (*Teunon and Newbould, JJ.*) ALOK CHAND PAL *v.* JALURAM NAMASUT.
45 I. C. 762=22 C. W. N. 563.

———S. 102—*Rent suit—Claim below Rs. 100—"District Judge"—Additional District Judge.*

No second appeal lies under S. 102 of the Act in a suit for rent in which the amount claimed does not exceed Rs. 100 and in which none of the questions mentioned in the section arises for decision. The expression "District Judge" in S. 102 of the Act includes an Additional Judge. (*Beachcroft, J.*) JUADULLA *v.* SHEIK BAKSHI. 49 I, C. 519 (C.).

———S. 102—*Scope of.*

Under the section, an appeal lies only when the judgment determines a question of right to enhance or vary rent or a question of title to or interest in land as between parties having conflicting claims thereto. An appeal will not lie, if merely a question as to the amount of rent payable is decided. (*Chatterjee and Roe, JJ.*) DINANATH SARMA *v.* SARMAN RAM DEB.
30 I. C. 277 (C.).

BENGAL LAND REGISTRATION ACT (VII of 1876).

———*Entries—Omission of.*

Omission of entries of Lakhraj land in the Pargana Register or Kanongo Register or General and Mouzari Register or in Thakmap is insufficient to prove that the land was "mal" and as such assessable. (*Mookerjee and Walmsley, JJ.*) BIPRADAS PAL *v.* MANORAMA DEBI.
45 Cal. 574=47 I. C. 49=22 C. W. N. 396.

———S. 28—*Alteration of entries by Collector—When justifiable.*

Where the father of the applicant gifted a 6 Anna share of Tauzi No 13350 in 1905 and the donee got himself registered as proprietor and the applicant applied for correction of Register D on the ground that the gift did not cover all the three villages composing the estate. *Held*, that no change had occurred, which would justify the Collector in altering the entries made in 1915. (*Grunning, M. C.*) JAIPURGASH SINGH *v.* RAMNANDAN SINGH. 1 Pat L. R. 74 (Cr.).

———S. 29—*Applicability.*

S. 29 of the Land Registration Act is applicable only to a case in which a person whose name is recorded, is no longer in possession of an interest and in which other persons' names have been recorded for every portion of the interest in which such persons' name was borne on the register. (*Morshead, M. C.*) BAIJNATH SINGH *v.* LACHUMAN SINGH. 1 Pat. L. R. 120 (Cr).

———S. 38—*Bar—Previous payment of rent by tenant.*

The bar prescribed by the section does not cease to be applicable merely because the plff. establishes that the tenant has previously paid rent to him amicably or because he brought tenant upon the land. (*Sanderson, C. J. and Mookerjee, J.*) BANGSHI BADAN *v.* KAMALA KANTA.
41 I. C. 477=26 C. L. J. 90.

———Ss. 42 and 52—*Scope of—Powers of Collector to register.*

Reading Ss. 42 and 52 together, the Collector has the power to order the name of the applicant to be registered where, in the case of assumption of the charge, he is satisfied that the possession exists; but in the case of succession or transfer he has no right to direct the name of the applicant to be registered unless he is satisfied first, that the succession or transfer has taken place and secondly that the applicant has acquired possession in accordance with such succession or transfer. Where each of the parties claims to have assumed charge, the only question which the Land Registration Deputy Collector has to determine, is if possession exists in favour of either of the applicants. (*Das and Bucknill, JJ.*) SYED ALI ZAMIN *v.* NAWAB SYED MAHOMED AKBAR ALI.
1 P. 68=3 P. L. T. 406=65 I. C. 135=1922 P. 315.

———Ss. 44 and 78—*Estate—Meaning of—Revenue-free property.*

The term 'estate' in the Act does not include revenue-free lands to which therefore S. 44 does not apply. S. 78 of the Act does not operate as a bar to a mortgage of a revenue-free property, obtaining a rent decree. (*Mullick and Jwala Prasad, JJ.*) PARTAP MAHTON *v.* BECHAN KUER.
42 I. C. 585 (Pat.)

BENGAL LAND REGISTRATION ACT (VII of 1876), S. 51.

———Ss. 51 and 72—*Entry by Collector in pursuance of Civil Court's orders—No appeal or review lies.*

The Land Registration Act gives no power to any Civil Court to amend or alter the entry made by the Collector in his books in pursuance of the Civil Court's orders not to interfere with the possession of the successful party. As a matter of first impression it seems that S. 62 of the Land Registration Act means that there is no right of appeal or review under any enactment whatsoever against the order of the Civil Court. (*Mullick and Bucknill, JJ.*) KAPALESHWAR JHA *v.* RAGHUNANDAN PRASAD. 1 Pat. L. R. 370=4 Pat. L. T. 718=74 I. C. 474=1924 P. 134.

———Ss. 52 and 55—*Person in possession—Mutation of names—Right to.*

S. 52 of the Land Registration Act contemplates two classes of cases (1) the case in which the applicant's possession exists and (2) cases in which succession or transfer has taken place. The first class includes cases in which the applicant claims to have assumed charge as joint proprietor on behalf of his co-sharer or manager. In such a case the Collector need satisfy himself only on the point of the possession of the applicant. Claims to joint ownership should not be indiscriminately accepted. But where the case of the applicant is that he had been in joint possession prior to the death of the deceased and has continued since, he cannot be refused registration. (*Morshead, M. C.*) BHOGRAJ SAHAY *v.* DULHIN RAMKUMARI KUER. 1 Pat. L. R. 71 (Cr.).

———S. 52—*Jurisdiction of Revenue Court—Determination of title under Civil Court sale.*

When a registration has long been completed and has become final, the Revenue authorities cannot enter into the validity of the right of another person by purchase at a civil court sale. It is a matter to be determined by the civil court. (*Morshead, M. C.*) JANARDHAN PRASAD *v.* MT. SANJHARI KUER. 1 Pat. L. R. 104 (Cr.).

———Ss. 52 and 42—*Question of possession—Cannot be referred to Civil Court.*

When two persons claim possession of a gift the Collector has to find out with whom the possession exists and not to refer to civil court. (*Das and Backnill, JJ.*) ALI ZAMIN *v.* MOHAMMAD AKBAR ALI. 65 I. C. 135=I. P. 68=3 P. L. T. 406=1922 P. 315.

———S. 55—*Question of possession—Right to refer to Civil Court—When arises.*

The jurisdiction either to determine summarily the question of the right to possession or to refer the matter in dispute to the Civil Court only arises where it is not proved to the satisfaction of the Collector that any person is in possession of the interest in dispute. (*Das and Bucknill, JJ.*) SYED ALI ZAMIN *v.* NAWAB SYED MAHOMED AKBAR ALI. 65 I. C. 135=1 P. 68=3 P. L. T. 406=1922 P. 315.

BENGAL LAND REGISTRATION ACT (VII of 1876), S. 78.

———S. 78—*Tenant's waiver—Effect of.*

The provisions of the Land Registration Act were framed for the protection of the tenant who could waive the benefits. If he does waive them he cannot resile from the position deliberately adopted by him. S. 78 of the Land Registration Act does not apply to the case of a person to whom rent has been assigned by a proprietor whose name has been registered under the Statute. 11 C.W.N. 141 Ref. It is sufficient for the plaintiff to prove during the trial that his name was registered under the Land Registration Act, subsequent to the institution of the suit. 23 Cal. 87; 26 Cal. 712; 2 C. W. N. 493; 11 C. W. N. 141 Ref. (*Mookerjee and Beachcroft, JJ.*) NAJABAT ALI *v.* BIBI KADIRAN. 53 I. C. 49=30 C. L. J. 48.

———Ss. 78 and 81—*Transferee of usufructuary mortgage—Previous patni to tenants—Right to recover rent in excess of share registered—Rent—Malikana.*

In a suit by plff. the transferee of a usufructuary mortgage from the proprietor who had previously granted a patni-lease to the deft. tenant, for arrears of rent, the tenant contended that the plff. could not recover rent in excess of the share for which he had registered his name. *Held*, that the case fell within S. 78 of the Land Registration Act for although the sum recoverable was described in the lease as "Malikana" it was in essence "rent" and was recoverable by the summary procedure prescribed in the Patni Regulation (VIII of 1819). The plff. though a mortgagee within S. 78 was entitled to the benefit of S. 81 of the Land Registration Act, there being no written contract between him and the tenants. (*Mookerjee and Beachcroft, JJ.*) ISWAR CHANDRA BERA *v.* KALI CHARAN SANTRA. 43 I. C. 726=27 C. L. J. 474.

———S. 78—*Dismisssal of suit—Filing of an appeal.*

Where a suit failed for non-production of a succession certificate in the trial court, the certificate may be obtained and filed in the Appellate Court on the appellant paying costs of the previous proceedings. (*Holmwood and Mullick, JJ.*) CHULHAN SINGH *v.* MADHO SINGH. 28 I. C. 383=19 C. W. N. 794.

———Ss. 78 and 81—*Proprietor—Right to sue.*

A proprietor is not barred from recovering rent if his case comes under S. 81 when the contract exists between the parties, though his name has not been entered under S. 78. The contract need not be between the actual parties. One between them and predecessors is enough. (*Woodroffe and Chatterjee, JJ.*) SURYA KANTA GHATTAK *v.* ANANDA MOHAN CHATTERJEE. 24 I. C. 866 (C.).

———S. 78—*Suit for rent—Plff. registered under the Act—Plea of benami.*

Obiter.—Where the plff. in a suit for rent is registered under the Act as proprietor or mortgagee, the deft. cannot plead that the plff. is a *benamidar* and therefore not entitled to receive rent. (*Mullick, J.*) MOHAMED HOSEIN *v.* HIRAMAN RAUT. 24 I. C. 118 (C.).

BENGAL LAND REGISTRATION ACT (VII of 1876), S. 78.

———S. 78—*Suit for rent—Plaintiff's name registered—Burden of proof.*

The burden of proving that the plaintiff cannot sue for rent without plff.'s name being registered under the Act lies upon the defendant. (*Mookerjee and Beachcroft, JJ.*) SURANGINI DASI *v.* NEKARADDI MULLICK. 23 I. C. 844 (C.).

———S. 78—*'Estate'— Resumed — Chaukidari Chakran land, if estate—Village Chuakidari Act Ss. 54 and 55.*

Resumed Chaukidari Chakran lands transferred to a Zemindar do not become an 'estate' within S. 78 of the L. R. Act with respect to which he is required to cause his name to be registered. No inferenee to the contrary can be drawn from Ss. 54 and 55 of the Village Chaukidari Act. Therefore S. 78 does not bar a suit for rent by the Zemindar against a tenant within those lands on the ground of non-registration under that section. (*Mookerjee and Beachcroft, JJ.*) TINKORI MOOKERJEE *v.* SATYA NIRANJAN. 19 C. L. J. 236=20 I. C. 250=18 C. W. N. 158.

———Ss. 78 and 81—*Rent—Kabuliat to plaintiff's predecessor—Non-registration of name in Collectorate—Effect—Suit for arrears of rent.*

A suit for arrears on rent on the basis of a *Kabuliat* in favour of the plaintiff's predecessor which was still subsisting is maintainable even though the plaintiffs were not registered proprietors within S. 78 of the Act. (*Stephen and Chatterjee, JJ.*) SHOSHI KUMAR BATTACHARJEE *v.* GOUR KISHORE. 18 I. C. 593 (C.).

———S. 78—*Registration under—Effect of—Actual possession, if affected by.*

Although registration of name under the Land Registration Act may be evidence of possession, it is not necessarily equivalent to actual possession, nor is it sufficient to interrupt the adverse possession, of the opponent of the person whose name has been registered. 29 C. 518 P. C., 10 C. L. J. 527 Fol. (*Mookerjee and Coxe, JJ.*) JOY KALI ROY *v.* HEMANGINI DEBI. 10 I. C. 363 (C.).

———S. 78—*Suit for rent by unregistered assignee, not barred.*

S. 78 does not bar a suit for the recovery of arrears of rent by an unregistered assignee of the rent from the landlord. (*Das and Ross, JJ.*) RAMESHWAR PRASAD SINGH *v.* RAM JANAK SINGH. 6 Pat. L. J. 109=60 I. C. 390= 2 Pat. L. T. 370.

———S. 78—*Suit for rent—Registration of name of proprietor before decree.*

Non-rcgistration of a person as the recorded proprietor of land under S. 78 of the Bengal Land Registration Act is not a disqualification which would deprive him of a cause of action. It is merely an impediment against his right to recover rent by a decree until the provisions of S. 78 of the Act are complied with. (*Atkinson, J.*) BALAK MAHTON *v.* MATHURA RAM DUBEY. 52 I. C. 267 (Pat.).

BENGAL LAND REGISTRATION ACT, (VII of 1876), S. 85.

———S. 81—*Ijaradar is not a proprietor and Seetion does not apply to him—Ijaradar—Proprietor.*

An ijaradar is merely a lessee and S. 81 has no application to a person who is not himself a proprietor but who has an interest which is subordinate to that of a proprietor. S. 81 seems to be a rider to Ss. 78 to 80 and as those sections deal with the case of proprietors there is no reason to think that S. 81 refers to cases of persons other than a proprietor. (*Chatterjee and Suhrawardy, JJ.*) PROBODH CHANDRA MITTER *v.* HARISH CHANDRA NASCAR. 27 C. W. N. 888= 1924 Cal. 124.

———S. 81—*Applies where a party is a vendee of a contracting party.*

The provisions of S. 81 of the Act are applicable to a case where one of the parties is a vendee of one of the contracting parties. (*Chatterjea and Panton, JJ.*) MESBAHUDDIN AHMED *v.* ABDUL. 65 I. C. 839=34 C. L. J. 119.

———S. 81—*Lease by one co-sharer—Suit by him alone for rent is maintainable.*

Where P, a co-sharer, leased his share to D for a certain rent, P. and his successors-in-interest can maintain a suit against D for rent upon the written contract of lease without reference to the other co-sharer landlords. (*Chatterjee and Suhrawardy, JJ.*) PROBODH CHANDRA MITTER *v.* HARISH CHANDRA. 64 I. C. 58=48 C. 1078.

———S. 81—*Scope of.*

The written contract mentioned in S. 81 of the Land Registration Act refers to a contract between the person who claims rent as proprietor and the person who is bound to pay rent to him under S. 78 of the Act. (*Mookerjee and Beachcroft. JJ.*) ISWAR CHANDRA BERA *v.* KALI CHARAN SANTRA. 43 I. C. 726=27 C. L. J. 474.

———S. 85—*Identity of applicant—Revision.*

Several years after the registration of a person's name in the records a rival claimant made an application on the ground that he is the person preferentially entitled. There is a dispute as regards his identity *Held* the Revenue Court may well leave the claimant to establish his claim in the Civil Court. It is largely a matter of opinion as to the circumstances in which a Commissioner's powers of revision should be exercised. (*Morshead M. C.*) MT. MADHURANI KUER *a*, RAJLILA SINGH. 1 Pat. L. R. 261. (Cr.).

———S. 85—*Revisional powers of Commissioner.*

The Commissioner has by S. 85 revisional jurisdiction over orders passed by all officers subordinate to him. The power ought to be exercised when there has been a failure of jurisdiction or a signal failure of duty or it is necessary to prevent gross abuse or injustice. The revisional powers should not be exercised where the aggrieved party has a right of appeal or a remedy by way of suit in the civil court. (*Morshead, M. C.*) TULSI RAM *v.* MT. SHAYAMPEARI KUER. 1 Pat. L. R. 246 (Cr.).

BENGAL LAND REVENUE ASSESSMENT REGULATION, (II of 1819.)

———*Rent—Lakhiraj land—Suit instituted under Regulation II of 1819 subsequently transferred to the Civil Court.*

Plff.'s predecessor obtained a decree in 1862 against deft's. predecessor for resumption of land held under an invalid *Lakhiraj* title created before 1790, the decree declaring the land liable to assessment. In a suit brought for *Khas* possession on the ground that the defts. were trespassers *Held*, that the suit instituted under Regulation II of 1819 and subsequently transferred under Regulation VII of 1822 was a suit dealing with rent. The decree of 1862 could not be regarded as establishing the relationship of landlord and tenant. (*Jenkins, C. J., Mookerjee and Beachcroft, JJ.*) MAHARAJA BIREDENDRA KISHORE MANICKYA BAHADUR *v.* BHARAT CHANDRA SINHA.
30 I. C. 910=22 C. L. J. 117.

———*Whether resumption creates the relationship of landlord and tenant—Non-payment of rent amounting to adverse possession, if aided by entry in* Thakbust *papers.*

A resumption proceeding does not of itself create the relationship of landlord and tenant. The entry in the *Thakbust* papers together with non-payment of rent constitutes adverse possession. (*Mullick and Jwala Prasad, JJ.*) BALDEO SINGH *v.* BRAHMADEO NARAYAN SINGH.
39 I. C. 107=1 Pat L. W. 721.

———Ss. 7 and 8—*Who can claim malikana—Entries in Arsatha if conclusive—Applicability of S. 8.*

Malikana is allowed to previous lessees of Government not accepting the settlement but it is not allowed where the settlement is made with the previous proprietor himself. S. 8 applies to persons having proprietary rights and not to persons who are in possession only without title. Arsatha entry is not conclusive unless it is adopted in the final settlement. (*Mullick and Jwala Prasad, JJ.*) SECRETARY OF STATE *v.* KHAJA MAHOMED JAN. 2 Pat. L. J. 266=39 I. C. 555=
2 Pat. L. W. 213.

———S. 10 (2), (3) and (4)—*Joint Settlement—Default by Sudar Malguzar—Effect—Co-proprietor's share whether affected.*

Where a joint settlement is made under S. 10 (2), (3) and (4) all the Malguzars are jointly responsible for the payment of revenue although the mahal is managed by the Sudar mulguzar and in cases of default by the Sudar Malguzar the entire tenure is liable to sale unless there is a contrary provision in the settlement. (*Miller C. J. and Coutts, J.*) LALJIT UPADHAY *v.* WAJIHUNNESA BEGUM. 5 Pat. L. J. 79=54 I. C. 658=
1919 Pat. 449.

———Ss. 22 and 23—*Bengal Alluvion and Diluvion Act (1847).*

A zemindar is bound to prove that a river was included in an estate under permanent settlement.

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The burden is discharged or shifted, if he succeeds in showing the river in the estate to be unnavigable or it is admitted to be so; and the Revenue authorities are not allowed to assess the beds silted by natural causes, to revenue under B.L. R. Act (II of 1819) or under Act IX of 1847. (*Richardson and Greaves, JJ.*) SECY. OF STATE FOR INDIA *v.* PROFULLA NATH TAGORE.
58 I. C. 896=24 C. W. N. 809.

———S. 21—*Bengal Alluvion and Diluvion Act (1847), S. 6.*

The period of limitation for a suit to contest an order of the Board of Revenue under S. 6 of B. A. and D. Act of 1847, assessing the land to revenue on the footing that the accretions to villages permanently settled or by *fluvial* act must be brought within one year from the date of plaintiff's knowledge of the Board's decision. (*Richardson and Greaves, JJ.*) PROFULLA NATH TAGORE *v.* SECY. OF STATE. 58 I. C. 902=24 C. W. N. 813.

BENGAL LAND REVENUE SALES ACT (XI of 1859.)

———*Extent—Bengal Land Rev. Sales Act (1868)*

The Act XI of 1859 extends to Govt. tenures in Dihi Punchannagram in Dt. Twenty-four Parganas, by virtue of Act VII of 1868. (Bengal Land Rev. Sales Act). (*Lord Shaw.*) HAJI BUKSH ILAHI *v.* DURLAV CHANDRA KAR.
39 Cal. 981=16 I. C. 821=
16 C. W. N. 842=23 M. L. J. 206=
12 M. L. T. 385=(1913) M. W. N. 1005=
14 Bom. L. R. 1063=10 A. L. J. 452=
39 I. A. 177=16 C. L. J. 620 (P. C.).

[On Appeal from 13 C. W. N. 633=3 I. C. 986=
9 C. L. J. 341.]

———*Karsha is not Revenue.*

Where a *howladar* holding a *howla* under Government asked the latter to manage during his unexpired term and during that period *karsha* fell into arrears, a sale cannot be held under the Land Revenue Sales Act to realise the same as it is not revenue. (*Walmsley and Ghose, JJ.*) UKILUDDI AKAN *v.* ASMAT ALI MUNSHI.
27 C. W. N. 723=1923 Cal. 714.

———*Sale under—Interest sold.*

In a sale under the Act the interest of the defaulting owner is not sold but the interest of the Crown subject to the payment of government assessment is sold. (*Mookerjee and Buckland, JJ.*) SECRETARY OF STATE FOR INDIA *v.* WAZED ALI.
65 I. C. 866=34 C. L. J. 141.

———*Joint possession—Suit for by benamidar vendee, is maintainable.*

A suit for joint possession by the purchaser of a separate account, in a sale held under the law is maintainable though the plff. is a benamidar. (*Walmsley ann Greaves, JJ.*) MOHESH CHANDRA DE. *v.* KALI KANTA SORMA. 60 I. C. 708 (Cal.).

BENGAL LAND REVENUE SALES ACT (XI of 1859.)

———*Revenue sale procured by fraud—Effect of.*

Where a sale under the Act is brought about by a deliberate default on the part of the agent of one of the co-owners and the purchase at the sale was effected under a pre-arranged plan to which the said agent was a party in the name of a person who under that arrangement was to hold the property for the benefit of himself and the other parties to it, *Held* that the sale had no higher effect than a private alienation and the purchaser who had taken with notice of or was implicated in the fraud should be made to reconvey the property to the rightful owners. (*Mookerjee and Panton, JJ.*) KUMAR SATISH KANTA RAI *v.* SATISH CHANDRA CHATTOPADHYA.

24 C. W. N. 662=55 I. C. 689=30 C. L. J. 475.

———*Revenue sale of estate—Right of purchaser.*

The purchaser of an estate at a revenue sale takes the estate as created at the time of the permanent settlement subject to well-known qualifications. The purchaser of an estate at a revenue sale, under the Act, has no right to revenue free lands, as described in the Record of Rights, simply because those lands are situated within the limits of the estate. But if he can prove that the revenue was assessed on the basis of the assets of those lands he can claim them. (*Mookerjee and Walmsley, JJ.*) ABDUL RAHMAN KAZI *v.* BAIKUNTHA NATH RAI.

41 I. C. 757=27 C. L. J. 133.

———*Notice, when necessary.*

No notice is required to be served on the proprietors before sale, where the arrears are for the current or next preceding year. (*Miller, C. J. and Foster, J.*) MAHARAJA KESHO PRASAD SINGH *v.* SECRETARY OF STATE FOR INDIA.

74 I. C. 881 (Pat.).

———*Scope of—Applicability.*

Bengal Land Revenue Sales Act is a complete Code in itself and is quite independent of the Limitation Act. (*Chapman, Mullick and Atkinson, JJ.*) KRISHAN DAYAL GIR *v.* ABDUL GAFFUR.

2 Pat. L. J. 402=40 I. C. 13=
2 Pat. L. W. 229.

———Ss. 2 and 3—*Scope of.*

A *Kabuliyat* in respect of Government tenure in Dihi Punchannagram ran thus:—"I shall pay the said jama in the Collectorate within 28th June every year," *Held*, according to S. 2 the last date on which the payment due would become arrear is 1st of July and first date when the tenure would be sold for arrears would be 28th June of the next year and a sale before that date is illegal. (*Lord Shaw.*) HAJI BAKSH ILAHI *v.* DURLA CHANDRAKAR.

39 Cal. 981=16 C. W. N. 842=
23 M. L. J. 206=12 M. L. T. 385=
(1912) M. W. N. 1005=15 Bom. L. R. 1063=
10 A. L. J. 452=16 A. L. J. 620=
16 I. C. 821=39 I. A, 177 (P. C.).
[On Appeal from 13 C.W.N. 633=9 C.L.J. 341=
3 I. C. 986.]

BENGAL LAND REVENUE SALES ACT (XI of 1859), S. 2.

———Ss. 2 and 3—*Due date for paying Revenue, —Depends on contract of parties—Sale before due date is* ultra vires.

The date on which the revenue is payable depends primarily not on general or administrative considerations such as the course of business in the Collectorate or the mode in which the accounts are kept but on the contract between the parties. Where a tenure was held under a *Kabuliat* which required him to pay his rent "within the 28th day of June every year" *held* that the holding could not be sold for arrears till after June 28th of the following year and a sale before that date was before time and *ultra vires* and conferred no title on the purchaser. (*Richardson and Greaves, JJ.*) MANMOTHA NATH MULLICK *v.* MAHOMED SOLEMAN.

68 I. C. 491=26 C. W. N. 140.

———Ss. 2, 3, 6, 7, 33 and 58—*Revenue sales—Duties to be considered—Arrears of revenue—Meaning of—Power of Collector to purchase estate—Notices under Sections 6 and 7 by whom to be issued—Ground declared and specified—Meaning of—Non-service of notice—Effect of.*

Per *Newbould, J.*—When notices of sale are signed by a Sub-Deputy Collector for the Collector a legal presumption arises that the issue of the notices was directed by the Collector. There are three dates to be considered in conection with sales under the Act. The first is the *kist* or instalment date fixed by the *kist bandi* of each estate. The second is the date fixed by the Board of Revenue for each district as the latest date in each quarter for payment of all arrears and lastly the date fixed for sale. The question whether an instalment of payment remaining unpaid is an arrear of revenue within the meaning of S. 2 is a question of fact. An instalment of revenue payable on account of January *kist*, if not paid, does not become an arrear until the 1st February next following. Per *Chatterjee, J.* (*Contra*), *Newbould, J.*—Under S. 58, the Collector having made a bid of Re. one cannot afterwards purchase the estate on behalf of the Government at the highest amount of the bid made by another. The purchase of an estate so made is against Section 58 and confers no legal right on Government. The words "unless such ground has been declared and specified in S. 33 do not include the reascns for the ground." The same objection taken before the Commissioner may be taken before a Civil Court, though the reasons given may be different. *Quaere* whether notices of sale under the Act issued and signed by the Sub-Deputy Collector "for the Collector" invalidate the sale. Whether non-service of notice under S. 7 is not a material irregularity in the conduct of the sale so as to invalidate the sale. (*Chatterjee and Newbould, JJ.*) AMRITA LAL ROY *v.* SECRETARY OF STATE.

41 I. C. 458 (C.)

———Ss. 2 and 3—*Land Revenue—Arrears—Effect of, not paying.*

In Bengal and Bihar the land revenue for *Chait Baisack Kist* becomes payable on the last

BENGAL LAND REVENUE SALES ACT (XI of 1859), S. 3.

day of *Baisakh* from which date it becomes payable as "arrear" and if this arrear is not paid within the date fixed by the Board of Revenue, the estate becomes immediately liable to sale. (*Sharfuddin and Roe, JJ.*) OJHA *v.* RAJBANSI KUER. 40 I. C. 638=2 Pat. L. W. 31.

——Ss. 3, 5, 6 and 33—*Gazette—Notification.*

Failure to notify the sale for arrears of Government Revenue in the official Gazette is no illegality vitiating the sale as being contrary to the provisions of the Act. *Semble*:—Notification in Official Gazette at Calcutta is a sufficient compliance. (*Lord Shaw.*) SHARFUDDIN *v.* SAMANTA RADHA CHARAN DAS. 46 Cal. 255= 16 A. L. J. 915=35 M. L. J. 644= 25 M. L. T. 80=29 C. L. J. 198= 23 C. W. N. 369=21 Bom. L. R. 544= 47 I. C. 995=45 I. A. 206 (P. C.).

[On Appeal from 41 Cal. 276=17 C. W. N. 1135= 20 I. C. 423.]

——S. 3—*Sale for arrears of Revenue—Nature of interest sold—Adverse possession—Limitation—Starting point of.*

Under Act XI of 1859, on the failure of an owner to pay Government assessment his estate or interest in the land is determined and on a sale which is held by the Government in consequence of the non-payment of assessment what is sold is not the interest of the defaulting owner but the interest of the Crown, subject to the payment of the Government assessment. Against the purchaser at the sale under Act XI of 1859, adverse possession commences to run only from the date of the sale. The prior adverse possession is an encumbrance free of which the mahal is sold. (*Lord Atkinson*) SURJA KANTA ACHARJYA BAHADUR *v*, SARADA CHANDRA ROY. 18 C. W. N. 1281=16 M. L. T. 290= 27 M. L. J. 365=1 L. W. 807= (1914) M. W. N. 757=16 Bom. L. R. 925= 25 I. C. 309=20 C. L. J. 563 (P. C.).

——Ss. 3, 7, 10, 14, 25 and 33—*Arrear—Payment towards later kist—Acceptance—Charge of appropriation by Revenue authority—Sale for arrears so created—Nullity.*

Appellant's property was put up for sale by the Collector in respect of the unpaid balance of kist of revenue payable in January 1912. It was found that the appellant had paid and the Treasury Officer of the Government had accepted the full amount towards the January kist. Subsequently however the Treasury Officer had appropriated the same to the first instalment of the kist payable in September 1901, with the result that an arrear was created in January kist for which the sale in question took place. *Held*, that the original appropriation could not be varied without the consent of the appellant, that there was nothing due in respect of the January kist and that the sale was therefore without jurisdiction. (*Sir Arthur Wilson.*) MUHAMMAD JAN *v.* GANGA BISHEN SINGH. 8 A. L. J. 594=13 C. L. J. 584= 13 Bom. L. R. 447=(1911) 1 M. W. N. 429= 10 I. C. 272=21 M. L. J. 1147 (P. C.).

[Reversing 33 Cal. 1193=10 C. W. N. 948.]

BENGAL LAND REVENUE SALES ACT (XI of 1859), S. 6.

——Ss. 5, 18 and 33—*Land Revenue—Embankment charges—Estate advertised for sale for revenue—Sale for arrears* of poolbandi—*Illegality—Beng. Act* (*II of* 1832) *and* (*I of* 1895).

Under S. 6 of the Bengal Act (XI of 1859) notifications were issued for the sale of certain land for arrears of land revenue. Subsequently a certificate was filed under the Public Demands Recovery Act (I of 1895) for arrears of *Poolbandi* (embankment charges), in respect of the land. The amount due for arrear of land revenue was paid before the sale but not the *Poolbandi* charges. The Collector accepted the amount and ordered the sale to proceed in respect of *Poolbandi* charges without a notice as required by S. 5 of Act (XI of 1859). *Held*, that the sale was invalid. Although no formal order of exemption had been made under S. 18 of Act (XI of 1859), the Collector having acknowledged payment in full of the arrears of land revenue for which the sale was advertised and having elected to proceed under the certificate procedure for the *Poolbandi* charges, and directed a sale thereunder, he could not treat the areear under the certificate as an arrear of land revenue without notice to the parties under S. 5. The sale was therefore without jurisdiction, (*Lord Dunedin.*) DHIRAJ CHANDRA BOSE *v.* SRIMALAI HARI DASI DEBI. 42 Cal. 765= 19 C. W. N. 507=28 M. L. J. 480= 2 L. W. 422=29 I. C. 290= 42 I. A. 58 (P. C.).

[On Appeal from 7 I. C. 43 P. C.]

——Ss. 6, 10 and 11—*Revenue sale—Notification—Object of—Specification of property*—Ijmali *sharer.*

Act (XI of 1859) is a stringent enactment for the realisation of arrear of revenue, but at the same time it provides certain safeguards for the protection of the interests of the defaulter—amongst which are Ss. 5 and 6 for the issue of notification of sales. In a notification for sale for arrears of revenue under the Act, the specification of the property to be sold must be sufficiently definite and clear in itself to enable possible purchasers to know what they are invited to bid for without reference to information in the Collector's Office. On a sale of an *ijmali* share, the notification of sale was "*Ijmali* share which cannot be specified excluding the separate accounts." A list of the 148 separate accounts opened under Ss. 10 and 11 of the Act followed. *Held*, that the notification was insufficient and as substantial injury was caused thereby, the sale was invalid. (*Mr. Ameer Ali.*) RAVANESHWAR PRASAD SINGH *v.* BAIJNATH RAM GOENKA. 42 Cal. 897= 42 I. A. 79=2 L. W. 355=19 C. W. N. 481= 17 M. L. T. 321=21 C. L. J. 412= 13 A. L. J. 501=28 M. L. J. 583= 17 Bom. L. R. 442=28 I. C. 699= (1915) M. W. N. 559 (P. C.).

——Ss. 6, 7, and 58—*Collector's peon opening bid—If precludes Collector from purchasing under S. 58.*

BENGAL LAND REVENUE SALES ACT (XI of 1859), S. 6.

The mere fact that at a sale under the Act a Collector' s peon opens the bid, does not preclude the Collector from taking over the estate under the second portion of S. 58 of the Act. The sale proceedings under the Act do not become void by reason of the notices under Ss. 6 and 7 having been signed by the Sub-Deputy Collector instead of the Collector. 31 Cal. 1036 dist. (*Woodroffe, Chitty and Shamsul Huda, JJ.*) AMRITA LAL ROY *v.* SECRETARY OF STATE. 22 C. W. N. 769 = 46 I. C. 447 = 28 C. L. J. 51.

[On Appeal from 41 I. C. 458.]

———S. 6—*Publication in Vernacular Government Gazette—Necessity of.*

It is sufficient, if the notification of a sale for arrears of Government revenue of an estate exceeding Rs. 500, be published in the Calcutta Gazette. It is not absolutely necessary to publish it in the Vernacular Government Gazette, and even if it is, the omission to do so would not render the sale null and void in the absence of proof of substantial loss caused thereby. 21 Cal. 70 (P. C.) Foll., 11 Cal 200 (F. B.) not foll. (*Richardson and Newbould, JJ.*) SHAMANT RADHA CHARAN DAS *v.* SHARFUDDIN HUSSAIN.
20 I. C. 423 = 41 Cal. 276 = 17 C. W. N. 1135.

———S. 6—*Insufficient notification—Effect.*

Notification insufficient in detail as to property sold renders the sale void. The Collector must specify mouzas when selling a residency estate. 42 Cal. 897 P. C. foll. Authorities reviewed. Per *Chapman, J.—Bona fide* description though insufficient is a mere irregularity rendering the sale liable to be avoided under S. 33. (*Chapman, Mullick and Atkinson, JJ.*) KISHORE DAYAL GIR *v.* ABDUL GAFFAR. 2 Pat. L. J. 402 = 40 I. C. 13 = 2 Pat. L. W. 229.

———S. 9—*Defaulting proprietor.*

A suit by mortgagor of a co-sharer against the entire body of co-sharers for recovery of revenue paid by him owing to their default is one under S. 9 the entire body of such co-sharers being the defaulting proprietor. The plff. was not bound to claim against each co-sharer the specific amount of revenue payable by him proportionate to his share. The remedies of a person paying arrears of revenue are threefold: (1) If he is a party to a suit for possession of estate, the Court can put him in temporary possession. (2) He can have a personal decree against the defaulting proprietors, or (3) A lien on the estate for the amount paid. (*Mookerjee and Carnduff, JJ.*) MOTI CHAND *v.* BAJRANG SAHAI.
17 I. C. 45 = 16 C. L. J. 148.

———S. 10—*Separate account under—Patni—Co-sharers.*

Where the patnidars of a share in a revenue paying estate owned by a number of co-sharers have been paying as per terms of their patni deed into the Collectorate, the Government revenue payable in respect of their landlords' share in the zemindari, any of the co-sharers who opens a separate account in respect of his share under S. 10 of Act XI of 1859, is entitled to have the money (rent) paid into the Collectorate and is entitled to have an order directing the patnidar to pay to the Collectorate the share of revenue to his separate credit. (*Teunon and Chaudhuri, JJ.*) GOUR GOPAL SINGH *v.* GOSTA BEHARI PRAMANICK.
34 I. C. 409 = 21 C. W. N. 214.

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———S. 12—*Purchaser's rights.*

A purchaser of a "Noabad Taluk," acquires it in the condition in which it was at the last settlement and not at its creation. (*Chatterjee and Newbould, JJ.*) GANGADAS SIL *v.* SECRETARY OF STATE. 32 I. C. 752 = 20 C. W. N. 636.

———Ss. 13 and 54—*Scope of—Revenue sale—Rights of purchaser — Adverse possession—Incumbrance.*

In a revenue sale it is not the right of the recorded proprietor that passes, but the share itself. A Hindu widow in possession of a share of an estate as heiress represents the full owner's interest and the purchaser of such a share acquires the share itself, and not merely a life estate. 22 Cal. 641, 11 C. W. N. 821, ref. and foll. Adverse possession against the defaulter whether for the full period of 12 years or less does not bind the purchaser of a share, who is not a person claiming from or through the defaulter. The words "shall not acquire any rights" in S. 54 of the Act refer to the acquisition of the rights in respect of interests, such as incumbrances or the like, which are referred to previously in the section. (*N. R. Chatterjea and Mullick, JJ.*) KHEMESH CHANDRA *v.* ABDULLAH HAMID. 43 Cal. 46 = 29 I. C. 350 = 19 C. W. N. 782.

———S. 13—*Estate, meaning of—Sale.*

The term "estate" as used in S. 13 of the Revenue Sale Law means the entire estate out of which the separate share has been carved. If the estate is not liable to revenue sale the Collector has no jurisdiction to sell any share thereof. Under S. 13 the Collector can sell only that share of the estate which has become liable to sell for arrears of revenue, according to the separate accounts. (*Jenkins, C. J. and Mookerjee, J.*) MARAMANI DASYA *v.* PRIYA NATH CHAKRAVARTHI. 18 C. L. J. 505 = 21 I. C. 953 = 18 C. W. N. 490.

———S. 13—*Notice—Requisites of—Residue—Sale of,*

In preparing a notice of sale under S. 13 of the Land Revenue Sale Law, the residue must be described with sufficient accuracy and fullness to enable intending purchasers to know what is offered for sale; where the residue alone is mentioned without its value, the description is not a sufficient compliance with the section. Where the notification mentioned the residue and there was no error in the description except with regard to the share in two villages there was no failure to comply with S. 13 of any irregularity in the notification. (*Brett and Mookerjee, JJ.*) CHOWDHURY RAM PRASAD SINGH *v.* CHOWDHURY PAWAN SINGH. 21 I.C. 354 = 18 C. L. J. 97.

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——S. 13—*Collector's powers—Sale of estate.*

The Collector can sell a revenue unit, whether estate or a share as a whole. He cannot separate it for the sake of realising arrears. (*Jenkins, C. J. and Chatterjee, J.*) GANGA PRASAD SINGH *v.* PARGASH SINGH. 16 C. L. J. 524= 16 I. C. 41=17 C. W. N. 844.

——S. 14—*Sale of entire estate for arrears—Admissibility of entries in mahalwar register.*

The sale of entire estate under this section for arrears due from part thereof which is separated and entered in a separate account in Collector's books is void. The sale of a share or particular arrears is void after the payment thereof. (*Lord Shaw*) MUTSADDI MIAN *v.* MAHOMED IDRIS. 34 I. C. 283=19 C. W. N. 764 (P. C.).

[On Appeal from 31 I. C. 743.]

——Ss. 14 and 37—*Arrears due—Purchaser of entire estate—Rights of Annulment of intermediate tenures.*

The purchaser of the entire estate sold under S. 14 of the arrears of Revenue due on "part of the estate" gets it free from all encumbrances. The words "arrears due on account of the same" mean entire arrears and also part of the arrears due on account of estate sold but not on account of the other estate. Only such portions of land as are actually covered by buildings, tanks, etc., can get the benefit of the exemption provided in exception 4. 9 C. W. N. 852; 12 C. W. N. 1029; 23 I. C. 17 foll.; 30 Cal. 498 not foll. (*Chatterjee and Newbould, JJ.*) JOGENDRA NARAIN RAY *v.* KIRAN CHANDRA RAY. 50 I. C. 406= 23 C. W. N. 315.

——S. 14—*Arrears—What is.*

It was found in a suit for annulment of a sale for arrears of revenue, that the estate consisted of two houses with revenue assessed proportionately payable by *kists*; and the June *kist* of one of the accounts was in arrears and the Collector ordered sale for the arears of March *kist* which was not due. *Held*, the sale was *ultra vires* and void and that the Collector ought to have closed all the separate accounts, before ordering sale of the entire estate. (*Stephen and Chatterjee, JJ.*) MUHAMMAD IDRIS *v.* MOTA SADDI MIAN. 31 I. C. 743 (Cal.).

——S. 14—*Defaulting proprietor, if excluded from sales under—First depositor to be purchaser—Suit to set aside sale under S. 14—Injury—Onus.*

Defaulting proprietors are not excluded from sales under S. 14 of the Act. The word 'other' in the section seems to be a mere inadvertance. The section was not intended to deprive the rights of the co-sharers *inter se* but merely to give them a chance of saving the estate and secure the payment of the revenue. The purchase is effected by payment of the arrears and the Collector is bound therefore to recognise the first depositor of the whole amount, or if there are more depositors than one those whose payments

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first amount to the total arrears due. Where the deft. has been formally declared purchaser under the section and possession delivered, it would be a manifest annulment of the sale, to take it away from him and to give it to the plff. (*Coxe and Imam, JJ.*) BAHARIA SAMBHO KOER *v.* HARI HAR PRASAD. 41 Cal. 1092= 24 I. C. 276=18 C. W. N. 1071.

——S. 14—*Incumbrances—Avoidance of.*

A revenue sale does not *ipso facto* avoid incumbrances and under-tenures but only renders them voidable at the option of the purchaser. Notice need not be given to avoid an under-tenure before bringing a suit. The option may the exercised by the institution of the suit within the time allowed by law. On such a suit being instituted the tenure will be regarded as annulled from the date of suit and the purchaser is not entitled for the period antecedent to such suit to any sum in excess of what actually represents the rent payable by the tenure-holder of the first decree as damages for use and occupation. (*Chatterjee and Mullick, JJ.*) DARSAN SINGH *v.* BHAWANI KOER. 19 I. C. 974=17 C. W. N. 984.

——S. 25—*Appeal, restoration of—Inherent powers.*

All final Courts including Revenue Courts, have an inherent power to make such orders as may be necessary for the ends of Justice. A Commissioner of a division possesses the power to restore an appeal under S. 25 of the Bengal Revenue Sales Act which he has decided *ex-parte* 33 Cal. 1178 (P. C.) ref. (*Moore, M. G.*) D. N. RAY *v.* NALIN BEHARI. 46 I. C. 621 (Cal.)

——Ss. 25 and 26—*Absence of arrears—Effect.*

The Commissioner is authorized to annul a sale not conducted according to the provisions of the Act. A sale of an estate for arrears of revenue which are not existent is null and void. (*Coutts and Das, JJ.*) CHHAKAWRI *v.* SECRETARY OF STATE FOR INDIA. 52 I. C. 990=1920 Pat. 1.

——S. 28—*Certificate of sale—Evidence of title.*

A certificate of sale granted under S. 28 of the Act is no conclusive evidence of title. *Coxe, J.*) RAM RATAN PUROHIT *v.* SIKDAR ALI. 14 I. C. 10 (Cal.).

——S. 29—*Any person—Meaning of.*

The words "any person who refuses to vacate can be removed by the Collector" refer to the former proprietors or persons claiming proprietary right through them and do not refer to under-tenure holders. (*Chatterjee and Mullick, JJ.*) DARSAN SINGH *v.* BHAWANI KOER. 19 I. C. 974=17 C. W. N. 984.

——Ss. 31 and 53—*Revenue Sale—Prior encumbrances on property sold—Effect on—Right to sale proceeds—Purchase by recorded proprietor—Effect.*

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S. 31 of the Bengal Land Revenue Sales Act (XI of 1859) does not transfer the charges, to which property sold at a revenue sale is subject, from the property to the sale proceeds. As the sale by the Government conveys a title free from encumbrances to the purchaser the mortgagees of the property sold are entitled to claim the same as creditors and such claims, in the order of priority, should be satisfied out of the sums in Court. In a case in which the property sold at a revenue sale is purchased by the recorded proprietor himself, the property is acquired under S. 53 of the Act, subject to all the encumbrances existing at the time of the sale which can therefore be enforced against the property. As regards the sale-proceeds however in such a case the recorded proprietor has all the rights given by S. 31 of the Act. (*Lord Buckmaster.*) TARINI CHARAN SARKAR *v.* BISHUNCHAND. 23 M. L. T. 147 = 7 L. W. 315 = 27 C. L. J. 303 = 34 M. L. J. 361 = 4 Pat. L. W. 249 = 16 A. L. J. 271 = 22 C. W. N. 505 = (1918) M. W. N. 295 = 44 I. C. 304 = 20 Bom. L. R. 253 (P. C.).

———S. 31—*Assignee of recorded proprietor—Right to surplus sale proceeds—Collector refusing to recognize assignee—Effect of—Right of assignee to sue for declaration—Lim. Act., Art S.* 120.

An assignee of the recorded proprietors is not their representative and the Collector is justified in refusing to pay to such assignee claiming on his own behalf the money held in deposit on account of the recorded proprietors. 12 Cal. 359 ref. The Legislature did not contemplate that the title of unrecorded proprietors should be lost to the extent that they would not be entitled to receive the surplus sale proceeds even if they would establish in the Civil Court as against the recorded proprietors that they were entitled to the estate at the time of the sale. The assignee could sue for a declaration of title. No question of limitation arose in the case. If Art. 120 of the Lim. Act was held applicable the right to sue did not accrue till the right to obtain relief by way of declaration had been denied. (*Mookerjee and Panton, JJ.*) BBJOY LAL SEAL *v.* NAYAN MUNJARI DASSI. 55 I. C. 639 = 24 C. W. N. 294 = 47 Cal. 331 = 31 C. L. J. 372.

———Ss. 33 and 6—*Annulment of sale—Irregularity—Publication in vernacular Gazette, if essential.*

Omission to notify in the Vernacular Government Gazette circulating in the locality the sale of an estate of which the Government Revenue exceeds Rs. 500 is not an illegality which *per se* vitiates the sale under S. 33 of Act (XI of 1859). It is a sufficient compliance with para 2 of S. 6 of the Act, if the sale is notified in the Calcutta Gazette. (*Lord Shaw.*) SHEIKH SHARFUDDIN *v.* SAMANTHA RADHA CHARAN DAS. 46 Cal. 255 = 23 C. W. N. 369 = 29 C. L. J. 198 = 16 A. L. J. 915 = 21 Bom. L. R. 544 = 35 M. L. J. 644 = 25 M. L. T. 80 = 47 I. C. 995 = 45 I. A. 205 (P. C.).
[On Appeal from 41 Cal. 276 = 20 I. C. 423 = 17 C. W. N. 1135.]

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———S. 33—*Revenue sale—Existence of arrear essential.*

The existence of an arrear of revenue is essential. Otherwise the sale is without jurisdiction. (*Sir Arthur Wilson.*) MAHOMED JAN *v.* BISHEN SINGH. 38 Cal. 537 = 38 I. A. 80 = 15 C. W. N. 443 = 9 M. L. T. 446 = (1911) 2 M. W. N. 277 = 21 M. L. J. 1148 = 10 I. C. 272 = 8 A. L. J. 480 = 13 C. L. J. 525 = 13 Bom. L. R. 413 (P. C.).

———Ss. 33 and 58—*Revenue sale—Notices of—Signature by Sub-Deputy Collector—Validity of—Binding by Collector—Illegality or irregularity.*

Where in a revenue sale the Collector's servant formally opened the bidding with an offer of Re. 1 but the Collector himself never entered into competition, made no further bid and the sale was conducted fairly and there were several independent bidders. *Held*, that the Collector was not precluded by the initial bidding of Re. 1 from taking over the estate under S. 58 of the Revenue Sale Law. A sale held under the Revenue Sale Law is valid though the notices under Ss. 6 and 7 of the Act have been signed by a Sub-Deputy Collector instead of by the Collector or other officer authorised to hold the sale under the Act. To set aside a sale held under the Revenue Sale Law the party must show either want of jurisdiction or material irregularity resulting in substantial injury. (*Woodroffe, Chitty and Huda, JJ.*) AMRITA LAL ROY *v.* SECRETARY OF STATE. 35 C. L. J. 221.

———S. 33—*Revenue sale—Suit to set aside—Grounds for.*

In a suit to set aside a revenue sale the plff. cannot urge any ground which he did not take in his appeal to the Commissioner under S. 2. (*N. R. Chatterjea and Newbould, JJ.*) SUKLAL BANIKYA *v.* BINDU MINDHU. 47 I. C. 422 (Cal.).

———S. 33—*Application—Illegal sales.*

S. 33 also applies to illegal sales held contrary to the excepted provisions. This principle does not apply if the property sold is not in arrear. An unauthorized sale by Collector does not affect proprietor's rights. 25 I.A. 151; 38 Cal. 537 (P.C.) Ref. (*Jenkins, C. J., Mookerjee and Richardson, JJ.*) KRISHEN DAYAL GIR *v.* IRSHAD ALI KHAN. 31 I. C. 965 = 22 C. L. J. 525.

———Ss. 33 and 34—*Applicability of—Sale annulled by a final decree of Civil Court.*

S. 34 refers to cases brought before Civil Courts under S. 33 of the Act. The two sections must be taken as being closely related to each other and the rule of limitation as applying only to suits under S. 33. The proprietor of an estate appealed to the Commissioner of Revenue against the order of the Collector selling his estate for arrears of revenue under the Act. The Commissioner by order dated 21-3-1900 set aside sale but on application of the auction purchaser reviewed his order and confirmed the sale. The proprietor filed a suit in the Civil Court for a declaration that the reviewing order was *ultra vires* and

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that he had no power of reviow. In the Privy Council his contention was upheld. *Held*, the judgment of the Privy Council was not a final decree of a Civil Court. (*Chatterjee and Walmsley, JJ.*) BAIZ NATH GOENKA *v.* NAND KUMAR SINGH. 28 I. C. 876=19 C. W. N. 464.

——S. 33—*If applies to sales under S. 14.*

S. 33 applies to sales under S. 14 and in the absence of injury to the plff. a suit to set aside a sale under S. 14 does not lie. 21 Cal. 844 foll. 21 Cal. 70 (P. C.) ref. to. (*Coxe and Imam, JJ.*) BAHURIA SAMBHO KOER *v.* HARI HAR PRASAD. 41 Cal. 1092=24 I. C. 276=18 C. W.N. 1071.

——S. 34—*Suit for relief by third party—Not within the section.*

S. 34 of the Act applies merely to the case of an owner who after default in payment of the revenue rent of his property by a suit succeeds in setting aside the sale held under the Act, and who has applied for and withdrawn the surplus purchase money lodged to the Collectorate under such sale for his own benefit. It has no application to a suit instituted by a third party against an auction purchaser at a revenue sale *e.g.*, a suit by the reversioners, in respect of a claim for relief not provided for by the Act itself. (*Mullick and Atkinson, JJ.*) BANSI SINGH *v.* SHEONANDAN THAKUR. 52 I. C. 692 (Pat.).

——S. 36—*No applicability to person claiming through certified purchaser.*

The section ought to be construed strictly and it does not apply when a person is not a certified purchaser himself but a person claiming through a certified purchaser. (*N. R. Chatterjee and Panton, JJ.*) SRISH CHANDRA BANERJEE *v.* PROTAP CHANDRA DAS. 62 I. C. 662 (Cal.).

——S. 36—*Object of—Benami purchaser—Third party—Power of, to question—Appeal, dismissal of—Other matters.*

Section 36 prevents only a true owner from disputing the title of his benamidar (certified purchaser) but a third party can enforce his claim against the true owner in respect of the property alleging the benami purchaser. In an appeal by a defendant who is found to be benamidar the discussion of other matters affecting the right of respondent need not be gone into. (*Fletcher and Richardson, JJ.*) JAGABANDHU DUTT *v.* RAJANI KANTA PAL. 37 I. C. 790 (Cal.).

——S. 36—*Applicability of.*

The section does not bar a suit for possession of lands in a Taluq purchased at a Revenue Sale in the benamidar's name. The section should not be liberally construed. (*Carnduff and Chapman, JJ.*) MATHURANATH GHOSHAL *v.* RATNESHWAR SEN. 23 I. C. 917 (Cal.).

——S. 36—*Certified purchaser—Suit for specific performance of contract against.*

S. 36 of the Act is no bar to a suit by the plaintiff against the certified purchaser for specific performance of a contract to transfer the property to the plaintiff. S. 36 being a penal section ought to be strictly construed and not liberally so as to

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assist the perpetration of fraud. (*Mukerjee and Holmwood, JJ.*) MONMOTHA NATH *v.* GIRISH CHANDRA. 18 I. C. 100=17 C. W. N. 75.

——Ss. 36 and 37—*Construction.*

Section 36 of the Revenue Sale Law is a penal provision and should be strictly construed as prohibiting suits only against certified purchasers referred to therein and not against his representatives. (*Chitty and N. R. Chatterjea, JJ.*) JADU NATH *v.* RAM NARAIN. 11 I. C. 434 (Cal.).

——S. 37—*Patni—Creation of, by auction purchaser.*

The mere creation of the Patni by an auction purchaser would not by itself be an indication to the under-tenure-holders that the option to annul the under-tenures had in fact been exercised. (*Greaves and Ghose, JJ.*) KULA MIAH *v.* NANU MIAH. 68 I. C. 449=1923 Cal. 195.

——S. 37—*Proviso—Revenue sale—Purchaser of entire estate—Right of occupancy.*

Where at a revenue sale under Act XI of 1859 a person purchases an entire estate is entitled thereafter to eject under-tenants with the exception of raiyats with rights of occupancy at fixed rents or at rents which can be assessed according to fixed rules under the laws in force. The "right of occupancy" in S. 37 proviso might be acquired under laws promulgated since 1859 and is not limited to the right under the Rent Recovery Act. (*Mitra and Geidt, JJ.*) SARAT CHANDRA ROY CHOWDHURY *v.* ASMAN BIBI. 35 C. L. J. 212.

——S. 37—*'Settlement' refers to contract with Government Bajeapti Taluq.*

The word 'settlement' in S. 37 of the Revenue Sale Law refers not to the Permanent Settlement of 1793 but to the contract with Government. In the case of a Bajeapti Taluq, the contract with Government is made when revenue is assessed thereon and is transformed into revenue paying estate liable to be sold for its arrears. (*Mookerjee and Panton, JJ.*) MOKBUL ALI SADAGAR *v.* BASARAT ALI. 66 I. C. 911= 34 C. L. J. 485.

——S. 37—*Suit for annulment of encumbrance in part.*

S. 37 of the Bengal Lnnd Rev. Sales Act must be strictly construed. Lands purchased free of all enumbrances at a revenue sale were settled with plff. in sadar putni taluka right by a patta under which the plff. had the rights of an auction purchaser to avoid or annul all encumbrances. Deft. held a tenure which comprised lands included in the plff.'s patta as well as other lands. In a suit by the piff. to set aside the deft.'s tenure; *Held*, that as all the lands of the deft.'s tenure were not included in the plff.'s sadar putni, the plff. was not entitled to annul the tenure in part. 5 C. L. J. 264 foll. (*Chaudhury and Cuming, JJ.*) MAHOMED GURAN CHOUKIDAR *v.* BASARAT ALI. 55 I. C. 645 (Cal.).

——S. 37—*Permanent tenure-holders if entitled to protection—Under-tenure created, by Government—Annulment—Regulation (VII of 1882.)*

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The words "time of the permanent settlement" in the first exception to S. 37 of Act (XI of 1859) do not mean the date of the first permanent settlement of 1793. 24 W. R. 476 and 10 C. W. N. 503 foll. It is only under the first exeception to S. 37 of Act (XI of 1859) that a permanent tenure-holder at fixed rates can claim protection. An under-tenure created by the Government can be annulled under S. 37. A settlement under clause 2 of S. 10 of Reg. (VII of 1822) does not create an under-tenure holder but a mufassal settlement holder. If a joint settlement is made under Cls. (2) and (3) of S. 10 of Regn. (VII of 1882) all the malguzars are jointly responsible for the payment of the Government revenue although the mahal is under the management of one of them as an agent or a sadar mulguzar. The entire tenure is liable to sale unless there is a provision to the contrary in the settlement. 7 C. L. J. 461 foll. (*Miller, C. J. and Coutts, J.*) LALJIT UPADHYAY *v.* MUSSAMMAT WAJIBUNNESSA BEGAM.
5 Pat. L. J. 79=54 I. C. 658=
1919 Pat. 449.

———S. 37—*Revenue sale—Occupancy right—Transferee in possession for less than 12 years.*

The interest of an occupancy raiyat is protected from annulment at the instance of the purchaser of an estate at a revenue sale. A transferee of an occupancy holding, who has been in possession of the holding for more than twelve years prior to the institution of the suit for ejectment by the landlord may acquire a claim to stay on the land. (*Fletcher and Walmsley, JJ.*) SUBAL CHANDRA CHOWDHURY *v.* SUVAMKAR BARUA.
49 I. C. 437 (Cal.).

———S. 37—*Proviso—Raiyats holding at fixed rates, if have protected interest.*

Raiyats holding at fixed rates are persons having a protected interest within S. 37 proviso of the Act. (*Fletcher and Smither, JJ.*) KALI PRASAD *v.* RASH BEHARI. 46 I. C. 254 (Cal.).

———S. 37—*Occupancy tenant at fixed rent—Ejectment.*

A person who has already acquired an occupancy right before the passing of the B. T. Act does not by obtaining a grant of a fixed rent lose that occupancy right, and such a person is protected from ejectment under S. 37 of the Act. (*N. R. Chatterjea and Richardson, JJ.*) LAKHI CHARAN SHAH *v.* HAMID ALI.
44 I. C. 543=27 C. L. J. 284.

———S. 37—*'Protected interest'.*

A tank existing prior to the deft.'s lease is not a 'protected interest' within the 4th exception to S. 37. (*Fletcher and Richardson, JJ.*) AKKIANNESSA *v.* ABDUL GANI SADAGAR. 41 I. C. 1 (Cal.).

———S. 37—*Remedy of a purchaser at a Revenue sale to avoid incumbrances.*

The purchaser at a revenue sale under the Act may not necessarily sue to avoid incumbrances but elect to effect it by any means. Judicial process is not at all necessary. (*Fletcher and Richardson, JJ.*) SABAK ALI *v.* KERAMAL ALI.
39 I. C. 273 (Cal.).

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———S. 37—*Revenue sale—Annulment of incumbrances.*

A sale for arrears of revenue does not *ipso facto* avoid incumbrances or under-tenures, but only renders them voidable at the option of the purchaser. It is therefore necessary that the purchaser must by some unequivocal act indicates his intention to avoid under-tenures if he desires to do so. A formal written notice to the tenure-holder would certainly be the most convenient mode or doing it. (*N. R. Chatterjee and Beachcroft, JJ.*) SAHODORA MUDALI *v.* SARBOSOBHA DASI. 42 Cal. 638=20 C. L. J. 494=
27 I. C. 258=19 C. W. N. 1030.

———S. 37—*Protected interest—Taluk—Division of.*

A portion of a *taluk* created before the Permanent Settlement was transferred and subsequently held in proportionate *jama* under a name different from the original *taluk*. The subsequent transfer and descent thereof can be traced from the original *taluk*. *Held*, the portion so transferred was protected under S. 37 of Act (XI of 1859.) The effect of the division of a *taluk* must depend on the intention of the parties. (*Newbould and Roy, JJ.*) DAYAMOYI CHOUDHURANI *v.* NARENDRA KISHORE ROY. 27 I. C. 114=19 C. W. N. 79.

———S. 37—*Purchaser.*

"Purchaser' in S. 39 includes real purchaser and not only a "certified purchaser or his heirs or assignees". (*Carnduff and Chapman, JJ.*) MATHURANATH GHOSAL *v.* RATNESHWAR SEN.
23 I. C. 917 (Cal.).

———S. 37—*Settlement—Meaning of.*

For the purposes of S. 37 the word 'settlement' in the section must be taken to mean the permanent settlement of the estate and not the year 1793 in which the greater portion of Bengal was permanently settled. (*Chapman and Newbould, JJ.*) AHMED ALI SADAGAR *v.* ABBAS ALI. 19 I. C. 872 (Cal.).

———S. 37—*Protected interest—Onus on a second appeal.*

In a suit for possession of undivided half share on the ground that it was included within a taluk purchased by plaintiff at a revenue sale in which the deft. pleaded that the share was part of *Howla* which was a protected interest. *Coxe, J. held*, that plaintiff must show that the lands were not included in *Howla* and remanded the suit. *Held*, reversing his judgment that the case was concluded by the finding of fact by the Lower Appellate Court and that defts. had failed to prove that the disputed land appertained to the *Howla*. (*Jenkins, C. J. and Chatterjee, J.*) RATNESSUR SEN *v.* KALI KUMAR BIDYABUSAN.
15 I. C. 701=16 C. W. N. 693.

———S. 37—*Suit for* khas *possession—Lakhiraj or mal land—Onus of proof.*

Plff. sued for possession of property included in a taluk and purchased at a Revenue Sale. The defendants pleaded that they held the lands under a *lakhiraj* tenure from before the permanent

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settlement. *Held*, that plaintiff must prove that the lands in suit were included within the mal lands of his estate. (*Brett and Carnduff, JJ.*) HALODHAR CHATTERJEE *v.* RAMENDRA NARAIN ROY.
14 I. C. 90=16 C. W. N. 980.

——S. 37, Excep. 4—*Scope of—Garden on land—Improvement.*

The fact that a garden was made on a piece of land long before its sale for arrears of revenue would not make it a land "on which a garden has been made" and it does not fall within the exception to S. 37 of Act and is liable to be annuled (XI of 1859). *Per Beachcroft, J.* S. 37 (4) contemplate improvements or works of a permanent character and they are protected irrespective of whether the lease was or was not given for the purpose of the work in question. But the work must still be in existence or the land used for that purpose. (*N. R. Chatterjee and Beachcroft, JJ.*) SANODORA MUDALI *v.* SARBOSOBHA DASI.
42 Cal. 638=20 C. L. J. 494=
27 I. C. 258=19 C. W. N. 1030.

——S. 37, Excep. 4—*Tanks--Buildings.*

The benefit of this exception is limited to such portions of land as are covered by tanks, buildings, etc. The exception does not cover lands on which there are no such permanent works. (*Carnduff and Chapman, JJ.*) MATHURANATH GOSHAL *v.* RATNESHWAR SEN.
23 I. C. 917 (Cal.).

——S. 39—*Howla—Suit to avoid.*

In a suit to avoid Howlas under this section defts. must prove something more than the existence of Howlas *i.e.*, the lands in suit are the lands relating to the Howlas, that they belong to defts. or the defts. are in their possession for at least a very long period. (*Carnduff and Chapman, JJ.*) MATHURANATH GHOSHAL *u.* RATNESHWAR SEN.
23 I. C. 917 (Cal.).

——S. 52—*Revenue Sale—Permanent tenure.*

In a resumed *khas mahal* there was *nimosat taluk* of which the last settlement had taken place in 1908, and under this *nimosat taluk* there had existed a *howla* from 1883. The *nimosat taluk* was sold for arrears of revenue in 1912. *Held*, that the sale of the *nimosat taluk* did not affect the *howla* which had been in existence before the last settlement of the taluk. (*Chitty and Smither, JJ.*) SRISTIDHAR GHOSE *v.* KEDARESWAR BISWAS
45 I. C. 892 (Cal.).

——S. 52—*Patnidar—Tenure specially registered—Revenue sale of parental estate.*

A Patnidar whose tenure is specially registered under Act (XI of 1859) and who purchases the parental estate at a sale for arrears of revenue does not thereby get the right of avoiding under-tenures subordinate to the *Patni*. (*Coxe and Roy, JJ.*) SAT GOWRI CHATTERJEE *v.* PRIYANATH BASU.
25 I. C. 497=18 C. W. N. 672.

BENGAL LAND REVENUE SALES ACT (XI of 1859), S. 54.

——S. 53—*Revenue sale—Prior encumbrances—Effect on—Right to sale proceeds by recorded proprietor.*

In a case in which the property sold at a revenue sale is purchased by the recorded proprietor himself the property is acquired under S. 53 of the Act, subject to all the encumbrances existing at the time of the sale which can therefore be enforced against the property. As regards the sale proceeds however in such a case the recorded proprietor has all the rights given by S. 31 of the Act. (*Lord Buckmaster.*) TARINI CHARAN SARKAR *v.* BISHUNCHUND.
34 M. L. J. 361=23 M. L. T. 147=7 L. W. 315=
27 C. L. J. 303=22 C. W. N. 505=
(1918) M. W. N. 295=4 Pat. L. W. 249=
16 A. L. J. 271=44 I. C. 304=
20 Bom. L. R. 553 (P. C.).

——S. 53—*Proprietor holding benami—Position of adverse possession, if an encumbrance.*

If a proprietor of an estate holding benami in the name of another makes default in the payment of revenue and purchases the estate himself when it is sold, he is in the position of a proprietor who has purchased his own estate and the purchase is subject to all the encumbrances existing at the time of the sale. Title got by adverse possession is an encumbrance within the meaning of S. 53 of the Land Revenue Sales Act and the proprietor of an estate who has lost some lands of this estate by adverse possession for the statutory period cannot by falling into arrears of revenue and purchasing the estate at the revenue sale get rid of such adverse possession. (*N. R. Chatterjee and Richardson, JJ.*) HAMDU MIA *v.* RAMDHAN DHAR.
43 I. C. 461 (Cal.).

——S. 54—*Sale for arrears of Government revenue—Mortgagee purchaser in execution of his decree—Sale not confirmed—Liability for revenue—Revenue sale free from incumbrance.*

Respondent a mortgagee of the suit properties purchased them in execution of a decree, obtained by him on the mortgage on March 19, 1900 and obtained a sale certificate on April 23, 1900. The revenue for the properties became an arrear on March 29, 1900, and the appellant purchased them at the revenue sale. In a suit by appellant to eject the respondent, *held*, that the respondent's proprietary title was complete on March 19, 1900, and that it passed to the appellant by the revenue sale. The respondent's mortgage title could not be kept alive so as to operate on March 29, 1900 as an incumbrance within S. 54 of Act (XI of 1859). (*Lord Shaw.*) BHAWANI KUMAR *v.* MATHURA PRASAD SINGH.
40 Cal. 89=39 I. A. 228=16 C. W. N. 985=
23 M. L. J. 311=12 M. L. T. 352=
(1912) M. W. N. 244=14 Bom L. R. 1046=
16 I. C. 210=16 C. L. J. 606 (P. C.).

——S. 54—*Sale under—What passes to the purchaser.*

BENGAL LAND REVENUE SALES ACT (XI of 1859), S. 54.

A sale held under the Act passes to the purchaser the whole share of the estate and not merely the right, title and interest of the defaulters. (*Stephen and D. Chatterjee, JJ.*) BILAS CHANDRA *v.* AKSHAY KUMAR DAS.

15 C. L. J. 436—14 I. C. 219=16 C. W. N. 587.

———S. 54—*Incumbrance—Lease of right to Collect rent is an.*

A proprietor granted *Mokurrai* with respect to his entire share and later on he gave a lease to his wife of his right to collect rent from *Mokurraridar* for Rs. 29 per year. *Held*, the right created by the proprietor in favour of the wife was incumbrance within the section. (*Coutts and Macpherson, JJ.*) SHAHZADI BEGAM *v.* KOKILA.

63 I. C. 183 (Pat.).

———S. 58—*Defaulting proprietor—Purchase by effect.*

When a defaulting proprietor purchases at a sale under Act XI of 1859, he acquires under S. 53 the estate subject to all its incumbrances existing at the time of sale and does not acquire any rights in respect to under-tenants or raiyats which were not possessed by the previous proprietor at the time of the sale. (*Mookerjee A. C. J. and Fletcher, J.*) SATYENDRANATH BANERJEE *v.* KRISHNASAKHA KAR.

35 C L. J. 185=69 I. C. 67=1922 Cal, 193.

BENGAL LAND REVENUE SALES ACT (VII of 1868.)

———*Scope of.*

The Act extends the word "Revenue" to "every sum annually paid to Government by the proprietor of any estate or the rents of all description of tenures in respect thereof." (*Lord Shaw.*) HAJI BAKSH ILAHI *v.* DURLAV CHANDRA KAR.

39 Cal. 981=16 C. W. N. 842=23 M. L. J. 206=12 M. L. T. 385=(1912) M. W. N. 1005=14 Bom. L. R. 1063=10 A. L. J. 452=39 I. A. 177=16 I. C. 821=16 C. L. J. 620=

[On Appeal from 13 C. W. N. 633=3 I. C. 986=9 C. L. J. 341.]

———S. 2—*Order of Commissioner—Finality of—Review of order.*

An order of a Commissioner setting aside a sale for arrears of revenue is "final" under S. 2 of Bengal Act (VII of 1868) and is not open to review by him. (*Lord Atkinson.*) BAIJ NATH RAM GOENKA *v.* NAND KUMAR SINGH.

40 Cal. 552=40 I. A. 54=17 C. W. N. 485=13 M. L. T. 487=17 C. L. J. 583=18 I. C. 956=15 Bom. L. R. 500=(1913) M. W. N. 553 (P. C.).

BENGAL LAND REVENUE SALES ACT (VII of 1868), S. 28.

———S. 12 (3) and (4).

By S. 12 (4) the tenant is protected from ejectment by virtue of improvements made by himself or previous holder and clause 3 protects when the tenant's interest is recognized in the last temporary settlement and the rent has been fixed under the Rent Law. (*Newbould, J.*) RASHIK CHANDRA DUPI *v.* PEARY MOHAN CHOWDHURY.

58 I. C. 287 (Cal.).

———S, 12 Cl. (3)—'*Created or recognized*'—'*Recognition*' *meaning of—Regulation* (VII *of* 1882) *and B. T. Act, Ch.* X.

The expression "created or recognised" in S. 12, Cl. (3) of the Act is used with reference to S. 9 (2) and S. 14 (1) of Regulation (VII of 1882,) 'Recognition' means something more than a mere record of a fact found to exist. It involves the notion of either acquiescence in or sanction of a fact found to exist. S. 12 (3) of Act 1868 applies also to proceedings under Chap. X of the B. T. Act. (*Mookerjee and Beacheroft, JJ.*) LAKHINDAR BARNA *v.* SARODA CHARAN DE.

24 I. C. 253=20 C. L. J. 40.

———S. 12 (4)—*Annulment of tenure—Tank.*

To protect from the annulment of a tenure of land with permanent tanks, by a purchaser at a sale under the Act, it is unnecessary to establish who dug those tanks. (*Mookerjee, A. C. J. and Fletcher, J.*) PEARY MOHAN ROY *v.* RASIK CHANDRA DHABI.

58 I. C 543 (Cal.).

———S. 14—*Interest in non-agricultural or non-horticultural land—Protection from ejectment.*

The interest of a person in land neither agricultural nor horticultural can be annulled under S. 14 of Act (VII of 1868.) (*Jenkins, C. J. and Mookerjee, J.*) CHANDRA KUNDAN AICH *v.* CHAITANYA CHARAN DE.

21 I. C. 542=18 C. L. J. 232.

———S. 28—*Injunction—Sale certificate.*

Injunction should not be granted restraining a person from getting a sale-certificate, due to him according to S. 28 simply on the apprehension that he would be in better position for the proof of services of notices, which question could not be raised in the suit for injunction under S. 33 of the Law of 1859. (*Jenkins, C. J. and Mullick, J.*) R. G. BROWN *v.* MOFIZUDDIN CHOUDHURY.

19 I. C. 575 (Cal.).

BENGAL LANDLORD AND TENANT PROCEDURE ACT (VIII B. C. of 1869), S. 4.

——S. 4—*Occupancy right—Under-raiyat.*

In cases governed by the Act occupancy rights are not acquired by under-tenants holding under-raiyats as the under-tenants cannot become raiyats. (*Mookerjee*, A. C. J. *and Fletcher*, J.) KAMINI SUNDARA DASI *v.* PRASANNA KUMAR SEN.

38 I.C. 662=24 C.W.N. 685.

——S. 6—*B. T. Act, Ss. 4 and 20—Under-raiyat—Occupancy right by prescription.*

An under-raiyat who has remained in occupation of a certain plot of land and has cultivated it for more than 12 years can acquire a right of occupancy under S. 6 of Bengal Act (VIII of 1869). The distinction between a raiyat and an under-raiyat was not recognised by Bengal Act (VIII of 1869). Under that Act the term "raiyat" included all classes of tenants who were actual cultivators of the soil. It was immaterial whether such a cultivator held his tenancy under a middleman or under a person who, though an occupancy raiyat originally had placed another tenant in possession of the lands of his tenancy for purposes of cultivation, unless such sub-lease, was "for a term year by year". Even under the B. T. Act an under-raiyat may by custom acquire a right of occupancy. (*Huda*, J.) PRASANNA KUMAR SIL *v.* KAMINI SUNDARI DASI. **55 I.C. 231 (Cal.).**

——Ss. 14 and 29—*Notice of enhancement given more than three months before suit.*

The object of S. 14 of the Act is that a suit for enhancement should not be brought without at least three months' previous notice. When a notice under that section is once given, the suit for enhancement of rent can be brought two or three years afterwards. (*Newbould*, J.) ABHOYESWARI *v.* BHAGAHIRAM RAJBANSHI. **53 I.C. 52 (Cal.)**

——S. 18—*Prevailing rate.*

"Prevailing rate" in S. 18 does not contemplate a rate brought into existence by the landlord pending disputes with the tenants regarding enhancement of rent. (*D. Chatterjee and N. R. Chatterjee*, JJ.) ASIR MAHAMED SHAIKH *v.* RAJA PROBHAT CHANDRA BARNAI. **30 I.C. 1=21 C.L.J. 576.**

——S. 21—*Registered Kabuliat—Interest of 300 per cent—Misrepresentation—Tenants imposed upon—No valid contract.*

Where the Court below found that the interest in the registered kabuliyat at 300 per cent per annum was extortionate and unconscionable and gave the plff. interest at 75 per cent by way of compensation finding at the same time there must have been some sort of imposition practised on the defts. *Held*, that there was no contract which as far as the interest was concerned was capable of being enforced, and therefore it cannot be said that this was a matter provided for by a written agreement

BENGAL LANDLORD AND TENANT PROCEDURE ACT (VIII B. C. of 1869), S. 27.

under S. 2[illegible] of Act (VIII of 1869). (*Woodroffe and Huda*, JJ.) JAGAT CHANDRA SAHA *v.* BIRENDRANATH DUTTA CHOUDHURY **49 I.C. 805=23 C.W.N. 291.**

——S. 27—*Limitation—Recovery of possession.*

Section 27 has no application to a suit for recovery of possession by a tenant ousted by a co-sharer landlord. (*Woodroffe and Coxe*, JJ.) GANDO PATTUNI *v.* SARAT PATTUNI. **32 I.C. 510 (Cal.)**

——S. 52—*Transferee of non-transferable occupancy holding—Right to deposit—Rent decree—Execution.*

Where a landlord decree-holder seeks to eject the tenant of a non-transferable occupancy holding in execution of a rent decree, it is open to a third person claiming to be the transferee of a part of the holding to make the deposit so as to avoid the ejectment. (*Teunon and Cuming*, JJ.) KALI KISHORE DAS *v.* GOPAL RAM SAHA. **49 I.C. 766=23 C.W.N. 132.**

——S. 52—*Extension of time.*

The first Court cannot extend time in execution after the refusal of the Appellate Court to do so in appeal. S. 52 has no reference to S. 66 (3), Bengal Tenancy Act. (*Chatterjee and Newbould*, JJ.) SHEIK HUNAI *v.* SARAT CHANDRA DUTTA. **38 I.C. 467=21 C.W.N. 749.**

——S. 53—*Tenant holding over.*

A tenant who not being a cultivator with occupancy rights, holds over without the landlord's assent, acquires no interest in the land and can be ejected forthwith under S. 53 of the Act and the mere fact of the landlord's toleration of the tenant's holding over is not necessarily conclusive of acceptance of tenancy in future. (*Mookerjee and Roe*, JJ.) PARAMANANDA SINGH *v.* SYJON SINGH. **37 I.C. 201=24 C.L.J. 30.**

——Ss. 59, 64 and 65—*Non-transferable holding—Execution, sale of—Sylhet.*

In execution of a decree for rent in a case in Sylhet governed by Bengal Act VIII of 1869, (whether the decree is a decree for the co-sharer landlord's share of rent or a decree for the whole rent due on the holding which is non-transferable) the holding cannot be sold under S. 59 or 64 or 65 of the Act. (*Teunon and Newbould*, JJ.) ALOK CHAND PAL *v.* JALURAM NAMASUT. **45 I.C. 782=22 C.W.N. 563.**

——S. 102—*Rent suit—Claim below Rs. 100—"District Judge"—Additional District Judge.*

No second appeal lies under S. 102 of the Act in a suit for rent in which the amount claimed does not exceed Rs. 100 and in which none of the questions mentioned in the section arises for decision. The expression "District

BENGAL LANDLORD AND TENANT PROCEDURE ACT (VIII B. C. of 1869), S. 102.

Judge" in S. 102 of the Act includes an additional Judge. (*Beachcroft*, J.) JUADULLA *v.* SHEIK BAKSHI. 49 I.C. 519 (Cal.).

——S. 102—*Scope of.*

Under the section an appeal lies only when the judgment determines a question of right to enhance or vary rent or a question of title to or interest in land as between parties having conflicting claims thereto. An appeal will not lie, if merely a question as to the amount of rent payable is decided. (*Chatterjee and Roe*, JJ.) DINANATH SARMA *v.* SARMAN RAM DEB. 30 I.C. 277 (Cal.).

BENGAL LAND REVENUE SETTLEMENT REGULATION (VII OF 1822).

——*Settlemsnt—Enhancement of rent.*

In a settlement under the Regulation there can be no enhancement of rent unless the tenant expressly agrees. Two holdings, non-agricultural and agricultural, cannot be amalgamated without the consent of the tenant. (*Stephen and Mullick*, JJ.) ABDUL RAHIM *v.* SECRETARY OF STATE. 22 I. C. 626 (Cal.).

——*Duties of Settlement Officer.*

The Ragulation authorises the Settlement Officer to record the existing rent and not to settle fair rent. The fact that the *jamabandi* is signed by the tenant is not enough to show that he assented to the enhanced rent. (*Jenkins*, C. J. *and Mullick*, J) ISHUR CHANDRA SARKAR *v.* TRAYLOKYANATH SINGHA. 19 I.C. 675=17 C.W.N. 865.

——*Applicability of—Alluvial lands—Settlement—B. T. Act, ch. X.*

The provisions of S. 3 apply to alluvial lands. Proceedings under Ch. X of the B. T. Act are a preliminary to the Settlement of Land Revenue under Regn. (VII of 1822). A renewal of the lease by Government must be deemed to be subject to S. 3. Regn. (VII of 1822) lays down rules not only for ascertaining and recording rights and for determining rents but also rules as to how a settlement is to be made. (*Chatterjee and Newbould* JJ.) RADHA KANTA *v.* SECRETARY OF STATE. 30 I.C. 94=23 C.W.N. 265.

——Ss. 7 and 8—*Who can claim malikana—Entries in Arsatha if conclusive—Applicability of S.* 8.

Malikana is allowed to previous lessees of Government not accepting the settlement but it is not allowed where the settlement is made with the previous proprietor himself. S. 8 applies to persons having proprietary rights and not to persons who are in possession only without title. Arsatha entry is not conclusive unless it is adopted in the final settlement. (*Mullick and Jwala Prasad*, JJ.) SECRETARY OF STATE *v.* KHAJA MAHOMED JAN. 2 Pat. L.J. 266=39 I.C. 355=2 Pat. L.W. 213.

BENGAL LAND REVENUE SETTLEMENT REGULATION (VII of 1822), S. 14.

——S. 9—*Chur lands—Temporary Settlement—Enhancement of rents of tenants.*

In the case of temporary settled estates such as is chur land, it would always be open to the revenue authorities to re-assess the revenue and resettle the estate with effect from the expiry of a previous term of settlement. To enhance the rents of the tenants proceedings under Part II of Ch. X of the B. T. Act or S. 52 of the B. T. Act should be taken. (*Richardson and Suhrawardy*, JJ.) ASHUTOSH CHAKRABARTY *v.* DWARIKA NATH MOTA. 36 C.L.J. 192=27 C.W.N. 121=70 I.C. 119=1923 Cal. 207.

——S. 9—*Settlement officer—Entry as fair rent—Enhancement.*

A Settlement Officer under Regulation VII of 1822, does not settle or enhance rent but records rates of rent existing in the village. The effect of an entry by the Settlement Officer as to the fair rent payable by the cultivator has not the effect of enhancement of his rent so as to entitle the landlord to claim rent at that rate. 16 W. R. 153; 20 W. R. 207; 21 W. R. 410; 22 W.R. 540; 22 W.R. 436; 11 C. L. J. 60, Rel. (*Mookerjee and Beachcroft*, JJ.) JAGADINDRA NATH *v.* MOHENDRA NATH. 52 I. C. 90=23 C.W.N. 887.

——S. 10 (2), (3) and (4)—*Joint settlement—Default by Sudar Malguzar—Effect—Co-proprietor's share whether affected.*

Where a joint settlement is made under S. 10 (2), (3) and (4) all the Malguazars are jointly responsible for the payment of revenue although the mahal is managed by the Sudar Mulguzar and in cases of default by the Sudar Malguzar the entire tenure is liable to sale unless there is a contrary provision in the settlement. (*Miller*, C.J. *and Coutts*, J.) LALJIT UPADHAY *v.* WAJIHUNNESA BEGUM. (1919) P.H.C.C. 449=54 I. C. 658=5 Pat. L.J. 79.

——S. 14—*Entry in record.*

The tenants' predecessor was entered as raiyat in the Settlement Record. *Held*, that the Secretary of State for India could go behind the entry in the Record, in absence of dispute as to the nature of tenancy or any official proceeding incorporated in the Rubekari of the settlement. (*Fletcher and Teunon*, JJ.) SECRETARY OF STATE *v.* GOBIND PRASAD BARIK. 39 I.C. 934=21 C.W.N. 505.

——S. 14—*Scope of.*

S. 14 of Regn. (VII of 1822) gives the collector jurisdiction to decide disputes of the nature of tenancy, but does not apply to where rival tenants claim not only a tenancy of the same nature but the same land under the same nature of tenancy. (*Sharfuddin and Coxe*, JJ.) RAJANI KANT *v.* RAM DULAL DAS. 17 I. C. 881=17 C.W.N. 55.

BENGAL LOCAL SELF GOVERNMENT ACT (III of 1885), S. 76.

———*District Board By-laws, Rr.* 15 *and* 19 *—Encroachment on Dt. Bd.—Road side land—No formal acquisition by the Dt. Bd.—Conviction under—Whether legal.*

Conviction of the accused under Rules 15 and 19 of the Dt. Bd. By-laws for having encroached upon and cultivated land claimed by the Board to be then roadside land but never formally acquired by them, although its officers have been taking earth therefrom is illegal and must be set aside. A District Board can only take action and acquire right over Zemindar's land adjacent to its road under Act III of 1885. (*Holmwood and Sharfuddin*, JJ.) JADU GHOSH *v.* DISTRICT BOARD OF MURSHIDABAD.
18 Cr. L.J. 267=23 I.C. 475=19 C.L.J. 635.

———S. 76—*Channel—Property of private person—Dt. Board.*

A Dt. Board can bring a private channel under its control and administration only by making an agreement with the person in whom the property in any channel is vested, under S. 76 of the Bengal Local Self-Government Act. The fact that the Dt. Board had entered the Channel in its books and had spent money therein is not sufficient to bring the channel under the control and administration of the Dt. Board, and the persons erecting the weirs and fishing in it with the permission of the owners, committed no offence against the Dt. Board's Bye-laws. (*Carnduff and Imam*, JJ.) SHASHI BHUSH GUPTA *v.* EMPEROR.
18 I.C. 996=13 Cr. L.J. 580.

———Ss. 78, 139 and 140—*District Board has power to frame Bye-laws providing for penalty for encroachment on roads.*

The District Board has impliedly, if not expressly, power to provide for, by its bye-laws, the punishment of encroachments over its roads in order to carry out the provisions of S. 78 of the Act, *viz.*, to provide for the repairs and maintenance of its roads, etc. S. 139 of the Act empowers the District Board to make bye-laws and S. 140 empowers it to impose punishment for the breach of bye-laws. (*Jwala Prasad and Adami*, JJ.) MAHESH SHAH *v.* DARBARI HUSSAIN.
3 Pat. L.T. 464=1 Pat. 251=55 I.C. 571=23 Cr. L.J. 139=1922 Pat. 545.

———S. 138 (d)—*Scope of—Rules under—Validity of—Transfer of property.*

S. 138 (*d*) of the Bengal Local Self-Government Act, empowers the Lieutenant-Governor to frame rules which restrict alienations as well as to frame rules for the procedure to be adopted when alienations are made. Rules 93 and 98 framed by Lieutenant-Governor under the Act are not *ultra vires* and rule 98 which has to be read, with rule 93 is not merely directory but is mandatory and the combined effect of these two rules is that property which has vested in the District Boards cannot be transferred except with the previous sanction of the Local Government and except by an instrument under the Common Seal signed of the chairman and two members of the Board. Though a rule framed for regulating the power to transfer property cannot prevent or prohibit the exercise of that power, it can regulate the extent and the mode of exercise of such power. (*Mookerjee and Chatterjee*, JJ.) MATHURA MOHAN SAHA *v.* RAMKUMAR SAHA.
43 Cal. 790=23 C.L.J. 26=35 I.C. 305=23 C.W.N. 370.

BENGAL MUNICIPAL ACT (III of 1884).

———S. 146—*Negligence—Injury—Cause of action—Bengal Municipal Act (III of* 1884), *S.* 363.

In order to give rise to a fresh cause of action new injury (and not the development of an old one) is sufficient. The amputation of the leg, in the case was treated as a mere development. Hence the date of the first injury and not that of the developed one is the day from which the period of limitation is to be computed.

The negligence of public bodies, such as the Dt. Board and Municipality, in the discharge of their duties imposed by the statute falls under the purview of the above section. S. 146, Bengal Local Self-Government Act provides a period of limitation for a suit against the members of the Dt. Board and hence if properly construed it does not apply to a suit against the Board as a separate legal entity. (*Miller*, C. J. *and Adami*, J.) ALLAN MATHEWSON *v.* CHAIRMAN OF THE DT. BOARD, MANBHUM.
1 Pat. L.T. 269=3 Pat. L.J. 359=38 I.C. 749=1920 Pat. 193.

BENGAL MEDICAL ACT (VI of 1914).

———Ss. 27 and 33—*Election roll—Refusal to insert name of candidate—Remedy—Rules—Powers of Local Government.*

The High Court has no jurisdiction to compel the returning officer to include and publish the name of the applicant in the final election roll. Under rule 16 of the rules framed by the Local Government the decision of the Local Government on any question as to the application of the rules is final and cannot be questioned in any Civil Court. The Act which is referred to in S. 27 of the Act is not one done by the Local Government but done in exercise of any power conferred by the Act on the Local Government. Even if the rules framed by the Local Government under S. 33 are *ultra vires* an application for *mandamus* compelling the returning officer to include applicant's name in the final election roll is not sustainable. (*Woodroffe and Coxe*, JJ.) NARENDRA NATH BASU *v.* STEPHENSON.
31 I.C. 618=19 C.W.N. 129.

BENGAL MUNICIPAL ACT (III of 1884).

———*Offences under—Notice to accused by Vice-Chairman, when legal.*

A notice to the accused issued on the authority of the Vice-Chairman without delegation of authority by the Chairman by a written

BENGAL MUNICIPAL ACT (III of 1884), S. 6.

order, was not invalid if it was issued with the express or implied consent of the Chairman, obtained subsequently. (*Chitty and Walmsley*, JJ.) KISTOLAL *v* CHAIRMAN OF HOOGLI CHINSURAH MUNICIPALITY.
20 C.W.N. 824=37 I.C. 515=18 Cr. L.J. 147=24 C.L.J. 57.

——Ss. 6 (3), 101, 103 and 110—*Municipality—Assessment—Jurisdiction of Civil Court.*

When a Municipal Corporation has acted in contravention of the provisions of the statute in imposing an assessment, the assessment is illegal. 35 Cal. 859; 37 Cal. 374, *relied upon*. Where there is some indication that the assessment has possibly been illegal, but the plaintiff does not establish with regard to any particular holding that the assessment has been, in fact, made in contravention of statute and is liable to be declared *ultra vires* by a Civil Court the suit should be dismissed. The mere circumstance that the lands assessed by a Municipality form part of revenue paying estate is no ground for exemption from assessment of rates. "Holding" means land held by an occupier under one title and surrounded by one set of boundaries. (*Mookerjee and Carnduff*, JJ.) SHAH HAMID *v.* CHAIRMAN OF PATNA MUNICIPALITY. **17 C.W.N. 812=15 I.C. 548=17 C.L.J. 131.**

——Ss. 6 (4), 204 and 218—"*House*," *Meaning of.*

"House" in S. 6 (4) of the Act includes the land or premises engaged or held with the building. (*Richardson and Beachcroft*, JJ.) BHUSHAN CHANDRA DUTTA *v.* CHAIRMAN OF THE KOTECHANDPUR MUNICIPALITY.
46 I.C. 298=19 Cr. L.J. 714=22 C.W.N 376.

——Ss. 6 (4)—*Building—Meaning of.*

Building according to S. 6 (4) includes erections, structures or buildings such as masonry walls. (*Sharfuddin and Teunon*, JJ.) MAHANT MOHABIR DAS *v.* GAYA MUNICIPALITY. **26 I.C. 651=16 Cr. L.J. 59.**

——Ss. 6 (13) and 30)—*Highway—Characteristic.*

Where certain land is kept open for allowing people to visit a religious car and the people passed by the implied permission of the shebaits and for a certain time each year and the land is covered by booth from which the shebaits collect toll, it is not a public road. (*Coxe*, J.) KUMUD BANDO DAS *v.* KISHORI LAL.
9 I.C. 562 (C).

——S. 15—*Person—Right to vote—Member of a joint Hindu family has such right.*

The members of a joint Hindu family are persons within the meaning of S. 15 of the Bengal Municipal Act, 1884. Where "a person is otherwise qualified to vote for a municipal election under S. 15 of the Bengal Municipal

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Act he is not disqualified from voting merely because he is a member of a joint Hindu family. The right to vote conferred on every person who is qualified to vote under S. 15 of the Act cannot be cut down. (*N. R. Chatterjee and Suhrawardy*, JJ.) CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF DACCA *v.* KRISHNA DAS NAG. **64 I.C. 168=36 C.L.J. 189.**

——S. 15—*Rules for elections.*

Local Government, can under this section frame rules for the proper conduct of elections. (*Teunon and Newbould*, JJ.) MOLLA ATAUL HUG *v.* CHAIRMAN OF MANIKTOLLA MUNICIPALITY. **24 C.W.N. 969=37 I.C. 960=48 Cal. 378.**

——Ss. 15 and 69—*Rules under—Rule* 17 *—Infringement of—Effect on election.*

Where an infringement of rule 17 of the rules framed under the above Act is proved and it is shown that more than one half of the constituency do not vote at the election and it was not shown that the result of the election had not in fact been affected, the election must be set aside as contrary to law. A provision as to the time of opening and closing the polls is merely directory and not mandatory. A violation of a mandatory provision avoids the election. (*Mookerjee and Pantan*, JJ.) SHAYAM CHAND *v.* CHAIRMAN OF THE DACCA MUNICIPALITY. **30 C.L.J. 270=53 I.C. 741=24 C.W.N. 189.**

——S. 15—*Rules under—Commissioner's qualification for election—Person authorised to vote.*

A person possessing the qualifications given in rule 2 framed under S. 15 and duly registered as provided by rules 4 to 12 is a qualified voter and thus eligible under S. 13 for election as a Municipal Commissioner and Registration under Rule 8 as a representative of the Corporation does not disqualify him for election. (*Brett and Carnduff*, JJ.) RASH BEHARI GHOSHAL *v.* J. C. STALKART.
14 I.C. 166=16 C.L.J. 212=16 C.W.N. 710.

——S. 15—*Rr.* 6 *and* 11—*Rules for elections.*

Rules 6 and 11 framed under S. 15 are *ultra vires* so far as they apply to general elections. (*Teunon and Newbould, JJ.*) MOLLA ATUL HUG *v.* CHAIRMAN OF MANIKOTTA MUNICIPALITY. **24 C.W.N. 969=37 I.C. 960=48 Cal. 378.**

——S. 15, *Proviso. Cls.* (1) *and* (2), 85 *and* 103—*Qualification to vote—Payment of rates and income-tax—Voter to be legally liable to pay rates and tax—Owner—Occupier.*

A person whose income is below the taxable minimum but who submits to the levy of income-tax, does not thereby acquire the statutory qualification as a voter as contemplated by S. 15, proviso 2. The payment of

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sates to be available as a qualifying circumstance to a voter under S. 151 proviso (1) must be by a person legally liable to pay the same. Where a son has contributed considerable sums of money towards the acquisition and subsequent improvement of a house which was purchased in the name of his father who lives at Benares in retirement, the son is rightly treated by the Municipality as "owner" and is therefore, liable under S. 103 of the Act to pay rates assessed on the house and entitled to vote under S. 15, Cl. (1). (*Mookerjee and Teunon, JJ*). NARENDRA NATH *v.* NAGENDRA NATH. **38 Cal. 501 = 13 C.L.J. 471 = 10 I.C. 43 = 13 C.W.N. 586.**

———**S. 15, prov. 2**—*Rules under—Suit for injunction.*

A suit for injunction by a voter against the Chairman of a Municipality for his refusal to insert his name in the register of voters on a technical ground is maintainable under C.P.C., S. 9, Sp. Rel. Act, S. 42 and Bengal Municipal Act, S. 15, prov. 2. (*Teunon and Newbould*, JJ.) MOLLA ATAUL HUG *v.* CHAIRMAN, MANICKTOLLA MUNICIPALITY.
24 C.W N. 969 = 57 I.C. 960 = 48 Cal. 378.

———**S. 15, cl. (2)**—*Right to vote—Joint assessment to Income-tax is sufficient to give.*

Where the income of both the father and the son are assessed, that fact is sufficient to qualify both of them to claim to be voters under cl. 2 of S. 15, the jointness of their family notwithstanding. (*Huda*, J.) CHARU CHANDRA MAJUMDAR *v.* CHAIRMAN OF THE MUNICIPALITY OF FARIDPUR.
70 I.C. 154 = 26 C.W.N. 412.

———**S. 15, cl. (3)** — *Occupation — Joint living with father is not sufficient.*

It is not sufficient to constitute occupation for the purpose of franchise that a son living with his parents should be allowed the sole use of the room without contract or payment of rent. (*Huda*, J.) CHARU CHANDRA MAZUMDAR *v.* CHAIRMAN OF THE MUNICIPALITY OF FARIDPUR. **70 I.C. 154 = 26 C.W.N. 412.**

———**Ss. 29, 34, 37**—*Execution of deed by municipal council—Formalities for.*

The expression "signed" in S. 37 of Beng. Mun. Act implies that the signature must be affixed for purposes of execution of the document and the insertion of a name, in any part of the writing, in a manner to authenticate the instrument, is sufficient. But if the name occurs in a document, not as authenticating the whole, but only for a particular purpose or only with reference to a part, it is not an effective signature. (*Mookerjee and chotzner*, JJ.) J. D. EZEKIEL *v.* ANANDA CHARAN SEN. **50 Cal. 180 = 70 I C. 794 = 36 C.L.J. 109 = 1923 Cal. 35.**

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———*S. 29—Suit against Municipality—Damages against officers of Municipality for wrong—Joinder of Vice-Chairman and Officers.*

Where no damages are claimed against the officers of a Municipality for any wrong done by them personally and relief is sought against the Municipality itself the only proper deft. in the suit is the Chairman of the Municipality. The joinder in the suit as defts. of the Vice-Chairman of the Municipality and its officers was not proper. (*Chitty and Panton*, JJ.) CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF KUSHETA *v.* SATISH CHANDRA.
46 Cal. 784 = 51 I.C. 993 = 23 C.W.N. 611.

———**S. 30**—*Private path way.*

A private pathway does not vest in the Municipality under S. 30 even after the amendment of the Act, 33 Cal. 1290, Foll. (*Fletcher and Richardson*, JJ.) CHAIRMAN, HOWRAH MUNICIPALITY *v.* HARIDAS DATTA.
43 Cal. 130 = 33 I.C. 271 = 20 C.W.N. 613.

———**Ss. 30 and 34**—*Powers of Municipal Commissioners.*

Under Ss. 30 and 34 of Bengal Act (III of 1884), Municipal Commissioners have powers to abandon an old road for a new one, to exchange lands for public purposes, acquire lands necessary for improvement of a road and to straighten a crooked road and dispose off fragments of the old road falling outside the alignment of the new one. (*Coxe*, J.) KHALIL RAHMAN *v.* DACCA DISTRICT BOARD.
11 I.C. 28 (Cal.)

———**S. 30**—*Applicability of.*

The words "not being private property and not being maintained by Government or at public expense" do not apply to "all roads including the soil." (*Coxe*, J.) KUMUD BHANDHO DAS *v.* KISHORI LAL.
9 I.C. 562 (Cal.)

———**S. 30**—*Levy of rent or toll—Goods placed on the road—Right of Municipality.*

In the absence of a contract creating the relation of landlord and tenant, the Municipality is not entitled to levy a tax from any person.

The property in the road has been vested in the Commissioners by S. 30 of the Act and the Municipality can use the road as owner of it for the purposes of the Act. (*Jwala Prasad*, J.) DHUNMUN CHOWDHURY *v.* EMPEROR.
3 Pat. L.T. 339 = 25 Cr. L J. 114 = 76 I.C. 178 = 1922 Pat. 286.

———**Ss. 34, 43 and 44**—*Lease of municipal property without sanction by resolution is void*

A lease of Municipal property would be void unless the lease had been sanctioned by the Commissioners at a meeting. The burden

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clearly lies upon the defendant lessee to establish that the requirements of the statute were fulfilled. In the normal course of events, the resolution adopted at a meeting of the Commissioners must be recorded; and S. 43 provides that minutes of the proceedings of a meeting of the Commissioners shall be entered in a book to be kept for the purpose and shall be signed by the president of the meeting, and such book shall be open to the inspection of the tax-payers.

Where the minute book has been produced, and there is no trace of a resolution on the subject, the position is that there is no valid lease.

Where a corporation is constituted by a statute, all persons and corporations are presumed to know the nature and extent of its powers. (*Mookerjee and Chotzner*, JJ.). AKSHAY KUMAR CHAND *v.* THE COMMISSIONERS OF BOGRA MUNICIPALITY.
37 C.L.J. 389=78 I.C. 506=1923 Cal. 675.

——S. 34—*Highway—Control by Municipality.*

If the public have a right of way over a private pathway, the Municipality have some control over such a pathway under S. 31 so as to prevent the road becoming a nuisance or the rights of the public being interfered with. (*Fletcher and Richardson*, JJ.) CHAIRMAN, HOWRAH MUNICIPALITY *v.* HARIDAS DATTA.
43 Cal. 130=33 I.C. 271=20 C.W.N. 613.

——S. 44—*Prosecution under Food Adulteration Act, cannot be sanction under.*

S. 44 of the Bengal Municipal Act does not empower the Chairman of a Municipality to sanction a prosecution under S. 6 of the Bengal Food Adulteration Act. (*Newbould and Suhrawardy*, JJ.) RAGHUNATH MODY *v.* KURSEONG MUNICIPALITY. **25 Cr. L.J. 170=76 I.C. 394=1923 Cal. 561.**

——S. 45—*Chairman — Delegation of power.*

Under S. 45 of the Act, a Chairman cannot delegate to the Vice-Chairman, his powers under the Licensed Warehouse and Fire Brigade Act. (*Newbould and Suhrawardy*, JJ.) REMEMBRANCER OF LEGAL AFFAIRS *v.* MULL. **25 C.W.N. 960=66 I.C. 428=34 C.L.J. 203.**

——S. 57—*Teacher in a Municipal School—Commissioner—Election rules, R. 13.*

A person who is disqualified under S. 57 of the Act is *ipso facto* disqualified for election as a Municipal Commissioner. A person holding a teachership in a Municipal School is not qualified to be elected as a Commissioner as he holds an office of profit under the Municipality. Rule 13 of the Election Rules means that only those persons should be included in the list of candidates who are qualified to be elected. (*Chitty and Walmsley*, JJ.) LAKSHIMI KANTA DE *v.* THE CHAIRMAN OF THE NAIHATI MUNICIPALITY. **47 I.C. 169 (Cal.)**

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——S. 60—*Municipal servant—Conviction—Appeal—District Magistrate—When debarred from hearing.*

A District Magistrate, who has merely received proceedings of a Municipality, is not debarred from hearing an appeal against the conviction of a Municipal servant unless he is in any way concerned with the Municipality. (*Jwala Prasad*, J.) TEJ NARAIN SINGH *v.* EMPEROR. **22 Cr. L.J. 387=61 I.C. 518=3 U.P.L.R. (Pat.) 55.**

——S. 85—*"Circumstances and property within the Municipality"—Meaning of.*

"Within the Municipality" in S. 85, govern both "circumstances" and "property" and the word "circumstances" must be interpreted as equivalent to "means." When a tax-payer resident within the Municipality, brings to his residence his income, no matter where earned or from what source derived, the income thus brought, to be spent and enjoyed within the Municipality, becomes part of his "means or "circumstances" within the Municipality and liable to assessment under S. 85 of the Act. (*Teunon and Newbould*, JJ.) CHAIRMAN OF THE COMMISSIONERS JOYNAGAR MUNICIPALITY *v.* SAILAHALA DATTA. **43 Cal. 443=61 I.C. 511=25 C.W.N. 47.**

——Ss. 85, 86 and 103—*Owner and Occupier—Meaning.*

Bare ownership of a holding within a Municipality does not mean rateable occupation, i.e., every occupier is not an owner and every owner is not an occupier. To constitute rateable occupation there must be use and enjoyment capable of being beneficial. (*Mookerjee*, A.C.J. *and Fletcher*, J.) SHAMSUDDIN *v.* PEYRI LAL DAS. **60 I.C. 498=25 C.W.N. 282.**

——Ss. 85, 113, 114 and 116—Ultra vires assessment—*Civil Courts' Powers.*

In an action for recovery of tax it is open to the assessee to urge in defence that the assessment is not in conformity with statutory provisions and *ultra vires*; the question can be opened by a Civil Court. The decision of the Commissioners under S. 111 of the Act is final only, when the assessment is made in accordance with S. 85. An assessment of tax under S. 85 (*a*) with reference to property and income of an assessee outside the Municipality is *ultra vires*. (*Chatterjee and Newbould*, JJ.) CHAIRMAN, RAJPUR MUNICIPALITY *v.* NOGENDRA NATH. BAGCHI. **23 C.W.N. 475=30 I.C. 394=29 C.L.J. 379.**

——Ss. 85 and 116—'*Circumstances,*' *meaning of—Assessment—Court's power.*

The word 'circumstances' in S. 85 of the Act is equivalent to 'means' so that the taxation should be according to the means and property of the rate-prayer within the Municipality. 35 Cal. 859, Foll. The assessment of the value of

the circumstances and property of the rate-payer for the purpose of S. 85 of the Act cannot be done by the Courts but only by the machinery provided by the Act itself. The non-disclosure by the Municipality of the basis of rate-payer's assessment, raises a *prima facie* case that elements other than the circumstances and property have been taken into consideration and that the assessment is illegal. (*Jenkins*, C. J. *and Mookerjee*, J.) DEB NARAIN DATTA *v.* CHAIRMAN OF THE BARUIPUR MUNICIPALITY, **41 Cal. 168=17 C.W.N 1230=20 I.C. 264=19 C.L.J. 205.**

———S. 85——*Municipality—Lessee if exempt from paying rates—Onus of proof of exemption.*

A lessee from a Municipality must pay Municipal rates unless there is provision in the lease for exemption and he must establish an exemption from the statute. 8 C.L.J. 525, Rel. (*Mookerjee and Carnduff*, JJ.) DEBI DAS *v.* CHAIRMAN OF MOTIHARI MUNICIPALITY. **13 I.C. 188. (Cal.)**

———S. 85—*Assessment—Conditions.*

To make the assessment under S. 85 by the Municipality valid, both the circumstances and the property of the person taxed must be within the Municipal area. (*Jenkins*, C.J. *and Chatterji*, J.) DEB NARAYAN DUTT *v.* CHAIRMAN OF THE BARUIPUR MUNICIPALITY. **12 I C. 32=39 Cal. 141.**

———S. 85—*Assessment—Circumstances and Property within Municipality—Income from Zemindari situate beyond the Municipality.*

Income from Zemindari situate outside the Municipality cannot be assessed, as it is not covered by the expression "circumstances and property within the Municipality" as under S. 85 the word "within" controls both the words "circumstances" and "property." (*Sultan Ahmed*, J.) KHAJA SYED MAHOMED ALI NAWAB *v.* CHAIRMAN OF THE BIHAR MUNICIPALITY. **56 I.C. 821=1 Pat L.T. 591.**

———S. 85 (a)—*Applicability—Several persons—Joint holding—"Circumstances and property."*

S. 85 (*a*) of the Act is not limited to a case where only one person occupies an entire holding. Where the possession of a holding by each of the several persons is actual and as of right and where a personal tax is in operation, each is subject to assessment according to his "circumstances and property" within the Municipality. Where sale proceeds of tea grown outside the Municipality are brought and placed in a Bank to the credit of a corporation, within the Municipality they or their "circumstances and property" within the Municipality are liable to be assessed to tax under S. 85 (*a*) of the Act. (*Mookerji and Buckland*, JJ.), CHAIRMAN JALPAIGURI MUNICIPALITY *v.* JALPAIGURI TEA CO. **54 I.C. 649=34 C.L.J. 283.**

———S. 85 (a)—*Means outside Municipal limits should not be considered.*

In assessing tax under S. 85 (*a*), the property and means of the assessee outside the Municipal limits should not be considered. The test to measure the means is to see what is earned within the Municipality. (*Asutosh Mookerjee*, A.C.J. *and Fletcher*, J.) DIBENDRA NATH RAI *v.* PRAVAB CHANDRA GHOSE. **60 I. C. 284=32 C L J. 210=28 C.W.N. 45.**

———S. 85 (a)—*Assessment—Naib—Zemindar's house—No rent—Zamindar liable for tax—House and kacheri.*

The *Naib* of a Zemindar who was occuping a small house adjoining the Zemindar's kacheri, did not pay any rent. The Municipality assessed taxes under S. 85, cl. (*a*) of the Municipal Act. *Held*, that the occupier of the house was the Zemindar, and therefore he, and not the plff. was liable to be taxed in respect of it. *Obiter*:—The plff's house and the kacheri house were not one holding for the purposes of the assessment under S. 85, cl. (*a*) (*Rampini and Mookerjee*, JJ.) GOBINDA CHANDRA GANGULY *v.* KAILASA CHANDRA SANYAL. **15 I.C. 909=15 C.L.J. 689.**

———S. 85-A.—*Zemindari outside Municipality—Income derived from—Whether "circumstances and property within the Municipality."*

Income derived by a person residing within the Municipality from a Zemindari outside the Municipality is not "circumstances and property within the Municipality" within the meaning of S. 85. (*Coutts and Dass*, JJ.) CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF THE MUNICIPALITY OF BEHAR *v.* RAMDEO DAS. **54 I.C. 227=4 Pat. L.T. 678=(1920) Pat. 120.**

———S. 87—*List not showing income does not invalidate the assessment.*

Every defect in the assessment list prepared under S 87 of the Act does not destroy the jurisdiction of the commissioner and render the assessment *ultra vires*. Where the list does not show the income upon which the tax was assessed, it is only a defect in form and does not invalidate the assessment. (*Mookerji and Buckland*, JJ.) CHAIRMAN, JALPAIGURI MUNICIPALITY *v.* JALPAIGURI TEA CO. **54 I.C. 649=34 C L.J. 283.**

———Ss. 97-A, 102 and 108—*Extension of Municipal limits—Tax—Added area if a new holding.*

A portion only of a holding being within the Municipal limits was assessed with Municipal tax, but later on the Municipal limits were duly extended so as to include the whole holding. *Held*, that the entire plot which was held by the assessees under one title constituted one holding and was liable to assessment as such upon the extension of the Municipal limits.

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The tax with reference to the area formerly within the area of the Municipality could not be enhanced during the quinquennium on the ground of the area of the holding having increased by reason of the extension of the Municipal limits, neither S. 97-A nor S. 102 nor S. 108 being applicable to the case. (*Chitty and Panton, JJ.*) CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF KUSTRA *v.* SATISH CHANDRA. **46 Cal. 784 = 51 I.C. 993 = 23 C.W.N. 611.**

——S. 101—*Waterworks — Storage and balancing tank is not machinery.*

The Corporation of Calcutta owned a reservoir and pumps for the supply of water to Calcutta. They erected a large tank called a balancing tank supported on columns so as to give it elevation. This tank could be filled by pumping from the reservoir, and when desired water could be released from it into the main supply pipe nearer Calcutta than the reservoir. The water so released flowed through the pipe by force of gravity; it not only increased the supply by its own volume, but also accelerated the velocity of the whole body of water passing through the supply pipe. The tank enabled the appellants to increase the supply during part of the day when the hourly consumption exceeded the capacity of the reservoir and pumps:—*Held*, that balancing tank was not "machinery" within S. 101 of the Bengal Municipal Act. (*Lord Atkinson.*) CORPORATION OF CALCUTA *v.* COSSIPORE AND CHITPORE MUNICIPALITY, **49 Cal. 190 = 26 C.W.N. 761 = 67 I.C. 926 = 15 L W. 253 = 48 I.A. 435 = 1922 P.C. 27 (P.C.)**

——S. 101, proviso 3—*'Machinery'—Overhead tanks to provide suburbs with filtered water—Assessable value.*

The overhead steel tank constructed by the Calcutta Municipality on premises No. 1, Khelat Babu's Lane, within the Municipality for the supply of filtered water to Calcutta is not 'machinery' within S. 101 and is not exempt from assessment as such.

Per *Fletcher and Greaves, JJ.*—If the tank was machinery, its existence could not be taken into account in assessing the value of the holding in view of the express terms of the third proviso to S. 101. Meaning of 'machinery' discussed. (*Fletcher, Beachcroft and Greaves, JJ.*) COSSIPORE CHITPORE MUNICIPALITY *v.* THE CORPORATION OF CALCUTTA **46 Cal. 910 = 54 I.C. 337 = 28 C.W.N. 727.**

——S. 135 — *Construction — Municipal Ferry—Right of private owners.*

The Public Ferries Act does not apply to Municipal Ferry according to Beng. Municipal Act. The Beng. Municipal Act, S. 155 cannot be construed in the light of Bengal Ferries Act. The right of ferry is not encroached if an unlicensed Ferry carries passengers from a place

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outside the prescribed area of two miles if the landing places at both the banks are beyond two miles. In the expression within a distance of two miles above or below the ferry, the distance is to be counted as along the banks of the river and not as radial distance.

The banks referred to in the last clause mean banks of the same river and the clause applies only where the river is partly within and partly without the Municipal limits. (*Chatterjee and Richardson, JJ.*) KASIM ALI *v.* CHAIRMAN OF MUNICIPAL COMMISSIONERS, CHITTAGONG. **21 C.W.N. 601 = 35 I.C. 782 = 25 C.L J. 639.**

——Ss. 178 and 271—*Objections to notice not legally disposed of — Prosecution is not justifiable.*

Where a notice is served on a person to remove a latrine under the Bengal Municipal Act, he is allowed to file an objection which has to be disposed of under S. 178. If the objection is allowed the original order is cancelled thereby; if not, a fresh period of time is to be given to comply with the requisition.

Where therefore an objection petition was filed, but that was not legally disposed of, and no fresh period of time was mentioned for removing the latrine *Held*, a prosecution under S. 271 was illegal. (*Jwala Prasad, J.*) RAMPARTAP LAL *v.* BARH MUNICIPALITY. **66 I.C. 417 = 3 Pat. L T. 301 = 23 Cr.L.J. 273 = 1922 Pat. 183.**

——S. 202 — *Applicability — Dispute as to title—High Court can interfere in revision.*

S. 202 of the Act cannot be applied where there is a dispute between any person and the Municipality with regard to the title to any land. Such a dispute must be decided in the ordinary way by a Civil Court. An order by a Magistrate under S. 202 of the Act is a judicial proceeding and the High Court has power to revise such an order. (*N. R. Chatterjea and Cuming, JJ.*) ALOKE MOHAN SAHA *v.* NARAYANAGANJ MUNICIPALITY. **59 I.C. 137 = 22 Cr. L.J. 25 (Cal.)**

——Ss. 202, 204 and 233—*Encroachment—Erection of structures.*

A person encroaching on the surface of a Municipal street by erecting a projection, without objection on the part of the Municipality, has no right to run up the projection to any height he likes, even though he does not thereby makes any further encroachment across the street. (*Fletcher and Panton, JJ.*) RAKHAL CHANDRA DE *v.* CHAIRMAN OF THE SURI MUNICIPALITY. **47 I.C. 306 (Cal.).**

——Ss. 202, 204, 218, 333—*Failure to comply with requisition under Ss. 202, 204—Limitation.*

On a failure to comply with a requisition under Ss. 202, 204 of the Act the limitation of

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six months under S. 353 begins to run from the date of the expiry of the period allowed for compliance with such requisition. (*Adami and Bucknill*, JJ.) GULAM RASUL *v.* EMPEROR.
22 Cr. L. J. 427=61 I.C. 715=
2 Pat. L. T. 390=6 P. L.J. 174.

——Ss. 209 and 353—*Agreement with Municipality—Imposition of conditions is not necessarily illegal.*

It is open to a Municipality by a requisition under S. 209 of the Bengal Municipal Act, to compel a person to erect a fence by the side of a tank. The person so bound can validly transfer to the Municipality the duty by conditions entered into by the latter with the former.

The language of S. 209 of the Beng. Mun. Act, is only indicative of this, that there is power in the Municipality to require a person to cause a fence to be erected by the side of a tank. But, because the power is existent in the Municipality by virtue of statutory provisions, it does not follow that the Municipality cannot accept conditions imposed by a person when he made a free gift of certain land to the Municipality. There is nothing in the Municipal Act itself which can remotely suggest that the Municipality is incompetent to enter into a binding engagement of this description. If that is so, the Municipality was held in the circumstances of the particular case, not competent to require him to cause a fencing to be erected at his own cost. (*Ghose and Cuming*, JJ.) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* NARAYAN CHANDRA BANERJEE.
38 C.L.J 13=73 I C. 776=
24 Cr. L.J. 680=1924 Cal. 101.

——S. 217—*Public road.*

A road within S. 217 should include a public right of way. (*Stephen and Carnduff*, JJ.) NANDO LAL *v.* BEJOY CHANDRA,
46 I.C. 818 (1)=19 Cr.L J. 742 (1)
=22 C.W.N. 599.

——Ss. 217, 273 and 353—*Prosecution—Consent of Commissioners—Evidence of sanction—Public authority—Consent in writing.*

The only evidence of sanction of prosecution by a public authority, is writing under the seal and signature of that authority. Where in a tabular form called the 'prosecution form' in the remarks column the words' I have seen' occurred and it was signed by the Commissioner and where in another form there was the word 'prosecute'. *Held*, that this was not authority, written or otherwise showing the consent of the Commissioners, or the Vice-Chairman on their behalf to a prosecution within S. 353 of the Act (1884). The authority which the Vice-Chairman has, is to convey the sanction of the Commissioners and not to pass any orders of any kind, and he must convey that sanction under his own seal, and signature to

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the Magistrate. (*Holmwood and Imam*, JJ.) RASLU BAKSH *v.* THE MUNICIPAL BOARD OF CHAPRA. 15 I.C. 796=13 Cr. L.J. 524=
16 C.W.N. 934.

——S. 218—*Conviction under—Legality.*

A conviction under S. 218 cannot be sustained when the essential preliminary steps according to Ss. 175, 176, 178 and 179 of the Act have not been observed before an application was made to the Magistrate under S. 202 of the Act for the criminal prosecution. (*Mookerjee and Sheepshanks*, JJ.) NABIN CHANDRA AICH *v.* NOAKHALI MUNICIPALITY. 28 C.L J. 598=
34 I.C. 988=17 Cr. L.J. 265=21 C.W.N. 470.

——S. 224—*Drain—Order for removal of—Power of Municipality—Estoppel.*

The Municipal Commissioners have no power under S. 224 or any other section of the Act to require the owner or occupier of a building to remove a drain in the building not being a branch drain nor one leading to a public sewer. Consent to an *ultra vires* order does not estop plff. from questioning it. (*Chatterjee and Walmsley*, JJ.) GOPAL MISSER *v.* KERAT CHAND. 20 I.C. 358=20 C L.J. 138.

——S. 224—*"Cesspool and drain"—Meaning.*

A channel for passage of water is not a drain unless it is shown that offensive matter passes through it and cesspool is pit into which water is discharged from drain as defined above and not any channel. Pits for collecting rain water and rice water are not cesspools and cannot be removed or closed by Municipality under S. 224. (*Roe and Jwala Prasad*, J.) KASI PATY MUKHERJEE *v.* CHAIRMAN OF THE PURI MUNICIPALITY.
40 I.C. 552=1 Pat. L.W. 774.

——Ss. 230, 271 and 353—*Inspector's report signed by Chairman, if complaint.*

Where a report of a Municipal Inspector with a recommendation to prosecute a party for offences under Ss. 230 and 271 of the Act was signed by the Chairman and bore an 8-anna stamp, *held*, that the document was not a petition of complaint but was a consent by the Chairman to the prosecution, under S. 353 of the Act and was sufficient for the purpose of the prosecution. (*Chitty and Walmsley*, JJ.) KRISTOLAL *v.* CHAIRMAN OF HOOGLI CHINSURAH MUNICIPALITY. 37 I.C. 515=
24 C.L.J. 57=18 Cr L.J. 147=
20 C.W.N. 824.

——S. 234—*Municipality cannot lease out road.*

S. 234 of the Act is an emergency section whereby a person who wants to use a road is temporarily allowed to deposit any moveable property on it, on payment of reasonable fees to the Municipality. But under the section, the municipality is not entitled to lease out its right

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for carrying on trade, etc. (*Jwala Prasad*, J.) DHUNMUN CHOWDHURY *v.* EMPEROR.
76 I.C. 178=3 Pat. L.T. 339 =25 Cr. L.J. 114=1922 P. 286.

——S. 237—*Sanction cannot be given with —Restrictions.*

The erection of a new verandha, in the place of an old one, is liable to be demolished under S. 237 of the Act, if, in contravention of Municipal sanction. A Municipal Council has no power to sanction a building with restrictions unless it has made rules for restriction. Where sanction is given with restrictions which are *ultra vires* of the Council, they can be disregarded. (*Coutts and Macpherson*, JJ.). BRIJ BEHARI LAL *v.* MUNICIPAL COMMITTEE, DALSONGUNJ.
63 I.C. 355=1921 Pat. 347.

——Ss. 237, 240, 241—*Erection of boundary wall is not a material alteration and cannot be prohibited.*

A material alteration or enlargement of any building, under S. 240 of the Act means erection of anything on a site attached or detached from any building standing on it, so as to alter the structure of the building on the site and therefore the erection of a boundary wall is not a material alteration or enlargement under S. 240. Consequently the Commissioners have no power to make a by-law under S. 241 prohibiting the erection of any such boundary wall within 5 feet of any public road. (*Dass and Ross*, JJ.) BASANTA KUMAR *v.* CHAIRMAN, MUNICIPAL COMMISSIONERS OF GIRIDHI. **63 I.C. 290=1921 Pat. 349.**

——Ss. 237, 238 and 240—*"Erect or re-erect a building"—Meaning of—Pulling down and putting up again whether re-erection.*

The words "erect or re-erect," in S. 240 of the Act do not necessarily mean build or re-build an entire house from its foundation. It depends upon the circumstances of each case. Pulling down and then putting up the whole of a balcony is not a "re-erection" within the meaning of S. 240. (*Chamier, C.J., Chapman and Jwala Prasad*, JJ.) CHAIRMAN OF GAYA MUNICIPALITY *v.* SHAM LAL GUPTA.
2 Pat. L.W. 190=41 I.C. 713= 3 Pat. L.J. 33=1917 Pat. 338.

——Ss. 238 and 240—*Building of new masonry wall—Whether erection of a house.*

The building of a new and additional masonry wall which materially enlarges a courtyard does constitute the erecting of a house within Ss. 238 and 240 and its erection without sanction of the Commissioner is an offence. (*Sharfuddin and Teunon*, JJ.) MAHANT MOHABIR DAS *v.* GAYA MUNICIPALITY.
26 I.C. 651=16 Cr. L.J. 59 (Cal).

——S. 238—*Notice under—Time should run from date of knowledge of building.*

There is nothing in S. 238 of Bengal Municipal Act to suggest that the period of 15 days should run from the date on which the Commissioners have knowledge of the building. The period should run from the date of the commencement of the erection of the building. (*Coutts and Macpherson*, JJ.) RAMDHANI LAL *v.* CHAIRMAN OF PATNA MUNICIPALITY. **69 I.C. 183 =1 P. 42=3 Pat. L.T. 779= 1922 P. 485.**

——S. 240—*Platform, construction of, on open space between house and drain, whether erection of building.*

A platform erected on the open space intervening in the street drain and the house, amounts to an erection of a building under S. 240 of the Act for which previous sanction is necessary. (*Atkinson*, J.) CHAIRMAN OF GAYA MUNICIPALITY *v.* SUKAN SINGH.
37 I.C. 854=3 Pat. L.W. 252.

——Ss. 241 and 273—*Building below plinth level—Conviction.*

The evidence for the prosecution showed that the accused had only laid the foundation a few feet below the ground-level, the brick work of which had not even reached the plinth level and there was no evidence to show the kind of building he was going to construct.

Held, that a conviction under S. 234 of the Act could not be maintained, because there was in fact no building in existence and it was not shown whether and where the building would be erected. (*Atkinson and Jwala Prasad*, JJ.) SHIV DUTT RAY *v.* BABU SATISH CHANDRA. **52 I.C. 386= 20 Cr. L.J 626 (P.).**

——S. 241 (d)—*Rules, object and construction of—Jurisdiction, excess of—Effect of.*

S. 241 (*d*) indicates the lines upon which the rules should be framed. If the Municipality exceeds in jurisdiction, the rules are *ultra vires*. The rules should not be construed too strictly. (*Atkinson*, J.) CHAIRMAN OF GAYA MUNICIPALITY *v.* SUKAN SINGH.
37 I.C. 854=3 Pat. L.W. 252.

——S. 241 (d), rule 1—*Gaya Municipality, powers of, to frame rules—Order to leave open space between house and street drain, legality of.*

Rule 1 of the rules framed by Gaya Municipality under powers vested in it by S. 241 (*d*) is not *ultra vires*. An order by the Municipality to a house owner to leave an open space between the external wall of the house and the drain is not illegal. (*Atkinson*, J.) CHAIRMAN OF GAYA MUNICIPALITY *v.* SUKAN SINGH.
37 I.C. 854=3 Pat. L.W. 252.

——Ss. 241 (3) and 242 (A)—*Party aggrieved by order under Sec. 241 (3)—Remedy of—Suit in Civil Court, when maintainable.*

A person aggrieved by an order under S. 241 (3) has a statutory remedy of an appeal to the Commissioner, provided by S. 242 A, and that

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while that remedy exists unexhausted it is not open to him to seek redress in a Civil Court. (*Atkinson, J.*) CHAIRMAN OF GAYA MUNICIPALITY *v.* SUKAN SINGH.

37 I.C. 355=3 Pat. L.W. 252.

——S. 242—*Action of Magistrate—Liability of the Municipality.*

Where on the recommendation of the Municipality the magistrate had a full enquiry made and passed an order under S. 144, Cr. P. C., to demolish a hut as being dangerous to the Municipality, he is in no way responsible for any damage caused thereby even if his order was wrong. (*Holmwood and Chapman, JJ.*) HARI CHARAN *v.* SURENDRA NATH.

18 I.C. 84 (Cal.).

——S. 250—*Ghee not for sale—Seized—Ghee in the custody of the bailee with consent of owner—Return to bailee.*

Where a bailee of goods has parted with possession with the consent of the owner, he cannot claim them back. Where ghee at the time it was seized was not put up for sale as fit for human consumption, it could not be seized under S. 250 of the Bengal Municipal Act. (*Jwala Prasad, J.*) RAM CHAND MARHATIA *v.* RAM PRATAB. 4 Pat. L.W. 62= 43 I.C. 796=19 Cr. L J. 220.

——Ss. 261 and 272 (2)—'*Kiln*'—*Country panjas or clambs or not kilns.*

A "Kiln" within the meaning of S. 273 (2) of the Bengal Municipal Act is a structure of a permanent nature. Making bricks by panjas or clamps as is done in the country side does not amount to using the place as a kiln and no offence is committed thereby under S. 273 of the Beng. Mun. Act. (*Sanderson, C.J. and Panton, J.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* TRAILOKHYA NATH CHATTERJEE.

26 C.W.N. 926=36 C.L.J. 168= 49 C. 1014=72 I.C. 356= 24 Cr. L.J. 356 (2)=1922 Cal. 194.

——S. 261—*Applicability—Section covers place of business from which offensive or unwholsome smells may arise.*

S. 261 of the Beng. Mun. Act covers a case of a manufactory or place of business from which offensive or unwholesome smells may arise. The section covers not only cases which are *per se* offensive or noxious but also a manufactory or place of business from which offensive or unwholesome smells may arise. (*Chatterjea and Panton, JJ.*) GOBIND CHANDRA MULLICK *v.* THE CHAIRMAN OF THE HOOGLY AND CHINSURA MUNICIPALITY.

26 C.W.N. 994=36 I.C. 518=1922 Cal. 99.

——Ss. 261 and 272(2)—*Such local limits as may be fixed—Meaning of resolution—Loss of—Evidence—If terms of resolution may be presumed—Official acts—Evidence Act, S. 65, 76 and 114 (e).*

BENGAL MUNICIPAL ACT (III of 1884), S. 290.

S. 261 of the Bengal Municipal Act is wide enough to be applied to all places within Municipal limits or the entire area within the Municipal boundaries. The words such local limits as may be fixed may be applied to the whole of the Municipal area. When the resolution of the Municipality had been lost or destroyed and secondary evidence of its terms was given under S. 65 of the Evidence Act, the presumption that official acts had been regularly performed under S. 114 (e) could not supply the deficiency in proof for as a rule the contents of documents could not be proved inferentially. In the absence of proof that any local limits had been found by the Municipality under S. 261 of the Act no one could be convicted of using without a license certain premises within the Municipality for storing hides in contravention of S. 261. It is doubtful if the penultimate clause in S. 261 empowers the commissioners to do more than with hold the license in individual cases since each case must be considered on its own merits. (*Sharfuddin and Richardson, JJ.*) SYED MOOKRAM ALI *v.* THE CUTTACK MUNICIPALITY.

14 Cr. L.J. 91=18 I.C. 651=17 C.W.N. 531.

——S. 261—'*Wood*' *includes timber.*

The word "wood" in S. 261 of the Act includes timber. A Timber yard requires a license under the section. (*Miller, C. J. and Coutts, J.*) EMPEROR *v.* TAR MUHAMMED JAN. 6 Pat. L J. 363=2 Pat. L.T. 722= 63 I C. 327=22 Cr. L.J. 631.

——Ss. 279 and 310—*Joint occupation by tenants—Onus of making out lies on the owner.*

The Bengal Municipal Act provides that where there is more than one tenant the owner shall be liable for the Municipal rates for water and lighting, unless the tenants jointly hold the holding. The status of the tenants and their relationship, to each other and the extent of their holding are facts peculiarly within the knowledge of the landlord and it is for him to prove that the the tenants are in joint occupation of the whole holding. (*Cuming, J.*) BISHNUPADA DEY *v.* CHAIRMAN OF THE MANIKTOLLA MUNICIPALITY. 64 I.C. 351 (Cal.)

——Ss. 290, 291, 292, 293, 295 and 297—*Rules framed by local Government under S. 290 are not* Ultra vires *and water supply can be cut off for non-payment of costs.*

Rr. 4, 9 and 24 (e) framed by the local Government for the Chittagong Municipality under S. 290 of the Bengal Municipal Act are *intra vires* and do not conflict with Ss. 295 and 297 of the same Act, The Municipality is, therefore, entitled to compel the occupier or owner of a house to pay for cost of water-metre to measure the amount of water consumed in the house or to out off water supply for non-payment of the same. (*Chaudhuri and Cuming, JJ.*) NAGENDRA LAL DAS *v.* THE CHAIRMAN OF THE CHITTAGONG MUNICIPALITY.

59 I. C. 340=47 Cal. 426.

BENGAL MUNICIPAL ACT (III of 1884), S. 321.

——S 321—Thakurhari *if a dwelling house.*

A *Thakurhari* where pilgrims stayed during festivals for 3 days at a time, and which contained no privies on the premises and there was no evidence as to what action the Municipality took for the conservency thereof is not a dwelling house within S. 321 of the Act. (*Woodroffe, Chitty and Shamsul Huda*, JJ.) THE CHAIRMAN, NABADWIP MUNICIPALITY *v.* GOUR CHANDRA. **49 I. C. 16 (Cal.)**

——S. 321—*Dwelling house—Meaning.*

The period for which a house is used for residence during the year determines whether it is a dwelling house. Also the action taken by the Municipality for conservancy purposes, must be taken into account. (*Chatterjee and Walmsley*, JJ.) CHAIRMAN OF THE COMMISSIONERS NOAVADWIP *v.* GOUR CHANDRA. **38 I. C. 789 (Cal.).**

——S. 321—*Dwelling house.*

A dwelling house is a house that is dwelt in. A holding ordinarily used as a place of business and occupied by plaintiff while in a state of unsound mind and having a cock-shed and cow-shed over it is not a dwelling house. (*Mookerjee and Beachcroft*, JJ.). RADHA GOBINDA *v.* NABADWIP CHANDRA PAL. **31 I.C. 10=19 C.W.N. 1027.**

——S. 321—*Latrine tax—Assessment.*

The assessment of latrine tax if not fixed by the Commissioners in a meeting as under S. 321 is *ultra vires*. Under S. 321 the fees are to be levied according to annual value of holdings containing dwelling houses or privies and not dwelling houses only. Where house and shops are included in one holding, fees should be levied on the annual value of the holding including shops *Caspers and Chatterjee*, JJ.). BEECHU RAM v. CHAIRMAN OF CHAPRA UNICIPALITY. **15 C.W.N. 519= 9 I.C. 218=13 C.L.J. 674.**

——S. 322—*Proviso.*

When a shopkeeper lives elsewhere and pays latrine cess for the house, he need not pay for the shop unless it contains a latrine or cesspool. The proviso does not exempt the owner of the shop if it is occupied by a different person. (*Caspersz and Chatterjee*, JJ.). BETCHU RAM *v.* CHAIRMAN OF CHAPRA MUNICIPALITY **15 C.W.N. 519=9 I.C. 218=13 C.L.J. 674.**

——S. 322 (4)—'*Dwelling-house*' *defined.*

A dwelling-house is a house with the superadded requirement that it should be dwelt in the apparent contradiction between the first para. of S. 321 and S. 322 (4) expl. with reference to the history of legislation on the subject. Explained (*Mookerjee and Beachcroft*, JJ.). RADHA GOBINDA *v.* NABADWIP CHANDRA PAL. **31 I.C. 10=19 C.W.N. 1027.**

BENGAL MUNICIPAL ACT (III of 1884), S. 363.

——S. 345—*Conviction—Proof.*

To sustain conviction under S. 345 the prosecution must prove that the place is closed as a market place by Magistrate on the Commissioner's report. (*Chitty and Walmsley*, JJ.). PUTIKAHARINI *v.* VICE-CHAIRMAN, VISHNUPUR MUNICIPALITY. **20 C.W.N. 1015= 38 I.C. 336=18 Cr. L.J. 304.**

——S. 330—*Sanction to prosecute for making noise—Sanction for one offence—Prosecution for another illegal.*

Where the vice-chairman of a Municipality sanctioned the prosecution of the accused for singing at night with a high-sounding instrument and the accused were convicted of beating a drum under Bye-law 80, *held*, that the conviction was illegal. Even in a case where a valid sanction has been given by the Municipality for the prosecution of certain persons for an alleged violation of one of the Bye-laws, a Magistrate is not competent to convict the accused of an offence against another. Considerable care should be exercised in putting into operation against citizens the provisions of a Bye-law such as the one against making noise, which can be utilised in an unduly repressive and unnecessarily restrictive manner. (*Bucknill*, J.). RAHIM *v.* EMPEROR. **72 I.C. 894=24 Cr. L.J. 478= 1 Pat. L.R. 48 (Cr.).**

——S. 356—*Distress warrant—Service of—Non mention of date of return does not render distress illegal.*

Under S. 356 of the Beng. Mun. Act every notice, summons, or other demand under the Act may be served personally on or presented to the person to whom the same is addressed or may be left at his usual place of abode with some adult male member or servant of his family. The mere fact that the date of return is not mentioned in a distress warrant does not render the distress illegal. (*Miller*, C. J. *and Ross*, J.). GOVERNMENT ADVOCATE OF BIHAR AND ORISSA *v.* GANGA PRASAD. **1 P. 423=75 I.C. 719=3 P.L.T. 559= 25 Cr. L.J. 31=1922 P. 532.**

——S. 361—*Rights of purchaser—At a sale of unclaimed holding.*

The rights of a purchaser at a sale held under a statute are governed by that statute. The purchaser of unclaimed holding for arrears of rates can claim no priority over a prior mortgagee. (*Chatterjee and Walmsley*, JJ.). MOHAMMAD SOLEMAN *v.* RAGHUNATH DUTTA. **39 I C. 387=21 C.W.N. 425.**

——S. 363—*Suit by Municipal servant against Chairman for salary is not governed by section.*

A suit by a Municipal servant for recovery of money due to him under a contract with the Municipality is one for breach of contract and

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is not governed by S. 363 of the Bengal Municipal Act. It is only in cases where plff. claims damages or compensation for a wrongful act committed by the Commissioners or their servants in the exercise of their statutory powers that S. 363 applies. 6 C. 8, foll.; 3 C.L.J. 376, ref. (*Richardson*, J.). PANCHANAN CHATTERJEE *v.* SANTOSH KUMAR BOSE.

65 I.C. 105 (Cal.

———S. 363—*Act done in pursuance of Act—Notice of suit necessary before filing suit.*

Where the Vice-Chairman of a Municipality acts under the direction of the Commissioners, the acts done by him are acts done under the Municipal Act and if the provisions of S. 363 of the Act as regards notice are not complied with by a person aggrieved by the act, a suit by him against the Vice-Chairman to recover damages is not maintainable. (*Mookerji*, A.C.J. *and Fletcher*, J.). SASANKA SEKHAR BANERJEE *v.* SUDHANGSU MOHAN GANGULI.

48 Cal. 45=59 I.C. 572=24 C.W N. 891.

BENGAL MUNICIPAL ELECTION RULES.

———Rr. 7, 10 and 29—*Removal of name from list of voters by chairman—District Magistrate's can restore the name.*

A certain persons name was entered in the list of voters and there was an application under r. 7 that his name should be removed, and an application by the person that his name should be included and the application was allowed by the chairman. The voter applied under r. 10 to the District Magistrate who restored his name in the register, *held*, that the District Magistrate had power to decide it under r. 29. (*Chaterjea and Newbould*, JJ.). SYAM CHAND BASAK *v.* NABENDRA NATH.

26 C.W.N. 147.

BENGAL, N. W. P. AND ASSAM CIVIL COURTS ACT, (XII of 1887).

———*Valuation of suit—Valuation by plaintiff may be challenged by defendant or amended by Court, but if not so done cannot be questioned in second appeal for the fist time.*

Although ordinarily the valuation as made by the plaintiff is to be accepted, the plaintiff is not at liberty to make an arbitrary valuation with a view to alter the forum, either of the trial of the suit or the adjudication of the appeal. The valuation as made by the plaintiff may be challenged either by the Court of its own motion or by the defendant. In either event, there is a determination of the question of valuation. If, on such investigation, is transpires that the subject-matter of the suit has been undervalued or over valued the Court may call upon the plaintiff to amend the valuation of the suit. If the plaintiff does not carry out the order of the Court, the consequence described in O. 7, R. 11, followed. This is the penalty for persistence in under valuation. If the order of the Court is carried out, the statement of valuation for purposes of jurisdiction or court-

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fees are both amended, and the amended valuation thereupon becomes the valuation of the suit. When S. 31 of the Bengal Civil Courts Act refers to the value of the original suit, the reference is to the valuation as made by the plaintiff subject to such amendment as may have been made under orders of the Trial Court. The Legislature did not mean by the expression "the value of the original suit" in S. 21 the real value of the subject-matter of the original suit regardless of what may have happened in the Trial Court. Where the plaintiff stated the value of the subject-matter of the suit for purposes of jurisdiction as also of court-fees at Rs. 3,600 and the defendant did not challenge this statement and the trial proceeded on the assumption that the valuation made by the plaintiffs was correct, *held*, that it was not competent to the defendant after they had been defeated in two successive courts to change the forum of appeal by the assertion that the value of the subject-matter of the suit exceeds Rs. 10,000—in other words, that if the suit had been properly valued that appeal would have lain to this court and not to the court of the District Judge. 34 C. 954; 23 C. 536; 18 A.L. J. 741; 45 C. 926, referred to. (*Mukherjee and Rankin, JJ*) HARIHAR DAS *v.* RAJKUMAR MUKHERJEE. 71 I.C. 1014=1923 Cal. 405.

———Ss. 8 and 21—*Power of District Judge to assign cases to Additional Judge.*

A District Judge can assign any case to an Additional Judge who in entertaining an appeal on such assignment does not act beyond his jurisdiction. (*Chamier, J.*) MUTSADDI LAL *v.* MUTEMAL.

34 All. 205=13 I.C. 384=9 A.L.J. 95.

———S. 8—*Land Acquisition case—Additional Dt. Judge.*

An Additional District Judge can hear a reference made over to him by the Dt. Judge, under S. 30 of the Land Acqn. Act. (*Fletcher and Beachcroft*, JJ.). JAJABAUDHUN *v.* NANDA LAL. 50 I.C. 798 (Cal.)

———S. 8—*Land Acquisition case—Additional District Judge.*

An Additional District Judge can dispose of land acquisition references made over to him by the District Judge. (*Teunon and Greaves*, JJ.). JOGESH CHANDRA SANYAL *v.* RASIK LAL SAHA. 50 I.C. 690 (Cal.)

———S. 8 (2)—*Addl. Dt. Judge—Assign me of function to—C.P. Code S. 92.*

An Addl. Dt. Judge is, by S. 8 (2), empowered to exercise the same powers as a Dt. Judge in suits under S. 92, C.P. Code. He need not, in such cases, be empowered by Local Govt. (*Chatterjea and Panton*, JJ.) MOHABUR RAHMAN *v.* ABDUR RAHIM.

62 I.C. 115=48 Cal. 53.

BENGAL N.W.P. AND ASSAM CIVIL COURTS ACT (XII of 1887), S. 8.

———S. 8 (2)—*District Judge—Transfer of case to Additional Judge.*

Under S. 8, sub-S. (2) of the Bengal N.W.P. and Assam Civil Courts Act the District Judge has power only to assign certain functions to the Additional Dist. Judge, that is to say, that he could assign to him particular classes of cases but could not transfer to him any particular case for decision. 44 Cal. 866, overruled. (*Jenkins*, C.J. *and Woodroffe, Mookerjee, Holmwood and D. Chatterjee*, JJ.) RUP KESHWAR LAL *v.* JAIJAI BIBI.

42 Cal 842=19 C.W.N. 791 =29 I.C. 935=21 C. L J. 437 (F.B). [Overruling 41 Cal. 866=22 I.C. 951= 18 C.W.N. 612.]

———S. 13—*Shahabad and Ballia — Deep stream — Government notification transferring villages from one district to another.*

Shahabad Civil Courts have no jurisdiction to try the suit in respect of villages lying north of the present stream which under the Indian Government's notifications is now in the Ballia district and the notifications of the Local Government transferring a village from Ballia to Shahabad and *vice versa* do not affect the matter. The power of the Local Government under S. 13 of (Act XII) of 1887 refers to alteration of local limits of the jurisdiction of Civil Courts but the Local Government can obviously act only within its own jurisdiction and it cannot give jurisdiction to a Civil Court in respect of anything outside its own jurisdiction which has been determined by the Notification of the Imperial Government. (*Coutts and Sultan Ahmad*, JJ.) MAHARAJ KESHO PRASAD SINGH *v.* NIRMAL KUMAR.

5 Pat. L.J. 451=57 I.C. 201= 1 Pat. L.T. 288=2 U.P.L.R. 152 (P.)

———S. 13 (2)—*Transfer of business — Assignment of business within local limits of one Court to another by District Judge is not a transfer of business—Effect of.*

An assignment of business within local limits of one Subordinate Court to another by District Judge under S. 13 (2) of the Act is not the same thing as the transfer of business under S. 150, C.P.C. (*Chatterjea and Cholmer*, JJ.) MAHAMADKAZEM ALI *v.* NAINUDDIN AHMED. **26 C.W.N. 216=70 I.C. 210= 1922 C. 41.**

———S. 13 (2)—*Redistribution of civil work in a district does not alter forum for execution of decree.*

After a mortgage decree was passed by the Sub-Judge, First Court, the Dt. Judge rearranged the civil work of the district and directed that all suits, proceedings, etc., relating to the area within which the property was situate should be filed in the Court of Sub-Judge, third Court. The decree-holder applied for execution to the Sub-Judge, First Court, who returned the application on the ground that he had no jurisdiction. *Held*, that the Sub-Judge, First Court, was the proper Court to execute the decree. (*Jwala Prasad and Adami*, JJ.). JAGANNATH PRASAD *v.* SHEONANDAN SAHAY. **2 Pat. L T. 374= 62 I.C. 487=6 P.L.J. 304=1921 Pat. 186.**

BENGAL N.W.P. AND ASSAM CIVIL COURTS ACT (XII of 1887), S. 21.

———Ss. 18 and 21—*Suit valued at less than Rs.* 5,000—*Appeal to Dt. Judge—Decree for more than Rs.* 5,000.

Where a suit is valued at less than Rs. 5,000 and the first Court dismisses the claim or awards a sum less than Rs. 5.000 and the Court on appeal comes to the conclusion that a sum exceeding Rs. 5,000 should have been awarded, it has jurisdiction to decide the appeal, and having once assumed jurisdiction, it has power to award a sum exceeding Rs. 5,000 (16 All. 286, foll.; 34 Cal, 954 and 17 Cal. 704, dist.) Under S. 11 of the Suits Valuation Act, 1887, the disposal of the appeal by a Lower Appellate Court cannot be questioned as being without jurisdiction on the ground of the valuation being beyond the pecuniary limits of the jurisdiction unless the disposal of the appeal on the merits has been prejudicially affected, 13 C.W.N. 423, dist. (*Mullick and Jwala Prasad*, JJ.) SATYA KINKAR SAHANA *v.* RAJA SRISRI SHIBA PRASAD SINGH.

4 Pat. L.J. 447=52 I.C. 452=1920 Pat. 17.

———S. 19. *Rule* (1)—*Value of interest claimed—Less than Rs.* 1,000—*Jurisdiction.*

Where value of interest claimed by the plaintiff is less than Rs. 1,000 the suit is cognizable by a Munsif. (*Mookerjee and Beachcroft*, JJ.) UPENDRA CHANDRA MITRA *v.* SATCOURI DHAR. **23 I.C. 964 (Cal.).**

———S. 21—*Appeal—Forum—Valuation of suit—Plaint amended—Claim reduced.*

In a suit originally valued at Rs, 7,500 the plaintiff amended his plaint stating that only Rs. 2,500 now remained due and claiming relief for that sum instead of Rs. 7,500. She however added a prayer for costs as originally incurred on Rs. 7,500. The valuation for purposes of jurisdiction and of Court-fee laid at Rs. 7,500 was not altered. *Held*, the subject-matter of the suit at the hearing of the first Court was less than Rs. 5,000 and the appeal lay to the District Judge and not to the High Court. (*Mears*, C. J. *and Bannerjee*, J.) ANDUR RASHID *v.* QUDRAT-UN-NISSA BIBI.

18 A.L.J. 741=37 I.C. 134= 2 U.P.L.R. 316 (A).

———S. 21—*Suit for sale for less than Rs.* 5,000— *Personal decree— Sale proceeds insufficient—Appeal—Forum.*

In a suit for a sale on a mortgage for less than Rs. 5,000, a decree was passed and made absolute. The proceeds of sale proving insufficient to discharge the decree, a further decree

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was passed under O. 21, R. 6 of the C.P. Code for more than Rs. 5,000 *Held* that an appeal lay to the District Ju[illegible] inasmuch as the value of the original suit was under Rs. 5,000. (*Richards*, C. J. *and Banerji*, J.) BADRUNNISSA BIBI *v.* SHANKAR LAL. **41 All. 384 = 49 I.C. 687 = 17 A.L.J. 266.**

——S. 21 (1)—*Jurisdiction of Dt. Judge—Appeal.*

A District Judge cannot hear an appeal from a decree or order where the value of the suit in which or the proceedings arising out of which the decree or order was made, exceeds Rs. 5,000. 16 Cal. L.J. 77; 27 Cal. 362; 24 C.L.J. 235, foll. (*Mookerjee and Beacheroft*, JJ.) BANDIRAM MUKERJEE *v.* POORNA CHANDRA ROY. **45 C. 926 = 43 I.C. 758 = 27 C.L.J. 115.**

——S. 21 (1) (a)—*Jurisdiction—Filing of award.*

While two persons claimed various sums of money as due from one another and the disputes were referred to a private arbitration and the arbitrator on taking accounts awarded a sum of Rs. 2,005 due by one party to the other and the application is made for filing the award, the effect is exactly like that of a suit for recovery of Rs. 2,005 by one party against the other, the value of which is the amount awarded by the arbitrator as due to the plff. (*Carnduff and Richardson*, JJ.) MOHESH CHANDRA KUNDU *v.* AMAR CHAND KUNDU. **19 C.L.J. 260 = 22 I.C. 793 = 18 C.W.N. 867.**

——S. 21 (1) (a)—*Mortgage suit—Valuation at more than Rs.* 5,000—*Appeal to Dt. Judge.*

A suit on a mortgage valued at more than Rs. 5,000 was instituted in the Court of the Subordinate Judge who decreed it *ex parte*. The defendant appealed to the District Judge against the order dismissing his application under O. 9, R. 13, C. P. C. The Dt. Judge allowed the appeal. *Held*, that under S. 21 cl. (*a*) of the Bengal N.W.P. and Assam Civil Courts Act, the District Judge had no jurisdiction to entertain the appeal and his order was a nullity. The mere omission of the parties to object to his jurisdiction did not confer it on him. (*Chapman and Atkinson*, JJ.) RAGHU SINGH *v.* USUF ALI. **4 Pat L.W. 445 = 43 I.C. 920 = 4 Pat. L.J. 202.**

——S. 21 (2)—*Decree by Munsif for Mesne profits exceeding jurisdiction—Appeal lies to District Judge.*

Where the Court passing a decree for possession also passes a decree for mesne profits on enquiry though the amount of mesne profits exceeds the pecuniary jurisdiction of the Court, in a Munsif's Court the case is appealable to the Dt. Judge under S. 21 (2). (*Das and Adami*, JJ.). DINANATH SAHAI *v.* MAYAWATHI KOER. **2 Pat. L.J. 143 = 6 Pat. L.J. 54 = 60 I.C. 346 = 1921 Pat. 69.**

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——Ss. 21 (4) and 22—*Appeal lying to District Judge ordered to be verferred to Subordinate Judge—Subordinate Judge, power of, to hear appeals.*

Where appeals lying to the District Judge under sub-S. 2 of S. 21 of the above Act are directed under sub-S. (4) to the Court of Subordinate Judge he should hear and dispose of them without any order of transfer under S. 22. (*Chamier and Piggott*, JJ.) SHEO HARAKH *v.* RAMCHANDAR. **37 All. 76 = 26 I.C. 783 = 13 A.L.J. 41.**

——S. 33—*Action under—Nature of.*

An order under S. 33 being an administrative one cannot be revised under S. 107, Government of India Act by the High Court. (*Mookerjee and Beachcroft*, JJ.) *In re* ATUL CHANDRA GUHA. **42 I.C. 619 = 27 C.L.J. 477.**

——S 37—*Mahomedan Law—Custom.*

Parties who were Mahomedans are under S. 27 of the Bengal N. W. P. and Assam Civil Courts Act, entitled to adduce special evidence with respect to an issue relating to a family custom contrary to Mahomedan Law—that female descendants could not inherit in the presence of male descendants.—(*Lord Macnaughten*). MUHAMMAD ISMAIL KHAN *v.* SHEOMUKH RAI. **15 Bom. L. R. 76 = 17 C.L.J. 143 = 12 M. L. T. 644 = 17 C.W.N. 97 = 18 I.C. 571 = (1913) M W.N. 27 (P.C.).**

——S. 37—*Applicability of.*

S. 37 only says that neither Hindus nor Muhammadans against their will should be subjected to the Law of the other or the English or any other Law. It allows a man to adopt for himself any special custom which he pleases. The section does not apply to a dispute between Mahomedans themselves. (*Tudball, Rafique and Walsh*, JJ.). RAJA *v.* ALLAHDIYA. **33 I C. 114 (All).**

——S. 37—*Jats—Hindus.*

Jats are governed by Hindu Law in the absence of a special custom. The onus of proving a special custom is on the person setting it up. In the U. P. of Agra and Oudh there is no custom of exclusion of daughters among Jats. They are treated as Hindus for the purposes of S. 37, Bengal N. W. P. and Assam Civil Courts Act. (*Tudball and Rafique*, JJ.) MUSAMMAT BHAGWANI *v.* KHUSHI RAM. **24 I.C. 982 (All.)**

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——S. 37—*Partition—Suit for—Ijmal lands in different villages—Separate suits, if maintainable—Uncultivable land, if should be included.*

Separate suits for partition of *Ijmali* lands lying in different villages can be brought against the same defendants, and in such suits, lands remaining uncultured and incapable of partition need not be included. (*Carnduff and Richardson*, JJ.) HEMCHANDRA CHOUDHURY *v.* HEMKANT KUMARI DEBI.

23 I.C. 442=19 C.W.N. 356.

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——S. 7, note (4)—*Bengal Estates Partition Act—Effect of.*

The ruling underlying S. 7, note (4) has become obsolete owing to Estates Partition Act, S. 5 (4). (*Walsh*, J.) ADIT PRASAD *v.* GANGA PRASAD. **38 I.C. 827=1 Pat. L.W. 120.**

BENGAL PATNI REGULATION (VIII of 1819.)

——*Patni—Rules relating to.*

A Patni taluq is a permanent, heritable and transferable tenure. A Zemindar can create this tenure over the whole or part of his estate. A Patni taluqdar has a corresponding right to let the whole or part of his to subordinate tenure-holders called Darpatnidars. This process of sub-infeudation may be carried further down, to several lower degrees. The Zemindar can apply to the Collector to sell the Taluq for arrears of rent and the sale cancels all under-tenures. But the under-tenure-holders can pay the arrears of rent into the Collector's Court and be put in possession of the Superior tenure in respect of which default has been made. The position of the Zamindar applies also to other degrees of tenure-holders in respect of their rights as against their respective under-tenure-holders.

Bengal Regulation (VIII of 1819) is a self-contained enactment and its provisions are not subject to those of the B.T. Act. (*Ameer Ali*, J.) ARTHUR HENRY FORBES *v.* MAHARAJ BAHADUR SINGH.

41 Cal. 926=1 L.W 1059=41 I.A. 91=18 C.W.N. 747= (1914) M.W.N. 397=15 M.L.T. 330=12 A.L. J. 653=27 M. L. J. 4=23 I C. 632=25 C. L. J. 434 (P.C.).

[Reversing 35 Cal. 737=7 C.L.J. 652.]

——*Proceedings under are against the tenure and not patnidar—Sale—Validity of.*

Proceedings under the Bengal Patni Regulation, taken for the realisation of arrears of Patni rent, are against the tenure, and the mere fact that in the application to the Collector, the Zemindar mentions the name of a deceased Patnidar, which stood on his book does not make the sale held under the Regulation invalid. 19 Cal. 703, referred. (*Mookerjee and Rankin*, JJ.). BEHARI LAL BISWAS *v.* NASIMANNESSA BIBI.

37 C.L.J. 222=73 I.C. 482=1923 Cal. 527.

BENGAL PATNI REGULATION (VIII of 1819).

——*Creation of patni over the head of another is illegal—Assignment of right by patnidar to Zemindar—Rights of assignee—Sale of assignee's interest—Right to object—Creation of fresh patni—Effect of.*

The idea of a patni being created over another patni is absolutely foreign to the scheme of the Patni Regulation and the position resulting therefrom would be anomalous. In the Patni Regulation a patnidar has been given certain rights as against the Zemindars. The patnidar is described as talukdar of the first degree and a tenure cannot be created over a talukdar of the first degree. There can be no objection to the assignment of the right to the Zemindar to receive rent from the patnidar which he is entitled to get under the patni settlement. In such cases the assignee of the Zemindar's interest would be entitled to recover rent from the patnidar by virtue of the assignment. The whole scheme of the Patni Regulation is that the patnidar is the only person whose interest could be sold under the Regulation and not the interest of the so-called sub-patnidar. Where a sale under the Regulation is held without jurisdiction even a person not affected by it could question it. (*Walmsley and Ghose*, JJ.) RAJENDRA NARAIN CHAUDHURI *v.* KHAN BAHADUR MOULVI ABU NASOR AHIYA. **27 C.W.N. 189=71 I.C. 327=37 C.L.J. 141=50 Cal. 146=1923 Cal. 189.**

——*Proceedings under are only against the tenure—Sale under the regulation—Validity impeached.*

Proceedings taken by the Zemindar under the Regulation for recovery of his dues are not personally against the patnidar but against the tenure. Where a sale held under the Regulation is impeached, the Zemindar is not prevented from recovering the arrears for the subsequent periods by summary procedure, till the proceedings impeaching the sale are over. (*Mookerjee*, A.C J. *and Fletcher*, J.) BIJOY CHAND MAHATAP *v.* ASUTOSH CHAKRAVARTY.

48 Cal. 454=62 I.C. 73=25 C.W.N. 42.

——*Collector—Power—Order for costs.*

Under the provisions of Regn. (VIII of 1819) the Collector has power to determine the actual rent due and has a *quasi judicial* capacity and therefore has jurisdiction to award costs. (*Fletcher and Newbould*, JJ.) BHUPENDRA KUMAR SARKAR *v.* KISSORI DASI.

40 I.C. 615 (Cal.).

BENGAL PATNI REGULATION (VIII 1819).

———*Non-registry of purchaser's name at landlord's Sheristah—Effect.*

In execution of a rent decree against the *patnidar*, a mortgaged Patni was sold and purchased by his son who did not annul the mortgage. In a suit on the mortgage the mortgagor's son was joined and a decree obtained. In execution of the mortgage decree the decree-holder himself purchased the Patni. The interest acquired by the purchaser at the rent sale was subject to the liability under the mortgage decree, and overridden by the interest acquired by the mortgagee in execution sale. The fact that the purchase was not registered at the Zemindar's sheristah would not affect the mortgagee purchaser's title until the Zemindar proceeded under Reg. (VIII of 1819). *Fletcher and Richardson*, JJ). BARODA CHARAN DHAR *v.* ERSHAD KHAN. **38 I.C. 520 (Cal.).**

———*Patni sale—Creation of new tenancy—Merger.*

A purchaser under the Patni Regulation (VIII of 1819) is entitled to eject tenants from their holdings when they have no protected right. There is no merger where the purchaser possesses the land as a third person wholly distinct from the *patnidars*, although he happens to be the son of them. The purchaser cannot obtain the original holding before the *patni* was created, though he is in possession of the same holding. (*Holmwood and Mullick*, JJ.) M. G. MALACHI *v.* AHLAD MAHATO. **27 I.C. 928 (Cal.).**

———*Suit for possession by patnidar—Defence of lakhiraj—Onus of proof.*

In a patnidar's suit for possession of lands in a Patni the defendant has to prove that the lands are *lakhiraj* and not *mal.* 4 C.L.J. 548, foll. (*Holmwood and Chapman*, JJ.) CHINTAMONI DUTT *v.* JOGESHUR BHATTACHARYA. **19 I.C. 64 (Cal.).**

———*Suit by landlord—Parties.*

A landlord brought a suit for rent, interest and declaration of his right to bring a tenure to sale under Regulation (VIII of 1819), in default of payment of arrears according to the Kabuliyat executed by the holder with the express power of sale. He failed to implead the Collector as a party to the suit. *Held*, the suit was badly framed as the Collector ought to be a party and hence the declaration could not be made. (*Stephen and Richardson*, JJ. MANINDRA CHANDRA *v.* ANNODA MOHAN. **15 I.C. 586 (Cal.).**

———*Under-tenures avoided.*

Under-tenures are not *ipso facto* avoided by a sale under the patni Regulation ; but they can be avoided otherwise than by a suit by an overt act such as for instance a proclamation under clause (2) of Sec. 15, indicating an intention to exercise a power of avoidance, so as

BENGAL PATNI REGULATION (VIII of 1819), S. 3.

to be communicated to the under-tenant. No notice need be given by a purchaser before bringing a suit. (*Coxe*, J.) KRISHNA PROMADA DASI *v.* PARASULLA. **11 I.C. 83 (Cal.).**

———*Decree for rent — Purchaser of patnidar's right, and title after decree, if personally liable—Property passing into the hands of thir person.*

Where a person purchased the right, title and interest of the patnidar of a patni mahal after a decree for rent had been passed against the patnidar. *Held*, the purchaser is not personally liable for the decree if the property passes out of his hands to a third party before the institution of the execution proceedings. For rent accruing due prior to the transfer, a transferee of a tenure is not personally liable. (*Das and Ross*, JJ.) INDER CHAND BOTHRA *v.* SURENDRA NARAIN SINGH. **1 Pat. 449=66 I.C. 711=3 Pat. L.T. 318=1922 Pat. 137=1922 P. 162.**

———S. 3—*Kabuliyat providing for delivery of ghee and kid is in the nature of an abwab and is not recoverable—Effect on Reg.* V of 1812, S. 3.

Where a kabuliyat contained a stipulation that the tenant was to pay one seer of ghee and one kid every year.

Held, under the circumstances it was of the nature of an *abwab* and hence not recoverable.

The general law against *abwabs* as embodied in S. 3 of Reg V of 1812 is not intended to be restricted by the Patni Regulation. (*Suhrawardy and Cuming*, JJ.) RAM TARAN TEWARY *v.* SM. KUMEDA DASSEE. **26 C.W.N. 634=68 I.C. 161=1922 Cal. 80.**

———Ss. 3, 5 and 6—*Patni—Alienation of part—Bengal Tenancy Act, Ss.* 12, 17 *and* 195, (*e*)—*Registration of transfer, if confers title without registration with Zemindar.*

The Patni Regulation provides rules for the alienation of a part of the Patni and these rules cannot be affected by Section 195 (*e*) of the B.T. Act and consequently alienation of a part of the *Patni taluq* though registered does not confer any interest on the transferee by virtue of Sections 12 and 17 of B. T. Act unless it is registered with the zamindar according to the provisions of the Patni Regulations. (*Stephen and Mullick*, JJ.) AZIMOODDIN *v.* MATHURA MOHAN SAHA. **18 I.C. 712=18 C.W.N. 383.**

———S. 3—*Rights of patnidar.*

Under this section the patnidar gets transferable and heritable rights over the subject of the grant but no right to the sub-soil in the absence of an express covenant to the contrary. (*Jwala Prasad and Adami*, JJ.). RAM LAL *v.* SATYA NIRAJAN CHAKRAVARTI. **5 Pat. L.J. 563=1 Pat. L.T. 474=57 I.C. 786=1921 Pat. 49.**

BENGAL PATNI REGULATION (VIII of 1819), S. 2.

———Ss. 3 (3) and 17 (3)—*Patni tenure—Successive rent decrees—Sale in execution of last decree—Charge on surplus sale proceeds for amounts of previous decrees—B. T. Act Ss.* 65, 165 *and* 165 (c).

Per *N. R. Chatterjea*, J. (*Smither*, J. contra). Not only can a patni tenure be sold under B.T. Act, but decrees for rent for earlier periods can be enforced against the surplus sale proceeds of a patni tenure when sold in execution of a decree for rent under the B.T. Act.

Per *Smither*, J. Under S. 3, cl. (3) of the Patni Regulation, the Zemindar has the right to hold the patni answerable for any arrears of rent, but only subject to the limitation specified in S. 17, cl. 3 of the Regulation under which if the zemindar should have failed to avail himself of the process which the Regulation provides, arrears of a period before the current year or the immediately expiring year, become mere personal debts and his charge in respect of such arrears is time barred. The zemindar has therefore no charge for the amounts covered by two previous decrees for rent upon the surplus proceeds of a sale in execution of a later decree for rent. The Words "public auction" in S. 3, cl. (3) of the Regulation should be taken to apply to any "public auction" and not limited to mean an auction under the Regulation, if there can be any public auction of a patni other than a public auction under the Regulation. (*N. R. Chatterjea and Smither*, JJ.). SATYA SHANKAR GHOSHAL *v.* MONMOHAN GUHA.
43 I C. 996=22 C.W.N. 131.

———Ss. 5 and 6—*Bengal Tenancy Act* (VIII *of* 1885), *Ss.* 12, 17 and 195 (*e*)—*Patni tenure, partial transfer—If transferee can compel recognition by Zemindar.*

Ss. 5 and 6 of the Patni Regulation (VIII of 1819) do not allow of a partial transfer of a patni Taluk as against the Zemindar without his express sanction and therefore the transferee cannot in view of S. 195 (*e*) of the B.T. Act claim recognition of such transfer by the landlord under Ss. 12 and 17 of that Act. (*Fletcher and Chatterjea*, JJ.). RAKHAL CHANDRA DAS *v.* UNA-PRASAD MISRI.
22 I.C. 788=18 C W.N. 629.

———Ss. 5, 8 (2) and 14—*Sale under Patni Regulation not void but voidable—Title of auction-purchaser, if can be impeached collaterally.*

A sale under Regulation VIII of 1819 is not void but voidable, so long as the Patni sale is in tact and if a suit would be barred, the title of the auction-purchaser could not be questioned collaterally. (*Mookerjee and Teunon*, JJ.). RAMSONA *v.* NANKUMAR SINHA.
16 C.W.N. 805=10 I.C. 90=13 C.L.J. 405.

———S. 6 (1)—*Non-Observance of provisions—Effect.*

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On omission to secure registration of his name by the payment of the fee the penalty is that the landlord is not bound to recognize his purchase and may sell the tenure in execution of a rent decree aginst the registered tenant. 7 C. W. N. 552, foll; 25 W. R. 157, diss. *Mookerjee and Holmwood*, JJ.) GANPAT SINGH BAHADUR *v.* MOTI CHAND. **16 C L.J. 301=17 I.C. 171=18 C.W.N. 103.**

———Ss. 8, 10 and 14—*Patni sale—Date of payment—Payment where to be made—Notice of sale defective—Purchase by stranger.*

When the Patni Regulation mentions Bengali months and dates throughout, the legislature intends that a day is to be reckoned in the manner prevalent in Bengal, that is, from sunrise to sunrise. A sale after a valid payment had been made to the officer of the Zemindar is without jurisdiction. 10 W.R. 66 (F.B.) 2 Beng. L.R.1. (F.B) ref. Payment to stop the patni sale may be made into Court, either by a subordinate talukdar under S. 13 of the Patni Regulation or by a patnidar who has applied for a summary investigation under S. 14, cl. (2.). A patnidar cannot stop the sale at the moment of sale by a deposit in the Collectorate. 15 W.R. 560, ref. S. 8 of the Patni Regulation is to be read with S. 10. The latter section contemplates a self-contained notice which comprises not only a specification of the arrears and a notification that the sale will be held on the 15th Jaist if the amount claimed be not paid before that date, but also a statement of the lots proposed to be sold in the order in which the sale will be held. Requirements of the Patni Regulation in respect of the notice mentioned in Ss. 8 and 10 are to be strictly complied with. 14 Cal. 365, 14 I.A. 30, ref. A purchase by a stranger at a putni sale must be set aside on the ground that the notice under S. 8 was defective. (*Mookerjee and Panton*, JJ.) BEJOY KRISHNA MOOKERJEE *v.* LAKSHMI NARAIN.
54 I.C. 736=30 C.L.J. 433.

———S. 8—*Co-sharer Zemindars—Application for sale—Notice—Place of service.*

When co-sharer Zemindars jointly make an application for sale of a patni and have several *Kutcheies* the notice required by the S. 8 must be served upon each *Kutchey*. The provisions must be strictly followed. (*Chatterjee and Walmsley*, JJ.) PANCHANON CHOUDHURI *v.* RAMENDRA SUNDAR TRIBEDI.
37 I.C. 897 (Cal.).

———S. 8—*Notice under—Non-publication for a period immediately preceding sale of patni, effect of.*

The notices, being absent on the Collector's notice board immediately preceding the sale though they were from 14 to 28-4-1909, *viz.*, from 21-4-1909 to 15-5-1909 the sale was invalid. (*Fletcher and Teunon*, JJ.). BEJOY CHAND MAHATAB *v.* MAMEZDAR RAHMAN.
36 I.C. 917 (Cal.)

BENGAL PATNI REGULATION (VIII of 1819), S. 8.

———S. 8—*Sale of Patni tenure—Service and publication of notice—Irregularity in.*

A due publication of the notices prescribed by Regulation (VIII of 1819) forms an essential portion of the foundation on which the summary power of sale is exercised and makes the zamindar who institutes the proceedings exclusively responsible for its regularity. The provision for the advertisement of the sale in the collectorate is mandatory and failure to duly observe it is a sufficient ground for setting aside the sale. (*Chatterjee and Chapman*, JJ.). RANJIT SINGH v. JNANENDRA NATH GUPTA.
27 I.C. 825 = 19 C.W.N. 963.

———Ss. 8, 10 and 14—*Patni—Sale—Suit to set aside sale—Mortgagee of defaulting patnidar if entitled to bring such suit—Notice under Ss. 8 and 10—One lot comprising several tenures—Notice—Sale irregular—Strict compliance.*

A patni sale is voidable, only and not void by reason of any irregularities in the transaction and it can only be avoided by a suit under S. 14 (1) of the Patni Regulation. 20 Cal. 746; 16 C.W.N. 805, ref. A mortgagee of the defaulting *patnidar* is entitled to bring such a suit. The notice in Ss. 8 and 10 of the Regulation must contain the various lots to be sold with the amounts claimed in respect of them. Where a lot comprises three tenures and the notice specifies only one, the notice is bad and the sale is irregular and liable to be set aside. The provisions of the Patni Regulation which allow of sales in a summary manner must be strictly complied with. (*Chitty and Teunon*, JJ.). HARIHAR NATH DAS *v.* RAJANI KANTA LAIK.
15 I.C. 537 (Cal.).

———S. 8 (1)—*Diminution in area does not exempt—Summary levy of rent.*

Though the *patni* has diminished in area from whatever cause since its creation it cannot be exempted from the terms of the Patni Regulation as to the summary levy of rental. (*Asutosh, Mookerji*, A.C.J. *and E. Fletcher*, J.). SHARAJINI DASI *v.* KAZI ABDUL.
60 I C. 452 (Cal.).

———S. 8 (2) and (10)—*Notice — Strict compliance with section is necessary for validity of sale.*

S. 10 of the Regulation contemplates a self-contained notice comprising not only a specification of the arrears, etc., but also a statement of the lots proposed to be sold in the order in which the sale will be held. The notice to be stuck up in the Collector's office, like the petition, must be specified with the balance due from all that patnidars to the Zemindar and a copy or extract of the notice applying to an individual defaulter is to be sent by the Zemindar to be published at the Cutcherry or at the principal town or village on the land of the defaulter. Strict conformity with the

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requirements of Ss. 8 and 10 in the matter of the contents and service of the notice is essential to secure valid sale. 9 C.W.N. 619, foll. (*Mookerjee and Panton*, JJ.). RAJA BHUPENDRA NARAIN *v.* MADAR BUX SHEKH.
66 I.C. 793 = 34 C.L.J. 399.

———S. 9—*Defaulting patnidhar purchasing tenure—Power to annul dar-patni.*

Where a defaulting patnidar purchased in the name of another person the patni in arrears and took possession of the dar-patni in the name of the ostensible purchaser. *Held* the patnidar was not entitled to annul the dar-patni tenure created by himself and as he under colour of law had evicted the dar-patnidar, the latter was not liable to pay rent for the period of his dispossession. (*Mookerjee and Holmwood*, JJ.) KALANANDA SINGH *v.* JARAO KUMARI.
17 I.C. 238 = 17 C. L.J. 96.

———Ss. 8, 10 and 14—*Patni sale—Avoidance of.*

A patni sale being voidable and not void for irregularities in the transaction, can be avoided by a suit under S. 14 (1) of the Regulation.

A mortgagee of a defaulting Patnidar can institute such a suit.

The notice under Ss. 8 and 10 must give various lots with the amount claimed on each. Where there is some mistake, the notice is bad and sale irregular and liable to be set aside. Summary sales under the Regulation must be an strict compliance with the provisions of the Regulation. (*Chitty and Teunon*, JJ.). HARIHARNATH DAS *v.* RAJANI KANTAL LAIK.
15 I.C. 537 (Cal.).

———S. 11—*Khudkhast raiyat is—Protection from ejectment.*

Under S. 11 a person who is a khudkasht raiyat is protected from ejection from the holding incluing the part he uses for residential purposes as well as the waste land and the land he cultivates. (*Newbould*, J.). KRISHNA PRAMADA DASI *v.* RASH BEHARI DAS.
67 I.C. 709 = 1923 Cal. 327 (1).

———S. 11—*Construction—Interest of occupancy raiyat—When protected.*

The terms of S. 11, cl. 1 are not satisfied unless at the least the right of transfer is expressly stated in the lease or other engagement to be a right to make transfers which shall not be mere encumbrances. That seems to be the natural meaning of the first paragraph of the first clause and that construction is borne out by the emphatic language of the 2nd paragraph. No transfer is to bar the indefeasible right of the Zemindar unless it is made with the condition that it shall not amount merely to an incumbrance and such condition can only be annexed where express authority for that purpose has been received from the Zemindar or superior

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landlord. (*Richardson and Suhrawardy*, JJ.). GOPAL CHANDRA PODDAR *v.* DWARIKA NATH DUTTA. **69 I.C. 655 (Cal.).**

———S. 11—Patni *tenure—Purchasers at rent sale—Encumbrance—Adverse possession—Defaulting proprietor—B. T. Act*, S. 10—*Admissions by decree-holder.*

A *patni* can only be sold for rent under Regulation (VIII of 1819) and the fact that the sale certificate was given on a printed form for certificate sales will not convert the *patni* sale into a certificate sale. A purchaser at a sale under Regn. (VIII of 1819) is not privy in estate to the defaulting proprietor and he does not derive his title from him, as under S. 11 of the Regulation he has acquired the property free of all encumbrances that might have been created by the act of the defaulter, his representatives or assignees. Consequently a claim of rent by such a purchaser is not barred by *res judicata* by reason of the failure of a suit for rent by a previous *patnidar* on the ground that the relationship of landlord and tenant between the then plff. and the deft. was not established. 17 C.W.N. 340, foll.; 25 Cal. 167, 26 Cal. 460, ref.; 19 Cal. 787 and 22 Cal. 244, ref.

An encroachment by a trespasser or adverse possession against the defaulting patnidar is an ncumbrance within the meaning of S. 11 of Regn. (VIII of 1819.)

The expression 'defaulting proprietor' in S. 11 of Regn. (VIII of 1819) means the proprietor of the tenure in default and those words are not intended to be restricted to the particular proprietor for whose default the patni was brought to sale. 21 Cal. 714, ref. (*Sharfuddin and Coxe*, JJ.). JOY MONGALA DEBI MISRANI *v.* SHILLINGFORD. **28 I.C. 173 (Cal.)**

———S. 11—*Rights of purchaser.*

A purchaser of a *patni taluk* takes it free not only of all encumbrances that might have accrued owing to the default of the proprietor but also free of any interest acquired by adverse possession commencing after the creation of the patni. (*Mookerjee and Beachcroft*, JJ.) KALIKANANDA MOOKERJEE *v.* BIPRO DAS PAL CHOUDHURY. **19 C.W.N. 18=26 I.C. 436=21 C.L.J. 265.**

———S. 11—*Ejectment—Purchaser at Patni sale—Adverse possession—Incumbrance.*

If an action in ejectment is brought by the purchaser, limitation will run against him only from the date when his purchase became final. 25 Cal. 167, foll. The interest of an adverse possessor is an incumbrance only when the adverse possession has continued for the statutory period. 14 C.L.J. 136, relied on. Where the defaulting patnidar was adversely possessing for ten years before the patni sale the trespasser's

BENGAL PATNI REGULATION (VIII of 1819) S. 11.

title by adverse possession had not been perfected and consequently no title was acquired by the purchaser. (*Mookerjee and Beachcroft*, JJ.) SATISH CHANDRA SINHA *v.* MUMJANALI DEBI. **18 I.C. 869=17 C.W.N. 340.**

———S. 11—*Mortgagee from patnidar of Patni—Patni sold in execution on default of putnidar—Effect.*

The mortgagee from the patnidar of a patni, which, on default of the patnidar to pay rent is sold in execution of a decree for rent, and is purchased by the Zamindar himself, has no right to enforce his security against the zemindar, his only remedy being a personal decree against his mortgagor for the mortgage debt. (*Brett and Carnduff*, JJ.) KRISTO DAS *v.* JATINDRA NATH. **14 I.C. 145=16 C.W.N. 561.**

———S. 11—*Grant of patni—Sub-soil mines—Right of grantee.*

A patni tenure is heritable and alienable unless there is an express declaration to the contrary in the patni lease. The patnidar acquires all the interest of the zemindar in the subject-matter of the lease. But it cannot create any right in the sub-soil unless it is expressly granted by the lease. Where the sub-soil rights are not expressly transferred in the patni lease, the rights in them and in the mineral remained with the zemindar. The sections do not vest the right over minerals or sub-soil in the patnidar without express grant. Where such rights are expressly granted the low rate of rent or absence of knowledge of valuable minerals beneath do not render the transfer invalid. A zemindar can at his option grant the surface rights or the sub-soil rights or both. When there is no express grant of either, the right to that which is not granted remains with the zemindar. (*Jwala Prasad and Adami*, JJ.) RAM LAL KAVIRAJ *v.* MAHARAJ KUMAR SATYA NIRANJAN CHUCKERBUTTY.
5 Pat. L.J. 563=57 I.C. 786=1 Pat. L.T. 474=1921 P.H.C.C. 49.

See also **47 Cal. 95=50 I.C. 849 (P.C.)=45 Cal. 87=42 I.C. 651 (P.C.)=44 Cal. 585=40 I.C. 139 (P.C.)=37 I.A. 136=6 I.C. 785 (P.C.)=15 I.C. 219 (P.C.)=39 I.A. 133.**

———S. 11 (2)—*Sale of Patni—Darpatni, if becomes void.*

Under-tenures created by a *patnidar* are *ipso facto* void on a sale under the regulations by the provisions of S. 11 (2) thereof, and are not merely voidable. The purchaser can take possession immediately. 3 B.L.R. (P.C.) 48; 4 C.L.R. 442; 21 W.R. 324 (P.C.), foll.; 12 W.R. 383, diss.; 2 W.R. (P.C.) 13, ref. (*Jenkins*, C.J. *and Mookerjee*, J.) KRISHNA PRAMADA DASI *v.* DWARAKA NATH SEN.
20 I.C. 654=17 C.W.N. 1092=19 C.L.J. 360.

BENGAL PATNI REGULATION (VIII of 1819) S. 11.

——S. 11 (3)—*Patni Tenure—Hereditary cultivators living in locality—Enhancement.*

Resident hereditary cultivators are entitled to protection by the proviso to cl. (3) of S. 11 and the clause further provides that the purchasers of the Taluk are not entitled to cancel *bona fide* engagements made to such tenants by the late incumbent and cannot demand from them any rent is excess of their previous engagements. By the acceptance of a lease the resident cultivator for fixed rent payable in perpetuity does not lose his status as hereditary cultivator and the rent payable by him cannot be enhanced under B. T. Act. (*Newbould*, J.) RAKHAL CHANDRA *v.* BHABADEB CHATTERJI.

33 I.C. 271 (Cal.).

——S. 11, cl. (3)—*Khudkasht Ryot—Agreement with dar-partnidar—Ejectment by purchaser of patni.*

A Khudkasht ryot, *i.e.*, a resident and hereditary cultivator does not cease to hold that position on his entering into an arrangement professing to be granting mirasi right by the darpatnidar, The purchaser of the patni cannot eject the ryot under S. 11 (3) of the Patni Regulation of 1819. (*Jenkins*, C.J. *and Mookerjee*, J.) SARBANANDA NATH *v.* RANA GAZI. 21 I.C. 530=18 C.L.J. 334.

——S. 11 (3)—*Ejectment—Ryots.*

S. 11 (3) does not protect a raiyat from ejectment by a purchaser at sale under the regulation, unless he is khudhast or Resident cultivator. (*Carnduff and Chapman*, JJ.) ISHAN CHANDRA NANDI *v.* GOUR MOHAN PODDAR. 15 I.C. 468 (Cal.).

——S. 11 (3)—*Bengal Rent Recovery Act, S. 16—Sales under Act—Purchaser, rights of—Ejectment of Khudkasht raiyats—Khas possession—Rent fair and equitable—Court, duty of.*

In sales under the above two Acts purchaser gets the property free of any incumbrance but he has no power to eject khudkasht raiyats and hereditary cultivators. If the Court finds that plaintiff is not entitled to khas possession it ought to determine fair and equitable rent payable if an alternative relief to that effect is prayed. (*Jwala Prasad and Adami*, JJ.) BRAJA SUNDAR DAS *v.* JAGANNATH DAS.

1 Pat. L.T. 258=56 I.C. 678=
1920 Pat. 181.

——S. 13—*Effect—Deposit of patni rent by darpatnidar—Possession given to darpatnidar—Patni rent—Payment by darpatnidar—Rent, if can be added to demand.*

Under S. 13 the defaulter can recover his tenure on payment of the advance made with interest, or on proof that the advance has been realised from the usufruct. The rent paid to the superior landlord for the years during which he has been in possession, cannot be added.

BENGAL PATNI REGULATION (VIII of 1819) S. 14.

12 Cal. 185, ref. (*Beachcroft and Walmsley*, JJ.) BEHARI LAL *v.* NASIMUNESSA BIBI.

41 I.C. 694=27 C.L.J. 480.

——S. 13—*Rights of darpatnidar.*

S. 13 merely gives the darpatnidar making an advance under it a usufructuary mortgage of the patni in order to recover the amount advanced from the profits thereof. (*Woodroffe and Carnduff*, JJ.). RAM JIBAN *v.* TOJ-UD-DIN. 9 I.C. 489=13 C.W.N. 401.

——S. 13, sub-S. (4)—*Lien of darpatnidar.*

Where a darpatnidar deposits the rent due to a zemindar from the patni, the lien of darpatnidar for the amount of a statutary lien is not affected by S. 65 of the B. T. Act or a sale thereunder. (*Ameer Ali*, J.) ARTHUR HENRY *v.* MAHARAJ BAHADUR SINGH.

41 Cal. 926=23 I C. 632=
1 L.W. 1059=41 I.A. 91=18 C.W.N. 747=
(1914) M.W.N. 397=15 M.L.T. 380=
12 A.L.J. 653=27 M.L.J. 4=
25 C.L.J. 434 (P.C.).

——S. 13 (4)—*Tenure-holder in possession of patni, whether landlord—Suit for arrears of rent—Limitation.*

A tenure-holder or *darpatnidar* who is put in possession of a patni, or depositing *patni* rent, under S. 13, is in the position of a mortgagee in possession and his possession is that of a landlord within the meaning of the Bengal Tenancy Act. He is entitled to sue for rent due before he was put in possession. The period of limitation is provided by the Bengal Tenancy Act and not by the Limitation Act. (*Fletcher and Richardson*, JJ.). ABDUL AZIZ *v.* BEHARI LAL. 41 I.C. 711 (Cal.).

——S. 14—*Patni taluk—Sale of, for arrears of rent—Suit by darpatnidar to set aside—Compensation to purchaser—Duty of Court to award—Remedy by suit, if available.*

In a suit for the reversal of a sale of a patni taluk for arrears of rent brought by the darpatnidars, S. 14 of Bengal Regn. (VIII of 1819 unambiguously and imperatively imposes a duty on the Court to indemnify the purchaser against loss at the charge of the Zemindar, etc. To discharge such duty a distinct issue should be framed as between the purchaser and the person chargeable, as to whether the purchaser has suffered any, and what loss against which he ought to be indemnified. On that issue there ought to be a finding and a decision subject to such right of appeal as there might be. *Quære*: Whether and if so, how far, the remedy given to a purchaser by S. 14 excludes all other remedies by suit? 26 C. 826; 21 W.R. 252, Ref. (*Sir Lawrence Jenkins.*) HUKAMCHAND BOID *v.* PIRTHICHAND LAL CHOWDHURY. 46 Cal. 670=17 A.L.J. 514=
36 M.L.J. 557=23 C.W.N. 721=
21 Bom. L.R. 632=(1919) M.W.N. 258=
30 C.L.J. 71=26 M.L.T. 131=
50 I.C. 444=10 L.W 416 (P.C.).

BENGAL PATNI REGULATION (VIII of 1819) S. 14.

———S. 14—*Payment of rent on receipt of notice under—Suit to recover, if maintainable—Not a voluntary payment.*

Having regard to the nature of the procedure provided by S. 14 of the Patni Regulation a payment of rent by patnidar to his zemindar upon receipt of the notice that the tenure would be sold to realize the rent due, does not fall within the rule that the money paid under pressure of legal proceedings is irrecoverable. In proceedings under S. 14 the Collector acts not in a judicial but in a ministerial capacity. (*Viscount Haldane*). JOYOTI PRASAD SINGH DEO BAHADUR *v.* KUMUD NATH CHATTERJI.
46 Cal. 1=45 I.A. 108=16 A.L.J. 369=5 Pat. L.W. 64=(1918) M.W.N. 441=24 M.L.T. 66=28 C.L.J. 165=8 L.W. 186=22 C.W.N. 1009=20 Bom. L.R. 856=45 I.C 827=35 M.L.J. 347 (P.C.).

[On Appeal from 27 I.C. 526.]

———S. 14—*Remedy under must be resorted to Suit for refund does not lie.*

On reversal of a patni sale, the purchaser must have recourse to the remedy provided by S. 14 to the extent it is available and cannot maintain a separate suit to obtain the relief which if he had so desired might have been granted to him against the Zemindar for reversal of the sale. (*Mukerjee and Rankin, JJ.*) CHOWDHURY MAHOMED AMIN *v.* MAHARAJA OF BURDWAN. **30 Cal. 756=75 I.C. 20=38 C.L.J. 192=1923 Cal. 732.**

———S. 14—*Notice of sale—Service sufficient if posted on office of defaulter—Irregular sale is only voidable—Second sale during the pendency of proceedings to set aside the first stand or falls with the first.* (*Richardson and Shamsul Huda, JJ*). MAHARAJADHIREJ OF BARDWAN *v.* MRITUNJOY GHOSE.
47 Cal. 782=60 I.C. 182=24 C.W.N. 785

———S. 14—*Rent paid to Zemindar by auction purchaser of a patni at a sale—Sale set-aside—Suit for refund—Lim. Act, Arts. 62 and 97.*

A suit by the auction purchaser at a patni sale which has been set aside for recovery of money paid to the Zemindars as rent during his period of possession will not be against the Zemindar. Such a suit brought more than three years after the date of the decree of the first Court setting aside the sale and the last of the payment made on account of rent is barred by limitation whether under Art. 62 or Art. 97 of the Lim. Act. *Semble*:—The remedy provided by S. 14 of Reg. VIII of 1819 is exclusive. (*Richardson and Huda, JJ.*) BEJOY CHAND MAHATAB *v.* TINKARI BANERJEE.
58 I.C. 751=24 C.W.N. 617.

———S. 14—*Scope of—Sale when set aside—Stranger purchaser.*

BENGAL PATNI REGULATION (VIII of 1819) S. 14.

S. 14 of the Patni Regulation does not restrict the right of suit to narrow and specified grounds. The validity of the sale may be successfully challenged on proof that the conditions prescribed by the Regulations have not been fulfilled and the Court exacts conformity on the part of the Zemindar with the statutory requirements. The purchaser though a stranger is only entitled to be indemnified against all loss at the charge of the Zemindar or other persons at whose instance the sale may have been made. Such loss would ordinarily be measured by costs of litigation and interest on the purchase money. 21 W.R. 252, ref. S. 14 of the Patni Regulation contemplates that the purchaser is to be made a party. If the purchaser has purchased on behalf of himself and others, he must be deemed to represent all such persons. (*Mookerjee and Panton*, JJ.) BEJOY KRISHNA MOOKERJEE *v.* LAKSHMI NARAIN JIU. **54 I.C. 786=30 C.L.J. 483.**

———S. 14—*Sale of a patni in a proceeding against a wrong person—Effect of.*

Proceedings under Patni Regulation may be taken against the patni tenure but the tenure cannot be sold by taking proceedings against wrong persons. A sale of a patni tenure in a proceeding taken against a wrong person is good and effectual unless framed for the purpose, and until that is done, the title of any person who claims under it, is valid against all persons who claimed under the alleged defaulter. 20 Cal. 746, foll. The words "on any other ground" in the second part of S. 14 of the Patni Regulation, are wide enough to cover a case of proceedings taken against wrong persons. (*N. R. Chatterjee and Panton*, JJ.) GOLAM SATTAR *v.* PRODYAT KUMAR TAGORE. **51 I.C. 933=29 C.L.J. 481.**

———S. 14—*Suit for determination of rent payable in future.*

The plffs. alleged that they held a Patni taluk on payment of certain money rent to the defts. but that the latter took proceedings under the Patni Regulations for realization of the value of certain paddy rents which they said, were payable for the *taluk*, and the plffs. in order to save their tenure from sale, deposited the amount claimed by the deft. The plffs. accordingly sued for a declaration that the *taluk* bore money rent and not paddy rent and for refund of the amount realized from them in excess of the proper rent. *Held*, that the suit was not barred under Art. 14 of the Lim. Act, because under S. 14 of the Patni Regulation the Collector could make only a summary investigation if the *talukdar* contested the *Zemindar's* demand for any arrear, that the determination of what was the rent payable for the tenure in future was beyond the scope of the Collector's power and that the plffs. did not require to set aside any act or order of the Collector. (*N.R. Chatterjee and Richardson, JJ.*). NAGENDRA LAL CHOUDHURY *v.* RAJA BIBI. **17 I.C. 504=17 C.W.N. 375.**

BENGAL PATNI REGULATION (VIII of 1819). S. 17.

———**Ss. 14 and 17**—*Decree-holder taking money deposited in Court—Sale set aside.*

Where a *putni* was sold under Reg. of 1819, the purchaser deposited the purchase money and the *patnidar* sued to set aside the sale but during the pendency of suit the decree-holder withdrew a portion of the money from the Collectorate as the *Patnidar's* money, and the sale was set aside under a compromise decree without any provision being made under S. 14, and the purchaser sued for refund, *held*, that the suit was maintainable and the decree-holder was bound to refund. (*Jwala Prosad*, A.C.J. *and Ross*, J.). MAHARAJ BAHADUR SINGH *v.* ABDUL RAHIM. **62 I.C. 900 (Pat.)**

———**S. 15, Cl. (2)**—*Scope of—Act* (VIII *B. C. of* 1865), *S.* 3.

S. 3 of Act (VIII B.C. of 1865) does not affect Clause (2) of S. 15 and a purchaser of a "patni" tenure must apply to the District Judge and not to the Collector. (*Mookerjee and Cuming*, JJ.). MONMOTHO NATH *v.* DISTRICT JUDGE 24 PERGANAS.
44 Cal. 715=40 I.C. 368=25 C.L.J. 535.

——— **S. 17**—*Scope of—Bengal Tenancy Act*, **S. 65.**

S. 65 of the Tenancy Act, does not contradict S. 17 of the Patni Regulation. (*Mookerjee and Beachcroft*, JJ.) BASANT KUMAR BOSE *v.* KHULNA LOAN COMPANY. **20 C.L.J. 1=26 I.C. 197=19 C.W.N. 1001.**

———**S. 17 (3)**—*Patni tenure—Successive rent decrees—Sale in execution of last decree—Charge on surplus sale proceeds for amounts of previous decrees—B. T. Act*, Ss. 65, 165 *and* 165 (c).

Per *N. R. Chatterjea*, J.:—The provision of S. 17, cl. (3) of the Regulation *viz.*, that the former balances beyond those of the current year or of that immediately expired if the sale be at the commencement of the following year will be mere personal debts of the patnidar, applies, only when the patni is sold under the Patni Regulation. The words "sale by public auction" in S. 3, cl. (3) of the Regulation refers to the summary sales under the Patni Regulation which alone are dealt with by it. The provisions of that Section or of S. 17 have nothing to do with a sale held under the general law. Rent is a first charge under the Patni Regulation as well as under the B.T. Act and there is no conflict between the two, so far as the question whether rent constitutes a first charge is concerned. (*N. R. Chatterjea and Smither*, JJ.) SATYA SHANKAR GHOSHAL *v.* MONMOHAN GUHA.
43 I.C. 996=22 C.W.N. 131.

———**S. 17 (c)**—*Sale of tenure for arrears of rent—Arrears antecedent to that period—Personal debts—Re-sale of tenure.*

Arrears of rent for a period antecedent to the period, to recover the rent of which, the tenure had been sold, must be regarded as personal debts recoverable under the ordinary procedure for the recovery of debts and not by re-sale of the tenure. (*Brett and Sharfuddin*, JJ.) KHITISH CHANDRA ACHARYA CHOWDHURY *v.* KHULNA LOAN CO., LTD.
14 I.C. 728=16 C.W.N. 804.

BENGAL PATNI SALE.

——— *Setting aside—Creditors of defaulting patnidar drawing out sale proceeds—Liability to refund.*

The Zamindar, the plaintiff brought a suit for Patni-rent. The Patni was disposed off by Regulation VIII of 1819, as the past rents were in arrears. One Peary Mohan Roy bought it. Out of the surplus sale proceeds in this transaction some of the defendants Nos. 1 and 9 took a specified sum from the Court. These were the creditors of the defaulting patnidars. The latter sued in the meantime to cancel the sale and it was so done. The Zamindar had to pay back to the purchaser but he brought a suit to realise that amount from defendants 1 and 9 who had taken the amount out of Court.

It was held, taking all facts of the suit into consideration that the plaintiff can sue defendants Nos. 1 and 9. They were tacitly bound to return the money to the Court. They failed in doing this and hence the Zamindar was obliged to pay again to the auction purchaser which otherwise he need not have paid. It was properly the business of defendants Nos. 1 and 9 to give back the surplus sale proceeds to the Court. (*Rampini and Woodroffe*, JJ.) BEHARI LAL SEAL *v.* MAHARAJA DHIRAJ BIJOY CHAND MAHATAB. **38 C L J. 137.**

BENGAL PERMANENT SETTLEMENT REGULATION (I of 1793).

———*Bengal Regulations* (*XIX of* 1793 *and* II *of* 1818)—*Permanently settled estate—Churs formed subsequent to settlement are liable to assessment—Non-navigable river — Ownership of the bed—Bengal Alluvion and Diluvion Act* XI *of* 1847), *S.* 6.

Land whether cultivated or waste at the time of the settlement, but included in a permanently settled estate, are exempt from further assessment under Bengal Regulation I of 1793. But this protection extends only to lands actually in existence at the time of the settlement and specifically included in the estate as settled.

Churs formed after the decennial settlement within the limits of the zemindari are to be treated as unsettled under Bengal Regulation II of 1890, even though the river bed from which the churs have been thrown up was the property of the zemindar at the time of the settlement and the jumma was imposed on the zemindari as a whole. It is therefore competent to the Government to assess to public revenue under

BENGAL PERMANENT SETTLEMENT REGULATION (I of 1793).

BENGAL PERMANENT SETTLEMENT REGULATION (I of 1793).

Bengal Act IX of 1847. Churs formed in a non-navigable river both where it flows through a permanently settled zemindari and within the middle line of the river where it is the boundary of the zemindari. The fact that the whole or half of the river bed, as the case may be was part of the permanently settled estate does not affect the right of the Government to assess the churs in question. 17 Cal. 590, distinguished. (*Viscount Cave.*). SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* MAHARAJA OF BURDWAN.

49 Cal. 103=67 I.C. 835=42 M.L.J. 61=26 C.W.N. 619=4 U.P.L.R. (P.C.) 1=35 C.L.J. 92=48 I.A. 565=1922 P.C. 6 (P.C.).

———*Construction — Malikana — Right to enhanced rate.*

Plaintiffs sued to recover under the terms of a permanent settlement in 1865 additional *malikana* or *dasturat* for a *mouzah* which formed part of a *jagir* carved out of the estate of his predecessor, the *malikana* for which *jagir* had been fixed in 1780 at Rs. 796 and odd. *Held*, disallowing plff.'s claim that the settlement of 1865 did not alter or add to the *malikana* fixed in 1780, but merely allocated to the *mouzah* in suit such sum as was proportionally payable n respect of it, and that the conduct of the parties since the settlement was consistent with this view of the facts. (*Lord Mersey.*). RAMESWAR SINGH *v.* SECRETARY OF STATE FOR INDIA.

12 I.C. 114=39 Cal. 1=38 I.A. 189=15 C.W.N. 1029=10 M.L.T. 285 (P.C.).

———*River bed—Inclusion in thak boundaries of estate—Effect of.*

From the fact that the bed of a large navigable river is shown to be included within the thak boundaries of a particular estate, it does not follow that the bed was settled with the zemindar at the time of the permanent settlement. (*Mookerjee*, A. C. J. *and Fletcher*, J.) SOUDAMINI DASYA CHOWDHURANY *v.* SECRETARY OF STATE. **65 I.C. 76 (Cal.).**

———*Churs—Accretion—Assessment.*

The mere fact that the permanently settled estate has become more valuable by the formation of *churs* is no ground for altering the assessment. The Revenue assessment on Riparian *Mouzas* at the time of the settlement was imposed on the adjoining half of the bed of the river also. (*Fletcher and Shamsul Huda*, JJ.) MAHARAJA OF BURDWAN *v.* SECRETARY OF STATE FOR INDIA.

46 I.C. 303=46 Cal. 390=22 C.W.N. 872.

———Nimak Sayar Mahal—*Zemindar—Settlement with different persons.*

Where at the permanent settlement the *Zemindari* was settled with the deft. and the *Nimak Sayar Mahal* with the plff. *Held*, that the plff. was entitled to dig for saltpetre in the land but so as to cause as little inconvenience as possible to the deft. as owner of the village. The plff. was not merely entitled to collect revenue. (*Jenkins*, C. J. *and Mookerjee*, J.). GOPAL CHAND *v.* JANKI KUAR.

41 Cal. 286=20 I.C. 650=18 C.L.J. 151=17 C.W.N. 1195.

———*Effect on military tenures.*

The permanent settlement may destroy a military tenure by a new contract with the holder of the tenure. It cannot affect the position of a tenure-holder with whom the new settlement was not made. 2 Mad. 128, rel. (*Roe and Coutts*, JJ.) RANI KESHOBATI KUMARI *v.* SATYANIRANJAN CHAKRAVARTI.

47 I.C. 179=1918 Pat. 305.

———Ss. 3 and 8—*Zemindar—Right of—Chaukidari Chakran lands.*

Since the permanent settlement the Zemindars have had at least a *prima facie* title to all lands for which they pay revenue, such lands being known as *Malguzari* lands. 12 M. I.A. 286. *Tannadari Chakran* (police service lands were *lakhiraj* (exempt from revenue) and liable to resumption by Government and the title of the Zemindar becomes extinguished by the resumption. All other *chakran* lands are *mulguzar* and the Zemindar is *prima facie* entitled to them, though in the case of *Chaukidari chakran* lands which involve the performance of duties in which the public are interested, the Zemindar cannot resume them. (*Lord Parker.*) RANJIT SINGH *v.* KALI DASI DEBI.

44 Cal. 841=21 C.W.N. 609=32 M.L.J. 565=15 A.L.J. 390=25 C.L.J. 499=19 Bom. L.R. 462=(1917) M.W.N. 459=6 L.W. 101=2 Pat. L.W. 1=22 M.L.T. 489=40 I.C. 981=44 I.A. 117 (P.C.).

———S. 8 (3)—*Bengal Regulation (XIX of 1793), cl. 2 (1)—Revenue free estate—Grant of.*

The mere fact that no rent is reserved in a patta does not necessarily imply that by it, a revenue free estate was granted. Direct payment of cess on account of rent free lands is not conclusive that those rent free lands constitute a separate estate. (*Miller, C.J. and Coutts*, J.). KUMAR PRAMATHA NATH MALLA *v.* MEIK.

5 Pat. L.J. 273=56 I.C. 184=1 Pat. L.T. 360=1920 Pat. 146.

———S. 10—*Service of notice, if a condition precedent to—Validity of sale—Proof—Onus—Ex parte entry in order sheet if evidence—Evidence Act (I of 1872), S. 114—Ill. (e)—Applicability.*

Service of notice under S. 10 is a condition precedent to the validity of a sale; therefore when the fact of service is denied, the onus is on the party alleging service to prove it; and

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the presumption in illustration (e) of S. 114 of the Evidence Act, that official acts have been regularly performed, has no application to such cases. An *ex parte* entry in the order sheet is not even *prima facie* evidence against the person denying service of notice. Sale held in mofussil after the money due on a certificate is paid into collectorate, is illegal. (*N.R. Chatterjee*, J.) NABADWIP CHANDRA NANDI *v.* DOLGOBINDA NANDI. 11 I.C. 472 (Cal.).

BENGAL PUBLIC DEMANDS RECOVERY ACT (VII of 1880).

———*Application for realization of security.*

Bengal Act VII of 1880 does not contemplate the realization of a security, for this a regular suit should be instituted. (*Mookerjee and Carnduff*, JJ.) NANDKUMAR DOBEY *v.* AJODHYA SAHU. 14 C.L.J. 292 = 11 I.C. 466 = 16 C.W.N. 351.

———(I of 1895).

———*Sale for arrears of road cess—Certificate issued to person who has no interest in the property—Validity of sale.*

Sale of property held under the Act by issuing certificates, for arrears of road cess against a person on the books of the Collector when the person has no interest in the property does not affect the real owner. (*Chamier*, C.J. *and Mullick*, JJ.) SHAHZAD BEGAM *v.* FASILUDDIN AHMAD. 41 I.C. 252 (Pat.)

———**Ss. 7 and 8**—Poolbandi *charges—Sale under certificate—Procedure—Land advertised for sale for arrears of revenue subsequently paid up.*

Under S. 6 of Bengal Act (XI of 1859) notifications were issued for the sale of certain land for arrears of land revenue. Subsequently a certificate was filed under the Public Demands Recovery Act, (I of 1895) for arrears of *Poolbandi* (embankment, charges, in respect of the land. The amount due for arrear of land revenue was paid before the sale but not the *Poolbandi* charges. The Collector accepted the amount and ordered the sale to proceed in respect of *Poolbandi* charges, without a notice as required by S. 5 of Act (XI of 1859). *Held*, that the sale was invalid. Although no formal order of exemption had been made under S. 18, Act (XI of 1859), the Collector having acknowledged payment in full of the arrears of land revenue for which the sale was advertised and having elected to proceed under the certificate procedure for the *poolbandi* charges and directed a sale thereunder, he could not treat the arrear under the certificate as an arrear of land revenue without notice to the parties under S. 5. The sale was therefore without jurisdiction. (*Lord Dunedin*) DHIRAJ CHANDRA BHOSE *v.* SRIMATI HARI DASI DEBI. 42 Cal. 765 = 22 I.C. 290 = 19 C.W.N. 507 = 28 M.L.J. 480 = 2 L.W. 422 = 42 I.A. 58 (P.C.)

BENGAL PUBLIC DEMANDS RECOVERY ACT (I of 1895), S. 10.

———**S. 7**—*Certificate.*

A certificate cannot be issued for a claim for damages as it does not fall under S. 7. A tenant cannot get refund of money recovered as damages for use and occupation for certain non-agricultural lands when he had notice of the increase in demand by the Settlement officer. (*Stephen and Mullick*, JJ.) ABDUL RAHIM CHOUDHURY *v.* SECRETARY OF STATE. 22 I.C. 626 (Cal.)

———**S. 8**—*Default in paying price—C. P. Code, O. 21, R. 71—Remedy not exhaustive.*

The deficiency made by purchaser in payment of price is to be certified to the Collector and not to the Court passing the decree if the sale is under the Public Demands Recovery Act. O. 21, R. 71 is not the only remedy of a person damnified. He can sue for damages unless he has executed a certificate under rule 71 as a decree. (*Atkinson and Roe*, JJ). KAMESHWAR NARAIN SINGH *v.* MAHESWAR PRASAD SINGH. 50 I.C. 59 = 1919 Pat. 210.

———**S. 9 (3)**—*Object of granting certificate*

The obvious intention under S. 9 (3) is that the Officer shall use his discretion as to the issue of a certificate and decide whether the case is a proper one and whether the money is due or not. A Certificate issued under cl. (1) though not duly signed or verified is not valid in law. (*Mookerjee and Beachcroft*, JJ.) MOHIUDDIN *v.* PIRTHICHAND LAL. 31 I.C. 664 = 19 C.W.N. 1159.

———**S. 10**—*Notice—Omission to serve—Sale a nullity—Bengal Act I of 1913—Effect for*

Under S. 10 of the Bengal Public Demands Recovery Act the omission to serve a notice under S. 10 makes the sale a nullity. In such a case the plaintiff need not apply to set aside the sale but can sue for possession on the footing that his title has not been affected by the sale. The suit would be governed by art. 142 of the Lim. Act. (*Mookerjee and Chotzner*, JJ.) LALIT MOHAN SEN *v.* MANORANJAN GHOSH CHAUDHURI. 36 C.L.J. 208 = 72 I.C. 698 = 1923 Cal. 13.

———**S. 10**—*Service of notice—Proof of.*

The mere entry in the order-sheet of the certificate case that notice had been served is no proof that service was effected and a sale without such service is void. (*Mookerjee and Beachcroft*, JJ.) SYED MOHIUDDIN *v.* PIRTHI CHAND LAL CHOUDHURY. 31 I.C. 664 = 19 C.W.N. 1159.

———**Ss. 10, 19 (2) and 21**—*Sale under Act—Right of purchaser—Non-service of notice—Effect.*

A purchaser at a sale under the Act acquires the rights and interests of the judgment-debtors mentioned in the Collector's certificate. Non-

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service of notice upon the judgment-debtors invalidates the sale and the original owners can recover the property within 12 years from that date if at all dispossessed Return of the serving officer stating that notices have been served producing receipts of the judgment-debtors is *prima facie* proof of due service. (*Mookerjee and Beachcroft*, JJ.) BEPIN BEHARI BERA *v.* SHASHI BHUSHAN DATTA. **18 C.L.J. 628 = 22 I.C. 95 = 18 C.W.N. 766.**

——S. 10—*What passes at sale under.*

A purchaser at a sale under the Public Demands Recovery Act, is entitled only to the right, title and interest of the persons named as judgment-debtors in the certificate at the time of sale. Where therefore an occupancy tenant mortgaged his holding to Government and subsequently he was dispossessed by the landlord who continued to be in possession till after the limitation period, the tenant's rights are extinguished by the law of limitation, and a purchaser of the holding at a sale under the Public Demands Recovery Act, being entitled only to the tenant's interest when subsisting, gets no interest whatever which he could enforce against the landlord. But divergence of judicial opinion exists over this question as to whether adverse possession on the part of the landlord operates to extinguish merely the equity of redemption or also the interest of the mortgagee. (*Mookerjee and Carnduff*, JJ.) NANDKUMAR DOBEY *v.* AJODHAYA SAHU. **14 C.L.J. 292 = 11 I.C. 463 = 16 C.W.N. 351.**

——S. 10—*Sale without service of notice—Nullity—Sale against a person who had ceased to hold title to the estate—Whether valid.*

A sale under the Act without due service of notice under S. 10 is a nullity and a sale in execution of a certificate issued against a person who was not the holder of the estate at the time the arrear fell due, is bad. (*Mullick and Jwala Prasad*, JJ.) SHEIK KHAIRUDDIN *v.* SAHDEO NARAIN SINGH. **38 I.C. 483 = 1 Pat. L.W. 319.**

——Ss. 15 and 32—*Certificate—Execution of—Dismissal—Appeal—Suit for recovery amount levied, Limitation.*

A certificate under the Bengal Public Demands Recovery Act can be executed only after it has become final, and so long, as the certificate is not set aside, the judgment-debtor cannot get back the money recovered in executions of that certificate. A judgment-debtor cannot by merely preferring an appeal against any order passed in execution of a certificate, get a fresh start of six months for bringing a suit under S. 15, of the Bengal Public Demands Recovery Act. (*Chatterjea and Duval*, JJ.) PEARY MOHAN MUKERJEE *v.* SARAT KUMAR ROY. **52 I.C. 882 (Cal.)**

BENGAL PUBLIC DEMANDS RECOVERY ACT (III of 1913), S. 3.

——S. 15—*Scope of.*

A suit to declare that the certificate granted by the Revenue authorities is without jurisdiction is not governed by S. 15. (*Mookerjee and Caspersz*, JJ.) NAGENDRA BALA *v.* SECRETARY OF STATE. **10 I C. 532 = 14 C.L.J. 83.**

——Ss. 19 and 21—*Sale under.*

S.313, A.C.R.C. 1882 is not applicable to a sale under Public Demands Recovery Act. S. 19 (2) of the Public Demands Recovery Act expressly bars its operation, but the judgment-debtor after tendering the full amount contemplated by the section can proceed under S. 21 of the same Act. (*Mookerjee and Beachcroft*, JJ.) BEPIN BEHARI BERA *v.* SHASHI BHUSAN DATTA. **18 C.W.N. 766 = 22 I.C. 95 = 18 C.L.J. 628.**

——S. 19 (2)—*C.P. Code, S.* 66.

S. 66, C.P.C. (1908) applies to the case of a purchaser at a sale in enforcement of a certificate issued under Act I of 1895, S. 19 (2). (*Carnduff and Chapman*, JJ.) BANGA CHANDRA NANDI *v.* TARA KINKAR PAL. **15 I.C. 291 = 16 C.W.N. 973.**

——(III of 1913).

——*Demand in addition to Revenue—Can be based only on Statutory or contractual liability.*

Where the Government makes a demand in addition to the revenue payable in respect of a permanently settled estate from the holders thereof such an additional demand can be recoverable if there is a special liability either statutory or contractual. Where the demand has been made and complied with for a very long time it must be referred to some legal origin: in other words the inference is that at some time there was an agreement between the Government and the proprietors that the former should maintain and repair the embankments in the estate with the aid of funds contributed by the latter. 45 C. 866; 22 C.W.N. 823, referred to. (*Mookerjee and Chotzner*, JJ.) NABADWIP CHANDRA NANDI *v.* SECY. OF STATE FOR INDIA. **50 Cal. 208 = 1923 Cal. 609.**

——Ss. 3 (1), 36 and 37 — *Scope of—Act is not retrospective and does not affect—Cause of action accruing under S. 10 of Act I of 1895.*

Act III of 1913 is not retrospective in its operation and does not extinguish or modify causes of action which have already accrued by failure to serve the notice under S. 10 of Act I of 1895. S. 36 of Act III of 1913 controls S. 3 (1). S. 37 of the Act bars the jurisdiction of the Civil Court only where the question relates to the making execution, discharge or satisfaction of a certificate duly filed under the

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Act or relates to the confirmation or setting aside or a sale held in execution of such certificate. (*Mookerjee and Chotzner*, JJ.) LALIT MOHAN SEN *v.* MANORANJAN GHOSH CHOWDHURY. **36 C.L.J. 208 = 72 I.C. 698 = 1923 Cal. 13.**

——S. 4—*Public demand—What is—Certificate, issue of.*

The 'Public demand' mentioned in S. 4 of the Public Demands Recovery Act includes a demand payable to the Collector by a person holding any interest in land, when such demand is a condition of the use and enjoyment of the land. S. 4 should not be so interpreted as to authorise the issue of more than one certificate in the prescribed form with regard to a single demand broken up into fragments. (*Mookerjee and Cuming*, JJ.) PRATAB CHANDRA JANA *v.* SECRETARY OF STATE. **35 C.L.J. 304 = 67 I.C. 375 = 1922 Cal. 101.**

——S. 10—*Notice — Omission to serve under the Sale a nullity.*

Under S. 10 of the Bengal Public Demands Recovery Act the omission to serve a notice under S. 10 makes the sale a nullity. In such a case the plaintiff need not apply to set aside the sale but can sue for possession on the footing that the sale had not affected his title. The suit would be governed by Art. 142 of the Limitation Act. (*Mookerjee and Chotzner*, JJ.) LALIT MOHAN SEN *v.* MANORANJAN GHOSH CHAUDHURI. **36 C.L.J. 208 = 72 I.C. 698 = 1923 Cal. 18.**

——S. 10—*Notice under—Proper service of.*

Service of notice under S. 10 must be effected in strict confirmity with that section.

Where a suit is instituted for having a sale under the Act declared null and void and not affecting the plaintiff's title, the defendant, must prove proper service of the notice under S. 10 as required by the law. (*Chattarjea and Richardson*, JJ.) NEMAI CHARAN DE *v.* SECRETARY OF STATE FOR INDIA. **46 I.C. 741 = 48 C. 496.**

——Ss. 10 and 31—*Notice—Service of—Death of one sharer before notice—Sale is not wholly void.*

The words "and also in some conspicuous part of the land" in S. 31 refer only to cases in which the service is effected by fixing a copy in conspicuous place in the office of the certificate officer and not to cases in which the same notice is served by fixing a copy on the outer door of the house in which the judgment-debtor ordinarily dwells or carries on business.

Where the judgment-debtor could not be found at home nor could service be effected on any adult male member and the only information which could be obtained was that the persons on whom notice was to be served were in some distant town, the only alternative left is to serve by fixing the copy on the outer door of the house.

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Where one of the sharers was dead prior to the serving of the notice, the sale is not wholly void. (*Coutts and Ross*, JJ.). BENI ROY *v.* BABUI BACHA KUER. **1 P. 273 = 69 I.C. 700 = 1 Pat. L.R. 196 = 1922 P. 546.**

——S. 31—"*And also in some conspicuous part of the land*"—*Meaning of.*

The expression "And also in some conspicuous part of the land" in S. 31 of Bengal Public Demands Recovery Act refers only to cases in which the service is effected by fixing a copy in some conspicuous place in the office of the certificate officers and not to cases in which the notice is served by fixing a copy in the outer door of the house in which the judgment-debtor ordinarily dwells or carries on business. (*Coutts and Ross*, JJ.) BENI ROY *v.* BABUI BACHA KUER. **1 P. 273 = 69 I.C. 700 = 1 Pat. L.R. 196 = 1922 P. 546.**

——S. 36—*Sale of property without existence of arrears of revenue is a nullity—Suit to set aside—Bar of limitation.*

Where in 1907 the revenue authorities proceeded to sell the property in dispute for an imaginary arrear of revenue the sale is a nullity and there is an usurpation of jurisdiction on their part. 37 Cal. 107, referred to: Thereupon a right accrued to the plaintiff under the law as it then stood to institute a suit to recover the property within 12 years from the date of dispossession. A right of this description could not be affected by the retrospective operation of a subsequent statute. (*Mookerjee and Chotzner*, JJ.). DHORENDRA KRISHNA MUKERJEE *v.* MOHENDRA NA'TH MUKHERJEE. **27 C.W.N. 886 = 70 I.C. 869 = 1923 Cal. 428.**

——S. 37—*Unauthorised action of revenue authorities—Does not oust jurisdiction of—Civil Courts.*

When the action of the revenue authority is wholly unauthorised. S. 37 of the Public Demands Recovery Act does not oust the jurisdiction of the Civil Courts to make a declaration, issue an injunction or to grant other adequate relief. (*Mookerjee and Cuming*, JJ.) PRATAB CHANDRA JANA *v.* SECRETARY OF STATE. **35 C.L.J. 304 = 67 I.C. 375 = 1922 Cal. 101.**

——S. 37—*Sale null and void—Suit to declare not barred.*

A sale held under the Act under Orders of the Certificate Officer without notifying the date, time and place is null and void and a suit for declaration that the sale is a nullity is not barred by S. 37 of the Act. (*Mookerji, A.C.J. and Fletcher, J.*) RHAJUDDIN *v.* SHAHANUTULLA MIA. **60 I.C. 752 (Cal.)**

BENGAL REGULATION (VIII of 1793), S. 5.

——S. 5—*(I of 1793), S. 10—and (I of 1801), Ss. 8 and 14—Separate taluk—Registry.*

A judgment of Sadar Diwani Adalat in 1805 ordered under Reg. (VIII of 1793), and (I of 1901), separation of certain taluk from an estate and deduction of the *jama* of the Taluk from that of the Zemindari; the order was not carried out. The Commissioner in 1854 refused separation of the *Jama*; in 1906, the Talukdar applied to have his Taluk separated and to have *Jama* assessed. In 1909 separation was ordered. The present suit is by Zemindar for declaration against the separation, the suit was however dismissed. *Held*, on appeal that the Court should not have interfered in the matter at all and that the separation of Taluk and *jama* was perfectly valid. (*Stephen and Mullick*, JJ.) HEMANTA KUMARI DEBI *v.* JAGINDRA NATH ROY.

22 I.C. 345=18 C.L.J. 526.

——S. 41—*Zemindar—Chowkidari chakran lands—Resumption by Government—Right of Zamindar.*

The Patnidar is entitled to the lands as passing under the patni if the Chowkidari lands are resumed by Government and settled with the Zemindar. (*Lord Parker*), RANJIT SINGH *v.* KALI DASI DEBI. 44 Cal 841=21 C.W.N. 609=32 M.L.J. 565=15 A.L.J. 390=25 C.L.J. 599=19 Bom. L.R. 462=(1917) M.W.N. 459=6 L.W. 101=2 Pat. L.W. 1=22 M.L.T. 489=40 I.C. 981=44 I.A. 117 (P.C.).

——(XI of 1793).

——*Object.*

Regulation (XI of 1793) was not intended to abolish all customs of primogeniture but only customs which had originated in consideration of financial convenience and which were repugnant both to Hindu and Mahomedan Laws. (*Caspersz and Doss*, JJ.) SARAT KUMAR DAS *v.* AKSHOY NARAIN DAS.

9 I.C. 961=13 C.L.J. 305.

——S. 3—*Construction.*

S. 3 merely gives effect to the general intention expressed in the preamble. (*Cospersz and Doss*, JJ.) SARAT KUMAR DAS *v.* AKSHOY NARAIN DAS. 9 I C. 961=13 C.L.J. 305.

——S. 10 — *Usufructuary mortgage — Interest—Mortgagor's right to surplus profits.*

Where an usufructuary mortgage was executed subject to the Bengal Regulation by which the mortgagee was entitled to possession but was to pay off all public charges and retain the surplus in lieu of interest and was not liable to accounts on redemption, *held*, that the mortgagee was not entitled to more than 12 per cent. interest and that the mortgagor was entitled to an account of the surplus proceeds in spite of the provision in the mortgage deed.

BENGAL REGULATION (V of 1793).

8 All. 402 foll. 33 All. 97; 7 I.C. 293, dist. (*Karamat Hussain and Chamier*, JJ.) HABEEBULLAH *v* ABDUL HAMID.

13 I.C. 963=34 All. 261=9 A L.J. 131.

——(XIX of 1793).

——Ss. 24 and 29—*Registration—Omission of Collector to enter information in Register and long possession—Effect of.*

Omission of Collector to enter information under S. 29 supplied by *Lakherajdar* according to S. 24 does not affect the title of *Lakheraj*. Registration and long possession are good evidence of his title. (*Chapman and Mullick*, JJ.) MANMOHINI DASSI *v.* ADWAITA MAITI.

19 I.C. 548 (Cal.).

——(XXXVII of 1793).

——S. 15—*Assertion of claim against State—Burden of proof.*

A *mudtamash* grant made hereditary by Regulation 37 of 1793 is not affected by Regulation 14 of 1825. The burden of proof lies on the claimant to show that his claim was well-founded as against the state. (*Mookerjee and Holmwood*, JJ.) SECRETARY OF STATE *v.* RASHIDUL HUQ. 21 I.C. 93=18 C.L.J. 31.

——(VIII of 1798).

——S. 5—*No separation of jama—Presumption.*

Where a talukdar is shown to have taken no steps under the regulation to obtain separation of the jama, the presumption would be that he was not an independant talukdar under S. 5 of the Regulation. (*Ameer Ali*, J.) RAJA SRIMATH RAY *v.* MAHARAJA PRATAP UDAI NATH SAHAI DEO. 33 M.L.T. 408=28 C.W.N. 145=(1923) M.W.N. 702=1923 P.C. 217 (P.C.).

——(V of 1799).

——*Jurisdiction of District Judge.*

The Jurisdiction of a Dt. Judge under Reg. V of 1799 is of a limited character and is more administrative than judicial. He can act there-under only if there is no claimant. The Judge has no jurisdiction in an intestate case to ignore the claim of one who has obtained a certificate until it is revoked by a competent Court. (*D. Chatterjee and Mullick*, JJ.) SUKHIA BEWA *v.* SECRETARY OF STATE.

19 C.W.N. 551=27 I.C. 821=21 C.L.J. 154.

——S. 4—*Applicability of.*

Under S. 4 the Judge cannot make an order unless a claimant is in possession and a suit has been instituted by another claimant out of possession. It is only during the pendency of such suit that the Judge can take security and

BENGAL REGULATION (V of 1799), S 5.

place one of the claimants in possession. (*Mookerjee and Caspers*, JJ.) SATARA BEGAM *v.* FAIZ ALI KHAN.
9 I.C. 994=13 C.L.J. 677.

——S. 5—*Order under.*

So long as no regular suit is brought by the persons claiming the property dealt with by the Court, an order under S. 5 of Reg. V of 1799, is *ultra vires*. (*Stephen and Mullick*, JJ.) BALIA KOER *v.* BANDRAM SAHU.
38 I.C. 512=20 C.W.N. 823.

——(VIII of 1800).

——Muki *papers filed by elakadars—Admissibility of admission—Roadcess returns.*

Mulki papers filed by the *elakadars* under Regulation (VIII of 1800) Para. III containing statements made by the plff.'s predecessor at a time prior to any dispute against his own interest can be admitted in evidence. It is competent to use admissions of the ladies made in a Road cess return filed by their *mukhtear*, against their representatives. If they are not of as admissions, they are certainly valuable as positive evidence of plffs. title. (*Halmwood and Chatterjee*, JJ.) KALI SANKAR SAHAI *v.* PRATAP UDAI NATO SAHI DEO.
15 I.C. 691=16 C.W.N. 683.

——(I of 1801).

——Ss. 8 and 14—*Independent taluk—Time within which separation is applied. for—"Actual Produce" in Sec.* 8—*Meaning of.*

Held, by the Privy Council that the proprietors of Taluk Balasutin which was established by a decree of the Sudder Dewany Adaulat of 1805 to be an independent taluk having duly applied for the separation of the taluk under S. 14 of Regulation (1 of 1801) within the year thereof had not been wanting in diligence in seeking the relief to which they were entitled. The delay of over 100 years that had occurred was due either to the opposition of the Zamindars or the action of the Revenue authorities; and the objections of the zemindar in their present suit to the separation being effected by the Revenue authorities were purely vexatious and designed to prolong litigation.

"The actual produce" on which the assessment of revenue under S. 8 of Regulation of 1801 was to be based was "the actual produce" at the time when proceedings were instituted for the separation of the taluk (*Ameer Ali*) RANI HEMANTA KUMARI DEBI *v.* MAHARAJAH JAGADINDRA NATH ROY.
31 I. C. 148=(1920) M.W.N. 66=22 Bom. L.R. 488=23 C.W.N. 149 (P.C.).

[On Appeal from 22 I.C. 345=18 C.L.J. 526.]

——(XXXI of 1803).

——S. 6, *Scope of.*

The agreement by a vendee to pay revenue

BENGAL REGULATION (XVII of 1806).

for land as well as for land reserved in vendor's possession is void and being a personal contract, the next vendee of the reserved land is not entitled to sue for the breach of such a covenant. (*Richards*, C.J. *and Rafique*, J.) ALI HUSAIN *v.* HUKIM ULLAH. 38 All. 230=33 I.C. 187=14 A.L.J. 266.

——(II of 1805).

——S. 2 (2)—*Assessment — Revenue by Government—Bar of right of.*

When the right of Government to assess certain lands claimed as *Lakhiraj* with land revenue appeared to have accrued in 1793 the case being governed by sub-s 2 of S. 2 until it was repealed, so far as regards Assam, by S. 28 of Assam Regulation I of 1886. *Held*, that the end of sixty years from 1793, Governments' right to assess the land with land revenue was time barred. Per *D. Chatterjee*, J.:—The principle that the right to assess revenue is a sovereign right and cannot be lost can have no application where there is a period of limitation provided by statute. 27 Mad. 16 diss. (*D. Chatterjee and Beachcroft*, JJ.) ANANDA KUMAR BHATTACHARJI *v.* THE SECY. OF STATE. 43 Cal. 937=32 I.C. 774=20 C.W.N. 576.

——(XVII of 1806).

——*Foreclosure — Service of notice — Mortgagee, when absolute owner.*

Where upon an application for foreclosure, proceedings are held under Reg. (XVII of 1806) the title of the mortgagee becomes absolute upon the expiry of the year of grace, although no suit is brought by the mortgagee for declaration of his right as absolute owner. It lies on the mortgagee to prove that notice of foreclosure has been duly served on the mortgagors. Where due service of notice had not been effected upon all the mortgagors individually *held* the mortgage had not been foreclosed, nor had the mortgagee acquired the absolute ownership of the property. (*Banerji and Piggott*, JJ.) JAGDIP NARAIN RAI *v.* SARUP KHAN.
17 A.L.J. 691=51 I.C. 73=1 U.P.L.R. (H.C.) 59.

——*Procedure—Compliance.*

Mere rubker or notice by Nazir does not prove compliance with the procedure under the Regulation unless the preliminaries laid down by the Regulation are proved to have been followed step by step. (*Knox*, J.) COLLECTOR OF MUTTRA *v.* BALDEO SINGH.
42 I.C. 952 (All.)

——*Scope of.*

Where a mortgage by conditional sale governed by Regulation (XVII of 1806) has not provided for possession by the mortgagee, the latter can obtain possession only by foreclosure proceedings under the Regulation. The limitation for a suit for foreclosure under the regulation

(17 of 1806) is 12 years. (*Banerjee*, J.) SHYAM CHANDRA SINGH *v.* BALDEO.
17 I.C. 467=10 A.L.J. 522.

———*Foreclosure of Mortgage—Demand, if necessary—Effect of delay—Minor—Service of notice on relation.*

A demand need not immediately precede the application for foreclosure. The delay between the demand and application does not prejudice the mortgagor. But it gives him on the contrary, a further opportunity to arrange for payment. The service of notice on minor's relation with whom he lived and who happened to be the mortgagor is sufficient, especially if the minor and the relation were members of joint Hindu family. Notice to subsequent mortgagee is necessary only if there is complete assignment. (*Scott-Smith and Wilberforce*, JJ.) GARDHAN DAS *v.* RUKMAN.
1 Lah. 292=58 I.C. 11=
4 P.L.R. 1921=2 Lah L.J. 198=
2 U.P.L.R. 154 (Lah.).

———*Proceedings under—Object of.*

Proceedings under Reg. (17 of 1806) are purely ministerial devised to give warning to the mortgagor of the impending disappearance of his right to redeem the mortgage and avoid a conditional sale and cannot in themselves confer a new period of limitation, for a claim which would be otherwise barred. (*Scott-Smith and Le-Rossignol*, JJ.) RATAN DAS *v.* GURAN.
79 P.R. 1918=45 I.C. 563=
52 P.W.R. 1918=25 P.L.R. 1918.

———*Mortgage by conditional sale—Defects in notice of foreclosure.*

Illegibility of the seal of the District Court on the foreclosure notice, or the ambiguity in mentioning the date of the deed where it has not led to any misconception on the part of the mortgagor or omission of words describing the mortgage property which causes no misconception in the mind of the mortgagor are not defects fatal to the validity of a notice of foreclosure as required by Ss. 7 and 8 of the Regulation. (*Scott-Smith*, J.) RAGHU NATH *v.* RUKNA. **82 P.W.R. 1918=45 I.C. 179=**
80 P.L.R. 1918.

———*Foreclosure.*

Plff. should be given full opportunity of showing that he has complied with all the technicalities under the Regulation. (*Johnstone*, C.J.) GIAN CHAND *v.* CHANAN SHAH.
2 P.W.R. 1916=32 I.C. 809=
39 P.L.R. 1916=199 P.W.R. 1916.

———*Notice of foreclosure.*

Notice proceedings under a conditional sale clause in a mortgage deed are invalid and of no effect, if no attempt is made to proceed against all the heirs of the mortgagor, if notice does not specify amount due by the mortgagor within the year of grace and, if no reference is

made to S. 7 Reg. (XVII of 1806). (*Kensington*, C.J *and Beadon*, J.) BULANDA *v.* FATTEH DIN. **57 P.R. 1914=23 I.C. 504=**
256 P.L.R. 1914.

———*Mortgage—Stipulation that foreclosure should follow on failure of mortgagor to pay two years' interest—Stipulation, if can take effect.*

A stipulation in a mortgage deed that foreclosure should result immediately on failure of mortgagor to pay interest on the mortgage money for two years, cannot take effect under the Regulation (XVII of 1806) or even under cl. 7 of S. 8 and S. 12 of the Rules for the Civil Administration of Civil Justice in the Punjab. (*Kensington*, C.J. *and Shah Din*, J.) BULAKI MAL *v.* DUNI CHAND.
116 P.L.R. 1914=22 I.C. 837=
95 P.W.R. 1914=94 P.R. 1914.

———Bai-bil-wafa—*Procedure in Punjab where Regulation not in force.*

In cases of *Bai-bil-wafa*, even when Regulation (XVII of 1806) was not in force in the Punjab, the mortgagee could not without any formalities convert his mortgage into a completed sale but must either bring a foreclosure suit or at least make some sort of reference to the Civil Court with a view to issue notice to the mortgagor. The regulation (17 of 1806) does not apply to shops. (*Johnstone and Chevis*, JJ.) SARNIMAL *v.* MURLIDHAR.
90 P.L.R. 1914=22 I.C. 680=
107 P.W.R. 1914.

———*Anomalous mortgage—Title of mortgagee is not complete without foreclosure.*

Where there is an anomalous mortgage, *viz.*, a combined mortgage by conditional sale and usufructuary mortgage then under the Regulation the mortgage was bound to institute proceedings for foreclosure within 12 years and the time for foreclosure does not arise till the period stipulated in the proviso for redemption had expired. A mortgagee's title must be held to be incomplete until it was confirmed by a regular suit under the regulation. Where before the expiry of the 12 years the T.P. Act came into force then the mortgage would be subject to the provisions of S. 60 of the T.P. Act. (*Prideaux*, A.J.C.) RUPA BAI *v.* RODBA.
6 N.L.J. 130=72 I.C. 121=1923 Nag. 274.

———*Foreclosure—Delivery of possession by mortgagor to mortgagee operates as a surrender.*

A mortgagee of the year 1875 provided that on default of payment of the money due within 2 years the mortgage would operate as a sale. After the expiry of the period the mortgagee applied for foreclosure under Bengal Regn. 17 of 1806 and a notice was issued under S. 82 of Act X of 1877. After the expiry of the period of one year's grace, the case was consigned to the records. Thereafter the mortgagor delivered possession of the property to the mortgagee

without process of Court and the mortgagee remained in possession. *Held* that the delivery of possession by the mortgagor and the mutation of names in favour of the mortgagee operated as a surrender of the equity of redemption on foot of the foreclosure proceedings. Since the mortgagee's is n possession in pursuance of the foreclosure proceedings and not as purchaser the surrender did not require registration under Act. X of 1877. (*Kanhaya Lal*, J.C.) BASHIR HUSAIN *v.* CHANDRA PAL SINGH.
25 O.C. 83=68 I.C. 223=1922 Oudh. 133.

———*Foreclosure—Notice.*

In foreclosure proceedings under Regn. XVII of 1806 if notice issued to the mortgagor has not the counter signature of the officer the foreclosure cannot be complete in spite of the order that the service had been duly effected. (*Chamier*, J. C.) DHAMA *v.* MADAR SINGH.
12 I.C. 345 (Oud)

———S. 1—*Foreclosure — Observance of formalities must be proved by the mortgagee.*

It is settled law that the Court will not presume that all the formalities required by Regulation XVII of 1806 in proceedings for foreclosure have been observed, but the mortgagee must prove affirmatively the due performance of every necessary condition.

The non-existence of the notice does not relieve the mortgagee of the burden of proving that the notice satisfied the requirements of Regulation XVII of 1806. (*Martineau and Brasher*, JJ.) MUNSHI RAM *v.* NAURANGA.
72 I.C. 575.

———S. 3—Tahwari—Salami.

Only specific sums payable to the landlord as rent are referred to in S. 3 and not 'abwab' impositions such as '*Tahwari*' and '*Salami*'. 11 Cal. 175, rel. on. (*Coxe and Chatterjee*, JJ.) KALANAND SINGH *v.* SAIRA. **25 I.C. 540 (Cal.)**

———S. 7—*Notice to mortgagor.*

S. 7 provides either for payment or tender to the mortgagor for deposit in Court, and a notice which simply informs the mortgagor that he must pay the money within the year and says nothing of the alternatives of tenders and deposits in Court is misleading. The defect is not cured merely by the addition of words "in the manner provided for in S. 7 of the regulation". (*Chevis*, J.) ZORA *v.* CHANDU.
68 I.C. 883=1923 Lah. 71 (2).

———S. 7—*Legal representatives.*

The words legal representatives in S. 7 includes any person who is interested in protecting the estate and includes a purchaser of equity redemption of a part of the property. The words 'amount due' used in the proviso to S. 7 refer to the earlier portion of the section and denote the "sum lent" under the mortgage-deed plus interest due thereon if the mortgage is without possession but do not include costs of improve-

ments though chargeable under the deed, nor any money due as rents, though that money was chargeable on the estate. (*Chevis and Shadi Lal*, JJ.) FAZUDDIN *v.* KHARAK SINGH.
31 I.C. 230=83 P.R. 1915=141 P.W.R. 1915.

———Ss. 7 and 8—*Notice—Mis-description of property—Whether fatal.*

Where in a notice under S. 7, the property mortgaged instead of being described as one half of a certain land was described as the whole of it and the words "*mabligh ikata hojawegi*" were used instead of *bai kata hojawegi* the first error was fatal to the validity of the notice. *Obiter*: the second error is also fatal. (*Rattigan and Beadon*, JJ.). SHAMBU RAM *v.* JAMITA.
43 P.L.R. 1914=23 I.C. 97=85 P.W.R. 1914.

———Ss. 7 and 8—"*Land*", *meaning of.*

Land in Regulation XVII of 1806, Sections 7 and 8 means something capable of physical possession. The provisions of the Regulation do not apply to a *bai-bil wafa* mortgage of a share in the income of a shrine which the mortgagor is entitled to get, though the income includes rent of land and house attached to the shrine. (*Scott-Smith*, J.) NAGA MUHAMMAD *v.* AHSAN-UL-HUQ.
170 P.W.R. 1913=21 I.C. 231=107 P.L R. 1913.

———S. 7—*Foreclosure of mortgage—Defective notcie—Signature.*

A notice of foreclosure not describing fully the various courses open to a mortgagor under section 7 is a defective notice and vitiates the foreclosure proceedings. The signature on such a notice, however illegible to ordinary people, but bearing the seal of the Court is a sufficient signature if it can be recognized by persons acquainted with the particular officer's mode of signing documents. (*Chevis*, J.) TARACHAND *v.* CHIMAN.
3 P.L R. 1912=12 I.C. 530=263 P.W.R. 1911.

———S. 8—*Mortgage by conditional sale—Foreclosure—Service of notice—Proof of.*

To prove that the equity of redemption of a mortgage by way of conditional sale has been extinguished under S. 8 of the Regn. the mortgagee must establish that he caused the mortgagor or his legal representative to be served with a copy of his own written application for foreclosure and also with a notice under the seal and official signature of the District Judge, warning him that the mortgage would be finally foreclosed in the event of his failing to redeem within a period of one year. The records of the proceedings taken under the Regulation cannot be accepted as *prima facie* proof of the fact of service of notice. (*Piggott and Walsh*, JJ.). RAM BARAN RAI *v.* HAR SEWAK DUBE.
45 I.C. 488=16 A.L.J. 377=40 All. 387.

BENGAL REGULATION (XVII of 1806). S. 8.

———S. 8—*Notice of foreclosure.*

A foreclosure notice specifying the land but not the Shamilat is invalid altogether when the land and a share in the Shamilat is mortgaged. Such notice cannot be valid for one part and invalid for the other part of the mortgaged property. (*Chevis and Jones*, JJ.) KARM ILAHI *v.* BINDRABAN.

17 P.R. 1918=39 P.W.R. 1918= 44 I.C. 540=18 P.L.R. 1918.

———S. 8—*Notice—Amount stated greater than amount due—Validity of—Scope of the Regulation.*

Under S. 8 of XVII of 1806, a mis-statement in the notice of the amount due does not invalidate it even where the amount stated, is greater than the amount due. The Regulation gives the mortgagor the right of preserving his property and if he does not avail himself of the rules for the same he is not entitled after one year of grace to urge that the sum demanded of him was larger than the sum really due. (*Rattigan and Scott-Smith*, JJ.) BARKAT RAI *v.* ALI.

91 P.R. 1913=341 P.L.R. 1913= 21 I.C. 343=223 P.W.R. 1913.

———(V of 1812).

———S. 3—Delivery of goats and ghee agreed to in a Kabuliat is a matter. Relating to abwab and is not sanctioned by the Bengal Patni Regulation. (*Suhrawardy and Cuming*, JJ.). RAM TARAN TEWARY *v.* S. KUNNEDA DASI.

68 I.C. 161=26 C.W.N. 634=1922 Cal. 80.

———S. 3—*Lease*—Zillah Karach—*Abwab.*

Where lease prior to Regn. VIII of 1793 specially provided for payment of *Zillah Karach*, *held*, this was part of the rent agreed upon and the landlord was entitled to recover. *Abwab* is an arbitrary and indefinite imposition levied by landlords on their tenants; an item forming part of the consideration for which the lease is granted is not an *abwab*. (*Jenkins*, C.J. *and D. Chatterjee*, J.) KALI KUMAR RAJ CHOUDHURY *v.* KAILAS NATH ROY CHOUDHURY.

27 I.C. 470 (Cal.).

———(XXIX of 1814).

———*Act does not apply to Kharagpur Ghatwalis—Incidents of latter tenure—Taluka Dunri—Succession—Impartible estate — Widow and undivided brother—Preference.*

Regn. XXIX of 1814 does not apply to Kharagpur Ghatwalis. One of the main distinctions between Ghatwals of the Birbhum and of the Kharagpur type is that the former are inalienable except with the consent of Government by whom the settlements were made and to whom revenue is paid direct, whereas the latter are alienable subject to the consent of the landlord to whom the rent or revenue is paid. The Regulation of 1814 applies to the former only.

BENGAL REGULATION (II of 1819). S. 103 B.

The incidents attaching to a Ghatwali of the Kharagpur type as evidenced in the case are: (1) that it is impartible, and permanent, (2) that it descends by lineal primogeniture, and (3) that it is alienable at least with the consent of the Zemindar. Unless there be some peculiar feature inherent in Ghatwali tenure which prevents the operation of the Mitakshara rule of succession in the case of impartible property, the same rule would apply. In a Mitakshara family being in commensality the inheritance even of impartible estates is confined to male members to the exclusion of females, unless the estate is the separate or self-acquired property and normal in the course of succession to ghatwali property is not different from that which regulates succession to other impartible property. (*Miller*, C.J. and *Foster*, J.) THAKURAIN FULBATI KUMARI *v.* MAHARAJA KUMAR RAO MAHESHWAR PRASAD SINGH.

74 I.C. 668=2 Pat. 685=4 Pat. L.T. 473= 1923 P. 453=1923 Pat. 161.

———(II of 1819).

———S. 103-B—*Rent—Claim to hold free of—Contract or Old grant must be proved.*

Neither in 1838, when the summary settlement was made nor in 1839, when the three mauza Amarpore Jabar, Amarpur Roop and Jabarpar Khas under the Permanent Settlement were amalgamated and named Amar Jabar, was any claim to hold free of rent on account of Malikanadari right put forward by the predecessors of the defendants. The investigations in 1839 were carried with complete thoroughness under Act II of 1819, in the final proceedings the revenue was reduced from Rs. 351 to Rs. 225. It was claimed on behalf of defendants, that the reduction was due to their Malikanadari rights. In 1840 in the Thakbast map and Khasra entries, which have no evidential value, were made by the Amin before the preparation of the regular survey of Amarpur Jabar to the effect that certain persons held Malikanadari (co-proprietary) right in mauza Amarpur Roop and held land free of rent. No objection was raised on behalf of the landlord, as the rent was collected by the Thikkadar. The claim on behalf of the defendants respondents was for the first time put forward in 1877 but it was resisted and disallowed on the ground that no such Mauza existed. The claim was again put forward, when the matter came for the purpose of cadestral survey, *held*, it lies upon those who claim to hold the lands free of the obligation to pay rent to show by satisfactory evidence that they have been relieved of this obligation, either by contract or by some old grant recognised by Government. 12 Moo. I.A. 331, foll. (*Amir Ali*, J.). JAGDEO NARAIN SINGH *v.* BALDEO SINGH.

71 I.C. 984=2 Pat. 38= 32 M.L.T. (P.C.) 1=(1923) M.W.N. 361= 27 C.W.N. 925=3 Pat. L.T. 685= 45 M.L.J 460=36 C.L.J. 499= 49 I.A. 329 (P.C.)=1922 P.C. 272.

BENGAL REGULATION (II of 1819), S. 22.

———Ss. 22, 23 and 24—*Bengal Regulation* (II *of* 1818), *S.* 10—*Silting—Cultivated land—Non-navigable river—Assessment to revenue.*

If it is proved that a river within the ambit of the zemindari was never a public navigable river, the onus which lies on the Zemindar to show that its bed was included within the limits of his permanently settled estate is discharged or shifted. The bed of a river included in a permanently settled estate is not different from other waste lands included in the estate; whatever changes may have occurred from natural or artificial causes and however the land might have improved in value, Government is not entitled to additional revenue for such lands. When the bed of such a river silts up and becomes fit for cultivation neither Regn. II of 1819 nor Regn. IX of 1847 authorizes the revenue authorities to assess the lands with revenue. *Quære.* Whether upon the enactment of the Act (IX of 1847) the limitation provided by S. 24 of Regn. II of 1819 ceased to be applicable to a suit by the owner to contest the validity of the assessment and to recover possession of the land. (*Richardson and Greaves*, JJ.) SECRETARY OF STATE FOR INDIA *v.* PRAFULL NATH TAGORE. **38 I.C. 896 = 24 C.W.N. 809.**

———(VII of 1822).

See BENGAL LAND REVENUE SETTLEMENT REGULATION (VII OF 1822).

———(XI of 1825).

See ALSO BENGAL ALLUVION AND DILUVION REGULATION.

———S. 4 (1)—*Accretion to Tenants' holding—Bed of the river forming property of landlord—Tenant gets benefit of accretion.*

Per Dawson Miller, C.J. *and Jwala Prasad*, J. The first clause of S. 4 of Bengal Regn. XI of 1825 applies clearly both to the case of a superior landlord, who holds from the Crown and to the case of the holder of a subordinate estate or tenure holding from a landlord intermediate between himself and the Crown and is limited in each case to accretions from the lands of the person from whom he holds and to whom revenue in the one case and rent in the other is payable. In the case of a superior landlord the person from whom he holds is the Crown and no one else. In such a case it is only where the Crown is the proprietor of the accreted lands that the section comes into operation. To hold otherwise and permit a landlord to acquire in this manner a proprietary right in the land of his neighbour, with whom he has no relationship such as that of a tenant to his landlord, would be going outside the scope and intention of the section and permitting what in effect would be confiscation of another man's land. This consideration does not apply where the claim is by a tenant against land of his landlord, a claim which by the proviso to cl. (1) of S. 4 is limited to a right of property similar to that possessed by the tenant in the tenure to which the land may become annexed, and which by the same proviso carries with it the liability to pay an increase of rent. 13 M.I.A. 467 Rel.; 1 P.L.J. 536; 1 P.L.T. 229, dist.

Per Mullick, J.: Bengal Regn. XI of 1825 does not provide for lands in a large and navigable river the bed of which is the property of an individual or those in a small and shallow river the bed of which is not the property of an individual. The Regulation is not exhaustive. It is subject to rules of equity and justice. Therefore land gained from the river bed by reformation *in situ* or otherwise will if it can be identified belong to the owner of the bed, except when otherwise expressly provided by the Regulation. This rule will preclude a tenant from acquiring a right of tenancy in an accretion from a river bed which was not the property of his landlord before emergence. 2 C.L.J. 185; 11 W.R. 115, Ref. (*Miller*, C.J. *and Mullick and Jwala Prasad*, JJ.) KHUBI MAHTON *v.* LECHMI DAS.

3 Pat. L.T. 313 = 67 Ind. Cas. 642 = 1922 Pat. 258 = 1922 P. 588 (F.B.).

BENGAL REGULATION (III of 1828), S. 10.

———S. 4—*Accretion—Reformation in situ—Identification—English and Indian law.*

When the land in dispute is shown to have reformed on its old identifiable site, it is not a case under cl. 1 of S. 4. There are no words which imply the confiscation or destruction of any private person's property whatever. According to the regulation, accretion is land gained from a river or the sea. The rule of the English Common law based on conditions which are entirely different should not be extended to Mufassal towns of India. (*Das and Adami*, JJ.) BABU BRAHMANAND SINGH *v.* DAUD BAHADUR SINGH. **1 Pat. L.T. 229 = 56 I.C. 344 = 2 U.P.L.R. (P.) 111 = 1920 Pat. 245.**

———(XIV of 1825).

———S. 3—*Mudadmash grant—Hereditary—Onus of proof.*

Where a mudadmash grant is made hereditary by S. 15 of the Regn. 37 of 1793, it is not affected by S. 3 (3) of Regn. 14 of 1825. The latter enactment simply casts the burden of proof on the claimant to establish his claim against the estate. (*Mookerjee and Holmwood* JJ.) SECRETARY OF STATE *v.* RASHIDUL HUQ. **21 I.C. 93 = 18 C.L.J. 31.**

———(III of 1828).

———S. 10—*Silting of river-bed—Limitation—Bengal Regn.* (IX *of* 1847).

The rules in S. 10 of Regn. III of 1828 and S. 24 of Regn. II of 1819 govern a suit to contest an order of the Board of Revenue under S. 6 of Act IX of 1847 confirming an assessment under the Act and to obtain an incidental relief such as recovery of possession of lands. The order corresponds to a decision of

BENGAL REGULATION (VII of 1832), S. 9.

the Board under Regn. (II of 1819) and unless the suit of the nature indicated by cl. (3) of S. 10 of Regn. III of 1828 is brought within the time limited by Regn. II of 1819 the decision of the Board becomes final and conclusive for all purposes. The thak and survey maps were not in themselves sufficient to justify the Court in saying that the Board's order was on the basis of the river being a public and navigable river, was wrong and should be reversed. 30 Cal. 291, ref. The question whether a river or water course is navigable or not does not depend on its name. (*Richardson and Greaves*, JJ.) PRAFULLA NATH *v.* SECRETARY OF STATE.
58 I. C. 902=24 C.W.N. 813.

———(VII of 1832).

——S. 9—*Conversion of member of joint Hindu family—Effect of.*

Where a Hindu father living jointly with his son becomes convert to Mahomedanism, he does not lose his right in the joint family property. (*Ameer Ali*, J.) KHUNNI LAL *v.* GOBIND KRISHNA NARAIN. **33 All. 356= 38 I.A. 87=15 C.W.N. 545= 8 A.L.J. 552=13 C.L.J. 575= 13 Bom. L.R. 427=30 M.L.T 25= (1911) 1 M.W.N. 432=10 I.C. 477= 21 M.L.J. 645 (P.C.)**

[On Appeal from 29 All. 487.]

———(III of 1872)

———*Applicability—Property partly situate in Sonthal Parganas and partly outside—Jurisdiction of Court not situate in Sonthal Paraganas to try the suit.*

The holders of the gadi of Lachmipur Estate District Bhagalpore comprising one of the chowrosi gadis even supposing their origin to be non-Hindu have adopted in general not only Hindu religion and Hindu social usages, but also the Hindu law regulating the succession of landed property. (*Lord Phillimore*) SAHDEO NARAYAN DEO *v.* KUSAM KUMARI. **37 C.L.J. 369=44 M.L.J. 476=71 I C. 769= 32 M.L.T. 121=2 P. 230= 4 P.L.T. 217=50 I.A. 58= 25 Bom. L.R. 566=18 L.W. 897= 1923 M.W.N. 377=27 C.W.N. 901= 1923 P.C. 21.**

———Ss. 5 and 6—*Jurisdiction of—Civil Court—Sonthal parghanas,*

Where a portion of the mortgaged property was situate in the Sonthal parghanas, a suit to enforce the mortgage is maintainable only before the settlement or other Officer appointed under Regn. V of 1893 and the Court exercising jurisdiction is bound by the rules as to usury in S. 6. (*Lord Moultan.*) MAHA PRASAD SINGH *v.* RAMANI MOHAN SINGH. **42 Cal. 116=25 I.C. 451= 41 I.A. 197=18 C W.N. 994=16 M.L.T. 105= (1914) M.W.N 565=1 L.W. 619= 20 C.L.J. 231=27 M.L.J. 459= 16 Bom. L.R. 824 (P.C.)**

BENGAL REGULATION (V of 1893).

———S. 3—*Entry in the Record of Rights can be challenged on ground of fraud.*

Das and Adami, JJ). SIB SARAN SHAH *v.* RAMESWAR DEY. **2 Pat. L.T. 4 = 60 I.C. 640=1920 Pat. 363.**

———Ss. 11 and 28—*Record of Rights—Entry that party is patnidar, effect of.*

Where certain parties are recorded, in a Record of Rights prepared under Regulation III of 1872 as Patnidars of all the lands in a village that implies that they are not darmokarardars of any of the lands in the said village and the said entry in the Settlement registers, has under Section 2 of the Regulation the force of a decree. It is not open to the landlord to avoid the effect of this decree either by a Civil Court under S. 25-A or by an objection under S. 25-A or by an objection under S. 25 (1). *Mookerjea and Beachcroft*, JJ.) MOOZAFFAR ALI *v.* KALU PRASAD SAHA.
22 I.C. 789=19 C.L.J. 29=18 C.W.N. 271.

———(VII of 1882).

———*Scope of.*

Under Regulation VII of 1882 Collectors are to decide disputes of title between raiyats where the Zamindars or Sadar Malguzars have no interest and which can in no way affect the assessment. (*Sharfuddin and Coxe*, JJ.) RAJANI KANT MUKERJEE *v.* RAM DALAL DAS. **17 I.C. 881=17 C W.N. 55.**

———S. 3—*Right of settlement—Chur Land.*

The provisions of the Regulation should be strictly complied with, if the proprietor of a permanently settled estate is to be deprived of his right to take settlement of chur land next to his. The Government has no power to settle the chur with a third party in contravention of S, 3 of Regn. VII of 1882, in the absence of danger to the peace, etc. (*Chatterjee and Walmsley*, JJ.) BRINDABAN CHANDRA *v.* KARUNA NIDHAN SINGH.
50 I.C. 84=23 C.W.N. 261.

———(V of 1893).

———*Sonthal Perghanas—Courts exercising jurisdiction—Powers of.*

Where property situate in the Sonthal Perghanas is mortgaged along with others, a suit on the mortgage is maintainable only before the settlement officer and not in Court outside the Sonthal perghanas. The duty of the court in trying such a suit is to give effect to rules against usury in S. 6 of the Bengal Regulation III of 1872. (*Lord Moulton*). MAHA PRASAD SINGH *v.* RAMANI MOHAN SINGH.
42 Cal. 116=41 I.A. 197=18 C.W.N. 994= 25 I.C. 451=16 M.L.T. 105= (1914) M.W.N. 565=1 L.W. 619= 20 C.L.J. 231=27 M.L.J. 459= 16 Bom. L.R. 824 (P.C.)

BENGAL REGULATION (V of 1893), S. 3.

——**Ss. 3 (1) 36 and 37**—*Act is not retrospective—Cause of action accruing under S.* 10 *of Act I of* 1895.

Act III of 1913 is not retrospective in its operation and does not extinguish or modify causes of action which have already accrued by failure to serve the notice under S. 10 of Act I of 1895. S. 36 of Act III of 1913 controls S. 3 (1). S. 37 of the Act bars the jurisdiction of the civil court only where the question relates to the making execution, discharge or satisfaction of a certificate duly filed under the Act or relates to the confirmation or setting aside of a sale held in execution of such certificate. (*Mookerjee and Chotzner*, JJ.) LALIT MOHAN SEN *v.* MANORANJAN GHOSE CHOWDHURY.

36 C.L.J. 208=72 I.C. 698=1923 Cal. 18.

BENGAL RENT RECOVERY ACT (X of 1859).

——*Non-transferable occupancy holding—Sale for arrears of rent.*

A non-transferable occupancy holding can be sold in execution of a rent decree obtained by the 16 annas landlords. (*Teunon and Newbould*, JJ.) NRIPENDRA *v.* NADIRKHAN.

66 I.C. 46=25 C.W.N. 554.

——*Khudkhast rights—Patni Sale—Purchaser, rights of.*

The effect of a transfer of a holding purchased at a patni sale with the consent of the landlord under Act X of 1859 can only be that the original tenant is considered to have relinquished the holding altogether and a new tenancy is created in the transferee. After the enactment of Act X of 1859, the original *Khudkasht raiyats*, continued to hold the same rights as they held before, but the *khudkhasht* right ceased to exist as a right that can be acquired after the passing of the Act. *Holmwood and Mullick*, JJ.) MALACHI *v.* AHLAD MAHATO. **27 I.C. 928 (Cal.).**

——*Acquisition of occupancy rights from trespasser.*

Under the Act a right of occupancy could be acquired under a trespasser as also under a temporary immediate holder. (*Mookerjee and Beachcroft*, JJ.) SRI SRI RADHA MADHAB NARAN HIKIM *v.* MILAN MAHATO.

21 I.C. 204=18 C.L.J. 23.

——*Transfer of occupancy right.*

A right of occupancy is a personal right and non-transferable beyond the life of each tenant, under the Bengal Rent Act (X of 1859). (*Stanyon*, J.C.). RAM PRASAD *v.* KISHORI LAL. **46 I.C. 657 (Nag.).**

——*Occupancy right—Thikadar, cannot acquire.*

Under this Act, the occupancy right is personal and non-transferable, and a person in possession as a *Thikadar* could not acquire such a right. (*Das and Ross*, JJ.) EDGELL *v.* BISWANATH PRASAD SINGH.

62 I.C. 59=2 Pat. L.T. 654.

BENGAL RENT RECOVERY ACT (X of 1859), S. 21.

——**S. 10**—*Price of produce and rent in cash forming one whole jama or rent.*

When the price of produce and rent in cash form according to the agreement one whole jama or rent payable by a tenant, the price of produce should be regarded, not as an abwab, but as rent. (*Mullick and Atkinson*, JJ.). SADANAND TEWARI *v.* DEBNATH MANJHI.

3 P.L.W. 270=37 I. C. 980=1917 Pat. 287.

——**Ss. 13 and 17**—*Chota Nagpur Landlord and Tenant Procedure Act, Ss.* 21 *and* 24.

Before the extension of the Tenancy Act to the district in which the land is situate, an agreement was made by executing a *kabulyat* for paying enhanced rent under the old Act (Rent Recovery Act). After the extension of the new Act, a suit for recovery of rent on the *kabulyat* was brought. *Held* (i) that S. 17 of Rent Recovery Act did not affect mutual agreement to pay enhanced rent and so S. 13 was inapplicable. (ii) that the agreement in the suit did not contravene the provisions of those sections and hence it was valid in its inception. (*Mookerjee and Beachcroft*, JJ.). GAJOO MAHATO *v.* COOKE. **16 C. L. J. 422=16 I. C. 929=17 C.W.N. 430.**

——**S. 13**—'*Under-tenant*'—*Meaning.*

'Under-tenant' in S. 13 does not mean a tenant under another tenant but a tenant or tenure-holder holding directly from the proprietor. (*Sharfuddin and Chapman*, JJ.). BRAJMOHAN PATTASING *v.* BAMDEB DAS.

38 I. C 820=2 Pat. L.J. 75.

——**S. 16**—*Presumption—Rebuttal of.*

The presumption under S. 16 of the Act will be displaced by the fact that a tenure came into existence for the first time long after the date of the Permanent Settlement, notwithstanding the rent at which it has been held has not been varied for 20 years; and therefore the tenure is liable to enhancement of rent. (*Jenkins*, C. J. *and Chatterjee*, J.) BALABHADRA PRISTE *v.* JAGANNATH MAHA PRABHOO.

26 I. C. 908 (Cal.).

——**S. 21**—*Usage—Question as to.*

The question of usage (as to the payment of rent in numerous instalments arises only where there is no written agreement between landlord and tenant under S. 21. (*Chatterjee and Newbould*, JJ.) MANINDRA CHANDRA NANDI v. DURGA SUNDARI DASIA. **32 I. C. 185=20 C.W.N. 680.**

BENGAL RENT RECOVERY ACT (X of 1859), S. 22.

———S. 23, Cl. (c)—*Tenant ousted by landlord—Summary suit for possession—Specific Relief Act, S. 9.*

A suit in Civil Court for the recovery of possession by a tenant who has been ousted by his landlord under S. 9 of the Specific Relief Act is barred by S. 23 (c) of Act X of 1859 according to which the suit is cognizable by the Collector alone. The effect of S. 9 of the Specific Relief Act and S. 23 of Act X of 1859 is that the Specific Relief Act confers a general right of action, subject to the particular exception provided by S. 23 (c) of the Rent Act. (*Stephen Chatterjea and Mullick*, JJ.) JUMLA SINGH *v.* E.G. KINGSBY. **21 I.C. 224 = 17 C.W.N. 1201.**

———S. 109—*Scope and effect of.*

Section 109 refers to a case of a single execution-creditor and a single judgment-debtor and does not specifically refer to one of joint and several decree against many judgment-debtors in which case the execution creditor can proceed against some, all or one judgment-debtor at his choice. The important provision of the section is that before proceeding against the immoveable property of the judgment-debtor, he must first proceed against his person or moveable property. The execution creditor can under the Act proceed against the immoveable property of some of the judgment debtors under money decree, not one for arrears of rent, if he has previously proceeded against their person or moveable property although he did not yet proceed against the moveable property of others. But he must proceed first against moveable before immoveable. It matters little if the judgment-debtor got another moveable in the meantime after the first was exhausted. An application to proceed against the person of the judgment-debtor is not the condition precedent to maintain one against his immoveable property. The true sense of Section 109 is that an execution creditor cannot ignore any moveable property of the judgment-debtor before proceeding against his immoveable; the judgment-debtor need not prove that he holds moveables in the district sufficient to satisfy the claim completely. As a decree must be self-contained and executed as it stands so a decree-holder cannot take out execution for interest under the decree which did not incorporate the payment of interest according to the terms of the *Solenamah* the basis of the decree; but he can apply for its amendment. (*Mookerjee and Beachcroft*, JJ.) BHIKASI SUKUL *v.* GADADHAR RAMANUJ DAS. **15 I.C. 735 = 16 C.L.J. 386 = 17 C.W.N. 87.**

———S. 109—*Rent decree—C. P. Code, (XIV of 1882), S. 310-A—Applicability of, to execution sale—Charter Act, S. 15.*

Section 310-A of the C. P. Code of 1882 applies to execution sales under S. 109 of the Bengal Rent Recovery Act X of 1859 by a Deputy Collector are amenable to the revisional jurisdiction of this Deputy Collector are subject to revision by the Court under S. 15 of the Charter Act. 33 C. 425, foll. Under S. 109 of Bengal Act X of 1859, the property of a judgment-debtor can be sold in execution of a rent decree against him, only if the decree cannot otherwise be satisfied by execution against his person or moveables. Any sale in violation of this procedure is *ultra vires*. (*Holmwood and D. Chatterjee*, JJ.) CHAITAN PATJOSHI *v.* KUNJA BEHARI. **11 I.C. 207 = 38 Cal. 832 = 15 C.W.N. 863 = 14 C.L.J. 284.**

BENGAL RENT RECOVERY (SALE OF UNDER TENURES) ACT (VIII of 1865), S. 6.

BENGAL RENT RECOVERY (SALE OF UNDER TENURES) ACT (VIII of 1865).

———S. 4—*Scope of.*

S. 4 makes it essential that in order that sale may be free from encumbrances under S. 16, the decree under execution should be one for arrears of rent due in respect of the under-tenure. The rent is regarded as due not from the person against whom the decree is obtained but in respect the tenure. (21 W.R. 94, ref.) Therefore if the landlord seeks to recover not merely the arrears due but additional sum not realizable in respect of that tenure, the purchaser does not get the right under S. 16. Such a decree though obtained in respect of arrears of rent of two tenures operates as a decree for money when any one tenure is brought to sale. (*Mookerjee and Beachcroft*, JJ.). KANTA LAIK *v.* LACHMAN OJHA. **17 I.C. 165 = 16 C.L J. 197.**

———S. 5—*Scope of.*

Amendment of decree is not necessary, the amendment of the plaint being sufficient under S. 5 The limitation imposed by O. 6, r. 17 has no application to an amendment directed by consent of parties. (*Stephen and Mullick*, JJ.). MADAN MOHAN NATH *v.* MAHARAJA OF CHOTA NAGPUR. **22 I.C. 778 = 19 C.W.N. 200.**

———S. 6—*Unregistered transferee of under tenure—If competent to deposit money under section—Sufficiency of deposit—Sale after deposit—Rights of* bona fide *purchaser.*

An unregistered transferee of an under-tenure is a person interested in the protection of the under-tenure within S. 6 of Act VIII of 1865 and is therefore competent to make a deposit under that section. 21 W.R., foll. 6 W R. Act X Rulings 59; 20 W.R. 59, rel. on 8 W.R. 96, 37 Cal. 823, 12 Cal. 24, rel. on. A sale held after a proper deposit under S. 6 of the Act has been made, is illegal. The question of the sufficiency of the deposit is a mixed question of law and fact which the High Court can determine in second appeal. The question of how much was deposited is one of fact but the question as to how much was required to be deposited is a question of law. 37 Cal. 107; 25 Cal. 833; rel. on. 14 Cal. 18; 11 Cal. 376; 15 Cal. 557, dist. Where a sale has taken place under the Act in execution of a rent decree the

BENGAL RENT RECOVERY (SALE OF UNDER TENURES) ACT (VIII of 1865) S. 6.

satisfaction of which has been certified to the court even before the execution proceedings commenced, the sale is void and cannot pass any title even to a *bona fide* purchaser for value without notice. Costs of process within the meaning of S. 6 of the Act are costs for the issue of the writ of attachment and the sale proclamation. (*Jenkins*, C.J. *and Mookerjee*, J.) MONI LAL *v.* NINA CHARAN.
20 I.C. 387 = 19 C.L.J. 388.

——S. 6—*All costs of process—Unregistered purchaser.*

All costs of process, include costs of execution. If the plff. judgment-debtor proves that some of the costs entered in sale proclamation are not really due, the sale made in good faith is not null and void. An unregistered purchaser cannot set up a title of superiority over the purchaser at rent sale. (*Coxe*, J.). KIRPA SINDHU ROY *v.* BANCHA NIDHIMAHANTI.
10 I.C. 899 (Cal.)

——S. 16—*Extinguishment of mokarari right—Acquisition of occupancy right.*

Where a mokarari right of a person is extinguished by operation of Section 16, there is nothing in law to prevent him from acquiring an occupancy right. 13 W.R. 410, foll.; 3 C.W.N. 13, Dist. (*Holmwood and Carnduff*, JJ.) BAMA CHARAN *v.* RAM KANAI DABEY.
28 I.C. 374 = 19 C.W.N. 858 note.

——S. 16—*Intermediate landlord—Obligation of—Agreement by him with another person to get rid of under tenures—Fraud.*

An intermediate landlord is bound to protect his tenant from all paramount claims and if he enters, into an agreement with another person to get rid of under-tenures by fraud or fictitious sale for arrears of rent, he commits an act of fraud against this under-tenants and the purchaser will not be entitled to annul the under-tenure. (*Mookerjee and Beachcroft*, JJ.). UMA CHARAN MANDAL *v.* MIDNAPORE ZEMINDARI COMPANY. 26 I.C. 182 = 20 C.L.J. 11 = 19 C.W.N. 270.

——S. 16—*Sale of tenure—Sub-division of tenure.*

A tenure sub-divided into two with the consent of the landlord gives rise to two independent tenures, and when the landlord sues to recover rent from one tenure-holder and a sale takes place in execution of the decree, what is sold is the tenure in default, and the purchaser acquires the status of a purchaser under S. 16 of the Act. A tenure can be created in respect of undivided lands. (*Mookerjee and Beachcroft*, JJ.) KARTIK CHANDRA SEN *v.* KAMAL BAISNAHI. 20 I.C. 826 (Cal.)

——S. 16—*Proviso—Tenure holder not protected.*

Where a grantee is a tenure holder and not a raiyat, the proviso to Section 16 does not apply to his case. (*Atkinson*, J.). ASRIP UPADHYA *v.* GOBARDHAN PANURI, 38 I.C. 146 (Pat.).

BENGAL ROAD CESS ACT (IX of 1880), S. 95.

—— S. 15—*Scope of.*

Otherwise expressed in the grant include a grant made to a person and his heirs.
(*Das and Adami*, JJ.). GOLAM NABI *v.* CHOWDHURI BASUDEB DAS. 69 I.C. 849 = 1. P. 201 = 1922 P. 411.

BENGAL REVENUE SALE LAW.

——S. 54—*Purchase at revenue sale—Nature of estate—Burden of proof.*

In a suit for *Khas* possession by the purchaser at a revenue sale, he must prove not merely that the land is within the ambit of his estate but also that it formed part of the mal assets at the time of the decennial settlement. (*Walmsley and Suhrawardy*, JJ.) SASTRI BHUSAN HAZRA *v.* KAZI ABDULLA.
28 C.W.N. 143 = 1924 Cal. 328.

BENGAL ROAD CESS ACT (IX of 1880).

——S. 20—*Road Cess Return—Rent mentioned by mistake—Recovery of higher rent.*

A landlord is not entitled to recover any rent for any land at a higher rate than that mentioned in the Road Cess Return for such land notwithstanding the fact that the entry is made by mistake or the rent became due before the return was made. (*Harrington and Carnduff*, JJ.) RAMESHWAR SINGH *v.* MOHENDRA NARAIN. 19 I.C. 249 (Cal.).

——S. 20—*Enhancerent—Increase in holding.*

A landlord cannot claim rent greater than that shown in the Road Cess Return unless the holding is materially altered, but not if the alteration is merely due to measurement or encroachment, or on account of entry in Record of Rights or the *Jama Wasilbaki*. (*Chamier*, C. J. *and Jwala Prasad*, J.) DHANUKDHARI MAHTON *v.* SERAJUL HUDA.
1 Pat. L.J. 521 = 38 I.C. 109 = 2 Pat.L.W. 421 = 1917 Pat. 312.

——S. 95—*Road Cess Return—Evidentiary value of.*

The evidentiary value of a Road Cess Return, which was made by a predecessor-in- interest of the tenant deft., is very considerable in favour of the plff. landlord and against the deft. tenant. S. 95 of the Bengal Cess Act is not exhaustive but merely limits the application of S. 21 of the Evidence Act, and excludes Road Cess Returns when they are sought to be admitted in favour of the person by or on behalf of whom they have been filed. 30 Cal. 1033, rel. (*Mookerjee and Carnduff*, JJ.) MOHENDRA NARAIN SINGH *v.* AJODHYA PROSAD SINGH.
15 I.C. 284 = 49 Cal. 1005.

BENGAL SURVEY ACT (V of 1875), S. 6.

———S. 6—*Proclamation.*

The proclamation required by S. 6 applies to a survey carried on under Ss. 4 and 5 of the Act. (*Mullick and Jwala Prasad*. JJ.) JUDAJI RAUT *v.* EMPEROR. **2 Pat. L.J. 18 = 38 I.C. 744 = 3 Pat. L.W. 429 = 18 Cr.L.J. 360.**

———S. 40 (1)—*Order under—Nature of.*

A possessory order under S. 40 (1) of the Bengal Survey Act bears analogy to a decision under S. 34 of Regn. VIII of 1822. The order, until reversed or modified by competent authority has the force of an order of a Civil Court declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector. (*Mookerjee and Panton*, JJ.) H.H. MAHARAJAH OF COOCH BEHAR *v.* RAJA MAHENDRA RANJAN. **66 I.C. 923 = 34 C.L.J. 465.**

———S. 41—*Order of Collector—Cr.P. Code S. 145.*

Order of Collector under S. 41 is equal to a decree of a Civil Court and the Magistrate should pay regard to it in proceeding under S. 145, Cr.P.C. (*Teunon and Beachcroft*, JJ.) SHRINATHA ROY *v.* PROBHAT CHANDRA. **38 I.C. 333 = 18 Cr. L.J. 301 (Cal.).**

———Ss. 41 and 63—*Decision under—If binding on Civil Courts.*

A decision under the Survey Act based on a partition map made behind the plffs. is not binding on the Civil Courts upon a question of title. (*Chatterjee and Chapman*, JJ.) WILLIAM GRAHAM *v.* PHANINDRA NATH MITTER. **31 I.C. 41 = 19 C.W.N. 1038.**

———S. 41—*Powers under—Collector can delegate to Assistant Settlement Officer.*

Revenue Officer appointed with the additional designation of a Settlement Officer is vested with the powers of a Superintendent of Survey under the Bengal Survey Act, and he has the powers of Collector under S. 41. He has power to delegate his functions to an Assistant Settlement Officer. (*Coutts and Ross*, JJ.) BABU BALGOBIND KUMAR *v.* BEHARI LAL. **66 I.C. 471 = 3 Pat. L.T. 617 = 1922 Pat. 114 = 1923 P. 96 (2).**

———S. 41 — *Order of Collector under, operates as an order of Civil Court.*

The order of a Collector under S. 41 of the Bengal Survey Act, determining the boundary of an estate, operates as the order of a Civil Court declaring the parties to be in possession of the lands in accordance with the boundary as determined by the Collector. (*Das and Adami*, JJ.) PARBHUCHARAN *v.* SECRETARY OF STATE FOR INDIA. **6 P. L.J. 51 = 61 I.C. 46 = 2 Pat. L.T. 118.**

BENGAL TENANCY ACT (VIII of 1885).

———S. 41—*Order under operates as order of Civil Court—Limitation— Presumption—Burden of Proof.*

An order under S. 41 of the Bengal Survey Act has the force of a Civil Court decree and a suit to upset the order must be brought within 12 years from the date of the order. The order is not void simply because no boundary pillars were set up. It will be presumed that the boundaries were duly laid down and the burden of proving the contrary lies on the person alleging it. (*Das and Adami*, JJ.) RAFIQ-UN-NISSA *v.* KESHWAR NARAIN SINGH. **59 I.C. 840 (Pat.).**

———S. 45—*Scope of.*

The latter part of S. 45 of the Bengal Survey Act does not require the publication of a proclamation previous to the demarcation of land. (*Mullick and Jwala Prasad*, JJ.) JUDAGI RAUT *v.* EMPEROR. **2 Pat. L.J. 18 = 38 I.C. 744 = 3 Pat. L.W. 429 = 18 Cr. L J. 360.**

———S. 62—*Applicability of.*

If a plff. suing for declaration of title and confirmation of possession, or in the alternative for recovery of possession of land, which has been the subject of survey proceedings, has been in possession all along and has never been dispossessed, Section 62 of the Act will be a bar provided the proceedings of the Asst. Superintendent of Survey were otherwise regular. But if there has been dispossession since the order of the Asst. Superintendent, then the suit will be one for declaration and recovery of possession and the section does not apply. (*Mullick*, J.) JANAKDULARI KOER *v.* SHEOJI MAHARAJ. **41 I.C. 86 (Pat.).**

———S. 62—*Suit for possession.*

S. 62 does not apply to a suit for possession on dispossession by reason of Survey and Settlement proceedings. 14 C. W. N. 366, Dist. (*Chamier*, C.J. *and Jwala Prasad*, J.) NAVAL KISHORE NATH SAHI DEO *v.* JALESHWAR DAYAL SINGH. **40 I.C. 588 (Pat.).**

BENGAL TENANCY ACT (VIII of 1885).

———*Chapter* XIV—*Execution of rent decree—Objection to, can be raised by tenant—Special procedure under Chapter* XIV—*Effect of.*

It is competent for a tenant against whom a decree for arrears of rent has been passed, to raise an objection in the execution proceeding that execution of such a decree is barred under the special provisions of Chapter XIV of the Act. Such an objection cannot be taken if the decree is executed as a decree for money under the provisions of the Civil Procedure Code. (*Chatterjea and Panton*, JJ.) ATULCHANDRA BASU *v.* ARIPSHAIK. **65 I.C. 810 (Cal.).**

BENGAL TENANCY ACT (VIII of 1885).

———*Non-transferable holding — Receiving rent after transfer—No ejectment.*

Where after transfer of a non-transferable holding dakhilas were received by transferees from plaintiffs who were then Ijaradars and after plaintiffs had become landlords by purchase of the proprietory right, and the act of the agent of plaintiffs in receiving the rent from the transferee was not repudiated by the plaintiffs, *held*, the transferee could not be ejected. (*Walmsley and Ghose*, JJ.) MAHOMED KASIRUDDIN PRODHAN *v.* BANI KANTA DAS.
1923 Cal. 520.

———*Applicability.*

The Bengal Tenancy Act does not affect rights of occupancy acquired prior to the passing of the same. (*Walmsley and Ghose*, JJ.) BHAJAN SHEIKH *v.* BALAI SARKAR.
1923 Cal. 375.

———*Applicability — Suit to eject under tenant is governed by the Act.*

Where the jama of an under tenancy contained at the time of its creation agricultural land as well as homestead, B. T. Act applies and not T. P. Act. (*Newbould*, J.) ABHAIPADA SIRCAR *v.* ATOR DOME.
67 I.C. 66 = 1923 Cal. 294 (2).

———*Interest of an* under-raiyat *in Bengal is not heritable.*

The interest of an *under-raiyat* in Bengal is not heritable. 31 Cal. 757 (F. B.), Referred to. (*Newbould and Panton*, JJ.) SUTU BIBI *v.* JAMINI SUNDARI GUHA. 1922 Cal. 85.

———Raiyati *holdings purchased before the Amendment Act, if subsists as such.*

With regard to the *raiyati* holdings acquired before the Amendment Act of 1908, came into force the occupancy right would be extinguished the holding itself subsisting as a *raiyati* holding. (*Chatterjea and Panton*, JJ.) PRAFULLA NATH TAGORE *v.* SECY. OF STATE.
63 I.C. 892 = 26 C.W.N. 100.

———*Suit by purchaser of* patni *to eject defendant as trespasser—Burden of Proof.*

In a suit by a purchaser of a *patni* at a rent-sale, to eject the defendants as a trespasser it is for the plff. to show that the Zemindar was in possession of the lands before the creation of the *patni*, and that the possession of the defendants commenced after the *patni* came into existence or that such possession was not adverse. (*N. R. Chatterjea and Greaves*, JJ.) MUNMOTHA NATH MITTER *v.* ANATH BUNDHO PAL. 61 I.C. 469 = 25 C.W.N. 106.

———*Under* raiyat, *cannot sub-let or transfer his rights.*

The Act does not give an *under-raiyat*, a right to create a sub lease so as to by valid against the *raiyat*. The right of an under-raiyat are not transferable. (*Huda and Panton*, JJ.) GOPAL MOLLAH *v.* MAFIDENNESSA BIBI. 61 I.C. 200 (Cal.).

———Ex parte *decree for rent—Party not entitled to same rate for all time.*

A party ought not, because he obtained an *ex parte* decree by keeping back the record, to be entitled for all time to get rent at a rate other than that which is provided for by the Bengal Tenancy Act. (*Fletcher and Cuming*, JJ.) PARAFULLA NARAIN MAJMUDAR *v.* PALKU MAHANUNAO. 53 I.C. 122 = 23 C.W.N. 860.

———*Scope and effect.*

The Act is not a complete Code and it does not incorporate the general principle of the law of contract. It does not affect the doctrines of equity jurisprudence which may be applied to the disputes between landlord and tenant. (*Mookerjee and Cuming*, JJ.) BAMANDAS *v.* NILMADHAB. 44 Cal. 771 = 35 I.C. 754 = 20 C.W.N. 1340 = 24 C.L.J. 551.

———*Entry in Record of Rights before amendment of* 1898*—No presumption of correctness—Agreement by parties.*

An entry made, after the decision of a dispute, in a Record of Rights before the amendment of the Bengal Tenancy Act by Act III of 1898 cannot be presumed to be correct. The parties may also agree that the entry is not correct though they do not agree as to what should be substituted in its place. (*Mookerjee and Beachcroft*, JJ.) SOBHAN BAKSH *v.* BIRENDRA KISHORE MANIKYA BAHADUR.
30 I.C. 939(2) = 22 C.L.J. 145.

———*Lakheraj—Ejectment - Existing from Permanent settlement not incumbrance to be annulled — Regulation* XIX *of* 1793, *S.* 6*—construction of—Tenures of insignificant area—Presumption.*

In 1793 the Government resumed all classes of invalid tenures but it did not think it necessary to resume Lakeraj tenures of insignificant area. When it is found that the defendants have been holding only a certain portion of the land as a Lakheraj tenure from a time before the Permanent Settlement out of the total area of the land in dispute, the plaintiff is entitled to eject the defendants from the remaining area of the land in respect of which the defendants are obviously trespassers. (*Rampini*, A.C.J. *and Ryves*, JJ.) TARAKISHORI CHOUDHARI *v.* NABIN CHANDRA KARMOKAR.
30 I.C. 53 = 21 C.L.J. 637.

———*Applicability of, to rent sale—Decree under Bengal Rent Act* (1869).

When a rent decree was obtained before B.T. Act came into force but sale in execution took place after its coming into operation the rights of the parties are governed by B.T. Act and not

by Bengal Rent Act (1869). (*Mookerjee and Carnduff*, JJ.) BIRENDRA KISHORE *v.* AHMED ALI.
15 I.C. 479=17 C.W.N. 619.

———*Scope of—Homestead.*

Obiter dictum:—The provisions of the B.T. Act apply to homestead of a person who is a raiyat although holding land at another village under different landlord.(*Mookerjee and Teunon*, JJ.) HARIHAR CHATTOPADHYAYA *v.* DINU BERA. **14 C.L.J. 170=10 I.C. 139=16 C.W.N. 536.**

———*Non-transferable occupancy holding—Sale in execution of money decree is valid by custom.*

The decree-holder, not being the landlord of the holding can, against the will of the judgment-debtor and without the express consent of the landlord cause a portion of the judgment debtor's occupancy holding to be sold in execution of a money decree there being local custom of transferability. (*Dawson Miller*, C.J., *Das and Adami*, JJ.) SUNDAR MOHAN *v.* GHANA RAUT. **3 Pat. L.T. 205=1922 Pat. 114.**

———S. 1, Cl. (5)—*'Rent'—Cess—Bengal Drainage Act*, (1880), S. 42 (*a*).

Money payable under Bengal Drainage Act, S. 42 (a) is 'rent' within S. 1, Cl. (5), B.T. Act and the decree for such money is rent decree within Ch. XIV of the B.T. Act. (*Chatterjee and Greaves*, JJ.) MANMATHA NATH MITTER *v.* ANATH BANDHU PAL. **50 I.C. 222=23 C.W.N. 201.**

———S. 2 (2)—*Extension of, to Orissa—Repeals old Rent Law.*

Chapter XIV of the Bengal Tenancy Act, after its extension to Orissa repeals so much of any Act including Act VIII of 1865, as is inconsistent with it. (*Lord Dunedin*) LAKSHMI DAR MAHANTI *v.* RATNAKAR MAHAPATRA.
48 I A 123=25 C W.N. 1009=40 M.L.J. 546=14 L.W. 358=(1921) M.W.N. 399=3 U.P.L.R. (P.C) 25=2 Pat. L.T. 453=61 I C. 1=30 M.L.T. 32=48 Cal. 811 (P.C.).

———S. 3—*Successive leases—Rights of lessee—Liability to pay rent.*

Under the Bengal Tenancy Act the question of the status of a tenant is not without importance and it would introduce confusion into the administration of the Act to say that if a holding be leased by the landlord for the purpose of cultivation first to one ryot and then to another the second ryot would be entitled to collect the rent payable by the first. (*Richardson and Suhrawardy*, JJ.) SHEIKH SONGSOR ALI *v.* JAGANNATH PAL.
37 C L.J. 263=1923 Cal. 368.

———S. 3—*Rent—Immediate payment not necessary to create tenancy—Waste land.*

The immediate payment of rent is not an essential factor in the creation of a tenancy. It is by no means unusual for waste lands to be granted to a tenant by his landlord with a stipulation that no rent shall be payable until they are brought under cultivation. There is nothing in the Bengal Tenancy Act which prevents such an arrangement. (*Dawson Miller*, C.J., *and Mullick*, J.) CHATTER KUMARI DEBI *v.* PRATAPDHUJ SINGH AND OTHERS.
67 I.C. 859=1923 Pat. 176.

———Ss. 3 and 50—*Homestead land created before T. P. Act must be presumed to be non-transferable.*

When a landlord sues a person on the allegation that he is a trespasser and that person sets up a transfer from a tenant, it is for the defendant to prove both the tenancy and validity of the transfer and in the absence of evidence to the contrary, homestead land comprised in a tenancy created before the Transfer of Property Act, 1882 was passed, must be presumed to be non-transferable.

Where the defendants deny the fact that the present holding came into existence before the Transfer of Property Act it is for the plaintiff to prove that the tenancy came into existence before the Transfer of Property Act. (*Kulwant Sahay*, J.) MAHADEO SARAN *v.* DHARAMNATH SAHAY. **72 I.C 662 (Pat).**

———S. 3—*Estate—Municipal area.*

Lands within Municipalities are within the scope of Bengal Tenancy Act unless expressly excluded by notification of Local Government. (*Das*, J.) KALI SAHU *v.* GIRDHARI MISTRI.
50 I.C. 778 (Pat).

———Ss. 3 (3) and 4—*Zerait land—Lessee of, is tenant only during lease—Sections do not create rights.*

Ss. 3 (3) and 4 of the B.T. Act do not separately or conjointly create or confer upon any one any status or right. They are mere definition sections specifying the classes of tenants to which the Act applies. A lessee of Zerait land is a tenant under S. 3 (3) only during the continuance of the term on the expiry of which he becomes a trespasser. (*Sir John Edge.*) MAHANTH JAGARNATH DAS *v.* JANKI SINGH. **43 M L J. 55=26 C.W N. 833=35 C.L.J. 306=(1922) M.W.N. 410=1 Pat. 340=31 M.L.T. 231 (P.C.)=66 I.C. 337=3 P.L.T. 197=49 I.A. 81=(1922) P.C. 142=(P.C).**

———Ss. 3 (3) and 4—*Tenant—Who is.*

A person holding a maintenance grant on condition of paying a proportionate share of Government Revenue is a tenant. (*Carnduff and Richardson*, JJ.) DWARKA NATH *v.* DAM BURUDAR MOHAPATRA. **38 Cal. 278=9 I.C. 394=15 C.W.N. 266.**

BENGAL TENANCY ACT (VIII of 1885), S. 3.

———S. 3, cl. 5—*Suit for damages for use and occupation—Is not a suit for rent—Decree is executable only under the C.P. Code.*

Where a co-sharer landlord brings a suit for that which is payable to him by a tenant for the use and occupation of his share of the land the suit is not a suit for rent as defined in S. 3 cl. 5 of the B. T. Act. Consequently a decree passed in the suit is not a decree under the B.T. Act and must be executed under the C.P. Code and not as a decree for rent under the B T. Act. (*Coutts and Das*, JJ.) MAHARAJA KESHO PRASAD SINGH *v.* RAMDENI SINGH. 2 Pat. 183=4 Pat. L.T 689=74 I.C. 454=1923 P. 397.

———Ss. 3 (5) and 105—*Damages for use prior to assessment of rent is "rent"—Not cognizable by Small Cause Court.*

A suit by a landlord for damages for use and occupation of land prior to rent being assessed on it under S. 105 of the above Act as *kabillagan* holding was held to be a suit for "rent" under S. 3 (5) of the Act, of which no Small Cause Court could take cognizance. (*Roe and Jwala Prasad*, JJ) MAHADEO RAI *v* KESHO PERSHAD SINGH.
1 Pat. L.W. 45=37 I.C. 909=2 Pat. L J.97=1917 Pat. 81.

———Ss. 3 (8) and 11—*Nimhowla tenure—Transfer of.*

Howla tenures of Backerganj are permanent tenures under S. 3, cl. 8 and can be transferred and bequeathed like other immoveable property under S. 11. If such a transfer is notified to the landlord he cannot claim its rent against the first tenants. (*Mookerjee and Beachcroft*, JJ.) PROMODE RANJAN GHOSH *v.* ABIJAN BIBI. 25 I.C. 373 (Cal.)

———S. 3 (9), 30, 182—"*Holding*," *does not include—Undivided share.*

An undivided share of land is not a 'holding' within S. 3 (9) of the Act and the phrase 'parcel' in that clause means entire parcel, Therefore S 30 has no application when the tenancy of a raiyat is an undivided share of land. (*Newbould and Panton*, JJ.) BINAYAK DAS *v.* SAMINUDDI.
59 I.C. 209=24 C.W.N. 1022.

———Ss. 3 (9), 30 and 188—*Purchaser of share in a separated holding.*

A purchaser of share in a separated holding cannot sue the raiyat of both the shares for enhancement of his share alone without joining the other co-sharers as plff. A purchaser is not the landlord of a holding within S. 30 and the owners of the separated shares of the holding are still joint landlords under S. 1. (*Sharfuddin and Richardson*, JJ.) HEMANTA KUMARI DEBI *v.* KULSUMANNESSA BIBI.
18 I.C. 847 (Cal).

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———S. 3 (9)—*Holding* howla.

The undivided share of *howla* does not fall under the definition of 'holding' nor under S. 30, B.T. Act; the landlord of the share is not therefore entitled to maintain an enhancement suit. (*Harrington and Mookerjee*, JJ) PARBATTY DEBYA *v.* MATHURA NATH BANERJI.
40 Cal. 29=16 C.W.N. 877=15 I.C. 453=16 C.L J. 9.

———S. 3 (9) "*Holding*," *meaning of—If includes lands of* under-raiyat—*Purchaser if can annul encumbrance.*

Unless specially mentioned, the word "Holding" has the meaning assigned to it under S. 3 (9); it does not include land held by an *under-raiyat* under Chapter XIV, and it cannot be sold in execution for arrears of rent so as to give the purchaser a right to annul encumbrances created by the *under-raiyat*. (*D. Chatterjee and N. Chatterjee*, JJ.) ARSADULLA *v.* MUNSEB ALI 16 C.W.N. 831=14 I.C. 349=16 C.L J. 539.

———Ss. 3 (10) and 20—*Settled raiyati—Holding land in village.*

For a person to become a settled raiyat within S. 20 of the B. T. Act by holding land as a raiyat continuously for a period of 12 years it is necessary that he must hold land in a "village" continuously during the whole of that period. The fact that the area within which such land is situated was at some time declared to be a "village" is of no avail as the declaration cannot have retrospective effect. (*Chatterjee and Panton*, JJ.) SREEMANTO BHARASA *v.* PORT CANNING LAND IMPROVEMENT CO., LTD. 55 I.C. 330 (Cal.).

———S. 4—*Raiyat*— Under-raiyat—*Cultivation.*

Where a tenant is not a cultivator, he is not an *under-raiyat* or a raiyat under B. T. Act and his liability for ejectment does not depend upon the provisions of the Act. The nature and the terminability of the tenancy must be ascertained before the determination of the sufficiency of notice entitling the plff. to a decree in an ejectment suit. (*Mookerjee*, A.C.J. *and Fletcher*, J.) GAYANATH *v.* ANUKULCHANDRA. 58 I.C. 835=32 C.L.J. 6.

———S. 4—*Definition of "under-raiyat".*

A tenant holding under a raiyat at a fixed rent or as an occupancy or non-occupancy raiyat is an *under raiyat*. (*Mookerjee*, A. C.J. *and Fletcher*, J.) KALI DAS CHAKKRAVARTY *v.* NASARAT. 58 I.C. 413=32 C.L J. 130.

———Ss. 4 and 105—*Scope of—Landlord and tenant — Non-agricultural land within Municipal limits.*

In its general scope, the Bengal Tenancy Act is a law for agricultural landlords and tenants. "Tenant" and "landlord" in S. 105

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of the Bengal Tenancy Act mean, respectively, a tenant and a landlord as defined in S. 4 of the Act. The section is not applicable to non-agricultural lands which are situated in a mufassal municipality and occupied by tenants who are engaged in trade or other non-agricultural employment. (*Woodroffe and Smither*, JJ.) BIPRADAS PAL CHOWDHRY *v.* AZAM OSTAGAR. **32 I C. 412=46 Cal. 441.**

——S. 4—Raiyat *at fixed rate of rent and occupancy raiyat—Distinction between their privileges.*

A *raiyat* at a fixed rate of rent is competent to create a permanent heritable interest in favour of his grantee although the latter is an *under-raiyat*. An occupancy *raiyat* is not competent to create in favour of his grantee a permanent heritable *under-raiyati* interest. Where the grantee is an *under-raiyat* of an occupancy raiyat, his interest is not heritable. (*Mookerjee and Richardson*, JJ.) MEHER ALI *v.* KALAI KHALASHI. **19 C.W.N. 1129=29 I.C. 461=27 C.L.J. 379.**

——Ss. 4 and 5—*Occupancy ryot or tenant at a fixed rate.*

A *kabuliyat* under which the tenant held the land from 1875 did not show that it was in renewal of a previous lease and there was no evidence of the existence of any tenancy before the kabuliyat was executed. *Held*, that it must be regarded as indicating the inception of the tenancy, and that the tenant must therefore be an occupancy ryot and not a ryot at fixed rate. (*Ross*, J.) HENRY HILL & CO. *v.* BAWAN THAKUR. **2 Pat. L.T. 605.**

——S. 4—*Not exhaustive.*

The classification of tenants in S. 4 of the act is not exhaustive. (*Chamier*, C. J.) JANAKI SINGH *v.* JAGARNATH DASS. **42 I.C. 177=3 Pat. L.W. 105=(1917) Pat 318.**

——S. 4 (3) (b)—*Not exhaustive—Occupancy raiyat—Rights of.*

Whatever might have been the earlier law, the occupancy raiyat enjoys under the B.T. Act substantial rights in the land and his interest cannot be appropriately described as a 'merely' personal right or personal privilege. The B.T. Act is not a complete Code, 35 C. 34, ref. It nowhere purports to give an exhaustive enumeration of all the incidents of occupancy right. (*Mookerjee*, C.J., *Fletcher*, *Chatterjee*, *Teunon*, *Richardson*, *Chaudhuri and Huda*, JJ.) CHANDRA BENODE KUNDU *v.* SHEIKH ALA BUX. **48 Cal. 185=48 I.C. 358=31 C.L.J. 510=24 C.W.N. 8 (F.B.).**

——S. 4 (3) (a)—*Raiyat.*

A tenant who holds lands at a rent which has not changed from the time of the Permanent Settlement is a "raiyat." (*Fletcher and Richardson*, JJ.) KSHIROD GOBINDA CHOWDHURY *v.* RAJENDRA NARAYAN SHAHA. **38 I.C. 94=27 C.L.J. 281.**

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——S. 4 (3)—*Scope of—Suit for declaration—Record of Rights is incorrect—Fixed rate holding.*

A suit for a declaration that the Record of Rights is incorrect is not one under the Tenancy Act; but nonetheless, the fact of long payment of rent at an unchanged rate may be taken as evidence to show that the holding was a fixed rate holding. [6 I.C. 217; 35 Cal. 763 ref. to.] (*Mullick*, J.) PIRTHI CHAND LAL *v.* MAHOMED TAHIR. **35 I.C. 427=1 P.L.J. 67=3 P.L.W. 527.**

—— S. 5—*Non-transferable holding—Sale of for residential purposes—Recognition by landlord on payment of enhanced rent—Effect of.*

Where a raiyat occupying his homestead within the residential suburb of the Naraingunj Municipality as part of his non transferable occupancy holding first sold the rest of the holding to a certain person, and next sold his homestead to the defendant, a pleader who purchased it for the purpose of his residence and for carrying on his profession as a pleader in the local Civil Courts, was recognised by the plaintiffs landlords, on payment of salami and was granted rent receipts in the forms prescribed in the Bengal Tenancy Act as for a kasht holding, while the rent previously paid was now quadrupled:

Held, in a suit brought by the plaintiff for ejectment of the defendant after service of six month's notice to quit terminating with the end of a year of the tenancy that the defendant's contention that his tenancy was in continuation of the old tenancy of the out going raiyat was not maintainable, that the tenancy originated in a fresh settlement with the plaintiffs and that in view of the purpose of which the new tenancy was created it was governed by the provisions of the T. P. Act. 16 C. 652; 19 C. 489; 27 C. 205, ref. (*Teunon and Abdul Majid*, JJ.) HARENDRAKUMAR ROY CHOWDHURY *v.* HARAKISHORE PAL. **70 I.C. 165=26 C.W.N. 389=1922 Cal. 201.**

—— S. 5—*Lessee, if a tenure-holder or a raiyat.*

A lease was granted on terms that if a tenant settled on any portion of the land leased out, the lessee would surrender to the lessor that portion and get in exchange for the same, lands of similar description. The lessee was not to cut down any tree or to sell, to make a gift of, or to transfer any portion of the land in any way: *Held*, that the land was not settled with the lessee for the purpose of settling tenants thereon, and that the interest created by the lease was that of a raiyat. (*Chatterjee and Duaval*, JJ.). GAZIRADDIN MANDAL *v.* GANGARAM. **53 I.C. 12 (Cal).**

——Ss. 5 and 195—*Applicability of.*

The law in S. 5 applies to all tenancies whether created before or after passing of the Act subject to reservations in S. 195.

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(*Teunon and Chaudhuri*, JJ.) SECRETARY OF STATE FOR INDIA *v.* JADAY CHANDRA MISRA. **39 I.C. 409=21 C.W.N. 452.**

———S. 5—*Tenure-holder—Ryot—Evidence—Jote—Meaning of.*

The terms of a lease and the papers of the landlord showing that the tenancy was a raiyati, is not conclusive as against the sub-lessees and they can prove from surrounding circumstances and other facts that the lessee was nothing more than a mere tenure-holder in relation to them.

The word "jote" does not necessarily mean the cultivator's interest. (*Chatterjee and Richardson*, JJ.) RAJANIKANTA *v.* YUSUF ALI. **34 I.C. 92=21 C.W.N. 188.**

———S. 5—*Non-transferable occupancy holding, transferee of—Co-sharer landlord--Recognition of.*

A transferee of a non-transferable occupancy holding, who afterwards obtains a recognition from some of the co-sharers landlords, gets a good title with regard to shares of those landlords, and as such has the right to joint possession of the holding. (*D. Chatterjee and Beachcroft*, JJ.) UMAR ALI *v.* JADU RAM KAPALI. **32 I.C. 855 (Cal.)**

——— S. 5—*Tenant's status determined from document.*

A tenant's status must be determined only from the document and if it is clear, no subsequent dealings of the tenant should be considered. (*Chaudhuri and Newbould*, JJ.) PROTAB CHANDRA *v.* MOHENDRA LAL. **32 I C. 717 (Cal.)**

———S. 5 — *Lease*—Zuripeshgi —*Raiyat taking—Effect of.*

A lease which is not merely a contract for the cultivation of the land but which also constitutes a valid security to the servant for the sum advanced cannot give rise to a claim to a *raiyati* interest. A *raiyat* does not lose his right to acquire occupancy rights in the land by taking a *Juripeshgi* lease thereof. 24 C. 272; 10 C.W.N. 351, rel. on. (*Chatterjee and Walmsley*, JJ.) LAL BAHDAUR SAHA *v.* M. MACKENZIE. **20 I.C. 781=19 C.W.N. 229.**

———S. 5—*Landlord and tenant—Lease—Construction—Option to tenant to take settlement on revised* Jama—*No offer of revised* Jama *by lessor—Holding over on same terms.*

Because as a matter of a fact a man does not have a tenant under him it does not follow that he must be a raiyat whatever the nature of his holding. Whether the leave was granted for the purpose of cultivation depends upon the facts existing at the inception of the tenancy. When a settlement provided that after the expiry of the lease the tenant should either accept a revised *jama* or give up his lease and the Collector never revised it *held* that the tenant was not only entitled but bound to go on paying the same rent. A person who is in the

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shoes of the Collector and who never asked the tenant for any revised *jama* must be held to have acquiesced in the tenant's holding on the same terms. (*Holmwood and Chapman*, JJ.) UPENDRA NATH *v.* BHAIRAL CHANDRA. **18 I.C. 471 (Cal.)**

———S. 5—*Application to* Sankhola *land.*

Sankhola land is agricultural land and the Bengal Tenancy Act applies to it; it is enough to show that a land is agricultural if any kind of grass is cultivated upon it. (*Chatterjee*, J.) SARGAPATI *v.* KARMADHAN BARUA. **11 I.C. 942 (Cal.).**

———S. 5—*Character of tenancy—How determined.*

To determine the character and purpose of a tenancy where the same is not clear from the terms of the lease, importance should be attached to the surrounding circumstances and the subsequent conduct of the parties. But where the original grant is clear on the point, subsequent conduct of parties would not alter the character of the tenancy. (*Chitty and N. Chatterjee*, JJ). PROMODA NATH ROY *v.* ASIRUDDIN. **11 I.C. 262=15 C.W.N. 896.**

———S. 5—*Land let out for cultivation—Lessee is not tenure-holder—Presumption under S. 5 (5) is not applicable where purpose of tenancy is known.*

S. 5 (5) has no application to the case of a person who does not hold more than one hundred standard bighas of land, there will be no presumption as to his being a tenure-holder. The true scope and meaning of S. 5 are that, where the purpose for which the tenancy was originally created is known and clearly proved, no other presumption as to the tenancy being otherwise than what the original purpose is, is admissible. If land is expressly leased out to a person for the purpose of cultivation and he was prohibited from making settlement of it with any other person, or granting *Shikmi patta* thereof, or using the land in any way which would interfere with cultivable nature thereof, the lessee is only a *Shikmidars* and not a tenure-holder under S. 5. (*Jwala Prasad and Bucknill*, JJ.) BENI CHAUDHURI *v.* TRILOKE NATH TEWARI. **1922 P. 425.**

———S. 5—*Tenure-holder* — Pradhan *in Sonthal Parganas.*

Pradhan in Sonthal Parganas is not a tenure-holder within B.T. Act but has a mixed status of Jaith Raiyat and Ijardar. (*Coutts and Sultan Ahmed*, JJ.) RAM CHARAN SINGH *v.* E.W. BEBBY. **58 I.C. 43 (Pat.)= 5 P.L.J. 656=2 U.P.L.R. Pat. 7= 1921 Pat. 8.**

——— S. 5—"*Jotedar*"—*Meaning*—"*Jotidar*" may mean either tenure-holder or raiyat. (*Mullick*, J.) GANGA RAM RAI *v.* MAULA BAKSH. **34 I.C. 185 (Pat.).**

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———**Ss 5 (1) and (2) and 19**—*Raiyat and tenure-holder—Grantee of Chur lands for reclamation and letting at a profit to cultivators—Grantee not a raiyat, but a tenure-holder.*

The question whether a person is a tenure-holder or a raiyat is ultimately one of fact. One must look to the attendant circumstances to judge of the purpose for which the lands are granted. 45 I.A. 72, ref. In 1883 appellant's predecessor acquired from the Government extensive chur lands in Bengal for the purpose of re-claiming them and then letting them at a profit to cultivators. There was some evidence that on occasions prior to 1885 the Board of Revenue and its subordinates had treated the holding as *ryoti*:—*Held*, that the appellants were tenure-holders within S. 5 of the Act and that S. 19 which saves occupancy rights, accrued to ryots prior to the Act, did not apply as neither the appellants nor their predecessor had held a *ryoti* interest in the land. (*Lord Sumner*) RAJANI KANTA GHOSE *v.* SECRETARY OF STATE FOR INDIA.

51 I.C. 226=46 Cal. 90=
23 C.W.N. 649=45 I.A. 190 (P.C.)

———**Ss. 5 (1) (4) (5) and 103-B**—*Tenure holder or raiyat—Lease of over 100 bighas of land to non-resident men for reclamation—Entry in Record of Rights.*

In determining the status of a tenant, *viz.*, whether he is a tenure-holder or a raiyat, two elements have to be borne in mind, firstly, the purpose for which the land was acquired, and secondly, the extent of the tenure or holding. The law assumes the raiyat to be the actual cultivator of the soil, either by his own labour or of members of his family or by hired labourers and it assumes also that ordinarily a larger area than 100 bighas would make cultivation by the personal agency of the tenant improbable. Land of more than 250 acres was leased to a resident of another place permanently at fixed rent, with a view to its reclamation at the lessee's expense and by his own efforts "by cultivating it or having it cultivated." *Held*, that it could not be said that the purpose was, primarily or otherwise that the demised land should be cultivated by his personal agency. The lease being at best equivocal the circumstances could be looked at, to judge of the purposes for which the lease was acquired and to determine the status of defendant.

The presumption arising under S. 103-B of the B. T. Act from an entry in the Record of Rights that the tenant was a raiyat and was held to have been rebutted by the evidence. (*Ameer Ali.*). DEBENDRA NATH DAS *v.* BIBUDHENDRA MAN SINGH BHRA MARAI ROY

45 Cal. 805=45 I.A. 67=
5 P.L.W. 1=27 C.L.J. 543=
45 I.C. 411=22 C.W.N. 674=
16 A.L.J. 522=28 M.L.T. 384=
(1918) M.W.N. 379=20 Bom. L.R. 743=
35 M.L.J. 214 (P.C.).

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———**S. 5 (1) and (2)**—*Tenure-holder or raiyat—Test of—Letting out to others.*

To determine whether a tenant is tenure-holder or raiyat the nature of the holding in its inception should be taken in to consideration. A tenant who having acquired a right to hold land for purposes of cultivation lets out the land to strangers for cultivation is tenure-holder, not a *raiyat*. (*Greaves*, J.) RAJ MOHAN DHUPI *v.* HARENDRA CHANDRA.

50 I.C. 468 (Cal.).

———**S. 5 (1) and (2)**—*Tenure-holder changing status to prejudice of tenants and claiming to be raiyat.*

A tenure-holder cannot be allowed to change his status to that of a raiyat to the prejudice of tenants on the land at the time of the change and even as regards tenants who enter upon the land after the change, their status would not be prejudcially affected if the change in the status of the tenure-holder is only in respect of an undivided portion of his tenancy and not in respect of the whole of that tenancy. (*Walmsley and Panton*, JJ.) ANNADA PRASANNA LAHIRI *v.* BADULA MANDAL. **47 I.C. 985 (Cal.).**

———**Ss. 5 (1) and (2) and 105**—*Status of tenant—Tenure or raiyati interest—Test.*

The mere fact that a tenant has sub-let his land is not decisive of the question whether he is a tenure-holder or a raiyat. The purpose for which the right of tenancy was originally acquired is the test. The statutory presumption under S. 5 (5) of the B. T. Act has no application when the terms of the original grant of a tenancy are known. In cases where the origin of tenancy is unknown or where the terms of a grant are ambiguous, the mode of user of the land and the evidence of the subsequent conduct of the parties may furnish a valuable clue to determine the original purpose of the tenancy. (*Mookerjee and Walmsley*, JJ.) SECRETARY OF STATE FOR INDIA *v.* DIGAMBAR NANDA. **43 I.C. 43=27 C.L.J. 334.**

———**S. 5 (1) and (2)**—*Tenure or Rayati holding—Conduct—Circumstance.*

The subsequent conduct of the parties and surrounding circumstances may be gone into to find out whether a tenancy is a tenure or a *raiyati* holding. 5 C.L.J. 522; 14 C.L.J. 38; 13 C.L.J. 485. rel. (*Sanderson*, C.J. *and Teunon*, J.) ABDUL WAHED KHAN *v.* NATABAR GHOSE. **42 I.C. 280 (Cal.)**

———**S. 5 (1)**—*'Bring it under cultivation by establishing tenants on it'.*

The section has not changed the pre-exist in law by the addition of the above wotds. (*Fletcher and Teunon*, JJ.) SECY. OF STATE *v.* GOBIND PRASAD.

39 I.C. 935=21 C.W.N. 805.

BENGAL TENANCY ACT (VIII of 1885), S. 5.

——S. 5 (1)—"*Bringing tenants on it.*"

The expression "or bringing it under cultivation" by establishing tenants on it did not change the pre-existing law. (*Teunon and Chowduri*, JJ). SECRETARY OF STATE FOR INDIA *v.* JADAY CHANDRA MISRA.
39 I.C. 409=21 C.W.N. 452.

——S. 5 (1) and (5)—*Tenure-holder—Raiyat—Lease—Construction.*

A lease was made in order that the grantee might cultivate the land after making it fit for cultivation at his own expense and by his own efforts. The grantee was to enjoy the land by cultivating it or having it cultivated, by any means he might consider necessary for cultivating the same and the grantor was not to raise any objection thereto. There was a period of remission fixed, during which no rent was to be paid for the land. The rate of rent itself was fixed in perpetuity and a premium was paid by the grantee to the grantor. The area covered by the lease exceeded one hundred *bighas*: *Held*, it was obligatory upon the Court to presume under S. 5 (5) of the B. T. Act that the grantee was a tenure-holder; and that the terms of the lease instead of rebutting supported the statutory presumption. The definition given in the section is not exhaustive. (*Jenkins*, C.J. *and Mookerjee*, J.) BIBUDENRA MAN SINGH BHRAMARBAR RAI *v.* DEBENDRA NATH DAS.
27 I.C. 432=20 C.L.J. 140.

——S. 5 (2)—*Raiyat and under raiyat—Distinction between—Ejectment.*

The distinction between a raiyat and an under-raiyat was recognised before the passing of the B.T. Act; Acts X of 1859 and VII of 1869 contemplate the existence of an under-raiyat. In a case governed by Act VIII of 1869 an under-tenant who holds under a under-raiyat cannot be a raiyat and cannot acquire a right of occupancy. (*Mookerjee*, C.J., *Fletcher*, J.) KAMINIR SUNDARI DASI *v.* PRASONNA KUMAR SIL. 58 I.C. 662=24 C W.N. 685.

——S. 5 (2)—*Raiyati land—Agricultural land—Proof.*

The evidence of persons who have known the land for years and taken part in its cultivation and a cess return describing the land as agricultural are proof that the land was originally agricultural. The fact that the land in question was in a subsequent chitta described as *bastu* land is immaterial. Nor does the erection of a homestead on a portion of the holding affect its character. (*Chaudhuri*, J.) ANUKUL CHANDRA CHAKRAVARTHI *v.* TUFANI SHEIKH. 53 I.C. 925 (Cal.)

——S. 5 (2)—*Raiyat—Decision of Board of Revenue.*

The decision of Board of Revenue that the tenant's predecessor was a raiyat within

BENGAL TENANCY ACT (VIII of 1885), S. 5.

S. 6 of Act VIII of 1869, is not a determination that he is a raiyat within S. 5. (*Fletcher and Teunon*, JJ.) SECY. OF STATE *v.* GOBIND PRASAD BARIK.
39 I.C. 934=21 C.W.N. 505.

——S. 5 (2)—*Tenancy—Character of, as shown by lease—If conlcusive.*

Where a lease clearly shows by its terms that the tenant was given a raiyati holding, the character of the tenancy is not altered by the mere fact of the lessee subsequently letting out the land to others but it is open to a sub-lessee who was no party to the contract of lease to show that the real purpose for which the land was acquired by the lessee was other than what was stated in the lease. (*Chatterjea and Richardson*, JJ.) RAJANIKANTA *v.* YUSUF ALI.
34 I C. 92=21 C.W.N. 188.

——S. 5 (2)—*Agricultural land—Raiyat—Under-raiyat*—Raiyat *letting land for market.*

There is nothing confining the operation of the B.T. Act to agricultural land except the definition of "raiyat" and the law governing raiyats deals with agricultural land. If a *raiyat* lets the land to an under-tenant for other than agricultural purposes, that does not take the land out of the operation of the Act. An under-raiyat's interest is one carved out of the raiyat's interest and must be governed by the same laws. (*Coxe and Ray*, JJ.) BARHANUDDI CHOWDHURY *v.* LALKHAN.
21 I.C. 43 (Cal.).

——S. 5 (2)—'*Raiyat*'—*Agriculture—*'*Cultivation*'—'*Agricuture*'—*Meaning of.*

A lessee of land let out for grazing cattle on it, may be a *raiyat* when the grazing is ancillary to cultivation but not otherwise. Whether it is ancillary to cultivation or not must be decided with reference to the facts and circumstances of the case. The term 'Agriculture' is wider than 'cultivation' and a purpose may not be ancillary to cultivation though connected with agriculture. A lease for gathering fruits from the trees on the land is not a lease for agricultural purposes. 11 W.R. 231; 14 C. W.N. 372, Dist. (*Mookerjee and Beachcroft*, JJ.) HEADAYET ALI *v.* KALANAND SINGH.
20 I.C. 332=17 C.L.J. 411.

——S. 5 (2)—*Raiyat—Meaning.*

A person who obtains a settlement from a joint fractional co-sharer without the assent of the other joint holders is not a raiyat within the meaning of the Act. (*Holmwood and Chapman*, JJ.) KADIR BAKSH *v.* RAM MANIKYADAS.
19 I.C. 395 (Cal.).

——S. 5 (2)—*Raiyat—Tenure-holder—Evidence of—Tests.*

A considerable portion of the land of a tenancy was brought under cultivation not by the raiyat but by the tenants settled by him on the land. *Held*, that it may be inferred that the

raiyat has treated himself as a tenure-holder rather than as an occupancy raiyat. 9 C.L.R. 449 and 11 Cal. 501, ref. A tenancy was created for the purpose of reclamation and was not limited in duration and descended from father to son, and grandson. The rent fixed upon the excess land at one stage was based on the initial rent. The rent was progressive. On one occasion a transfer by the tenant was recognized by the landlord. Sometime ago the tenant professed to be a permanent tenure-holder and executed a permanent sub-lease still in force. In one instance the rent was enhanced and the enhanced rent had been paid without protest: *Held*, that the rent of the tenancy had not been fixed in perpetuity and could be enhanced. (*Mookerjee and Beachcroft*, JJ.) BAMAPADA ROY *v.* THE MIDNAPORE ZEMINDARI CO. LTD. **16 I.C. 376=16 C.L.J. 322.**

———S. 5 (2)—*Raiyat—Members of a firm.*

The members of a firm are capable of acquiring rights of occupancy, in land and when such rights have been acquired they will pass to the successors-in-interest of the original members of the firm. 25 W. R. 117; 4 Cal. 957; and 11 Cal. 501, Ref. (*Atkinson and Dass*, JJ.) SRI THAKUR PARMOD BANABIHARI *v.* ATKINS. **53 I.C. 106=4 Pat. L.J. 533.**

———S. 5 (5), 45 and 116—*Raiyati*—Zuripeshgi *lease—Cultivation of indigo—Occupancy rights—Notice to quit* — Khudkasht *land—Admission of tenant.*

On the expiry of the lease of the suit lands, the landlord sued to eject the defendant who resisted ejectment on the ground that he had acquired occupancy rights therein and also because there had been no notice to quit under S. 45 of the B.T. Act. *Held*, that deft. had acquired occupancy rights in the larger of the two areas in suit, the High Court having rightly found that that area was not the landlord's private land and rightly held that there was nothing in S. 116 of the B.T. Act which precluded the acquisition of occupancy rights. The deft. having admitted that the smaller area was private land, the High Court erred in going behind his admission but should have held that notice to quit was unnecessary and given a decree for ejectment. 24 Cal. 272, dist. (*Sir Arthur Wilson.*) DAMODAR NARAYAN *v.* DALGLIESH. **38 Cal. 432=9 I.C. 913=38 I.A. 65=15 C.W.N. 345=9 M.L.T. 364=8 A.L.J. 441=13 C.L.J. 512=13 Bom. L.R. 396=(1911) 2 M.W.N. 182 (P.C.)**

———S. 5 (5)—*Alluvial accretion — Person occupying without engagement with Govt. is a tenant.*

Where a person occupies alluvial accretion without entering into an engagement with the Collector before taking possession, but he is allowed to remain in possession on payment of rent, he is a tenant—17 C.L.J. 431; 22 C.L.J. 132, Ref. The Revenue authorities are competent to make a malikana settlement of the lands

with a third person. 34 C.L.J. 779, Ref. (*Mookerjee and Cuming*, JJ.) RANI HEMANTA KUMARI DEBI *v.* THE MIDNAPUR ZAMINDARI COMPANY. **35 C.L.J. 493=1923 Cal. 25.**

———S. 5 (5)—*Raiyati holding—Extent over 100 bighas—Presumption.*

The presumption under S. 5 of the B.T. Act is rebuttable and evidence is admissible to show that a holding although exceeding 100 bighas in area is in fact that of a tenure-holder. (*Fletcher*, J.) ABDUL GANI *v.* RADHIKA MOHAN. **55 I.C. 249 (Cal.).**

———S. 5 (5)—*Applicability of—Presumption under.*

The section applies to tenancies created before the Act. (*Per Teunon*, J.) The Act applies to agricultural tenancies whether created before or after the Act. The presumption that any tenant holding more than 100 bighas is a tenure-holder and not a raiyat is a rebuttable one. (*Fletcher and Teunon*, JJ.) SECY. OF STATE *v.* GOVIND PRASAD BARIK. **39 I.C. 934=21 C.W.N. 505.**

———S. 5 (5)—*Application—Presumption under—Retrospective operation.*

S. 5 (5) is not restricted to suits or proceedings between landlords and tenants only. The presumption under S. 5 (5) applies to tenancies created before the Act and also to those less than 100 bighas. S. 5 (5) is a provision of adjective law and can have retrospective effect. The fact, that rent of a tenure, was altered before 40 years, does not mean that the rent is fixed permanently. (*Mookerjee and Cuming*, JJ.) JAGABANDHU SAHA *v.* MAGNAMOJI DASSI. **44 Cal. 556=36 I.C. 884=24 C.L.J. 363=22 C.W.N. 89.**

———S. 5 (5)—*Presumption—Tenancy before Act.*

Though the presumption that if a man holds more than 100 bighas he must be supposed *prima facie* to be a tenure-holder is not applicable to occupancy rights acquired by a raiyat before the Act, yet when the question is whether the tenant was or was not a raiyat, the area should be taken into consideration. 1 W.R. 68, foll. (*Coxe and Richardson*, JJ.) SARAT CHANDRA ROY *v.* RATUBUDDIN. **17 I.C. 227=16 C.L.J. 271.**

———S. 5 (5)—*Holding less than 100 bighas—Presumption that tenant is a raiyat, if arises.*

No presumption arises under S. 5, clause (5) that a tenant in occupation of an area less than 100 bighas in extent is a raiyat. (*Mookerjee and Caspers*, JJ.) TARA NATH *v.* ISWAR CHANDRA DAS. **14 C.L.J. 598=11 I.C. 164=15 C.W.N. 398.**

———Ss. 5 (5) and 103-B—*Lease—Land exceeding 100 bighas—Settlement—Presumption—Record of Rights.*

The presumption under S. 5 of the B.T. Act from the fact of the area leased being over

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100 bighas is a week one and is rebutted by the presumption arising under s. 103 of the Act as to the correctness of the entry in the Record of Rights. *Held*, that the lease at its inception being one for cultivation, the subsequent letting out of the land by the lessees did not convert them into tenure-holders. In construing the lease, the intention of both the lessor and the lessee must be looked into. (*Mullick and Atkinson*, JJ.) KULWANT SAHAY *v.* BABURAM TEWARI. **43 I.C. 941 = 5 Pat. L.W. 311 = 1917 Pat. 379.**

——Ss. 6, 60 and 105—*Settlement of fair and equitable rent—Presumption of fixed rent—Heritable tenure after permanent settlement.*

A landlord applied under S. 105 of the B.T. Act for settlement of fair and equitable rent of a tenure created by a *howla patta* in 1233 B.S. expressly making the tenure hereditary with no clause about fixity of rent.

Held, that though the plaintiff had been realizing the same rent for a great many years, the rent was not fixed, and he was entitled to have a fair and equitable rent assessed.

The mere fact that a heritable tenure was created could not by itself mean that a *mokurari* tenure was created. (*Chaudurí*, J.) SRIMANTA KUMAR CHAKRABARTY *v.* SABAR ALI HOWLADAR. **32 I C. 702 (Cal.).**

——S. 6—*Assignment of a part of a Taluk—Effect.*

No new tenure is created by assignment of part of a Taluk though the assignee gets a sanad from the proprietors. Rent of that part cannot be enhanced. (*Sanderson*, C.J. *and Mookerjee*, J.) CHANDRA KANTA *v.* RAM KRISHNA. **20 C.W.N. 1002 = 36 I.C. 707 = 24 C.L.J. 275.**

——S. 6 (a)—*Enhancement of rent, Burden of proof.*

S. 6 (*a*) of the B. T. Act prescribes that where a tenure has been held from the time of the permanent settlement, its rent shall not be liable to enhancement, except upon proof that the rent is enhanceable either by local custom or by the conditions under which the tenure is held. Where there is no proof of local custom, the Court has to determine, first, whether the tenures have been held from the time of the Permanent Settlement, and secondly, what are the conditions under which the tenure is held. (*Mookerjee and Chotzner*, JJ.) NURUL HUQ *v.* MAHARAJAH BIRENDRA KISHORE MANIKYA BAHADUR. **38 C.L.J. 121 = 72 I.C. 979 = 1924 Cal. 133.**

——S. 7—*Liability to enhanced rent.*

A stipulation that the tenure holder is to pay rent for lands besides those mentioned in the *Kabuliyat* which may be under his cultivation or which may be found in excess upon measurement indicates that rent is not fixed in perpetuity and hence the same can be enhanced. (*Rampini and Sharfuddin*, JJ.) SURJA PROSAD SUKUL *v.* MIDNAPORE ZEMINDARI COMPANY, LTD. **38 C.L J. 369.**

——S. 7—*Enhancement, Question of rights, cannot be raised in Second Appeal.*

Where the landlord seeks to have the rent of a tenure-holder enhanced, the first point for investigation is, whether the rent is liable to enhancement. When this has been made out, the next point for determination is, whether there is a customary rate payable by persons holding similar tenures in the vicinity. It is only when this has been answered in the negative that the rent can be enhanced up to such limit as the Court thinks fair and equitable. Where none of these matters had been investigated in the Court of First instance nor raised there, the question could not be raised on appeal. (*Mookerjee and Cuming*, JJ.) THE MIDNAPORE ZEMINDARY CO. LTD., *v.* SRIDHAR MAHATA. **49 Cal. 866 = 36 C.L.J. 96 = 67 I.C. 775 = 1922 Cal. 152.**

——Ss. 7, 30, 191 and 192—*Etmans—Temporary settlement—Enhancement of rent.*

A temporary settlement holder is not by virtue of Ss. 191 and 192 of the B. T. Act precluded from exercising the ordinary powers of a landlord under S. 7 or S. 30 of the Act. Etmans are tenures and therefore S. 7 applies to the enhancement.

The rent of a tenure is always liable to enhancement unless the landlord has precluded himself by contract or is estopped by law and the mere fact that the parties have agreed that resort may be had to the Patni Regulation to recover arrears of rent cannot mean that the rent was permanently fixed. (*N. R. Chatterjee and Duval*, JJ.) JOGESH CHANDRA ROY *v.* MOKBUL ALI CHOWDHURI. **23 C.W.N. 945 = 54 I.C. 850 = 30 C.L J. 140.**

——S. 7—*Enhancement of rent—Limitation.*

In course of proceedings under Chap. X of the B.T. Act, plff. applied for the enhancement of rent and deft. asserted that the tenure had been held at a rent which had not been changed since the Permanent Settlement and the rent could not be enhanced. Plff. withdrew his application with liberty to sue afresh. More than twelve years thereafter the plff. sued for enhancement of rent of the same tenure under S. 7 of the B.T. Act on a contract embodied in some old *kabuliyats*. *Held* that the Law of Limitation was no bar to a suit of this nature. (*Sanderson*, C.J. *and Teunon*, J.) BIRENDRA KISHORE *v.* MAHOMAD DOULATKHAN. **43 I.C. 59 = 22 C.W.N. 856.**

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——S. 9—*Enhancement of rent within 15 years.*

It is only when the rent entered, is the result of actul settlement that rent cannot be enhanced within 15 years but not when it is mentioned from old one. (*Chapman and Mullick*, JJ.) BHAGABAN MAHAPATRA *v.* PALTURAM SINGH. **32 I.C. 749 (Cal.)**

——Ss. 9 (a) and 97—*Estate includes accretions and reformations—Manager of Court of Wards can sue.*

'Estate' in S. 95 (*a*) means all that the holder is entitled to by way of reformation or accretion. Lands handed over to the Manager of the Court of Wards and lands subsequently reformed are the whole estate. S. 97 of the Act gives the Court of Wards power to sue in the case of an estate coming under S. 95 (*a*) of the Act. When the Act gives the Dt. Judge power to direct the management of an estate by the Court of Wards, that body has the same powers as it has in regard to other estates coming within the Court of Wards Act. (*Woodroffe and Cuming*, JJ.) SECY. OF STATE *v.* ANAND MOHAN ROY.
66 I.C. 287=34 C L.J. 205.

——Ss. 11, 18 and 85—*Raiyat at fixed rates.*

S. 85 of the B.T. Act which restricts the power of raiyats to grant under-leases must be read along with Ss. 11 and 18 of the same Act. It does not apply to the case of a raiyat holding at fixed rate of rent. 19 C.W.N. 1127, foll. (*Fletcher and Duval*, JJ.) HOCHEN SARDAR *v.* POREPH NATH PAL. **34 I.C. 647 (Cal.)**

——S. 11—*Agricultural lease—Transfer.*

A lease in respect of agricultural lands if covered by S. 11 of the B. T. Act is transferable. (*Chaudhuri*, J.) NISHIKANTA DUTTA *v.* SHASHI KANTA KARMKAR. **52 I.C. 19 (Cal.)**

——Ss. 11 and 18—*A 'Transfer'—Meaning.*

Transfer in Ss. 11 and 18 includes lease (*Ashutosh Mookerjee and Beachcroft*, JJ.) HARI MOHAN PAL *v.* ATUL KRISHNA BOSE.
32 I.C. 503=19 C.W.N. 1127.

——Ss. 11, 18 and 85 — *Under-raiyati Permanent sub-lease—Right to grant.*

S. 85 of the B.T. Act has no application to a sub-raiyat granting an under-lease. The T. P. Act has no application to a tenancy under the Act. The transfers contemplated in Ss. 11 and 18 of the B. Tenancy Act are transfers out and out and not partial transfers by way of sub-lease.

The B. T. Act does not prohibit the grant of sub-lease by an under-*raiyat* and therefore such sub-leases are valid document between the grantors and the grantees. (*Chatterjee and Chapman*, JJ.) PARUSHULLA SHAIKH *v.* SITAL CHANDRA DAS.
28 I.C. 267=19 C.W.N. 1110.

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——Ss. 11, 88 and 170 (3)—*"Transfer"—Whether includes lease—Sub lease—If valid—Sub-lessee if could pay money into Court to prevent sale.*

"Transfer" in Ss. 11 and 88 includes a lease, so that a permanent tenure holder or a raiyat at fixed rate of rent can grant a sub-lease and the sub-lessee can pay money into Court under S. 170 (3) to prevent a sale of the holding. (*Mookerjee and Beachcroft*, JJ.) HARI MOHAN *v.* ATAL KRISHNA BOSE. **23 I.C. 925 (Cal.).**

——Ss 11 and 12—*Transfer or partition.*

S. 12 of the B.T. Act does not apply to the transfer or partition which may therefore be effected without the necessity of registration and notice required by that section. (*Stephen, and Richardson*, JJ.) RAM DHAN DHAR *v.* SHARUP CHANDRA SEN. **18 I C. 479=17 C.W.N. 313.**

——S. 12—*Transfer of permanent tenure.*

A transfer of a permanent tenure by a registered document is complete under Section 12 of the Bengal Tenancy Act as soon as the document is registered. (*Ameer Ali*, J.) SURAPATI ROY *v.* RAM NARAYAN MUKERJEE.
30 Cal. 680=73 I.C. 193=45 M L J. 219=18 L.W. 681=33 M L.T. 314=L.R. 4 P.C. 159=50 I.A. 155=39 C.L.J. 26=28 C.W.N. 517 (P.C).=1923 P.C. 88.

——S. 12—*Landlord can sue for rent the usufructuary mortgagee from tenant.*

The landlord of a tenure can sue for rent the usufructuary mortgagee of his tenant if the said mortgagee his taken possession of the mortgaged property. 12 C. 185=10 C. 443, Rel. (*Teunon and Newbould*, JJ.) NITYANANDA SARKAR *v.* HARI MOHAN SARKAR.
64 I.C. 750 (Cal.)

——S. 12—*Permanent tenure—Transfer—Liability of transferor—Security for rent.*

When a permanent tenure is transferred and the provisions of S. 12 of the B.T. Act are complied with the transferor ceases to be liable for the subsequent rent and any property which he has mortgaged as security for the rent ceases to the be subject to charge for rent. (*Teunon and Greaves*, JJ.) MAHARAJA BEJOY CHAND, *v.* SARAT CHANDRA ADHYA. **51 I.C. 909=29 C.L.J. 476.**

——S. 12—*Validating Act (I of 1903)—Transfer of tenancy complete on registration.*

Under the Validating Act a transfer of the whole or a portion of permanent tenancy may be complete upon registration although the landlord's fee is not paid and no notice of the transfer is given to him. Though the transfer of a permanent tenure is complete on registration, still if the transferee allows the transferor to represent him to the landlord, he cannot

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take exception to the sale of the tenure in execution of a decree for arrears of rent against the original tenure-holder. (*Richardson and Mullick*, JJ.) (ALI MAHOMED *v.* AFTABUDDIN BHUYA. 34 I.C. 231=20 C.W.N. 355.

——— —Ss. 12 and 56 (3)—*Transfer of permanent tenure—Demand for receipt with tender—Landlord's refusal.*

The transfer of a permanent tenure under S. 12 is complete as soon as the document is registered, and it operates to discharge the transferor from the liability to pay rent.

A transferee is entirely within his rights if he demanded a receipt, in the prescribed form under S. 56 (3) with the statement therein that he is the tenant. A tender is not vitiated because a receipt is asked for. (*Mookerjee and Beachcroft*, JJ.) RUPCHAND GHOSE *v.* NARENDRA KRISHNA.
28 I.C. 683=19 C.W.N. 112.

———S. 13—*Permanent tenure—Execution sale.*

The title of a purchaser of a permanent tenure at Court auction is completed by his payment of the landlord's fee irrespective of acceptance thereof by the landlord. 16 Cal. 642; 19 Cal. 17; 21 Cal. 433, ref. Therefore, a decree obtained by a landlord against the recorded tenant after the notice of such transfer is not a decree for rent. (*Mookerjee and Teunon*, JJ.) GIRISH CHANDRA GUHO *v.* KHAGENDRA NATH. 13 C.L.J. 613=9 I.C. 1001=16 C.W.N. 64.

———S. 13—*Presumption of correctness in law, when arises.*

Till the record of rights is not finally published, no presumption of correctness arises and the presumption so arising is not conclusive but only rebuttable. (*Atkinson*, J.) IMRIT MAHTON *v.* BAHADUR SINGH. 34 I.C. 857 (Pat.).

———S. 15 — *Non-compliance — Decree against an heir cannot in the absence of representation, be executed against others.*

Failure on the part of several heirs of a tenant, to comply with the requirements of S. 15 of the Act, does not entitle the landlord to treat one of them as representative of the entire tenancy and a decree obtained against one cannot be executed against the entire tenancy. Where a representation is established, the decree binds all the heirs even though some were not parties to the suit. (*Mukerjee*, C.J. *and Fletcher*, J.) FAIZU-MUESSA *v.* GAGANESWRI. 63 I C. 706=26 C.W.N. 138.

———S. 15—*Heirs of tenure-holders not notifying succession to landlord—Decree for rent against tenants in actual occupation.*

The representatives of the original tenure-holders did not give notice of succession to the landlord and deposit the fees prescribed by the

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Act. Two of them abandoned the tenure and others had their names recorded as tenants in actual occupation. On a default in the payment of rent, the landlord sued and obtained a decree. *Held*, that the decree obtained against the recorded tenants operated as a rent decree. (*Asutosh Mukeerji*, A.C.J. *and Fletcher*, J.) ABOY CHARAN DATTA *v.* MANORANJAN ROY. 60 I.C. 810 (Cal.).

———S. 15—*Heirs of tenure-holder—Non-registration in the sherista does not affect their rights.*

The mere failure of the heirs of the recorded tenure-holder to cause their names to be registered in the landlord's sherista does not entitle the landlord to affect their interest by sale in execution issued in a suit against a person, who, to the knowledge of the landlord had no interest in the property. The sale must be one in justice and equity and should operate as a sale of the tenure. 10 Cal. 996, rel. (*Walmsley and Buckland*, JJ.) PROVAS CHANDRA CHATTERJEE *v.* JAHARUDDIN MONDAL.
39 I.C. 49=32 Cal. L.J. 77.

———Ss. 15 and 16—*Holder of superior interest succeeding to permanent tenure—Notice of succession to Collector, if necessary.*

The object of Ss. 15 and 16 of the Act appears to be to give information to the superior landlord or tenure-holder of a change in his tenants or subordinate tenure-holders, and not to enable the Collector to amend his register. Therefore, where the holder of superior interest himself becomes entitled to a permanent tenure, it is not necessary for him to serve on himself a notice of his succession, before he can file a rent suit. (*Brett and Richardson*, JJ.) MOFI ZUDDIN *v.* LAKHAN. 18 I.C. 234 (Cal.),

———Ss. 15 and 16—*Compliance with.*

The provisions of Ss. 15 and 16 are complied with if the landlord's fees are deposited with the Collector after the suit is filed. (*Brett and Carnduff*, JJ.) RAJNI KANTA SARKAR *v.* MAKHAN LAL GOSWAMI. 18 I.C. 542 (Cal.)

——Ss. 15 and 16—*Failure to get names recorded in landlord's sherista—Liability for rent—Presumption.*

So far as tenures are concerned, the Bengal Tenancy Act makes it obligatory upon the tenants to have their names recorded in the landlord's sherista whenever they become entitled to them by succession. In the case of a tenure, where only one tenant takes the trouble to have his name recorded in the landlord's sherista and the others, either by design or negligence, fail to do so, it may be presumed that the tenants who failed to have their names recorded in the landlord's sherista consented to the tenant who had his name recorded representing them both in transactions and in suits affecting the landlord and the tenants. 10 C. 896; 26 C. 677, Ref.

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But other principles arise where the Court has to deal with the case of the sale of a holding, as to which there is nothing in the Bengal Tenancy Act compelling raiyats to have their names recorded in the landlord's sherista. No presumption as to representation can be drawn by a Court where only one of the co-raiyats has his name recorded in the landlord's sherista, and the others failed or neglected to do so. 9 C.W.N. 843, Ref.

It is a question of fact in each case whether the recorded tenant does in fact represent the holding in dispute and the fact that only one tenant is registered is an item in the evidence upon the question whether he is or is not the representative tenant *qua* the landlord. (*Das and Adami*, JJ.) JAIDEB THAKUR *v.* JAWAHIR MISSIR. (1923) Pat. 57 = 69 I.C. 565 : 1 Pat. L.R. 47 = 1923 P. 206.

———S. 15—*Objection — Compliance with the section during appeal—Succession to permanent tenure—No notice to Collector at time of suit for rent—Notice issued and necessary—Effect.*

The objection of non-compliance with S. 15 ought not be allowed in appeal when it was not pressed in the first Court and the suit ought not at that stage to be dismissed on the ground of non-compliance before suit especially where during pending of appeal, S. 15 was complied with. (*Sharfuddin and Roe*, JJ.) NARAIN PRASAD *v.* GAJO MAHTO. 2 Pat.L.W. 181 = 42 I.C. 838 = 2 P. L.J. 701.

———S. 16—*Patni tenure—Interest acquired by succession — Registration is compulsary—Defaulter cannot question legality of sale.*

It is incumbent on persons, who acquire an interest in a patni tenure by succession, to get themselves registered in the books of the landlord, under S. 15 of the Bengal Tenancy Act. If they fail to take the necessary steps and at the same time make default in the payment of rent, they cannot very well be heard to assail the legality of a sale under the Patni Regulation on the ground that their names were not mentioned in the application to the Collector. (*Mookerjee and Rankin*, JJ.) BEHARI LAL BISWAS *v.* NASIMANNESSA BIBI. 37 C.L.J. 222 = 73 I.C. 482 = 1923 Cal. 527.

———S. 16—*Applicability—Construction.*

S. 16 of the Act is a penal clause and should be strictly construed. It applies only to a person claiming the rent as a tenure-holder and not to one who claims by virtue of a purchase from the person to whom rents accrued due. (*Chatterjea and Panton*, JJ.) MESBAHUDDIN AHMAD *v.* ABDUL. 65 I.C. 839 = 34 C.L.J. 119.

———S. 16—Khudkhasht *and* Paikhasht *tenants—Protection of.*

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The word '*Khudkhast*' in the Permanent Settlement Regulation applied to raiyats. The permanent tenants settled in the village were called the *Khudkhasht* raiyats, *i.e.*, cultivating the land of their own village or the village in which they resided. They were distinguished from the *Paikhasht* tenants, *i.e.*, the temporary tenants who were residents of other or neighbouring villages. *Khudkhasht* tenants were protected from eviction while the *Paikhast* were treated as tenants-at-will. In sales under Act (VIII of 1865) the purchaser acquires the property free from encumbrances but he is not entitled to eject *Khudkhasht* raiyats or resident and hereditary cultivators. Where it is found that the defts. are residents and hereditary cultivators and have dwelling-houses on portions of the land and where the lands in suit are described as *Khudkhasht* in the Survey Record of Rights, plff., a purchaser in a sale in execution of a rent decree under Act (VIII of 1865) is not entitled to recover *khas* possession of such lands. (*Jwala Prasad*, J.) BRAJA SUNDAR DAS *v* JAGARNATH DHAL. 1 Pat. L.T. 258 = 56 I.C. 678 = 1920 Pat. 181.

——S. 16—*Scope of.*

The object of S. 16 is to prevent the holder of a permanent tenure from recovering rent from his raiyats without attorning fealty to the superior landlord. (*Sharfuddin and Roe*, JJ.) NARAYAN PRASAD *v.* GAJO MAHTON. 2 Pat. L.W. 181 = 42 I.C. 838 = 2 Pat. L.J. 201.

——Ss. 17 and 88—*Sub-division of holding.*

A landlord is not bound by the sub-division of a holding or the distribution of its rent unless his consent in writing had been obtained nor is he bound to make the transferee of the holding as joint deft. in a suit for rent against the recorded tenants. (*Brett and Woodroffe*, JJ.) RAMMOYI DAS *v.* RAPAI PRAMANICK. 9 I.C. 801 = 13 C.L.J. 267.

——Ss. 18 and 20—*Raiyat holding at fixed rate of rent—Occupancy right—Acquisition of—Sub-lease—Transfer.*

The grant of a sub-lease by a raiyat holding at fixed rent is a transfer of an interest in the holding within S. 18 of the B.T. Act. A person holding under a raiyat at fixed rent is not debarred from acquiring a right of occupancy. (*Huda*, J.) SHEIKH NASARAT *v* KALI DAS CHUCKERBUTTY. 54 I.C. 750 (Cal.)

——Ss. 18 and 85 (2)—*Sub-lease by raiyat at fixed rate—Grant of permanent lease by occupancy raiyat.*

S. 85 of the B.T. Act does not apply to a sub-lease creating a permanent tenancy created by a raiyat holding at fixed rates. S. 18 of the Act applies to such a case.

In the case of a sub-lease granted by an ordinary occupancy raiyat if the *kabuliyat* creating the tenancy be not admissible in

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evidence under S. 85, clause (2) of the B.T. Act the tenancy may be established by proof of possession of payment of rent or otherwise. 10 I.C. 469 and 17 C.W.N. 468, rel. (*Teunon and Cuming*, JJ.) RAMCHARAN BAIRAGI *v.* UDAI BAIRAGI. 49 I.C. 516 (Cal.)

——S. 18—*Lessee—Rights of.*

A lease providing that lessee shall hold a house on a fixed and un-enhanceable rent of Rs. 5 per annum, confers on lessee an interest of raiyat at fixed rate and the rights of alienation of the lessee are those of a permanent tenure-holder. S. 85 does not apply if S. 18 applies. (*Mookerjee and Beachcroft*, JJ.) HARIMOHAN PAL *v.* ATUL KRISHNA BOSE. 32 I.C. 503=19 C.W.N. 1127.

——S. 18—*Sale of shares of holding.*

A raiyat at fixed rates is entitled to sell specific portions of the holding and such purchasers are not reduced to the position of occupancy ryots. 11 C.W.N. 217, foll. (*Coxe*, J.) AKHOY KUMAR *v.* NARAIN DEY. 9 I.C. 663 (Cal.)

——S. 18 (a)—'*Transfer*'—*Includes lease.*

The term 'transfer' in cl. (*a*) of S. 18 of the Act, includes a lease. (*Mookerjee*, C. J. *and Fletcher*, J.) AMAR CHAND *v.* PRASANNA DASI. 51 I.C. 829=25 C.W.N. 9.

——S. 18-A—*Scope of—Assertion of permanent tenancy.*

S. 18-A of the B.T. Act lays down that nothing contained in an instrument to which exception is taken, can be used as evidence as against the landlord of the permanence of the tenure mentioned in such instrument. The section does not prevent the use of the document for an entirely different purpose, namely, to show that there was an assertion by the tenure-holder at the time, that his tenancy was of a particular description. (*Mookerjee and Beachcroft*, JJ.) BANWARILAL *v.* DWARKANATH MISSIR. 52 I C. 825=29 C.L.J. 577.

——S. 18-B—*Evidence—Recitals relating to tenure—Admissibility against landlord.*

Recitals in a deed of gift to which the landlord is not a party and relating to the incidents of tenure are not admissible in evidence against the landlord under S. 18, Bengal Tenancy Act. (*Mookerjee*, A.C.J. *and Fletcher*, J.) UJIR ALI SARDAR *v.* SHADHAI BEHARA. 33 C.L J. 182=68 I.C. 1008=1922 Cal. 185.

——Ss. 19 and 181—*Ghatwali land—Acquisition of occupancy rights.*

Rights of occupancy can be acquired in Ghatwali lands under Act (X of 1859) and Act (VIII of 1869) and S. 181 of Act (VIII of 1885) does not take away rights of occupancy acquired or

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enjoyed under the two acts. (*Richardson and Beachcroft*, JJ.) SITIKANTA ROY *v.* BIPRADAS CHARAN. 27 C.L.J. 536=46 I.C. 485=22 C.W.N. 763.

——Ss. 19 and 5—*Scope of.*

S. 19 refers to persons who are raiyats within S. 5 and have occupancy rights before the passing of the Act. (*Fletcher and Teunon*, JJ.) SECY. OF STATE *v* GOBIND PRASAD BARIK. 39 I.C. 934=21 C.W.N. 803.

——Ss 19 and 20—*Occupancy rights, how created.*

A Zamindar, a manager, or temporary holder of an estate, cannot create occupancy rights, which are acquired in time by any person cultivating lands in an estate unless evicted by legal process. A *bona fide* holder, as cultivating ryot, of land under a temporary manager, proprietor or even lease-holder would after 12 years acquire occupancy right. (*Roe and Jwala Prasad*, JJ.) HARMANAGE NARAIN SINGH *v.* GANOUR SINGH. 37 I.C. 360 (P.).

——S. 20—*Settled Raiyat need not have held the same land for the 12 years.*

Raiyat means primarily a person who has acquired a right to hold land for cultivation by himself and his family or by servants or partners and also includes his successors in interest. In order that a person may be a settled raiyat, it must be proved that he held for 12 years continuously but the land held may not be the same for all the 12 years. (*Mookerji and Rankin*, JJ.). MAHARAJA BAHADUR SIR PRODYOT *v.* UMESH CHANDRA SAHA. 72 I.C. 640 (Cal.).

——Ss. 20 and 21—*Lease by a guardian without the sanction of Dt. Judge merely voidable.*

A lease by a mother guardian of an infant without the sanction of District Judge is merely voidable. If the lease is held for more than 9 years after the expiry of the term, there can be no question of avoidance and the lessee acquires a status of non-occupancy ryot. (*Mookerjee and Beachcroft*, JJ.). SITANATH PANDA *v.* HAR NARAIN MAHAPATRA. 30 I.C. 38=21 C.L J. 644.

——Ss. 20 and 21—*Extension of, to Orissa—Rent Act* (X *of* 1859)—*Settled Raiyat.*

Section 6 of the Rent Act must be taken to have been repealed in Orissa in 1891 when Ss. 20 and 21 of the B.T. Act were extended to Orissa; so that a raiyat who is in occupation of Nij Jote lands continuously for more than 12 years, acquires the status of a settled raiyat even though the tenancy originated when S. 6 of the Rent Act was in force. 1 C.L J. 310, appd. (*Mookerjee and Beachcroft*, JJ.) RAFIUDDIN MAHOMED *v* ISWAR RAUT. 20 I.C. 394=17 C.L.J. 585.

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———**S. 20**—*Zerait land—Tenant from lessee is a raiyat and can acquire occupancy rights.*

S. 20 of B.T. Act gives right of acquirement of land to a lessee of Zeraiti land, he being raiyat. (*Mullick and Bucknill*, JJ.) SHEOGOBIND RAM SAHU *v.* MAHIPAT DUSADH.
2 Pat. 913=1924 P. 207.

———**S. 20**—*Settled raiyat—Of continuous holding as such necessary—Proof of holding—Cultivation—Necessity.*

If a person is alleged to have been a settled *raiyat* it must be proved that he continuously held, as a *raiyat*, land situated in the village, although the land need not be identical throughout the period of 12 years. The holding of land is to be continuous, and, further, the holding is to be in the character of a *raiyat*. This becomes obvious when regard is had to the definition of the term 'raiyat' given in S. 5, cl. (2). *Raiyat* means primarily a person who has acquired a right to hold land for the purpose of cultivating by himself, or by members of his family or by hired servants, or with the aid of partners, and includes also to the successors-in-interest of part of the proprietor, and communicated to the tenant before that date.

There is nothing in S. 120 itself to cut down the generality of the expression "any other evidence that may be produced" used by the Legislature in S. 120, paragraph (2) of the Bengal Tenancy Act. If it were the intention of the Legislature to exclude such evidence as may be furnished by the dealings between the landlords and tenants subsequent to the 2nd day of March, 1883, it should have expressed that intention in more clear terms. As. S. 120 stood at the time when the Act was passed, it allowed the Court to consider "any other evidence that may be produced" in connection with the question whether the land claimed as *sirait* was in fact *zirait*. The Evidence Act deals with the question what evidence is relevant evidence, and there is no power in the Court to reject any evidence as irrelevant if the landlord offers that evidence and the Evidence Act says that it is relevant.

A demise on the footing that the land demised is the proprietor's private land is hardly an agreement or compromise within the meaning of the terms as used in paragraph (2*a*) of the section but quite apart from any other consideration, the agreement or compromise which the Revenue Officer is not to regard is an agreement or compromise made before the Revenue Officer in a proceeding connected with the record-of-rights. (*Das and Kulwant Sahay*, JJ.) MAHARAJAH KESHO PRASAD SINGH *v.* PARMESHRI PRASAD SINGH.
2 Pat. 414=71 I.C. 902=(1923) Pat. 68 : 4 Pat. L. T. 135=1 Pat. L.R. 111=1923 P. 276.

———**S. 20**—Kaimi *raiyat is a settled ryot.*

In Behar and Orissa *kaimi* denotes a settled raiyat and not a raiyat at a fixed rent. (*Miller, C.J. and Mullick*, J.) PUNIA MAHTO *v.* SHAIKH BUNDEY ALI. **3 Pat. L.J. 387=1 Pat. L.T. 690=1921 Pat. 358.**

———**S. 20**—*Occupancy right*—Parti *land*—*Presumption—Settlement in good faith by* de-facto *landlord.*

The lands in suit being *parti* lands possession will be deemed with the rightful owner and consequently a patnidar could not be said to be in possession at the date of the settlement with the defts. and the patnidar not being in possession, the defts. did not derive any title under their settlement from him and they were not protected from ejectment on the ground they were induced in good faith by him. 20 Cal. 708, 21 C.W.N. 93, 8 C.W.N. 320 and 18 C.W.N. 525, ref. The principle laid down in Bind Lal Pakrashi's case (20 Cal. 708) being an encroachment upon the ordinary rule of law that the grantor is not competent to confer upon the grantee a better title than what he himself possesses must be cautiously applied and is not to be extended. (*Jwala Prasad and Adami*, JJ.) KUMAN DAS *v.* GULAM ALI NADAF.
57 I.C. 323=1 Pat. L.T. 185.

———**S. 20**—*Occupancy rights—Thekadar.*

Possession under a lease as a thekadar and not cultivating tenant does not confer occupancy rights. (*Chamier*, C.J. *and Sharfuddin*, J.) STONEWIGG *v.* SHEO RACHAYYA SINGH.
35 I.C. 622 (P.).

———**S. 20 (1)**—*Trespasser—Raiyat holding under—Occupancy rights.*

Where a raiyat holds lands appertaining to a mahal under a trespasser, for more than 12 years, the raiyat would acquire a protected interest against a purchaser of the mahal if the raiyat had *bona fide* belief that the person under whom he held the land was the real owner, and if that person also *bona fide* believed that he was the real owner. (*Chitty and Cuming*, JJ.) UMESH CHANDRA DAS *v.* SIKDAR ALI. **52 I. C. 699 (Cal.).**

———**S. 20 (7)**—*Possession of tenant for eleven years before enhancement—Presumption.*

When possession of a holding for eleven years prior to the date of enhancement of rent is proved a presumption of possession for 12 years under S. 20 (7) of the B. T. Act will arise. (*Chotterjee and Greaves*, JJ.) RASUL MAHMED BEPARI *v.* ABUL FAZAL CHOWDHURI. **28 I.C. 380 (Cal.)**

———**S. 20 (7)**—*Raiyat—Meaning of.*

A raiyat is a person who acquires land for the purpose of cultivating it. (*Chamier*, C J. *and Sharfuddin*, J.) STONEWIGG *v* SHEO RACHAYYA SINGH. **35 I.C. 622 (P.).**

BENGAL TENANCY ACT (VIII of 1885), S. 21.

——— **S. 21—*Settled raiyat—Revenue sale—Holding at fixed rate—Permanent lease—Occupancy right.***

Contract or no contract, every raiyat who is a settled raiyat of a village and obtains a *raiyati* interest in other lands in that village acquires a right of occupancy in those other lands. Therefore a settled raiyat holding lands under the terms or a permanent lease at a fixed rate of rent, has a right of occupancy in the land which is not annulled by a sale for arrears of revenue of the estate comprising the village. (*Fletcher and Richardson*, JJ.) LAKHI CHARAN SAHA *v.* MOKAR ALI.

45 I.C. 25=27 C.L J. 298.

——— **Ss. 21 and 182—*Homestead land held otherwise than part of holding.***

Where a tenant is a settled raiyat of a village having a right of occupancy, in some agricultural land in the village, any homestead land held by him otherwise than as part of the holding must in the absence of a local custom to the contrary be governed by the provisions of the Bengal Tenancy Act, applicable to a raiyat. (*Rampini*, J.) GOLAM MOWLLA *v.* ABDOOL SOWAR MONDUL.

9 I.C. 922=13 C.L.J. 255.

——— **Ss. 21 and 182—*Joint operation—Effect.***

A settled raiyat acquiring other land in the village to prepare homestead thereon, becomes an occupancy raiyat of such other land though such other land may not belong to the same landlord. (*Atkinsn and Manuk*, JJ.) GANGA SINGH *v.* CHAIRMAN OF THE DIST. BOARD, PATNA. **50 I.C. 8=1919 Pat. 235.**

——— **S. 22—*Merger.***

The disputed lands were comprised in a revenue paying estate which was purchased by the plaintiffs on the 6th March 1916 at a sale for arrears of revenue. On the 11th February 1918 the plaintiffs commenced this action to eject the defendant as a trespasser. The defendant was a cultivator who had acquired the right of occupancy raiyat in the Record of Rights finally published in 1895. On the 16th July 1901 he took from the then proprietors a permanent lease under what was described as a Taluki Pottah. The plaintiffs contended that the effect of the permanent lease granted to him by the proprietors on the 11th July 1901 was to extinguish the rights of occupancy which he then possessed and that thereafter he must be deemed to have held as a tenure holder. *Held* that the occupancy right has not been affected by the subsequent acquisition of the tenure. 26 C.W.N. 565 (P.C.), Foll. (*Mookerjee and Chotzner*, JJ.) JOGENDRA KRISHNA ROY *v.* SHAFAR ALI.

76 I.C. 582=1923 Cal. 373.

——— **S. 22, Sub. S. (2)—*Occupancy holding—Purchase by part proprietor—Effect of.***

Under S. 22, sub-S. (2) of the B.T. Act on a transfer of an occupancy the holding does not

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cease to exist and the purchaser holds the land as a joint proprietor or joint tenure-holder, as the case may be. To put the matter briefly, the purchaser enjoys the land in his character of proprietor or tenure-holder and not as a raiyat. But as upon the disappearance of the tenant right, all the holders of the superior interest would *prima facie* be entitled to possession, that one amongst them who is allowed to keep exclusive possession of the land is made to pay his co-sharers a fair and equitable sum for such use and occupation. The co-sharers, who are deprived of the rent they had previously realised from the occupancy raiyat, are in this manner compensated for their lose. (*Mookerjee and Chotzner*, JJ.) PURNA CHANDRA ROY *v.* MATHURA MOHAN SAHA.

36 C.L J. 89=70 I.C. 68=1923 Cal. 210.

——— **S. 22—*Acquire, meaning of—Accrual of Tenancy rights.***

The word "acquire" in respect of occupancy rights is really used in the Act; but in the preceding S. 21, sub-section (2) the expression occurs "shall be deemed to have a right of occupancy under law then in force." But it appears to be carefully avoided in S. 22, sub-section (2) in the sentence commencing "If the occupancy right in land is transferred to a person." It would appear then, from the context, that the word "acquire" implies the accrual to a *raiyati* tenancy of rights conferred by the Statute rather than the transfer of rights by another tenant. (*Miller*, C J. *and Foster*, J). RAM DAYAN SINGH *v.* BHULOTAN SINGH.

72 I.C. 705.

——— **S. 22—*Amendment* (I *of* 1907) *not retrospective.***

The Amending Act (I of 1907) has no restrospective effect. Where a tenure holder brought the subordinate raiyati interest before the amendment of S. 22 of the B. T. Act in 1907, the subordinate right does not lose its separate existence and merge in the superior right after the Amending Act of 1907 came into force. 15 I.C. 705; 38 I C. 534, Ref. (*Suhrawardy and Cuming*, JJ.) ABDUL REKIB KHAN *v.* JALAL AHMED. **65 I.C. 584.**

——— **S. 22—Raiyati *holding—Purchase by co-sharer landlord prior to amendment of section—Status of landlord.***

According to S. 22 of the Act as it stood before its amendment by Act I of 1908, the status of a co-sharer landlord purchasing a *raiyati* holding was that of a *raiyat* and he was as such competent to grant an under raiyati lease. (*Newbould and Buckland*, JJ.) ILU MANDAL *v.* BIMALENDU ROY. **69 I.C. 337 (Ca .**

——— **Ss. 22 and 49—*Sub-lease by raiyat—Consent of landlord.***

In order that a sub-lease by raiyat may be binding on the zuperior landlord, there must be a registered lease for a period not exceeding

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9 years or consent of the landlord. Where a landlord has purchased the Raiyat's interest in execution of a rent decree, a mere issue of notice under S. 49, does not mean recognition by landlord, of the under-tenant as his immediate tenant. (*Beachcroft*, J.) HARI CHARAN DUTTA *v.* NIBARAN CHANDRA DAS.
50 I.C. 37 (Cal.).

——— S. 22—*Purchase of* raiyati *interest by landlord.*

Plaintiff, a co-sharer landlord bought the *raiyati* interest in a holding and underlet the holding by registered lease to defendant before the passing of the Bengal Tenancy Amendment Act. The defendant was an *under-raiyat* and could be ejected on the expiry of the lease. (*Fletcher and Richardson*, JJ.) ALIMADDIN *v.* AINADDIN MAJUMDAR. 38 I.C. 534 (Cal.).

———S. 22—*Lease by tenure-holder—Rights after the expiry of lease.*

A raiyat, holding land under a tenure-holder and acquiring a lease of the tenure, is no raiyat, and so he must restore its possession after expiry of lease term. (*Sharfuddin and Roe*, JJ.) MR. MANNERS *v.* SATROGHAM DAS.
36 I.C. 178 = 20 C.W.N. 800.

———S. 22—*Proviso*—Raiyati *interest—Merger of—Sale for arrears of interest.*

Though the *Raiyati* right merges into that of the superior landlords by the sale of the holding for arrears of rent and its purchase by the landlord the right of an under-raiyat remains alive till he is evicted by law. (*Sharfuddin and Richardson*, JJ.) ANANT PRASAD SINGH *v.* MANNERS. 29 I.C. 459 (Cal.).

———Ss. 22 and 49—*Purchaser of the right of superior talukdar—Rights of—Ejectment of under-raiyat—Notice.*

Where the right of the superior talukdar has been purchased and the purchaser has not stepped into the shoes of the occupancy raiyat nor has there been a merger of any kind under S. 22 of the Act, his right to eject an under-raiyat arises, not by reason of merger but upon the termination of the interest of the occupancy raiyat, and a notice under S. 49 is unnecessary. (*Holmwood and Chapman*, JJ.) SARADA KIRPA LALA *v.* CHAITANYA CHARAN DE.
25 I.C. 741 (Cal.).

———S. 22—*Landlord and tenant—Occupancy* raiyat *purchasing superior tenure, effect of—Under-raiyat.*

On the purchase by an occupancy *raiyat* of a superior tenure it is the occupancy right that ceases to exist and not the holding itself and therefore the under-*raiyat* continues to be an under-*raiyat* and is not elevated to the shares of an occupancy *raiyat*. 24 C. 143; 32 C. 386 (F.B.), Foll. (*Mookerjee and Mullick*, JJ.) AKHIL CHANDRA BISVAS *v.* HASANALI SADAGAR. 18 C.L.J. 262 = 20 I.C. 698 = 19 C.W.N. 246.

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———S. 22—*Occupancy holding—Transfer of.*

The decision in 27 Cal. 473, laying down the principle that a non-transferable occupancy holding itself a part from the occupancy right, cannot be sold giving right to the transferee of retaining its possession, is not overruled. But when such a piece of land is transferred to a co-proprietor, the occupancy right ceases and other co-proprietors get its joint possession. (*Jenkins*, C.J. *and Chatterjea*, J.) SALIMA SAIDATAUNESSA BIBI *v.* ENATULLA TALUKDAR. 16 I.C. 524 (Cal.).

———S. 22—*Purchase of holding with occupancy right by a co-sharer landlord—When transfers right to possession—Effect before amendment.*

A co-sharer landlord purchasing a holding with occupancy right has a right to hold the land in opposition to any other co-sharer only when the occupancy right is transferable by custom. S. 22 before its amendment did not effect transfer of rights of occupancy, not transferable, by custom. (*Chatterjee and Teunon*, JJ.) BEJOY SINGHA *v.* SHASHI MUKHI.
12 I.C. 67 (Cal.).

———S. 22—*Collectorate partition—Effect of—Possession.*

In all cases where there is a Collectorate partition between co-proprietors if the lands are merely the *bakaht* lands of the landlords before the partition, then in the absence of any special arrangement come to between the landlords themselves at the time of the *batwara*, none of them has the right to dispute the possession of those *takhta* the particular lands in question fall. The only exceptions are those which are created by law either under the Bengal Tenancy Act or under some other provision of law whereby a tenancy interest or possibly some other interest in land is acquired. (*Miller*, C.J. *and Adami* J.) QYAMUDDIN KHAN *v.* RAMYAD SINGH. 3 Pat. L.T. 519 = 67 I.C. 530 = (1922) P. 355.

———S. 22—*Occupancy raiyat acquiring Mokurari right, before the Act merger.*

If an occupancy raiyat acquired mokurari right in the lands in which he had occupancy rights, prior to the passing of the Act, his rights of occupancy merged. S. 22 of the Bengal Tenancy Act did not create a new law but merely stated the law as it then stood. 2 Pat. L.J. 225 (1917), Dist. (*Coutts and Macpherson*, JJ.) MULLICK MUKTEAR AHMAD *v.* BABU KALI CHARAN.
2 Pat. L.T. 525 = 1921 Pat. 357.

———S. 22—*Co-sharer proprietor—"Third person."*

A co-sharer proprietor may be a third person within S. 22 (2) of the B.T. Act, 1885, if he was

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inducted on the land as a tenant and not as a proprietor. (*Roe and Coutts*, JJ.) EMAMUDDIN *v.* SAIYAD MAHOMED RASHIT-UL-HUQ.
33 I.C. 110=4 Pat. L.J. 640.

——S. 22—*Joint Proprietary right—Lease of share—Tenure holder—Acquisition of occupancy right.*

A lease was executed in respect of a certain share in a Zemindari and no specific land was mentioned for the lessee to cultivate. *Held*, the lease created only a tenure. A tenure-holder cannot acquire a right of occupancy in the lands comprised in his ijara or farm while holding the village as an ijardar or a farmer. To determine whether the right conferred by a lease is that of a tenure-holder under the B.T. Act, the intention of the parties has to be looked into. The principal object of giving the lease of an entire village or a share therein is to enable the lessee to collect rents from tenants. The fact that the lessee may bring under cultivation some lands in the village will not alter the character of the tenure created by the lease. There can be no lease for the purpose of cultivation in a village where no lands to be cultivated are specified in the lease. A lessor who is a part proprietor in an *ijmali* or joint village, has no right to create any right in respect of any specific lands in the village to the prejudice of the other co-proprietors without their consent. A co-proprietor in a village cannot acquire any occupancy or non-occupancy right in the village. (*Miller*, C. J. *and Jwala Prasad*, J.) STONEWIGG *v.* DWARKA SINGH.
45 I.C. 706=4 Pat. L.W. 428.

——S. 22—*Bengal Act* (I *of* 1907)—*Effect of.*

The purchase by a landlord of an occupancy holding prior to 1908 is governed by the Act. If an occupancy holding is purchased by a co-sharer landlord on behalf of the other sharers the whole tenancy is merged and the purchasing landlord cannot be heard to say that the non-occupancy right still subsists. (*Mullick*, J.) RAJA RAM SAHU *v.* JHANTI GOPE.
34 I.C. 75 (Pat.)

——Ss. 22 (1), 49, 85 (2) and 167—*Under raiyat—Landlord's rights.*

The landlord purchasing the holding of a raiyat in execution of a rent decree against him can sue the under raiyat for *khas* possession and can succeed without annulling the encumbrance under S. 167 or giving a notice under S. 49 since the sub-letting was invalid. (*Jenkins*, C. J. *and Roy*, J.) GAJADHAR MANDAL *v.* RAGENDRA NATH GHOSH.
19 I.C. 652=17 C.W.N. 860.

——S. 22 (1)—*Doctrine of merger—Applicable to cases prior to enactment of B.T. Act.*

The doctrine of merger enunciated in S. 22 applies when an occupancy tenant who is also a co-sharer landlord acquires upon partition the interest of a sole landlord in a whole or portion of his occupancy holding, which is allotted to his exclusive *takhta*. The doctrine of merger was not introduced for the first time in 1885. S. 22 only enunciated the law as it then stood and it did not create any new law. (*Coutts and Macpherson*, JJ.) MULLIK MUKTHAR AHMAD *v.* KALI CHARAN.
2 Pat. L.T. 525=1921 Pat. 337.

——S. 22, Cl. 2—*Non-transferable occupancy holding—Purchased by co-sharer landlord does not give him any title.*

Where a co-sharer landlord purchases a non-transferable occupancy holding he does not acquire title in the holding as a raiyat under S. 22, Cl. 2 of the B.T. Act before its amendment by Act I of 1907. Consequently a person to whom he let out the holding would be a raiyat and not under raiyat. 27 C.W.N. 759. (*Walmsley and Ghose*, JJ.) ROSHANALI v. CHANDRA MOHAN DAS. **50 Cal. 749=27 C.W.N. 759=78 I.C. 447=1923 Cal. 701.**

——Ss. 22 (2) and 85—*Amending Act* (*I of* 1907.) *Raiyati interest—Purchase by landlord—Ejectment of under raiyat.*

A landlord purchasing a raiyati interest in execution of a money decree is in effect a private alienee and he cannot insist upon any right which he as landlord might otherwise have had under S. 85 (1) of the B.T. Act to treat the under-raiyat as a mere trespasser. The change made by the Amending Act of 1907 in S. 22 (2) has not altered the law as previously understood. A fractional landlord who gets a transfer of an occupany holding still acquries from the raiyat some sort of tenancy or intermediate interest (except the rights of the occupancy) which prevents him from treating the under-raiyat as trespaeser. (*Richardson and Walmsley*, JJ.) BABU RAM DHENG *v.* UPENDRA NATH KOLY. **44 I.C. 922 (Cal.).**

——S. 22 (2)—*Co-sharer landlord—Purchase of non transferable occupancy holding—Exclusive possession.*

A co-sharer landlord cannot by purchasing a non-transferable holding in execution of a decree for the rent of his share retain exclusive possession as against his co-sharer landlord. S. 22 (2) of the B.T. Act applies only to a case in which a transferable occupancy holding is the subject-matter of the purchase. 27 Cal. 473, appl. (*Teunon and Newbould*, JJ.) BIPRO DAS PAUL *v.* SURENDRA NATH BASU.
43 I.C. 467 (Cal.).

——S. 22 (2)—*Applicability.*

S. 22 (2) of the Act applies only where a transferable occupancy holding has been purchased. (*Jenkins*, C. J. *and Mookerjee*, J.) LAKHI KANT DAS *v.* BALABHADRA PRASAD DASS. **25 I.C. 556=19 C.L.J. 500.**

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——— **Ss. 22 (2) and 49**—*Co-sharer tenure-holder—Acquisition of occupancy right—Existence of raiyati—Tenant under-raiyat to be under-raiyat under co-sharer tenure-holder.*

The Eastern Bengal and Assam Act (I of 1908) S. 10, Cl. (*b*) which amends S.22, Cl. (2) of the B.T. Act has no retrospective operation. If a co-sharer tenure-holder purchased an occupancy holding under the tenure before the Amending Act came into operation he acquired the rights of a raiyat though not those of an occupancy-raiyat and he can bring a suit to eject a tenant of the holding who is an under-raiyat under S. 49, Cl. (*b*) of the B. T. Act after the Amending Act came into force. (*Sharfuddin and Coxe*, JJ.) NABIN CHANDRA PAL *v.* BANGA CHANDRA CHOWDHURY.
15 I.C. 705 (Cal.).

——— **S. 22 (2)**—*Applicability of, to non-transferable occupancy jote.*

S. 22 (2) of the B. T. Act does not apply to a Non-transferable occupancy jote.

Where a co-sharer purchases a non-transferable occupancy jote, his co-sharer can recover *khas* possession of this jote jointly with the purchaser on the ground of its having been abandoned. 27 Cal. 473, rel on ; 32 Cal. 386, 24 Cal. 143, dist. (*Carnduff*, J.) LAKHI KANT DAS *v.* BALBHADRA PRASAD DAS.
13 I.C. 336 (Cal.).

——— **S. 22 (2)**—*Occupancy holding—Purchase by co-sharer landlord — Partition by Collector — Allotment to another sharer—Effect of.*

A co-sharer landlord, who purchases an occupancy holding and becomes liable to pay proportionate rent to the other co-sharers under S. 22 (2) of the B. T. Act, cannot be ejected from the purchased holding, when it is, upon a subsequent Collectorate partition, allotted to the takhta of another co-proprietor, 2 P.L.T. 163, appr. The terms '*kasht*' or '*Bakasht*' are words of art introduced for the purpose of understanding the possession of lands by the proprietors and the tenants. (*Jwala Prasad*, A. C. J. *and Das*, J.) NANDKISHORE SINGH *v.* MATHURA SAHU. **3 Pat L.T. 13 = 65 I.C. 586 = 1922 P. 193.**

——— **S. 22 (2)**—*Co-sharer landlord—Purchase of holding—Collectorate partition—Effect of holding allotted to another co-sharer—Continuance of tenancy.*

When a co-sharer purchases the holding of an occupancy raiyat, and upon a Collectorate partition the holding is allotted to the share of another co-sharer, the tenancy right continues and the holding does not cease to exist. Under S. 22 (2) of the B. T. Act of 1885 the occupancy right only ceased to exist but not the holding itself. 24 Cal. 143 ; 32 Cal. 386, foll.

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Quaere :—What will be the position under Amending Act of 1907 ? (*Das and Adami*, JJ.) BASUDEO NARAIN *v.* RADHA KISHUN.
3 P.L.T.22 : 1922 Pat. 55 = 65 I.C. 281 = 1922 P. 62.

——— **S. 22 (2)**—*Right to sue for entire rent.*

A Co-sharer's right to sue for the entire rent is not affected though one co-sharer purchases a portion of the holding. (*Jwala Prasad*, J.) RAM RATTAN SINGH *v.* JANG BAHADUR SINGH. **62 I.C. 47, (P.).**

——— **S. 22 (2)**—*Occupancy holding—Purchase by—Co-proprietor—Position of Partition—Effect.*

An occupancy holding purchased by a co-proprietor becomes the *bakasht* land of the co-sharers which the purchaser is allowed under S. 22 (2) of the Act to keep apart for himself on condition of paying rent to his co-sharers. It is liable to be allotted on a partition as *bakasht* to the co-sharer in whose *patti* it is situate and the purchasing co-sharer is not entitled to continue in possession of it. (*Adami*, J.) MATHURA SAHU *v.* CHANDRADIP SINGH. **59 I.C. 87 (P.).**

——— **S. 22 (2)**—*Co-sharer purchasing occupancy holding.*

A co-proprietor purchasing an occupancy holding is entitled to retain its possession on payment of rent to his co-sharers and he cannot be ejected by a proprietor on whose share it falls on the partition of the estate. (*Jwala Prasad*, J.) RAM PRASAD *v.* GOPAL CHAND.
58 I.C. 955 = 2 Pat. L.T. 163.

——— **S. 22 (3)**—*Ijaradar, sub-lease by, with Landlord's consent is binding on latter.*

A let his *taluq* in *ijara* to B authorizing him to buy holdings at sales in executions for arrears of rent, and to sub-let the same. C, a tenant of a holding in the *ijara* fell into arrears. In execution the holding was purchased by B who sub let the same to C and after his death inducted upon the property of his heirs. On the expiry of the *ijara* A sued to eject C's heirs as trespassers, *held*, having regard to S. 22 (3), the holding continued that C and his heirs were under-*raiyats* and that as the sub-letting was consented to by A he took it burdened with the under-*raiyats*. (*Teunon and Newbould*, JJ.) NARANJAN *v.* DURGADAS.
60 I.C. 449 = 33 C.L.J. 575.

——— **Ss. 22 (3) and 180**—*Occupancy raiyat.*

A person holding land continuously for 23 years out of which he held it as ijardar for 8 years and as raiyat for 15 years gets a right of occupancy ; though the period of ijara, intervened, the right of occupancy is deemed to be held in abeyance for that period. (*Jenkins*, C.J. *and Roy*, J.) JASI MUDDIN SHEIK *v.* BENI MADHAB DAS. **19 I C. 635 = 17 C.W.N. 881.**

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——S. 22 (3)—*Ijardar purchasing occupancy holding—Position of.*

An *Ijardar* who purchases occupancy holding becomes a raiyat because the occupancy right comes to an end though the holding subsists. (*Coxe*, J.) MEHDI LAL *v.* GRANT.
18 I.C. 636 (Cal).

——S. 22 (3)—*Ijardar, whether can acquire occupancy right in ijara.*

An ijardar cannot, by reason of S. 22, subsection (3) of the Bengal Tenancy Act, acquire occupancy rights in lands comprised in the ijara by purchase or otherwise. (*Mookerjee and Teunon*, JJ.) RAGHUBAR MAHTO *v.* H. MANNERS. 11 I.C. 389=13 C.L J. 568.

——S. 22 (3)—*Amending Act I of 1907—Thicadar—Purchase of occupancy holding—Eviction on expiry of lease—Non-occupancy rights acquired by ijaradar—B. T. Act, Sch. III, Art. I—Mesne profits.*

Prior to the Amending Act of 1907 the acquisition by a thicadar of an occupancy right by purchase was not barred by S. 22 (3) and therefore the thicadar acquired occupancy rights in the lands purchased before the lease of 1905. 13 C.L.J. 561, ref. The Amending Act of 1907 could not take away rights of occupancy already vested in deft. and that the survey entry meant that the lands were held only on lease. Any agreement in the lease of 1905 to give up the occupancy rights already acquired would be void under S. 178 of the B.T. Act, the covenant being restricted to acquisitions during the term of the lease. Under S. 22 (3) the thicadar could not acquire occupancy rights during the term of his lease irrespective of his contract. S. 22 (3) simply means that no occupancy right passes and the thicadar acquired non-occupancy rights in the lands purchased during the term of the lease and the suit was barred under Sch. III, Art 1 (1). 24 Cal. 143, 32 Cal. 386, 15 C.L.J. 647, foll. The plff. not having offered to pay the purchase money to the defts. the claim for ejectment was bad. The defts. were occupancy raiyats in respect of lands purchased after the expiry of the lease in execution of the decrees for rent, which accrued, during the term of the lease. (*Das and Adami*, JJ.) MORGAN *v.* RAMJI RAM. 5 Pat. L J. 302=56 I.C. 386=1 Pat. L.T. 310=1920 Pat. 168

——S. 22 (3)—*Purchase by ijardar of occupancy lands prior to 1907—Consent of landlords—Position of ijardars—Question of transferability.*

An ijardar could purchase an occupancy right from a raiyat during the subsistence of the ijara prior to the amendment of S. 22, subsection (3) by the Amending Act (1907) 4 C.L. J. 209 foll. An ijardar has the power to grant consent in the same way as the landlord during tenure of ijara. The question of transferability does not arise where the ijardars in their position of landlords over the tenant gave consent to

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the sale, being themselves the purchasers. (*Atkinson and Adami*, JJ.) HARRINGTON *v.* DWARAKA PRASAD CHOWDHURY.
56 I.C. 59=1920 Pat. 11.

——Ss. 23 and 155—*Misuse of land.*

A suit for ejectment with an alternative prayer for injunction if the defts. were found not to be trespassers restraining them from misusing the land is maintainable under S. 23 B.T. Act and Ss. 54 and 55 Sp. Rel. Act and the plff. need not proceed under Ss. 25 and 155 B.T. Act. It is a misuse of the occupancy holding to construct a public cremation ghat with shade and plinth on the holding so as to render it unfit for cultivation. (*Teunon and Chaudhuri*, JJ.) DHIRENDRA KUMAR ROY *v.* RADHA CHARAN ROY. 57 I.C. 758 (Cal.)

——S. 23—*Raiyat—Right of, to timber.*

A raiyat has the *prima facie* right in the absence of a contrary custom to fell timber which becomes the property of the landlord so as to put the holding to the best use as an agricultural holding. (*Chatterjea and Richardson*, JJ.) SHYAMA CHAREN *v.* MUSTAFIZAR RAHIMAN SMITHER. 41 I.C. 769 (Cal.)

——S. 23—*Right to trees—Suit by landlor*

In a suit by a landlord against his tenant for possession of land adjacent to tenant's holding, plff. must prove that the land was not included in the limits of the holding. The tenant has a right to fell timber trees on his holding; and any custom set up by landlord to the contrary must be proved by him. This right to fell trees is different from the right to appropriate the timber so felled. (*Fletcher and Smither*, JJ.) MEYOA LALL GHOSE *v.* GOBINDA SUNDER SINNA CHOWDHURY. 41 I C. 679 (Cal.),

——S. 23—*Raiyat holding at a fixed rent—Rights.*

Raiyat holding at fixed rate of rent can cut and appropriate even such trees as were standing at the date of lease. 5 C.L.J. 413, not foll. (*Fletcher and Richardson*, JJ.) RADHIKA NATH ROY *v.* SAMIR FAKIR. 38 I.C. 49=21 C.W.N. 636.

——Ss. 23 and 76, (1) (2) *cl. (f)—Occupancy raiyat can erect a pukka dwelling house.*

The purpose of the tenancy being gardening the construction of a pucca dwelling house on a small portion of the holding by an occupancy raiyat is within his rights, the building being required to be suitable only under the circumstances of the *raiyat* constructing it. 31 Cal. 1041, foll. (*Chatterjee and Walmsley*, JJ.) NARAIN CHANDRA DALAL *v.* MANINDRA CHANDRA NANDI. 37 I.C. 999 (Cal.).

——S. 23—*Holding market on occupancy holding—Injunction, grant of.*

Where the occupancy tenants of a holding execute a release deed in favour of some of the

landlords and relinquish possession of one-tenth portion of the holding, and the landlords attempt to erect structures and hold market thereon, the other landlords can restrain them by injunction from executing their design.

An occupancy holding is made unfit for tenancy under S. 23 of the above Act when one-tenth portion of it is withdrawn from actual cultivation for altogether non-agricultural purposes such as establishing a market; the section includes not only permanent but also temporary unfitness for purposes of tenancy. (*Mookerjee and Roe*, JJ.) RAJKISHORE MONDAL *v.* RAJANI KANT.

37 I.C. 249=24 C.L.J. 85.

———Ss. 23, 86 and 87—*Transfer of portion of occupancy holding does not amount to —Abandonment.*

The transfer of a portion of a non-transferable occupancy holding does not amount to an abandonment so as to entitle the landlord to re-enter upon that portion. Where there are several tenants in a holding each holding a separate portion thereof, each of these portions does not constitute a separate holding. (*Chatterjea and Suhrawardy*, JJ.) KARIM CHAKLADAR *v.* SAHORANESSA BIBI

64 I.C. 330=25 C.W.N. 717.

———Ss. 23, 25 (A) and 76—*Ejectment—Raiyat sub-letting holding—Purposes inconsistent with agriculture.*

Plffs. brought an ejectment suit under cl. (*a*), S. 25. Subsequently he brought another suit for arrears of rent subsequent to the alleged forfeiture. *Held*: No waiver being made at the commencement of the suit, the ejectment claim cannot be defeated. Before the ejectment order under S. 25 (*a*) is obtained, the plff. must prove that the land was used for purposes inconsistent with agriculture and that the effect of the use is to render the entire land in the tenancy unfit. When a raiyat sub-lets a small portion of his holding to another who digs a tank out of practical necessity and without rendering the land unfit, he could not be ejected under S. 25 (2). (*Mookerjee and Carnduff*, JJ.) SOURINDRA MOHAN *v.* RAHIM BAKSH.

15 I.C. 497 (Cal.)

———S. 23—*Right to trees—Custom—Record of Rights.*

Where in a suit by a landlord against his tenant for recovery of the price of two mango trees alleged to have been cut and appropriated by the defendants who were his tenants, the defendants pleaded that they were entitled by custom and to cut and appropriate the trees standing on their kasht lands and the Court below found in favour of the custom set up by the defendants relying in support on an entry in the Record of Rights which showed that the names of the tenants had been recorded against their holdings with a note "Bakabza Raiyat". *Held* that on the evidence

the custom had been made out. (*Jwala Prasad*, J.) MAHARAJA SIR RAMASEWAR SINGH BAHADUR *v.* SONDHARI RAI.

1 Pat. L.R. 105.

———S. 23—*Rights of tenants.*

Tenants are entitled under S. 23 to use the land for any purpose consistent with the provisions of the section. (*Miller*, C.J. *and Adami*, J.) GRANT *v.* EKLAL JHA.

3 Pat. L.T. 386=67 I.C. 49=1922 Pat. 171.

———Ss. 23 and 90—*Occupancy right—Raiyat taking—Lease of fishery does not get.*

A raiyat taking a lease of fishery only cannot acquire an occupancy right therein, but if he takes a lease of a holding of which portions are under water then his right to the acquisition of occupancy rights in the entire holding inclusive of the portion which forms the bed of the water cannot be defeated, the landlord may reserve the right of fishery when letting out the land. (*Mullick and Ross*, JJ.) HENRY HILL & CO., *v.* SHEORAJ RAI.

3 Pat. L.T. 53=64 I.C. 346=1922 Pat. 9.

———S. 23—*Trees—Right to—Custom—Onus of proof—Penal Code, S. 424.*

The Record of Rights contained an entry that 'nine annas of the value of the trees' when cut and sold would belong to the landlord and the remaining seven annas to the tenant. The tenant cut the branches of the same trees and removed them. The landlord filed a complaint under S. 424 of the Penal Code. The tenant pleaded that the landlord's right to nine annas share had reference only to trees cut and sold and not to trees cut for domestic purposes. *Held*, the onus of proving the custom set up by the tenant rested upon him, both in a Civil and a Criminal Court, before which the issue arose. The tenants had no absolute right to appropriate the entire timber of the trees for their own purposes. (*Jwala Prasad*, J.) PANCHI MANDAR *v.* EMPEROR.

1 Pat. L.T. 318=57 I.C. 273=21 Cr. L.J. 609.

———S. 23—*Landlord and tenant—Trees—Right to.*

Under the common law the property in trees belongs to the landlord. S. 23 of the B. T. Act only declares the right of tenants to cut the trees but does not entitle them to the timber of the trees when cut, unless a custom to the contrary is established, the onus whereof is upon the tenants. Where there is no evidence of any custom establishing the tenant's right to the same the landlord is entitled to get the full compensation awarded for the trees. (*Jwala Prasad and Das*, JJ.) RAMHIT SAHU *v.* MAHADEO CHAUDHURI.

1 Pat. L.T. 143=2 U.P.L.R. (Pat.) 43=56 I.C. 126=1920 Pat. 129.

BENGAL TENANCY ACT (VIII of 1885), S. 25.

———Ss. 25 and 155—*Misuse of holding—Decree in ejectmnet, form of.*

In a suit under S. 25 for the ejectment of an occupancy tenant for the misuse of the holding, the Court should not direct in its decree the payment of compensation besides ejectment. It should under S. 155 fix the amount of compensation and a period during which it should be paid or if the misuse is capable of remedy, a period for remedying the same. In execution of such decree, ejectment is to follow when the compensation is not paid or the misuse is not remedied. (*N. R. Chatterji and Suhrawardi*, JJ.) KARIM *v.* ASWINI KUMAR SIKDAR. **63 I.C. 236 = 25 C.W.N. 658.**

———S. 25—*Landlord and tenant—Unauthorised transfer of holding works a forfeiture—Usufructuary mortgage of holding not transferable by custom—Effect.*

The unauthorized transfer of a holding does not *per se* work a forfeiture under the Bengal Tenancy Act ; there must be something in the nature of an abandonment by the tenant or something of that kind. The mere fact therefore that a tenant mortgaged usufructuarily his holding which is not transferable by custom, will not entitle the landlord to re-enter, nor will he bound by the transfer. (*Richardson and Newbould*, JJ.) BHUPENDRA NATH BOSE *v.* BANSI TANTI. **22 I.C. 416 = 40 Cal. 870.**

———S. 25—*Transfer of Property Act, S. 111 (g)—Conditions of forfeiture of tenant's interest.*

A forfeiture of a tenant's interest is brought about by his denial of the landlord's title only if the denial is express and made prior to suit for ejectment instituted in consequence of the denial. 23 Cal. 113, rel. on. 13 C.L J. 1, 5 I.C. 708, dist. (*Jwala Prasad*, J.) SAMUNDAR SINGH *v.* MUKHTAL SINGH. **37 I.C. 935 (Pat.).**

———Ss. 25 (a), 23 and 76—*Ejectment—Excavation of tank—Necessity — Subsequent suit for rent—Forfeiture—Waiver.*

The plffs. sued for ejectment of occupancy *raiyats* under Cl. (*a*) of S. 25 of the B.T. Act. A suit for rent was subsequently commenced in respect of a period subsequent to the alleged forfeiture. *Held*, that there was no waiver at the date of the commencement of the suit and the claim for ejectment could not be defeated on that ground. 10 C.L.J. 187, ref. Before a landlord can succeed in an action under S. 25 (*a*) of the B.T. Act it is obligatory on him to prove that the land has been used in a manner which renders it unfit for the purposes of the tenancy. What has to be considered is the effect of the Act upon the entire land comprised in the tenancy. Where a tank is a necessity there is no cause of action for ejectment. (*Mookerjee and Carnduff*, JJ.) SOWRINDRA MOHAN *v.* RAHIM BAKSH. **15 I.C. 497 (Cal.).**

BENGAL TENANCY ACT (VIII of 1885), S. 27.

———Ss. 26 and 188—*Occupancy holding—Will—Invalid.*

An occupancy *raiyat* has no power to bequeath by will his holding in the absence of a special custom. 27 I.C. 235, foll., '27 I.C. 61, Ref. (*Fletcher and Richardson*, JJ.) KUNJALAL ROY *v.* UMESH CHANDRA ROY. **27 I.C. 382 = 18 C.W.N. 1234.**

———Ss. 26 and 17 (3) (d)—*Occupancy holding—Will—Disposition by raiyat—Validity of.*

In the absence of proof of any local usage to the contrary a *raiyat* is not competent to make a will of his right of occupancy. A right cannot be inferred by mere implication from the language used in a statute ; there must be a clear and unequivocal enactment to confer the right. (*Mookerjee and Beachcroft*, JJ.) AMULYA RATAN SARKAR *v.* TARINI NATH DEY. **42 Cal. 284 = 27 I.C. 235 = 18 C.W.N. 1290 = 21 C L.J. 187.**

———S. 26—*Non-occupancy tenant—Holding heritable.*

The holding of a non-occupancy *raiyat* is apart from possible exceptions, heritable. (*Jenkins*, C. J. *Stephen*, *Woodroffe*, *Holmwood and Chatterjee*, JJ.) MIDNAPORE ZAMINDARI CO., LTD. *v.* HRISHI KESH GHOSH. **41 Cal. 1108 = 25 I.C. 562 = 18 C.W.N. 828 = 19 C.L J. 505 (F.B.).**

———Ss. 27 and 37—*Assessment of rent—Suit between ex-proprietor and tenant—Purchase or revenue sale.*

The position of the purchaser of an estate at a revenue sale, at any rate in respect of his relations with his tenants is not absolutely independent of that of the ex-proprietor and he is subject to the same limitations imposed by the B. T. Act in regard to suits for the enhancement of rent as the ex-proprietor including the time limit imposed by S. 37 of the Act. When rent has been assessed in a suit between the proprietor of an estate and the tenant, there is a statutory presumption under S. 27 of the B. T. Act that it is fair and equitable and that presumption is not affected by the fact that the estate changes hands by reason of revenue sale. (*Beachcroft*, J.) SHASTI CHARAN BISWAS *v.* NAKUL CHANDRA BARUA. **49 I.C. 959 (Cal).**

———S. 27—*Presumption of rent.*

A prior decision in a rent suit may be taken to determine the rent claimed in that suit and to give rise to the presumption that the rent in subsequent years remained the same. (20 Cal. 505, 21 C. 236, 4 C.W.N. 43, Foll.) The weight to be attached to such a presumption depends on whether the decision was arrived at after an adjudication of the question of the amount or rate of rent. If there had been such an adjudication, the Court in the subsequent suit need only look to subse-

quent events to determine whether there had been any change since. If there had been no such adjudication both prior and subsequent events must be considered. (*Brett and Mitra*, JJ.) BENI PRASAD KOERI *v.* RAJ KUMAR CHOWBEY. **17 I.C. 111=16 C.L.J. 124.**

———S. 29—*Permanent Enhancement—Cannot be had without writing and Registration.*

The true effect of S. 29, B. T. Act is that there is no permanent enhancement when there is an attempt to increase rent without writing registered. But still the legislature allows the landlord to realise the rent at the increased rate provided rent at that rate has been actually *paid* for a continuous period of not less than 3 years immediately preceding the period for which rent is claimed. If the landlords do not bring themselves within the precise language of the clause, they are not entitled to the benefit. (*Mookerjee and Chotzner*, JJ.) JANAKI BALLAV ROY *v.* ENAT MONDAL. **37 C.L.J. 489=72 I.C. 136=1923 Cal. 600.**

———S. 29—*Rate of rent—Evidence of—Rent collection papers not properly proved is not evidence.*

In coming to a conclusion as to the rate of rent the Court should not treat as independent evidence rent collection papers which are not proved by the persons who are alleged to have made the collection. (*Suhrawardy*, J.) FAIJADDIN *v.* AGNI KUMAR SARMA. **71 I.C. 300 (Cal.).**

———S. 29—*Applicability — Purchaser of non-transferable occupancy holding—Enhancement of rent.*

S. 29, Bengal Tenancy Act, does not apply to the case of the purchaser of a non-transferable occupancy holding whose title the landlord does not recognise, but who afterwards is recognised as a tenant on agreeing to pay a fixed rent. (*Ghose*, J.) FERASAT ALI MULLIK *v.* PRIAMBODA DEVI. **69 I.C. 414 (2) (Cal.)**

———S. 29—*Suit for rent—Defence under S. 29, when available.*

Where a tenant omitted to raise a defence under S. 29 of the B. T. Act in a prior suit for rent he is not estopped from taking it in a subsequent suit. (*Suhrawardy and Cuming*, JJ.) NAFAR CHANDRA PAL CHOWDHURY *v.* BHUSI MOLLA. **65 I.C. 581 (Cal.).**

———S. 29—'*Rent*' *includes rent due for previous period.*

The section is no bar to a duly registered agreement complying with the other terms of the section taking effect for a period prior to the date of execution. 'Rent,' in S. 29 may include rent for a previous period which was due but not paid. (*Newbould and Panton*, JJ.) HESENJAN CHAUDURI *v.* MAHAFEDJUDDIN. **62 I.C. 619 (Cal.).**

———S. 29—*Enhancement—New rental for additional area is not enhancement.*

If the tenant's holding is increased on his taking a settlement of an additional area and a new rental is fixed thereby increasing the rent originally paid, the rent so increased is not an enhancement and S. 29 does not apply. (*Walmsley and Greaves*, JJ.) TARAK NATH SARKAR *v.* SRISH CHANDRA RAI. **60 I.C. 412 (Cal).**

———S. 29—*Encroachment by tenant—Agreement to pay consolidated rate.*

The section applies when the holding remains constant and does not apply to a case where a tenant takes possession of some land of the landlord not included in the contract of the tenancy, and agrees to pay a consolidated rent for both the lands together as in such a case a new tenancy is created. (*Mookerjee*, A.C.J. *and Fletcher*, J.) SAHAR MUNSHI *v.* JNANADE SUNDARI ROY. **57 . . 998=32 C.L.J. 135.**

———S. 29—*Enhancement of rent—Agreement.*

The section is not a bar to enhance rent in excess of two annas in the rupee when the enhancement is due to an agreement entered into to settle a *bona fide* dispute as to the area of the tenancy. (*Beachcroft*, J.) DABIRUDDIN JOORDAR *v.* MIDNAPORE ZAMINDARI CO., LTD. **57 I.C. 850 (Cal.).**

———S. 29—*Enhancement of rent—Fixed before Act.*

A *Kabuliyat* after the B. T. Act enhancing rent fixed before the Act by more than 2 annas in the rupee, is void under B. T. Act, S. 29. (*Richardson and Shamsul Huda*, JJ.) DINESH CHANDRA DAS *v.* BRIJENDRA KISHORE ROY. **50 I C. 370 (Cal.).**

———S. 29—*Holding—Change of area—Occupancy raiyat—Enhancement.*

The area of the holding was described in the *dakhilas* and in the papers kept by the land lord as 7¾ bighas. In 1902-03 there was a fresh survey made by the landlord when the area was found to be 9½ bighas. In 1904-05 the tenant agreed to pay him rent at the rate of Rs. 16-14-0 per annum for the holding as found by measurement in 1902-03. Before 1902-03 the rent was at the rate of Re. 1-6½ per bigha but in 1904-05 the rent according to the agreement was at the rate of Re. 1¾ per bigha. In a suit by the landlord for recovery of rent at the rate of Rs. 16-14-0 per annum for three years. *Held*, the provisions of S. 29 of the B.T. Act, have been violated (*Walmsley and Panton*, JJ.) SONUALLA SARDAR *v.* BHAGABATI DEBYA. **48 I C. 35=28 C.L.J. 152.**

———S. 29—*Rent kept in abeyance—Landlord's right to realise the full nominal rent.*

Where a clause for deduction of rent in a *kabuliyat* is merely a threat that the rent at

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the full rate would be levied in case the tenant would not execute a *kabuliyat* within a year after the expiry of the term, the landlord's claim at the full nominal rate is inadmissible. The stipulation in the *kabuliyat* with regard to the deduction to be allowed was a mere devise to evade S. 29 of the B T. Act. (*Richardson and Beachcroft*, JJ.) SIR PRODYAT KUMAR TAGORE *v.* CHUNDRA MOHUN SIL.
44 I.C. 574 (Cal.).

——S. 29—*Rent reserved with temporary remission—Whether full can be recovered—Penalty.*

Where the true rent is liable to be increased on certain conditions, the agreement for increase is inoperative. (*Fletcher and Richardson*, JJ.) SATIS CHANDRA MUSTAFI *v.* AMANULLA BEPARI. 40 I.C. 113 (Cal.).

——S. 29—*Stipulation to pay enhanced rate of rent after remissions for some years, if valid.*

A stipulation to pay an enhanced rate of rent after enjoying remission of portion thereof would be in breach of the provisions of S. 29 of the Act and therefore the landlord would not be entitled to recover rent at the enhanced rate. (*Fletcher and Richardson*, JJ.) PRODYAT KUMAR TAGORE *v.* MAHARULLA SUNDAR.
39 I.C. 497 (Cal.).

——S. 29 and 42—*Two different sums of rates of rent in a* kabuli yat *whether valid and amount to evasion of S. 29—Test of.*

Where different sums as rates of rent are stated in a *Kabuliyat*, it is to be judicially found which of the two is the true rate. The landlord is entitled to recover the true rent only, bigger or smaller as it may be. But if the bigger is meant to evade the provision of S. 29 it cannot be recovered. (*Fletcher and Richardson*, JJ.) MANINDRA CHANDER NANDI *v.* SRINIBASH KASYA. 39 I.C. 1 (Cal.).

——S. 29—*Amalgamation of occupancy holdings with enhanced rate creates no change in the old tenancy.*

An amalgamation, without a registered document, of two occupancy holdings with an enhancement of more than 2 annas in the rupee on the old Jama though the lands remain the same, does not, in the absence of proof of the creation of, or an intention to create, a new tenancy alter the old tenancy and enable the landlord by such subterfuge to evade the provisions of the above Act and claim enhanced rate of rent. (*Chatterjee and Walmsley*, JJ.) KRISTADHAN GHOSE *v.* GOLAM MANDAL.
37 I.C. 862 (Cal.).

——S. 29—*Enhancement of rent—Fresh agreement.*

When by a fresh agreement the rent of an occupancy holding is altered in such a way as to violate the provisions of S. 29 of the Act, the landlord is only entitled to the rent at the original rate. The alteration of money rent of an occupancy holding by a fresh agreement into produce rent with a proviso that the rent exigible on default is to be in excess of the original rent, is unenforceable as it violates the provisions of S. 29. (*Chatterjea and Beachcroft*, JJ.) TARAP ALI *v.* KALI PADA BANDOPADHYA. 34 I.C. 97 = 23 C.L.J. 685.

——S. 29—*Enhancement of rent—Contracts.*

A contract providing for an enhancement exceeding 2 annas in the rupee in contravention of S. 29 is wholly void and cannot be operative to the extent of the enhancement of 2 annas. Proviso (1) to S. 29 does not control Cl. (6) of the section and a continuous realization of rent at an illegal enhanced rate will not entitle the landlord to realize rent at the rate. (*Teunon and Choudhury*, JJ.) NAFARCHANDRA PAL *v.* RAHMAN SHEIKH. 34 I.C. 45 (Cal.).

——S. 29—*Agreement to pay rent after expiry of term.*

In a case in which the term of the *kabuliyat* was over, before the passing of the Act, the question whether an agreement by an occupancy *raiyat* to pay the full rent stipulated for in a *kabuliyat* on the expiry of its term where during the term a large portion of that rent was to be kept in suspense (*hajat*) contravenes the provisions of S. 29, need not be considered. (*Chatterjee and Newbould*, JJ.) MANINDRA CHANDRA NANDI *v.* DURGA SUNDARI DASIA.
32 I.C. 185 = 20 C.W.N. 680.

——S. 29—Kabuliyat *to pay enhanced rent not enforceable.*

Kabuliyat to pay enhanced rent being in contravention of S. 29 cannot be enforced. However it may be used as evidence of agreement between those landlords in whose favour it is made. (*Mookerjee and Beachcroft*, JJ.) RAJ KUMAR SARKAR *v.* FAIZUDDI TARAFDAR.
30 I.C. 891 = 22 C.L.J. 86.

——S. 29—*Splitting up of the holding—Effect of.*

The section applies only where the holding remains constant and if it is split up into different tenancies the section does not apply. (*Mcokerjee and Roe*, JJ.) NAZIR PEYADI *v.* IYATINDRA NARAIN ACHARYYA.
30 I.C. 320 = 22 C.L.J. 88.

——S. 29—*Real enhancement of rent under the section.*

When rent is asseseed on excess land and also on new land taken by a tenant and the rent for the lands in tenant's possession is consolidated, there is no enhancement of rent and the section will not apply. (*Mookerjee and Beachcroft*, JJ.) RAJ KUMAR SARKAR *v.* FAIZUDDIN TARAFDAR. 30 I.C. 283 = 22 C.L.J. 81.

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——S. 29—*Enhancement of rent—Distribution of rent.*

The distribution of rent by agreement of parties over different parcels of land is not enhancement under S. 29 of the B. T. Act, if the total rent is left unaltered. (*Mookerjee and Mullick*, JJ.) ROWSHAN SIRCAR *v.* SHYAMACHARAN CHAKRABARTY. **27 I.C. 49= 20 C.L J. 331.**

——S. 29—*Applicability of—Contract for enhancement.*

S. 29 of the Act applies only where there is a contract for enhancement and not where there is a *bona fide* dispute about the rent payable before. 18 Cal. 333; 28 Cal. 90, Foll. (*Mookerjee and Beachcroft*, JJ.) BATA MANDAL *v.* MANINDRA CHANDRA NANDI.
19 C.W.N. 321=25 I.C. 829= 21 C.L.J. 325.

——S. 29—*Abwabs—Illegal cesses—Payment of husks over and above rent—If illegal.*

Where a *Kabuliyat* stipulated for the payment of husks over and above certain *nadki* rent and the plaint did not treat the husks as part of the rent nor were cesses claimed or paid on such basis, the claim as to husks is within the prohibition against abwabs and other illegal cesses and could not therefore be recovered. (*Jenkins*, C.J. *and Mookerjee*, J.) KALAR SINGH v. MATHURA PRASAD. **25 I.C. 547= 19 C.L J. 402.**

——S. 29—*Rent payable in kind.*

S. 29 of the Act does not apply where the rent is payable in kind. (*Mookerjee and Beachcroft*, JJ.) FAZAL IMAM *v.* SAKOR MAHTON. **25 I.C, 442=19 C.L.J. 333.**

——Ss. 29 and 113—*Tenant in possession of lands not included in his holding—Subsequent agreement to include them on condition of enhanced rent—Pattah following not including them—Validity of pattah.*

Where a tenant found in possession of certain lands, not included in his original holding had subsequently executed a *Kabuliyat* in favour of the landlord at an enhanced rate but on condition that the said lands were included in his holding and a pattah was granted, without however including the lands. *Held*, the pattah was invalid under Ss. 29 and 113 of the B.T. Act; that it and the oral agreement should be given the go by, that the enhanced rent was not valid and could not be recovered by the landlord; that the enhanced rent being illegal nothing more could be given that neither the lands nor the rent as claimed could be decreed. (*Holmwood and Chapman*, JJ.) BIRENDRA KISHORE MANIKYA BAHADUR *v.* JINA GAZI. **23 I.C. 579 (Cal.).**

——S. 29—Kabuliyat—*Provision that no custom should be pleaded as ground for non-payment of full rent—Suit for rent—Plea of custom reducing rent, if can be pleaded.*

Where a *Kabuliyat* expressly and in general terms provides that no custom or usage should be allowed as a ground for non-payment of the full rent reserved, a plea for reduction of rent on the ground of a specific custom should not be allowed to be raised for the reason that it is not merely in contravention of the terms of the *Kabuliyat* but is also opposed to proviso (5) of S. 92 of the Evidence Act. (*Stephen and Mullick*, JJ.) SHRI NEWAS PRASAD SINGH *v.* RAM RAJ TEWARI. **22 I.C. 822= 18 C.W.N. 598.**

——Ss. 29 and 63—*Enhancement of rent—Alteration in kind—If enhancement.*

Enhancement of rent means increase in amount without alteration in kind. The conversion of cash rent into that in kind is no enhancement. An agreement that if the tenant should continue in occupation after expiry of the lease, he would pay rent in kind, is valid and enforceable. (*Ashutosh Mookerjee and Beachcroft*, JJ.) GOBIND MANDAR *v.* BANARSI PRASAD **21 I.C. 351=18 C L.J. 74.**

——S. 29—*Raiyat— Tenant—Settled on land by ijardar—Expiry of ijara.*

It is perfectly well settled even if a trespasser settles a person as a raiyat on land, that person becomes a non-occupancy raiyat and is exempt from ejectment. 20 Cal. 708, rel. If an ijardar gives a settlement of a holding to any one, that person becomes a raiyat on the land, and he does not cease to be raiyat when the ijara comes to an end. 10 C. L. J. 65, foll. (*Sharfuddin and Coxe*, JJ.) HANIF MANDAL *v.* BARADA KISHORE ACHARYA **16 I.C. 419 (Cal.).**

——S. 29—*Enhancement of rent.*

A tenant executed a *Kabuliyat* and stipulated therein that although the rent of his holding is Rs. 23, Rs. 14 were to be in abeyance for three years and Rs. 8 were to be paid every year, and a new settlement to be made with his landlord. If he failed to do so, he would pay the whole rent from the beginning. In a suit by the landlord to recover the rent at Rs. 23 for the tenant's failure to execute the new agreement after 3 years, it was held that the proviso in the contract was inserted to defeat the provisions of S. 29 and the rent being defined as lawfully payable in money the landlord was entitled to a decree at Rs. 8 per year; and the realization at Rs. 23, is an enhancement, (*Sharfuddin and Coxe*, JJ.) KHITISH CHANDRA LAHIRI *v.* GARPA HAZRA. **15 I.C. 878 (Cal.).**

——Ss. 29 and 147 (A)—*Enhancement in compromise in suit for ejectment of trespassers—Sections do not apply.*

Section 29 of the B. T. Act applies to the rent of an occupancy raiyat and S. 147-A—

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applies to a suit between a landlord and a tenant as such. Where a suit was brought by the plaintiff for ejectment of the defts. on the allegation that defts. who had been holding under a time expired kabuliyat were trespassers, there was a compromise under which defts. agreed to remain in possession of the land and were to be recognised as tenants with occupancy rights at the rents which were mentioned in the compromise. The defts. agreed to pay a lump sum of money for old arrears. There was default in the payment of the sum agreed upon and the landlord brought a suit for recovery of the amount.

Held, that the suit was not governed either by Section 29 or Section 147-A of the B.T. Act, as the prior suit which ended in a compromise was a suit between a landlord and trespasser. (*Coutts and Adami*, JJ.) CHOUDHURI SHEO GOBIND SINGH *v.* MAHABIR MISSER.

1922 Pat. 319 = 71 I.C. 143 = 3 Pat. L.T. 301 = 1922 P. 655.

———S. 29—*Applicability—Section does not apply to Increased rent for—Increased area—"Specially" meaning*

Section 29 has no application to an increase in the amount of rent by reason of an increase in area. It applies only to an increase in the rate of rent.

The word "specially" in the section has no reference to the quantum of the reduction of rent allowed for the consideration there mentioned but merely required that owing to special circumstances the rent is lower than it otherwise would have been. Mere proof that rent was a low rent would not be sufficient, unless it is also proved that the low rate was arrived at for a particular consideration. Conditions for bringing an enhancement within the proviso (iii) to Section 29 considered. (*Miller*, C. J. *and Adami*, J.) GRANT *v.* EKLAL JHA.

3 Pat. L.T. 386 = 67 I.C. 49 = 1922 P. 171.

[On Appeal from 64 I.C. 332

———Ss. 29 and 147-A—*Compromise—Considerations extraneous to suit—Effect of.*

Section 29 of the B.T. Act does not apply where a compromise changes the status of a tenant.

There is no substantial difference between rule 3 of O. 23 of the C.P. Code and Section 147-A of the B.T. Act in regard to the jurisdiction of a Court to record a compromise. There is no reason why a Settlement of disputes forming the subject-matter of a suit should not be regarded as the consideration of the contract relating to matters extraneous to the suit. (*Mullick and Jwala Prasad*, JJ.) RAMAPADARA NATH SINGH *v.* SORRAI KOERI.

52 I.C. 20 = 4 Pat. L.J. 667.

———S. 29—*Enhancement of rent—Compromise of litigation.*

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An enhancement of rent of an occupancy holding in excess of that allowed by Section 29 of the B.T. Act agreed to by means of a compromise is illegal. (*Imam*, J.) SRI KRISHNA LAL *v.* SHEOBALAK GOPE.

44 I.C. 638 = 4 Pat. L.W. 247.

———S. 29—*Agreement — Consideration—Changing status of tenant from occupancy raiyat to a tenant at fixed rate.*

An agreement between landlord and tenant raising the status of the occupancy raiyat to a tenant at fixed rate, and enhancing the rent by more than two annas in the rupee as a consideration for the change of status is not prohibited by any of the provisions of the Bengal Tenancy Act. (*Jwala Prasad*, J.) MUHAMMAD JAN *v.* COMMISSIONER OF PATNA.

37 I.C. 797 (P.).

———S. 29—*Tenancy Act at fixed rate not under the section.*

A tenancy at a fixed rate does not come under S. 29 of the Bengal Tenancy Act, which is applicable only to the money rent of an occupancy raiyat. (*Jwala Prasad*, J.) MOHAMAD JAN *v.* COMMISSIONER OF PATNA.

37 I.C. 797 (P.).

———S. 29 (b)—*Enhancement of rent—Proof of previous rent by tenant—Onus on plaintiff landlord to justify enhancement.*

Where in a suit for arrears of rent at an enhanced rate by the landlord, the tenant proved the previous rent and also that the enhancement was in excess of two annas in the rupee, the onus is upon the plff. landlord to justify the enhancement which was in excess of that allowed by S. 29 (*b*) of the B. T. Act. 36 C. 604, foll. (*Mookerjee and Cuming*, JJ.) RAJENDRA NARAIN MAZUMDAR *v.* SHEIK KALIM.

49 Cal. 875 ; 26 C.W.N. 758 = 67 I.C. 813 = 1922 Cal. 575.

———S. 29 (b)—*Enhancement of rent*—Kabuliyat *by tenant for enhanced rent*—Kabuliyat *contravening provisions of S. 29, Cl. (b)—Onus of proof.*

The onus of proving that a *kabuliyat* contravenes S. 29, Cl. (*b*) is on the tenant. Where a *kabuliyat* executed by a tenant agreeing to pay enhanced rent is found to be bad as contravening the provisions of Section 29, clause (*b*), it cannot be allowed to stand for a part. (*Carnduff and Richardson*, JJ.) TARAMANI CHOUDHARANI *v.* SAFATULLA MANDAL.

22 I.C. 854 (C.).

———S. 29 (b)—Kabuliyat *rent mentioned—Remission of portion—Enhancement of rent.*

Where the Kabuliyat showed a rent of Rs. 57-4-0 but remitted Rs. 17-2-0 so that the remaining rent was Rs. 40-2-0 which was being paid the rent at the end of the term could not under S. 29, Cl. (*b*) of the B.T. Act be enhanced so as to exceed by more than 2 annas in the rupee. The *Kabuliyat* was an attempt to evade

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S. 29 (*b*). S. 29 (*b*) of the B.T. Act applies to contract, executed at the time of enhancement as well those executed some years before. (*Jenkins*, C.J. *and Mookerjee*, J.) MAHAMAYAKAR *v.* KISHORE CHAND.
18 C.L J. 502=21 I.C. 948=18 C.W.N. 738.

——S. 29 (c)—*Settlement of a bona fide dispute as to rent—No enhancement.*

An agreement to pay a certain rent entered into by a raiyat in settlement of a dispute to avoid litigation is not an agreement to enhance rent within Cl. (*c*) of S. 29. When the origin and the incidents of a tenancy are not known, it may be inferred that there is a *bona fide* dispute as to the amount of rent. But the mere fact that the tenant claims a certain rent and the landlord asserts otherwise, does not conclusively show a *bona fide* dispute as to rent. (*Mookerjee and Teunon*, JJ.) RAM PRATAB KOERY *v.* GOKAL KUAR. **12 I.C. 589 (Cal.).**

——S. 29 (1)—*Continuous period of three years—Meaning of.*

The words "continuous period of not less than three years immediately preceding the period for which the rent is claimed" in S. 29 (1) of the Bengal Tenancy Act do not mean the period for which rents are claimed collectively in the suit, but mean the period in respect of which the rent is payable as a separate cause of action. (*Buckland and Cuming*, JJ.) JOGENDRA NATH MAITRA *v.* GOPAL CHUNDRA SAHA.
64 I.C. 188 (Cal.)

——S. 29 (1)—*Requirements of.*

The requirements of S. 29 Proviso (1) are fulfilled if it is proved (1) that there was an agreement to pay rent at a higher rate than the previous rate, and (2) that rent has been paid at the higher rate. It is not necessary that a whole amount, if payable at the enhanced rate, has been actually realized by the landlord. (*Mookerjee and Chatterjea*, JJ.) GANESH DUTT SINGH *v.* LACHMI NARAIN SINGH. **34 I.C. 783=23 C.L.J. 209.**

——S. 29 (3)—*Enhancement of rent—Right of landlord.*

To entitle a landlord to enhanced rent under S. 29 (3) of the B. T. Act he must prove three things:—(i) that the raiyat has held his land at a specially low rate of rent in consideration of cultivating a particular crop for the convenience of his landlord; (ii) that he is released from the obligation of cultivating the crops; and (iii) that he deems the rent which he agreed to pay fair and equitable. S. 29 (3) of the B. T. Act applies where the purpose of the tenancy is the growing of a particular crop and, in consideration of that the rent is not merely a low rent but a rent especially low on that account. (*Ross*, J.) EKLAL JHA *v.* WILLIAM MELING GRANT. **64 I.C. 332.**
See **On Appeal 67 I.C. 49=3 Pat. L.T 387=1922 P. 171.**

BENGAL TENANCY ACT (VIII of 1885), S. 30.

——S. 30—*Reclamation pattah—Reservation of progressive rent—Maximum reached—Suit for enhancement of rent, if lies.*

Where lands in the Sunderbans of Bengal are let on a reclamation lease and provision is made for the gradual enhancement of rent up to a prescribed maximum, a presumption arises that the maximum so prescribed is to be the full rent so long as the tenure subsists. The general provisions of the B.T. Act for enhancement of rent do not apply to such a case. 9 W. R. 65; 15 B.L.R. 125; 9 Cal. 505, ref. If a tenure is heritable, permanent and transferable, there is a presumption in favour of fixity of rent and the onus is on the landlord to rebut it. (*Ameer Ali*) PORT CANNING AND LAND IMPROVEMENT CO., LTD. *v.* KATYANI DEBI.
46 I.A. 279=37 M.L.J. 578=17 A.L.J. 1061=1 U.P L.R. (P.C.) 91=33 I.C. 522 (P.C.)=(1920) M.W.N. 160=24 C.W.N. 369=11 L.W. 296.

[On Appeal from 25 I.C. 274=19 C.W.N. 56.]

——Ss. 30 and 35—*Fair and equitable rent—Whether the provisions of the sections are conclusive tests.*

The provisions under the section are not conclusive tests to ascertain whether the rent of a raiyat is fair and equitable. (*Beachcroft*, J.) DABIRUDDIN JOORDAR *v.* MIDNAPORE ZAMINDARI CO., LTD. **57 I.C. 850 (Cal.).**

——Ss. 30, 52 and 105—*Rise in prices of crops—Power of Settlement Officer to decide—Separate suit—Enhancement of rent.*

A claim for enhancement of rent on the ground of rise in the average local price of staple food crops during the currency of the existing rent, is to be determined by a Settlement Officer in a proceeding under S. 105 of the Act. The parties should not be driven to a separate suit for its determination. A landlord may be entitled to additional rent under S. 52 even though he is unable to establish that the previous measurement is inaccurate and unreliable, where the tenant was in possession of more land. (*Mookerjee and Beachcroft*, JJ.) SUKRAJ ROY *v.* LAL BAHADUR GOPE.
51 I.C. 34=26 C.L.J. 283.

——S. 30—*Applicability of—Rent payable partly in cash and partly in kind.*

S. 30 of the B. T. Act refers to a tenancy where the rent is solely payable in money and not where rent is paid partly in cash and partly in kind. (*Sanderson*, C. J. *and Mookerjee*, J.) PRIYANATH PAL *v.* TARINI CHARAN ROY.
35 I.C. 618=24 C.L.J. 373.

——Ss. 30 and 113—*Enhancement of rent.*

Enhancement of rent by more than two annas in the rupee as the prevailing rent is not illegal. (*Chapman and Mullick*, JJ.) BHAGWAN MAHAPATRA *v.* PALTURAM SINGH.
32 I.C. 749 (Cal.).

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——— **Ss. 30, 52, 28, 36 and 154**—*Excess land—Additional rent—Enhancement—Retrospective effect of decree for enhancement.*

When it appeared that the rent was assessed on the assumption of the area without actual measurement under Ss. 52 and 30, the landlord can claim additional rent for excess land and enhancement of rent. There is a fundamental distinction between a claim for enhancement of rent, and that for additional rent and a decree for enhancement of rent can have no retrospective effect and back rent cannot be claimed at enhanced rate in the suit in which enhancement is sought.

Per *Beachcroft, J.*—The mere fact that a rate per bigah is not mentioned in the *kabuliyat* does not justify the inference that there must have been a measurement before the execution of the *kabuliyat*. (*Mookerjee and Beachcroft, JJ.*) EJEL MULLICK *v.* FELAI MULLICK.
28 I.C. 498 = 21 C.L.J. 309.

——— **Ss. 30 and 188**—*Suit for enhancement of rent.*

One of several joint landlords cannot alone bring a suit for enhancement of rent under S. 30 of the B.T. Act making the others party defendants. 38 C. 270, Foll. (*Mookerjee and Beachcroft, JJ.*) ABDUL GAFUR MANDAL *v.* UMA KANTA PANDIT. 24 I.C. 266 = 19 C.W.N. 260.

——— **Ss. 30 and 3 (9)**—*Landlord—Purchaser.*

Purchaser is not the landlord of a holding within S. 30; and the purchaser of one of two separated shares of a tenure cannot sue for enhancement of his share of rent against a raiyat holding under the owners of two separated shares without joining the owner of other separated share as plaintiff. (*Sharfuddin and Richardson, JJ.*) HEMANTA KUMAR DEBI *v.* KULUSAMANNESSA BIBI. 15 I.C. 847 (Cal.).

——— **S. 30**—*Undivided shares of howla—Enhancement of rent.*

An undivided share of a howla does not come within the definition of holding nor does it fall within S. 30. The landlord of such a share is not entitled to maintain a suit for enhancement. 25 Cal. 917, relied on. (*Harrington and Mookerjee, JJ.*) PARBATTY DEBYA *v.* MATHURA NATH BANERJEE. 40 Cal. 29 = 16 C.W.N. 877 = 13 I.C. 453 = 16 C.L.J. 9.

——— **Ss. 30 and 31-A**—*Enhancement of rent and option of lowest rate.*

The lowest rate paid by several tenants may be adopted as the prevailing rate for enhancement of rent. 1 C.W.N. 318, foll. (*Caspersz, J.*) LALIT KOER *v.* BABY HIT NARAYAN SINGH. 9 I.C. 5 (Cal.).

——— **Ss. 30, 105 and 188**—*Suit for Enhancement of rent—Non-joinder of Receiver not made a party.*

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In a proceeding for enhancement of rent the co-sharer landlords shown by the record of right. to be entitled to the lands were made parties A receiver, who had been appointed in respect of the share of one of the co-sharer landlords at the instance of a mortgagee of that share was not impleaded as a party to the proceeding. *Held*, that the omission to join the receiver as a party did not vitiate the proceeding though his joinder would have been proper. (*Adami and Buknill, JJ.*) MADHEVA SURENDRA SAHI *v.* AWADH MISSER. 3 Pat. L.T. 316 = 65 I.C. 349 = 1923 P. 86.

——— **S. 30**—*Claim for fair rent in past—Years does not lie.*

A suit for enhancement of rent proceeds on the admission that a rent is now paid by the tenant to the landlord and asks for enhancement on any of the grounds mentioned in S. 30. A suit for the determination of a fair and equitable rent, on the other hand, proceeds on the assumption that no rent has hitherto been paid by the tenant. A suit for determination of fair and equitable rent does not lie when the landlord claims fair rent in respect of past years for which rent has been paid already accrued due and not in respect of future years. (*Das and Buknill, JJ.*) GOBIND LAL SIJUAR *v.* RAM SARAN LALL.
68 I.C. 433 = 2 Pat. L.T. 642.

——— **Ss. 30 and 52**—*Holding—What is.*

An undivided share in a parcel or parcels of land is not a holding. The word 'parcel' in the definition of the word 'holding' does not mean an undivided share. (*Chapman and Atkinson, JJ.*) HARNANDAN RAI *v.* KESHO PRASAD SINGH. 1 Pat. L.W. 798 = 40 I.C. 585 = 2 Pat. L.J. 553.

——— **Ss. 30 and 111-A.**—*Enhancement of rent.*

Where an occupancy tenant is wrongly entered in Record of Rights as raiyat at fixed rate, the landlord can sue for enhancement of rent under S. 30 before suing for declaration that the entry is wrong. (*Mullick and Atkinson, JJ.*) BRIJ BEHARI SINGH *v.* SHEO SHANKAR JHA. 2 Pat. L.J. 124 = 1 Pat. L.W. 434 = 39 I.C. 85 = 1917 Pat. 108.

——— **Ss. 30 (a) and 31 (a)**—*Prevailing rate of rent.*

There is no prevailing rate of rent within S. 30 (*a*) in a village situate in a district to which S. 31-A does not apply, if seven different rates of rent are paid by seven different tenants for lands of the same description varying by substantial degrees. (*Teunon and Newbould, JJ.*) AGHORE NATH MUKHOPADHYA *v.* ABHOY CHARAN NATH.
33 I.C. 85 (Cal.).

BENGAL TENANCY ACT (VIII of 1885), S. 30.

———S. 30 (a)—*Enhancement—Record of rights—Entries in—Presumption.*

Under S. 30 the plaintiff was successful in showing that the holdings were non-existent in previous years as had been recorded in the Record of rights. It was so proved under S. 30 of the Bengal Tenancy Act in a suit for the increase of rent. *Held*, that the tenants have to prove that their fields formed part of other fields which were taxed uniformly all along. (*Das and Kulwant Sahay*, JJ.) NAND LAL CHAUBE *v.* KESHO PRASAD SINGH.
1923 Pat. 339=1924 P. 245.

———Ss. 30 (a) and 31-B—*Prevailing rates—Ascertainment of.*

The prevailing rate of rent in any local area is a question of fact depending on the actual rents existing from time to time. It increases and diminishes according to existing circumstances, the process being automatic. When the rate has been determined, it will be deemed to be the prevailing rate unless there is an increase in rent in the village or a rise in the price of staple food crops. The expression is used in the same sense in Ss. 30 and 31, B.T. Act. (*Dawson Miller*, C.J. *and Kulwant Sahay*, J.) RAMJI RAM *v.* RAM KUMAR.
74 I.C. 11=1923 Pat. 345.

———S. 30 (b) *Homestead land, rent of—Can be enhanced.*

The rent of an occupancy raiyat of homestead lands is liable to enhancement under S. 30 (*b*) of the Act. (*Walmsley and Ghose*, JJ.) RAJA RESHEE *v.* TRAILOKHYA MOHATA.
76 I.C. 492=1923 Cal. 370.

———Ss. 30 (b) and 182—*Homestead land—Comes within the Section—Enhancement of rent.*

There is nothing in S. 30 of the B.T. Act to restrict it to the land actually used for cultivation. To attract the operation of the section it is sufficient that the land in question is a holding held at a money rent by an occupancy raiyat. Nor would S. 182 remove homestead lands from the operation of S. 30. It would no doubt be open to the tenant to prove that the rent of homestead land by custom or local usage is not liable to be enhanced under S. 30 (*b*) but failing the proof of any such custom of usage homestead land would come within the operation of S. 30 (*b*). As to whether in any particular case an enhancement should be granted would depend on the circumstances of the case. (*Cuming and Panton* JJ.) RAJA RESHEE CASE LAW *v.* CHINTAMONI DALAL.
36 C.L.J. 305=70 I.C. 535=27 C.W.N. 962=1922 C. 510.

———S. 30 (b)—*Suit for enhancement.*

In a suit for enhancement of rent on the ground of rise in the prices of staple food crops, the landlord need not prove the value of crops at the time of creation of tenancy, for the purpsoes of comparison. (*Fletcher and Newbould*, JJ.) BHUDHAR CHANDRA ROY CHOUDHURY *v.* NANDA LAL ROY.
40 I.C. 682 (Cal.).

BENGAL TENANCY ACT (VIII of 1885), S. 31.

———S. 30 (b)—*Rate of enhancement of rent.*

In settling the rate of enhancement under S. 30 (*b*) of the Act the Court must consider the nature of the land on which the rent is to be assessed. If it is upland, the prices of the upland staple crop must be considered and if it is low land the prices of low land staple crop must be considered. (*Chamier*, C.J., *and Sharfuddin*, J.) SAJIWAN MAHTO *v.* GULAM CHAND LAL. **35 I.C. 678=1 Pat. L.J. 409.**

———S. 30 (c)—*Occupancy tenant—Enhancement of rent.*

In spite of the *kabuliyat* of an occupancy tenant providing for an enhancement of the rent only in the case of a survey being made the landlord can apply to have the rent enhanced under S. 30 on his making out a proper case for enhancement. (*Fletcher*, J.) GOPAL PRAMANIK KAPALI *v.* KALI KANTA GHOSE. **55 I.C. 85 (Cal.)**

———S. 30 (c)—*Enhancement—What is.*

The enhancement under S. 30 (c) should include a sum in addition to the interest payable upon capital spent by the landlord for the improvement and the enhancement agreed to by the tenant may be taken *prima facie* as his estimate of what would be fair rent under S. 30 (c) till the tenant shows that his estimate was erroneous. (*Mookerjee and Chatterjee*, JJ.) GANESHDUTT SINGH *v.* LACHMI NARAIN SINGH. **34 I.C. 783=23 C.L.J. 209.**

———S. 31—*Rent—Enhancement of—Sublease by occupancy raiyat not a ground for refusing enhancement.*

The mere fact that an occupancy raiyat has sublet part of his holding is not a sufficient reason for refusing his landlord an enhancement of rent under the provisions of the Act. (*Walmsley*, J.) BASIRUDDIN SARKAR *v.* JOGENDRA MOHAN DAS. **64 I.C. 182 (Cal.).**

———S. 31 (a)—*Amendment of—Enhancement of rent—Prevailing rate.*

Per *Sharfuddin*, J.—The 'prevailing rate' is not the average rate of rent of neighbouring villages. Where it is found that there is no prevailing rate in the neighbouring villages, no decree for enhancement can be given. Where the provisions of S. 31 (*a*) of the Bengal Tenancy Act are not extended, the principles of the prevailing rate cannot be applied. Per *Coxe*, J.—S. 31 (*a*) does not apply in a district to which it is not formally extended however reasonable, the provisions of that section may be. (*Sharfuddin and Coxe*, JJ.) RAM DEO SINGH *v.* MOHESHWAR PRASAD.
29 I.C. 880=21 C.L.J. 458.

BENGAL TENANCY ACT (VIII of 1885), S. 31.

——Ss. 31 (a) and 50 (2)—*Ch. X, Ss. 113, and 115—Enhancement—Average.*

In making enhancements, in a certain area giving two staple food crops the mean or average of the increase of the prices should not be left out of consideration. (*Teunon and Chapman, JJ.*) HARIHAR PRASAD BAJPAI *v.* AJUBAI MISRI. 22 I.C. 604=45 Cal. 930.

——Ss. 32 (b) and 35—*Rent—Enhancement.*

S. 32 (*b*) relating to the mode of calculating an enhancement of rent where there has been a rise in the price of staple food crops is imperative unless there are circumstances showing that it would be unfair and inequitable under S. 35 to allow enhancement in accordance with S. 32 (*b*). (*Beachcroft, J.*) RAMANI MOHAN ROY *v.* ABDUL NASSAYA. 57 I.C. 115 (Cal.).

——S. 35—*Enhancement—Grounds.*

S. 35 means that the Court has to consider the facts of the particular case and the rules set out in the Act relating to the particular application and then, before it allows an enhancement it must be satisfied that the enhancement is fair and equitable, the provision being inserted for the protection of the tenant. (*Sanderson, C.J. and Richardson, J.*) ISHAN CHANDRA *v.* RAMA PROSAD. 65 I.C. 656=25 C.W.N. 897.

——Ss. 35—*Scope of.*

S. 35 of the B.T. Act relates to the amount of assessment and does not refer to the ground upon which a Court has to determine whether an increase should be allowed or not. (*N.R. Chatterjee and Duval, JJ*). GURU CHARAN NANDI *v.* SARAB ALI. 23 C.W.N. 1041= 52 I.C. 79=30 C.L.J. 9.

——S. 37—*Enhancement of rent—Tikadar and tenant—Suit by proprietor within fifteen years of agreement for enhancement.*

S. 37 of the B.T. Act bars a suit for the enhancement of rent for fifteen years after in respect of a contract validly made and binding between the parties. If an illegal and invalid contract and one not legally binding is made within fifteen years, such a contract does not come within S. 37 so as to operate as a bar to the institution of a suit for enhancement of rent. (*Chapman and Atkinson, JJ.*) BUDHAN MAHTON *v.* WAZIHUNNISSA BEGUM. 4 P. L.W. 210=4 P.L J. 106= 44 I.C. 292=1918 Pat. 162.

——S. 38—*Abatement for rent.*

Where after lands have been let out at a certain rent, it is established that other persons have rights of pasturage on the lands, the tenants are entitled to an abatement in respect of those lands thus liable to pasturage. (*Chatterjee and Richardson, JJ.*) DINANATH DAS *v.* SARAT CHANDRA. 34 I.C. 851 (Cal.).

BENGAL TENANCY ACT (VIII of 1885), S. 40.

——S 38—*Rent—Abatement—Land covered with sand.*

A liberal interpretation must be put on the word "permanent" in S. 39 of the B. T. Act and it must be construed with reference to existing conditions.

Land covered with sand suffers a permanent deterioration. (*Holmwood and Walmsley, JJ.*) KRISHNA SAHAI *v.* PALAK DHARI RAUT. 22 C.L J. 42=29 I.C. 236= 20 C.W.N. 1167.

——S. 38 (1)—*Right to claim abatement is not restricted to occupancy tenants.*

Obiter:—The right to claim abatement of rent in the circumstances mentioned in S. 38 is not confined only to occupancy tenants but exists in all tenants irrespective of their status, though occupancy tenants are expressly referred to in the section. (*Jwala Prasad, A.C.J. and Ross, J.*) BABU SUKHRAJ RAI *v.* GANGA DAYAL SINGH. 63 I C. 219= 2 Pat. L.T. 569.

——S. 40—*Commutation of rent—Notice to be given to parties—Order without—Jurisdiction.*

Although S. 40 of the B. T. Act does not state explicitly that no order of commutation is to be made till opportunity has been afforded to the party liable to be affected thereby to appear and contest the applications, it is obvious on first principles that no order should be made till notice of the application has been served. The object of the application for commutation is to secure an alteration of the most essential element of the tenancy, namely, the rent. It is of the utmost importance to the party whether the rent is to be paid in kind or in cash and if the rent is to be paid in cash, what sum should be taken as the proper amount payable in lieu of rent previously paid in kind. An order for commutation cannot be made without notice to the party affected and where it is so made by the Revenue Court it acts without jurisdiction and its order is *ultra vires*. An order under S. 40 made by a Revenue Court without jurisdiction does not bind the Civil Court 45 C. 769: 18 C. 467, Ref. (*Mookerjee and Chotzner, JJ.*) GORA CHAND HALDAR *v.* RAKHAL CHANDRA GOPE. 37 C.L J. 473= 72 I.C. 37=1923 Cal. 364.

——S. 40—*Commutation of rent.*

S. 40 allows a commutation of rent only where the rent is in reality payable in kind either wholly or partially and the tenant has the status of an occupancy *raiyat*. Where the order of the Settlement Officer commuting rent is without jurisdiction the Civil Court was competent to declare that as a nullity. (*Mookerjee and Fletcher, JJ.*) MOHESH DUTTA SUKLA *v.* SHEIKH HURMAT. 67 I.C 946= 28 C.W.N. 714.

BENGAL TENANCY ACT (VIII of 1885), S. 40.

——S. 40—*Order of Rev. Court—Settlement.*

Where it is proved that the tenant is not an occupancy raiyat, a Revenue Court's order for commutation is without jurisdiction and is not conclusive between parties nor binding on Civil Courts. 21 C.L.J. 487; 21 C.L.J. 590; rel. (*Chatterjee and Newbould*, JJ.) SHEIKH POKAN *v.* RAJANI KAMUL CHAKRAVARTY.
50 I.C. 285=23 C.W.N. 614.

——S. 40—*Application for commutation of rent—Civil Court if can question the propriety of the order of commutation—Officer to whom application made if can transfer to another.*

A Civil Court is not competent to examine the propriety of an order of commutation under S. 40. An application for commutation of rent under S. 40 should be entertained and determined by the officer to whom it is presented and cannot be transferred by him to any other officer. (*Mookerjee and Walmsley*, JJ.) JADHU NATH MANNA *v.* PRAN KRISHNA DAS.
45 Cal. 769=46 I C. 455=27 C.L.J. 569.

——S. 40—*Revenue Courts—Competency of—Commutation proceedings can be questioned by Civil Court.*

Where a revenue Court exercises jurisdiction, the presumption is that the holding is occupancy holding and the rent is payable in kind. A Civil Court can examine the competency of a revenue Court in commutation proceedings when a suit for recovery of arrears of rent is brought before it. ((*Jenkins*, C.J. *and Chatterjee*, J.) DURGA MOHUN *v.* SUKUMAR DAS.
19 C.W.N. 825=30 I C. 412=21 C.L.J. 390.

——S. 40—*Commutation of rent—Mode of calculation—Price of landlord's share.*

Wherein an application for commutation the original Court in calculating the average price to be adopted in the respect of the paddy due to the landlord's share worked it out for the village to be Rupees 2-8-0 per maund and the Commissioner reduced it to Rupees 2 4 0 per maund on the basis of experience in previous cases. *Held* that these cases should be decided on the merits whenever possible and general standards should be resorted to only in the absence of anything more reliable to go by. (*Moreshead*, M C.) NAJMUL HUDA *v.* SEWAKA MAHTON.
1 Pat. L.R. 263 (Cr.).

——S. 40—*Commutation of rent—Compromise between tenants and Co-sharer landlord—Effect of.*

Where the Court below held that an order requiring the tenants to pay the commuted rent to the landlords who were parties to the compromise and to continue to pay rent in kind to others, is not only very undesirable but also not warranted by the law, *held* that the view of the court below was erroneous.

It is open to the Revenue Court to apply section 40 of the B. T. Act or to refuse to apply for the purpose of commuting rent but, the validity of any arrangement by the proprietors or any of the proprietors with the tenants is not affected by its refusal.

The determination of the validity of the compromise as between the co-sharers and the raiyats may be left the Civil Court to settle. (*Moreshead*, M.C.) THAKUR SINGH *v.* RAI PERMATHO NATH MITRA.
1 Pat. L.R. 172 (Cr.).

——S. 40—*Commutation of rent—Preliminary objection.*

An enquiry with a view to determining the sum to be paid as a money rent should not be undertaken before the issue of grant or refusal of commutation of rent is rightly determined since otherwise the labour and the expenses to the parties of the enquiry may be spent to no purpose. (*Moreshead*, M.C.) BHAGWAT PRASAD *In re*. **1 Pat. L.R. 92 (Cr.).**

——S. 40—*Commutation of rent*—Manhunda *rate.*

Where the tenants failed to apply for commutation previous to undertaking the Manhunda rate, they are deemed to have foregone their right to commutation when compared with cash rents of the adjoining villages. (*Dixon*, C.) RAMDIHAL KHAR *v.* BABU BALDEO LAL. **1 Pat. L.R. 76 (Cr.).**

——S. 40—*Commutation of rent—Deterioration in irrigation facility—Effect of.*

The consideration of the question of commutation of rent should not be restricted to the standpoint of the landlord and tenant. The public is also interested in the food supply of the country and if there is the danger of deterioration in the irrigation system of the lands it is a reasonable ground for refusing commutation. (*Moreshead*, M. C.) RANI BHUBNESHWARI KUER *v.* MT. SHAM SUNDER KUER.
1 Pat. L.R. 65 (Cr.).

——S. 40—*Rent — Commutation—Occupancy holding—Transferability of holding—Consideration.*

On an application by the transferee of an occupancy holding for commutation of rent under S. 40 of the B.T. Act it was held that the burden lay on the applicant to establish his status as occupancy tenant which status was disputed. It is open to the applicant to establish his right by proving that occupancy holdings are transferable by custom without the consent of the landlord or that the landlord has in fact recognised the transfer. The Revenue Officer is not bound to decide the question of the custom of transferability in entertaining an application for commutation. It is a question for the Civil Court and the Revenue Court need only enquire whether the transferee has been recognised as a tenant. (*Moreshead*, M. C.) KULDIP NARAIN SINGH *v.* MT. JASODA KOER. **1 Pat. L.R. 62 (Cr.).**

BENGAL TENANCY ACT (VIII of 1885), S. 40.

———**S. 40**—*Commutation of rent—Compromise by some of the landlords, if binding on others.*

In proceedings of commutation of rent under S. 40, a compromise between the tenants and some of the landlords does not bind the other landlords who were not parties to the compromise. (*Das*, J.) SURAT NARAIN SINGH *v.* NATHUNNI RAI. **56 I.C. 538 (Pat.).**

———**S. 40**—*Proceedings under—Injunction.*

A Civil Court has no jurisdiction to restrain by injunction a party to a proceeding under S. 40 of the B.T. Act, from further proceeding with an application made by him under that section to the Revenue Court. (*Atkinson and Adami*, JJ.) BHAJAN AHIR *v.* GANGESHWAR KUAR.

5 Pat. L.J. 76=53 I.C. 37=1919 Pat. 461.

———**S. 40 (5), (6)**—*Appeal when lies.*

S. 40 (5) of the B.T. Act does not govern cl. (6) of the same section. The appeal contemplated under cl. (5) is an appeal against an order passed under cl. (3) determining the sum to be paid as a money rent. An order refusing or allowing an application for commutation is not appealable and revision is the only remedy. (*Gruning*, M.C.) INDERDEO SINGH, *v.* ANOOP SINGH.

1 Pat. L.R. 123 (Cr.).

———**Ss. 40 (5) and 188**—*Appeal by some landlords only whether maintainable.*

The restrictions applicable to an application for commutation of rent under S. 40 of the B.T. Act that it must be made under S. 188 of the Act, by all the landlords together or by an agent on their behalf, do not apply to the case of an appeal in which the procedure followed is the one laid down in O. 41, R. 4, C.P. Code. (*Walsh*, J.) *In re* BHOJRAJ MAHTO.

41 I.C. 787=1 Pat. L.W. 578.

———**Ss. 44 and 45**—*Notice — Homestead raiyat.*

Where the notice to the deft. was not served by the landlord within six months before the expiry of the term nor was the suit instituted after six months, the suit for ejectment was barred. (*Mookerjee and Teunon*, JJ.) HARIHAR CHATTOPADHYAYA *v.* DINU BORA.

14 C.L.J. 170=10 I.C. 139=16 C.W.N. 536.

———**S. 44**—*Homestead land—User for agricultual purpose—Ejectment—Urban holdings—Occupany right.*

Where homestead land ceases to be such and is let out for cultivation and both cereals and vegetables are grown upon it, the land is governed by the provisions of the B.T, Act and a lessee is a non-occupancy raiyat liable to be ejected only on any one of the grounds specified in S. 44 of the B.T, Act.

BENGAL TENANCY ACT (VIII of 1885), S. 46.

Quære: **Whether the B. T. Act applies to urban holdings as for instance in the city of Patna.** (*Chamier*, C.J. *and Sharfuddin*, J.) MT. WAJIBUNNISSA BEGAM *v.* FAKIRA MAHTON. **3 Pat L.T. 621=1923 Pat. 94.**

———**S. 44 (c)**—*Raiyat holding from year to year.*

There is no raiyat who holds from year to year under the Act and if the tenant is a non-occupancy raiyat not holding under a lease for a term, he cannot be ejected under S. 44 (c). (*Mookerjee and Beachcroft*, JJ.) JOTIRAM KHAN *v.* JONAKI NATH GHOSE.

33 I.C 54=20 C.W.N. 258.

———**S. 45** — Khudkhast *land—Expiry of lease—Suit in ejectment by landlord—Notice to quit unnecessary.*

In a suit by a landlord to eject a tenant from *khudkhasht* land on the expiry of the lease, notice to quit is unnecessary. (*Sir Arthur Wilson.*) DAMODAR NARAYAN *v.* DALGLIESH.

38 Cal. 432=38 I.A. 65=15 C.W.N. 345=9 M.L.T. 364=8 A.L.J. 441=13 C.L.J. 512=13 Bom. L.R. 396=9 I.C. 913=(1911) 2 M.W.N. 182 (P.C.).

[On Appeal from 8 C.L.J. 533.]

———**S. 45**—*Notice to quit.*

A suit for the ejectment of a non-occupancy ryot instituted before the repeal of S. 45, without giving notice to quit is not sustainable. (*Woodroffe and Carnduff*, JJ.) KALANAND SINGH *v.* BHEKH DHARI SINGH.

9 I.C. 805 (Cal.).

———**S. 46**—*Agreement—Tender of, how made—Notice, if necessary.*

The word "agreement" in S. 46 of the B. T. Act means an agreement which the landlord proposes that the tenant should execute. Where a landlord filed in Court under S. 46 of the B.T. Act the drafts of a proposed agreement duly stamped, but the Court, served on the tenant an exact copy but without a stamp on it along with a notice, there is a perfectly good tender of the agreement as required by S. 46 of the B.T. Act, even though the notice was not in accordance with the strict terms of S. 46. (*Fletcher and Huda*, JJ.) THE PORT CANNING AND LAND IMPROVEMENT COMPANY *v.* NAYAN CHANDRA PRAMANIK.

22 C.W.N. 358=45 I.C. 234=28 C.L.J. 87.

———**S. 46**—*Enhancement of rent—Refusal to agree—No ejectment unless, agreement is tendered to raiyat—Suit for ejectment—Refusal to agree to enhancement of rent.*

S. 46 of the Bengal Tenancy Act provides that a non-occupancy ryot shall not be ejected by suit for refusal to agree to an enhancement of rent, unless the agreement for enhancement

BENGAL TENANCY ACT (VIII of 1885), S. 46.

is tendered to the raiyat, and the rules framed by the Government prescribe the provisions of the C.P. Code relating to service of summons as applicable to the mode of service. (*Mookerjee*, A.C.J. *and Fletcher*, J.) BHARAM CHAND GUIN *v.* KANAK SARKAR. **26 C.W.N. 359 = 68 I.C. 991 = 35 C.L.J. 203.**

——**Ss. 46 and 158**—*Occupancy Raiyat—Suit for fair and equitable rent.*

The tenant holding over for 3 years is a non-occupancy raiyat and the plff. could have sued both for fair and equitable rent or for enhancement of rent. But once the tenant had already become an occupancy tenant, a suit for fair and equitable rent is not maintainable. (*Miller*, C.J. *and Mullick*, J.) DAYAL KUNDU *v.* MALHU PATHAK.

47 I.C. 558 = 5 Pat. L.J. 406.

——**S. 48**—*Scope of—Sub-letting by ryot.*

It would be defeating the intention and policy of the legislature to hold that S. 48 applies only where the whole of a ryots' holding is sublet. 39 Cal. 839, expl. (*Teunon and Huda*, JJ.) NATIBULLA AKANDA *v.* BADI BEPARI, **42 I.C. 243 (Cal).**

——**S. 48**—*Application of*—Under-raiyat *paying produce rent—Lease construction of.*

Where under a lease an *under-raiyat* undertook to deliver paddy and on default to pay a certain sum of money, *Held*, that S. 48 had no application as there was no money rent, the section being restricted to "holding at a money rent," and it applies only when raiyat and under-raiyat hold at money rent. (*Mookerjee and Beachcroft*, JJ.) KAMARADDI *v.* MON-MOHINI DASIA.

41 I.C. 373 = 29 C.L.J. 234.

——**S. 48**—*Under-raiyat — Payment in kind—Suit for money value.*

If an under-raiyat executes a *Kabuliyat*, agreeing to deliver to plffs., at their house a certain quantity of paddy per annum, and in case of default, the landlord should recover the money value settled by the terms of the *Kabuliyat*; *Held*, in a suit to recover the money value, that tenant must prove that the amount claimed is in excess of the rent payable by him. S. 48 of the B. T. Act applies only where the land held by a raiyat is co-extensive with the land held by the under-raiyat and not where it is a fraction of the holding of his raiyat landlord. 39 Cal. 839, ref. (*D. Chatterjee and Chapman*, JJ.) AKRAM ALI *v.* ANWAR ALI.

24 I.C. 677 (Cal.).

——**S. 48**—*Under-raiyat—Limit of rent recoverable.*

The landlord of an under-raiyat holding under money rent cannot recover more than a quarter of the rent which he himself pays in

BENGAL TENANCY ACT (VIII of 1885), S. 48.

respect of the land let out to under-raiyat. But the section does not apply where the land comprised in the holding of the raiyat is of different qualities and there are no means to decide the various rates at which the various classes of lands were assessed. (*Harington and Mookerjee*, JJ.) NIM CHAND SHAHA *v.* JOY CHANDRA NATH. **39 Cal. 839 = 15 I.C. 256 = 16 C.W.N. 857.**

——**Ss. 48 and 49 (b).**

An *under-raiyat* holding under a pattah executed before passing the B.T. Act without any express provision of the duration is liable to be ejected upon a notice according to S. 49 (c) within which his case falls. (*Jenkins*, C.J., *Woodroffe, Mookerjee, Carnduff and Chatterjee*, JJ.) RAJ KUMARI DEBI *v.* BARKATULLA MANDAL. **39 Cal. 273 = 14 C.L.J. 407 = 12 I.C. 161 = 16 C.W.N. 6.**

——**S. 48**—*Lease by mortgagee in favour of mortgagor —Rent recoverable is governed by section.*

On 16-1-1917 defendants executed Zarpesgi lease of 2 bighas of Kasht land in favour of the plaintiff in consideration of Rs. 975. On 18-1-1917 the defendants executed a kabuliat in favour of the plaintiff for a term of 9 years from fasli 1324 to 1333 in respect of the same land the rent reserved being Rs. 75 As. 5 per year. As they defaulted in payment of the reserved rent the plaintiff brought a suit for fasli 1325 and part of fasli 1326. The defendants pleaded that during the revisional survey the rent was recorded at Rs. 24-8-0 and that the plaintiff was not entitled to pay more. The trial Court decreed the suit at a rental of Rs. 24-7-0. The appellate Court held that the tenancy created by the kabuliat was a new tenancy and that the defendant while executing the zarpesgi lease did not lose his original status of a raiyat and decreed the suit in full. *Held* that the transactions of mortgage and lease were independent of each other and the rent recoverable by the plaintiff was regulated by S. 48 of the B.T. Act and the plaintiff was not entitled to a greater rent than that to which he was entitled under the section. (*Ross*, J.) CHATURGUN BIND *v.* TILAKDHARI SINGH.

71 I.C. 470 = 1923 P. 402.

——**S. 48**—"*Holding at a money rent*"—*Landlord and under-raiyat.*

The words "holding at a money rent" in S. 48 of the B.T. Act govern the word "under-raiyat" just preceding them and not landlord. An under-raiyat holding land on an agreement to pay rent in kind is not protected by the provisions of the section. (*Roe and Jwala Prasad*, JJ.) KILASPATI CHOUDHURY *v.* MUNESHWAR CHAUDHURY.

3 Pat. L.J. 575 = 53 I.C. 965 = 4 Pat. L.W. 109.

BENGAL TENANCY ACT (VIII of 1885), S 48.

——S. 48 (a)—*Not applicable to case of rent in kind—Eviction by title paramount is a good defence to suit for rent.*

S. 48 (*a*) does not apply to cases where the rent fixed in the *kabuliyat* is rent in kind and not in cash. 29 C.L.J. 284, ref. to.

Eviction by title paramount is a good defence to a suit for rent if the party evicting has a good title. (*N. R. Chatterjee and Newbould*, JJ.) KRISHNA KUMAR SHAHA ROY *v.* PIRU FAKIR. **35 C.L.J. 159=1922 Cal. 273.**

——S. 48 (a)—*Applicability—Rent in kind.*

Where an under *raiyati* kabuliat provides for the payment of paddy or its value, as rent, such rent is not money rent and is not governed by S. 48 (*a*) of the Act. (*Chatterjea and Newbould*, JJ.) KANTOORAM *v.* PIRU. **63 I.C. 502. (Cal.).**

——S. 49—*Agreement to lease to two tenants—Notice in ejectment to one—Validity.*

When an agreement is made to lease the property to two tenants and they enter into possession though no lease is executed law treats them as tenants and the notice in ejectment should be served on both under S. 49, B.T. Act. But when the lessees obtained a decree for specific performance but did not execute the decree and a lease was executed only in favour of one of them, notice is not necessary. (*Chatterjee and Cuming*, JJ.) PITAMBUR GAIN *v.* RAM CHARAN MORAL. **1924 C. 483=76 I.C. 365=28 C.W.N. 157.**

——S. 49—*Ejectment—Settled raiyat of Homestead—Gets raiyats right therein.*

A settled raiyat of the village holding a homestead, though as an under-raiyat, or under a raiyat, acquires a raiyati right in that homestead. 43 C. 195, Ref. (*Suhrawardy and Cuming*, JJ.) ISAPALI *v.* SATIS CHANDRA ROY. **68 I.C. 504, (Cal.).**

——S. 49—*Notice to quit—Mode of service—Tenants-in-common—C.P. Code, O. 5, R. 15.*

Under S. 49 a notice to quit should be served in the manner prescribed in the C. P. Code for the service of a summons. If such a notice is issued to tenants-in-common and one of the tenants receives the notice for all, the Court, should consider the facts with reference to O. 5, R. 15, C.P.C. or with reference to the rule that service upon one joint tenant is a service on all. (*Richardson*, J.) HARICHARAN MANDAL *v.* BIGHORE GAIN. **56 I.C. 127 (Cal.).**

——Ss. 49 and 85—*Kayami raiyat—Occupancy raiyat—Grant of lease for more than nine years—Transferee from ryot.*

A lessor describing himself as a *Kayami* ryot does not necessarily imply that he was a ryot at a fixed rent. Where the lessor did not thereby or otherwise represent himself as a raiyat at a fixed rent and the lessee was not induced to take the lease by such representation *held*, that the lease which was for a term of more than nine years was invalid and neither the lessor nor the purchaser from him was estopped from challenging its validity, 22 C. W.N. 179, Foll. The interest of an under-raiyat is not heritable. 31 Cal. 757, Foll. (*Chaudhuri and Cuming*, JJ.) NADIRAM CHAUDRASIL *v.* SRINATH CHAKRAVARTHI. **34 I.C. 906=24 C W N. 93.**

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——Ss. 49 and 167—*Purchaser of occupancy holding—Under-raiyati holding—Encumbrance—Notice to quit.*

A person purchasing an occupancy holding at a sale held in execution of a decree for arrears of rent can eject, without annulling the encumbrance under S. 167 of the B.T. Act or serving a notice to quit under S. 49 of the Act, an under-raiyati whose holding was created without a registered lease and without the consent of the landlord. 28 Cal. 205; 17 C.W. N. 860; 31 Cal. 932 and 13 C.W.N. 913, dist. Ss. 167 and 49 of that Act, as to notice to quit to be served on under-raiyat apply only where there is a subsisting tenancy which stands good against the landlord, unless it is put an end to, in the manner specified. (*Chatterjee and Newtould*, JJ.) BHUBAN MOHAN *v.* SHEIK BADAN. **46 Cal. 766=53 I.C. 334=30 C.L J. 201.**

——Ss. 49 and 85 (2)—*Ejectment of under raiyat—Notice to quit—Permanent sub-lease—Previous possession.*

In plff's. suit to eject the deft., an under raiyat, after service of a notice to quit under S. 49 of B.T. Act, the deft. set up a permanent sub-lease granted by the plff.'s vendor and pleaded estoppel. *Held*, that the lease being invalid under cl. (2) of S. 85, the tenancy could be put an end to, by a notice under S. 49 and the deft. not having a subsisting tenancy could not rely upon his previous possession. 23 C.W.N. 435, foll.; 13 C.L J. 649 and 24 C.L.J. 639, dist. The principle of estoppel cannot be invoked to defeat the plain provisions of a statute. If the contract was given effect to, the provisions of cl. (2) of S. 85 would be defeated in every case. (*N. R. Chatterjee and Newbould*, JJ.) ALLIMUDI BEPARI *v.* CHAINTAHARAN MUKHOPADHYAYA. **51 I.C. 403=23 C.W.N. 437.**

——S. 49—*Under-raiyat—Notice to quit signed by one of several landlords—Validity of.*

A notice to quit served on an under-raiyat and signed by one of the landlords is not invalid in law. (*Fletcher and Huda*, JJ.) JAKHER MOHAMMED *v.* KHATIR MOHAMED. **23 C.W.N. 76=56 I.C. 265.**

BENGAL TENANCY ACT (VIII of 1885), S. 49.

——S. 49—*Applicability of—Under-raiyat—Right of occupancy.*

An under-raiyat can by usage or by custom obtain a right of occupancy and S. 49 of the B.T. Act cannot apply to an under-raiyat who has got a right of occupancy. (*Fletcher and Huda*, JJ.) GOPAL MANDAL *v.* TAPAI SANKHARI. **28 C.L.J. 84=46 Cal. 43=45 I.C. 545=22 C.W.N. 618.**

——Ss. 49 and 85—*Ejectment—Notice—Lease from year to year.*

In 1891 plff. granted an under-raiyati lease to the deft. The lease was not for any specified term, but was described as *karsana patta* (yearly lease). *Held* that the lease was terminable by a notice to quit under S. 49 (*b*) Per *Mookerjee*, J.—It is of the very essence of the annual tenancy that it is terminable by the landlord on notice, to quit. S. 49 prescribes no form of notice, nor does it indicate the length of notices. An under-raiyat is protected from ejectment until the end of the agricultural year in which a notice to quit is served upon him by his landlord, and this indicates the time when it becomes obligatory upon him to lease. (*Mookerjee and Beachcroft*, JJ.) CHANDI CHARAN NATH *v.* SOMLA BIBI, **22 C.W.N. 179=44 I.C. 254=28 C.L.J. 91.**

——S. 49—*Notice to quit by several joint landlords—Notice signed by one.*

A notice under S. 49 of the B. T. Act purporting to emanate from three landlords but in fact signed by one of them is a proper notice to quit. There is no necessity for the notice to be signed by the landlord at all. It is sufficient that the notice is sent at the instance of the landlord calling upon the under-raiyat to quit the land. 29 Cal. 231, foll. (*Chitty and Smither*, JJ.) MAFEDUL SHA FAKIR *v.* MAHARUDDIN. **44 I.C. 49 (Cal.).**

——Ss. 49 and 85—*Raiyat-if can create under-lease.*

A raiyat holding at a fixed rate of rent is competent to create a permanent under-lease. A raiyat may by custom have a right to create a permanent sub-lease and the sub-lease so created is not inadmissible in evidence but the party who wants to prove it must establish the custom before it is admitted in evidence. A permanent sub-lease granted by a raiyat is inadmissible in evidence even if the terms of the document have been partly performed and the raiyat can eject the sub-lessee by a notice to quit under S. 49 (6). 16 C.L.J. 144, 17 C.W.N. 469, 21 C.L.J. 478, foll. (*Fletcher and Newbould*, JJ.) RASHED KAZI *v.* PACHOO SARDAR. **42 I.C. 534 (Cal.).**

——Ss. 49 and 85—*Notice—Invalid sub lease.*

Where the sub-lease to an under-raiyat, granted by the raiyat of a non-transferable occupancy holding is not valid against his landlord under S. 85, the landlord can eject the under-raiyat without any notice under S. 49 when the raiyat transfers the holding to the under-raiyat. (*Sanderson*, C. J. *and Mookerjee*, J.) JADAB SARDAR *v.* GOVINDA CHANDRA. **44 Cal. 272=34 I.C. 912=21 C.W.N. 368.**

——Ss. 49 and 87—*Occupancy right—Transfer of—Notice — Land-lord's right of re-entry.*

Where in the absence of any custom of transfer, an occupancy *raiyat* transfers the property to the under *raiyats*, without the consent of the land-lord he has a right to re-enter upon the property without a notice under S. 49 of the B. T. Act.

S. 49 applies where the occupancy raiyat still remains in the position of the land-lord, and not where the occupancy raiyat has forfeited his interest by having transferred his interest without the consent of the land-lord.

A notice served under S. 87 of the B. T. Act is not required for the land-lord to re-enter in a case like this. (*Fletcher*, J.) JADAB CHANDRA SIRDAR *v.* GOVINDA CHANDRA MANDAL. **29 I.C. 466 (Cal.).**

——S. 49—*Denial of title in prior suit—Suit to eject—Notice to quit.*

Plaintiff, a gomastah of a land-lord obtained certain lands from him and let them out to the defendant. In a suit for rent brought by plaintiff against defendant, the latter pleaded that he had always paid his rent to the plaintiff for the benefit of the land-lord and that he was a *raiyat* holding directly under the land-lord. The plaintiff sued to eject the defendant, without notice, as a trespasser. *Held*, that the defendant could not be evicted without notice to quit under S. 49 of the B. T. Act. (*Holmwood and Chapman*, JJ.) KALA GAZI *v.* MAHESWAR CHAUDHURI. **27 I. C. 273 (Cal.).**

——S. 49—*Abandonment—Relinquishment—Transfer of holding—Ejectment.*

Where a transfer of the whole holding has been made, the landlord is ordinarily entitled to enter on the holding. A relinquishment of the whole holding without any proof, of payment of rent or of any arrangement made to pay the rent is a relinquishment in fact, which entitles the landlord to eject the tenant. S. 49 of the B.T. Act does not apply to such a case. (*Holmwood and Chapman*, JJ.) AMINUNNISA *v.* JINNAT ALI. **42 Cal. 751=19 C.W.N. 43=27 I.C. 271=20 C.L.J. 548.**

——S. 49—*Notice.*

S. 49 prescribes no form of notice nor length of notice. The Act itself protects the under-raiyat from ejectment for one agricultural year after a notice to quit is served upon him by his landlord. (*Jenkins*, C. J. *and Roy*, J.) HARIFULLA GAIN *v.* BENOED BEHARY MONDOL. **19 I.C. 557=17 C.W.N. 982.**

——S. 49—*Under raiyat—Under-lease for indefinite time—Ejectment.*

An under-raiyat holding under a lease for an indefinite time can only be ejected for non-payment of rent and not arbitrarily by giving him notice under Sec. 49 of the B. T. Act. (*Holmwood and Chapman*, JJ.) SHANGSER ALI *v.* HADANULLA. 18 I.C. 82 (Cal.).

——S. 49 (a)—*Leasehold property—Heritability of.*

Lease hold property for a term of years is heritable and a son of the tenant holding the land after the death of his father can be ejected on the expiry of the term without notice. (*Holmwood and Chapman*, JJ.) NIRODE MOHANDEY *v.* JAGAR ALI. 27 I.C. 46= 20 C.L.J. 328.

——S. 49 (b)—*Notice under—Formalities of—English Law not to be imported in India.*

On the 26th December, 1914 a notice was served by the plaintiffs upon the defendant. This notice was described as a notice under S. 49, Bengal Tenancy Act. It stated in the first place that the plaintiffs did not admit that the defendants were under-raiyats. But it was added that if they were under-raiyats, they should vacate the land. There was no specification of the date when the defendants were required to vacate the land. The suit in ejectment was not instituted till the 7th January, 1918. On a question arising as to the validity of the notice. *Held*, that technicalities of the English Law relating to the form and contents of a notice to quit should not be introduced in connection with the provisions of S. 49, Bengal Tenancy Act. There was sufficient compliance with the requirements of S. 49 if what was served upon the tenant gave notice to quit the land at the end of the agricultural year next following and the suit was instituted after the lapse thereof. (*Mookerjee and Chotzner*, JJ.) PURNA CHANDRA DAS *v.* ALI MAHOMED. 70 I.C. 999=37 C.L.J. 548.

——S. 49 (b)—*Ejectment--Permanent lease by raiyat—Lessee is not an under-raiyat.*

Where a raiyat grants a permanent lease without the consent of the tenure-holder and the lessee and his heirs remain in possession for more than 12 years their status is not that of an under-raiyat and they cannot be ejected by the service of a notice to quit under S. 49 (*b*) of the B. T. Act. 28 C 205, 17 C.W.N. 860. Rel. (*Teunon*, J.) PURNA CHANDRA DAS *v.* JOY LAL PAYADA. 64 I.C 756 (Cal.).

——S. 49 (b)—*Permanent sub-lease by* raiyat *to under*-raiyat—*Effect of.*

A permanent sub-lease by a raiyat (not being a *raiyat* holding at a fixed rate) to an under-*raiyat* is not operative as such between them. But the grantee is an under-*raiyat* who holds otherwise than under a written lease, and his tenancy is liable to be determined in the manner provided by S. 49 (*b*) of the Act. Till such

determination the grantor cannot treat the under-*raiyat* as a trespasser. (*Mookerjee*, A.C. J. *Fletcher*, *N. R. Chatterjea*, *Teunon and Richardson*, JJ.) CHANDRA KANTA NATH *v.* AMJAD ALI HAZI. 25 C.W.N. 4= 61 I.C. 466=32 C.L.J. 296 (F.B.).

——S. 49 (b)—*Effect of notice.*

Where a notice to quit is given to a sub-lessee for over nine years after the Bengal Tenancy Act, he cannot resist plff.'s claim for ejectment. (*Chatterjee and Richardson*, JJ.) NAZIR ALI SHIKDAR *v.* BANSHI BADAN. 23 C.W.N. 435=42 I.C. 621= 29 C.L.J. 388.

——Ss. 49 (b) and 85 (2) and (3)—*Under-ryoti lease for more than nine years, created prior to the Act, whether invalid after nine years of the Act.*

A sub-lease for a term exceeding nine years granted by a ryot prior to the Act does not become void after the expiry of nine years from the passing of the Act but remains operative as against the ryot. 29 Cal. 148, foll. (*Chatterjee and Richardson*, JJ.) MIA RAJA PATWARI *v.* RAM KUMAR DE. 41 I.C. 846=29 C.L.J. 391.

——Ss. 49 (b) and 85—*Under-raiyat—Holding for a term—Devolution—Ejectment—Notice.*

There is nothing in the Act to take away the right of the heirs of an under-*raiyat* to succeed to the remainder of the term granted by the *raiyat* within the powers conferred on the latter by S. 85. Apart from custom or express enactment, a lease for a term devolves on the heirs of the original lessee. On expiry of the term the heirs may be ejected without notice under S. 49 (*b*) of the Act. (*Richardson and Mullick*, JJ.) ALEJAN BIBI *v.* RAHAM ALI. 22 C.L J. 232=31 I.C. 26=20 C.W.N. 756.

——Ss. 49 (b) and 85 (2)—*Raiyat—Grant of permanent lease.*

The grant of a lease by a raiyat from generation to generation on payment of rent is a nullity. Being initially void, no ratification of the lease is effected by acceptance of rent. (*Woodroffe and Coxe*, JJ.) MOHIN CHANDRA DE *v.* BAIDANATH. 29 I.C. 879=21 C.L.J. 478.

——Ss. 49 (b) and 167—*Under-raiyati—Ejectment—Notice—Landlord—What is.*

An under-tenant not being an occupancy ryot cannot be ejected without the notice prescribed by Sec. 49 (*b*) of the Act. The Landlord is the person who, on the extinction of the other rights comes into direct relation with the tenant or under-tenant. (*Holmwood and Chapman*, JJ.) RASIK LAL *v.* KRISHNA MOHAN. 18 I.C. 249=17 C.W.N. 781.

——S. 49 (c) *Landlord and tenant—Lease—Holding over—Trespasser—Notice.*

A mere omission to sue a tenant in ejectment after the expiry of the tenancy would not make

him a tenant by holding over but where he held over for a considerable period and after him his sons held over for another long period, the tenancy might reasonably be regarded as a tenancy by holding over and the tenants are entitled to a notice under S. 49 (*c*) of the B.T. Act before ejectment. (*Chitty and Teunon*, JJ.) CHATURBHUJA NANDA *v.* GOPAL DOLAI.
18 I.C. 448 (Cal.).

——S. 49 (6)—*Transfer of a non-transferable under-raiyati holding—Notice.*

Notice for ejectment is essential under clause 6 when the landlord knowingly accepts rent, from transferees of a non-transferable under-raiyati, in the name of original tenant. (*Chatterjee and Beachcroft*, JJ.) ABDUL HAMID *v.* UDOY CHANDRA ACHARJEE.
32 I.C. 614 (Cal.).

——Ss. 50 and 29—*Distinction between.*

S. 50 of the B.T. Act contemplates a case where a tenancy has been held at a certain rate, while S. 29 applies only to a case where rent has been actually paid for a period of three years. (*Mookerjee and Chotzner*, JJ.) JANAKI BALLAV ROY *v.* ENAT MANDAL.
37 C.L J. 489=72 I.C 136=1923 Cal. 600.

——S. 50—*Presumption—Sub-division or variation in Rent do not affect.*

A sub-division of a tenure does not deprive the tenant of the benefit of S. 50 of the B.T. Act, nor does it affect the continuity of the tenure. A slight variation in rent, though unexplained, does not deprive the tenant of the benefit of the presumption under S. 50 of the B. T. Act. (*Mookerjee and Chotzner*, JJ.) TARAKUMAR GHOSE *v.* KUMAR ARUN CHANDRA SINGH. **36 C.L.J. 389=74 I.C. 383=1923 Cal. 261.**

——S. 50—*Presumption—Rebuttal—Contract of tenancy subsequently entered into between the parties.*

Where there is a uniform rate of rent for 20 years, it is open to the landlords to rebut the presumption arising in favour of the defendants by a contract of new tenancy entered into subsequently which entitles the landlords to claim rent from the tenants after the expiry of the term of the lease at the rate of rent payable for the cultivated lands of the village. (*Mookerjee and Cuming*, JJ.) SARAT CHANDRA DE DAS *v.* TARAPRASANNA BHATTACHARYA.
70 I.C. 437=36 C.L.J. 333=1923 Cal. 141.

——S. 50—*Applies to suits or proceedings under the Act and not to a suit in ejectment.*

S. 50 (2) is by its terms, limited in its application to suits or proceedings under the Bengal Tenancy Act. A suit for ejectment does not fall within that description. But it has been ruled that even in cases where S. 50 is not directly applicable, the Court may act on a presumption similar to the one arising under the

section, if the facts justify the necessary inference. The same principle plainly applies to suits or proceedings where the rule embodied in S. 50 is extended by analogy. (*Mookerjee and Rankin*, JJ.) MANMATHA NATH KAR *v.* PROBODH CHANDRA. **37 C.L.J. 52=73 I.C. 416=1923 Cal. 102.**

——S. 50—*Applicability —Rent— Partly payable in kind and partly in cash.*

Rent means whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant. It is in this sense that the expression "rent" is used in S. 50 of the B. T. Act. The substantive rule enunciated in S. 50 (1) and the presumption embodied in S. 50 (2) of the B. T. Act do not become inapplicable because a tenure-holder or raiyat holds at a rent payable partly in cash and partly in kind or entirely in kind. 12 W.R. 14; 14 W.R. 388; 15 W. R. 479, Rel. (*Mookerjee and Chotzner*, JJ.) DINA NATH PAL *v.* RAJA SATI PRASAD GARGA BAHADUR.
27 C.W.N. 115=36 C L.J. 220=72 I.C. 663=1923 Cal. 74.

——S. 50—*Sub-division and Amalgamation do not affect continuity of tenure.*

S. 50 (3) of the B. T. Act was inserted for the benefit of the ryots and not with a design to prejudice tenure holders. The operation of S. 50 (1) and (2) is not excluded in the case of tenures merely by reason of sub-division or amalgamation. 36 C. 287, not foll. S. 50 (1) of the B. T. Act contains the substantive rule on the subject of protection from enhancement. The sub-division of a tenure does not work a breach in the continuity of the tenure, if each fragment is held at a proportionate rent and the aggregate rent equal to the original rent. (*Mookerjee and Rankin*, JJ.) KRISHNA KAMINI DASI *v.* NILMADHAS SAHA.
36 C.L J. 382=73 I.C. 312=1923 Cal. 66.

——S. 50—*Enhancement of rent—Suit for—Matters to be considered.*

A suit to enhance rent proceeds on the presumption that a Zamindar holding under the Permanent Settlement has the right, from time to time, to raise the rents of all the rent-paying lands within his Zemindari, according to the perganah or current rates, unless either he is precluded from the exercise of that right by a contract binding on him or the lands in question can be brought within one of the exemptions recognised by Reg. VIII of 1793. Consequently in each of these cases, the nature of the tenure and the conditions under which it is held is the primary question to be determined with reference to the documents and circumstances disclosed therein. (*Mookerjee and Chotzner*, JJ.) ABINAS CHANDRA DAS *v.* MAJUB ALI CHOWDHURY. **36 C.L.J. 196 (2)=70 I.C. 273=27 C.W.N. 328=1922 Cal. 461.**

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——Ss. 50 and 104 (*h*)—*Presumption—None, where origin of tenancy known—Suit under S.* 104 (*h*)—*Maintainability.*

The presumption as to the fixity of rent laid down in S. 50 of the Act does not apply where the origin of a tenancy is known. It is not competent to a Civil Court to revise the rent fixed in the Settlement Rent Roll. Where a person is not really affected by an entry of rent in the Record of Rights he would not be entitled to claim a revision of rent under S. 104 (*h*) Cl. 4 of the B. T. Act, even though his case may fall under Cl. 3 of the section. (*Woodroffe and Suhrawardy*, JJ.) SECRETARY OF STATE FOR INDIA *v.* RAM CHARAN ACHARJYA. **70 I.C. 207 (Cal.).**

——Ss. 50, 105 and 108-A.—*Presumption, when rebutted—Lease for 3 years—Holding over—Rent—Settlement of enhanced rent.*

A *kabuliat*, dated 1282, B. S. for 3 years in favour of certain tenants contained the following clause "After the termination of the period of settlement we shall take a fresh settlement on a proper rent." It was further stated in the *kabuliyat* that "we shall enjoy the tenancy for a fixed term under the conditions stated above and to this effect we execute this *raiyati kabuliyat* for a fixed period." The landlords did not exercise their right to take possession of the tenure or to alter the rent after the expiration of the term of the kabuliyats. On an application made before the Settlement Officer for settlement of fair and equitable rents on the grounds of excess area and that the rate of rent is lower than the prevailing rate and also on account of rise of prices of staple food crops. *Held* (1) the Kabuliyats were executed before the B. T. Act came into operation and the term mentioned therein also expired before that date and (2) there was was nothing to prevent the landlords from enforcing the terms of the kabuliyat after the expiration of the year 1284 B. S. and the fact that they did not take possession or otherwise after any of the terms of the previous tenancy gave rise to the inference that a new tenancy commenced from after that date upon the same terms as regards payment of rent and other stipulations except the stipulation with regard to the period of the settlement. That being so the origin of the present tenancy should be considered to be from the year 1285 B. S. and the presumption under S. 50 of the B. T. Act, was rebutted in the case. (*Suhrawardy and Ghose*, JJ.) UDOY CHANDRA BASU *v.* MAHOMED ALI BEPARI. **65 I.C. 389 (Cal.).**

——S. 50—*Presumption—Payment of rent at uniform rent does not raise.*

The mere fact of payment of rent at a uniform rate for any number of years, apart from the presumption that can be raised under S. 50 B.T. Act, does not raise any presumption of fixing of rent. (*Suhrawardy and Cuming*, JJ.) YAKUB ALI CHOUDHURI *v.* RAJ KUMAR DUTTA. **65 I.C. 527 (Cal.)**

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——Ss. 50 and 115—*Presumption—Record of Rights, publication of, excludes.*

After the publication of the Record of Rights in respect of a tenancy under Chap. X of the B. T. Act, the tenant is precluded by S. 115 from claiming the presumption under S. 50 of the Act. (*N. R. Chatterjea and Panton*, JJ.) BAMANDAS BIDYASAGAR BHATTACHARYA *v.* SADHU MAJHI. **26 C.W.N. 945 = 64 I.C. 445 (Cal.)**

——S. 50—*Presumption of fixity of rent may be rebutted by proof of—Additional sum paid as rent.*

The presumption as to fixity of rent, raised by S. 50 of the Act, is rebutted by an inference that an additional sum paid by a tenant was lawfully a part of the rent paid with the consent of the tenant. (*Newbould*, J.) RAJESWAR *v.* BAHADUR. **63 I.C. 317 (Cal.)**

——Ss. 50 and 158—*Applicability of—Denial of tenancy—Presumption.*

The principle underlying S. 158 of the B.T. Act, is that there should be an admitted tenancy. Where there is a denial of tenancy the inquiry contemplated by that section cannot be made. In dealing with an application under S. 158 of the B.T. Act, it is not necessary to find whether the tenant is entitled to the benefit of the rule contained in S. 50 ordinarily this section is applicable when the landlord seeks an enhancement of rent. (*Walmsley*, J.) MONMOHAN GHOSE *v.* NARAIN CHANDRA DAS. **55 I.C. 709 (Cal.)**

——Ss. 50 and 116—*Presumption—Uniform payment of rent—Enhancement of.*

The presumption under S. 50 of the B.T. Act is not applicable to a tenant recorded in the Record of Rights as an occupancy raiyat under S. 102 (*b*) of the Act and not as raiyat holding at fixed rates. 24 C.L.J. 363 ref. (*Chatterjee and Duval*, JJ.) GURU CHARAN NANDI *v.* SARAB ALI. **23 C.W.N. 1041 = 52 I.C. 79 = 30 C.L.J. 9.**

——Ss. 50 and 105—*Presumption*—Kabuliyat—*After commencement of tenancy—Rent enhanceable.*

The mere fact that the rent was enhanceable under a *Kabuliyat* executed after the inception of the tenancy is not sufficient to rebut the presumption arising under S. 50, clause (2) of the B. T. Act, the question being whether the rent was in fact altered or not. If it was not altered then the tenant was entitled to the full benefit of the presumption. (*Beachcroft*, J.) DHIRENDRA NATH GHOSE *v.* PURNA CHANDRA DUTTA. **51 I.C. 904 (Cal.).**

——Ss. 50 and 115—*Presumption under.*

After the publication of the Record of Rights under Chap. X of the B.T. Act, in respect of a tenancy, the tenants are debarred by the provisions of S. 115 of the Act from claiming the

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presumption which S. 50 of the same Act mentions. (*Woodroffe and Huda*, JJ.) MURLIDHAR ADITYA *v.* RADHA MOHAN HARZA. **51 I.C. 552 (Cal.).**

——S. 50—*Consolidation of raiyati holdings—Effect of—Right of occupancy—Hat—Rent.*

Consolidation of raiyati holdings does not alter their nature, unless with the agreement between the landlord and tenant to change its nature. Raising *hats* on a tenancy does not raise a presumption of permanency. The fact that there was no change in rent, for many years, does not mean that the original contract was to pay a fixed rent. Where a tenancy is transferred and the purchaser is described as *marafatdar*, it means that the purchaser is not recognized as a tenant. (*Chatterjee and Greaves*, JJ.) MANMATHA NATH MITTER *v.* ANATH BANDHU PAL. **50 I.C. 222=23 C.W.N. 201.**

——S. 50—*Landlord and tenant—Lease to tenant—Liberty to settle land on expiration of term—Pre-existing tenancy.*

A lease creating a tenancy for a particular term at a fixed rent and giving the landlord the right at the expiration of that term to settle the land with whomsoever he pleases, cannot be taken as a mere recognition of a pre-existing tenancy. (*Fletcher and Shamsul Huda*, JJ.) DHARANI KANTA LAHIRI *v.* ISMAIL SHAIKH. **46 I.C. 221 (Cal.).**

——S. 50—*Presumption.*

Even a slight variation of rent not explained by causes like alteration in area rebuts the presumption under S. 50. (*Woodroffe and Mookerjee*, JJ.) PRASANNA DEBA RAIKAT *v.* MOHANAND DAS. **40 I.C. 553 Cal.**

——S. 50—*Presumption of fixity of rent—Rebuttal of enhancements.*

The liability to enhancement is imposed not only by the *jama wasil baki* papers but by the law which, in the absence of a presumption under S. 50 or upon rebuttal of that presumption, imposes a liability to enhancement upon tenants. 16 C.L.J. 24, foll. (*Chatterjee and Beachcroft*, JJ.) NIROD KRISHNA GHOSE *v.* PRODUT KUMAR TAGORE. **32 I.C. 794 (Cal).**

——S. 50—*Presumption—Principle of.*

The presumption in S. 50 of the Act does not rest upon the question whether one uniform rate of rent has been paid or not but upon whether the rent has been changed or not, so that where it is proved that the rent in respect of a tenure has remained unaltered for upwards of 20 years the defts. would be entitled to the presumption under S. 50 of the Act. (*Woodroffe and Mullick*, JJ.) DINAMANI CHOUDHURANI *v.* JAGAT CHANDRA. **23 I.C. 773 (Cal.).**

——Ss. 50 and 115—*Record of Rights—Entry as occupancy raiyat in—Presumption of fixity of rent, if applicable.*

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A tenant, recorded in a Record of Rights prepared under Chapter X of the Act as an occupancy raiyat merely, cannot according to the S. 115 get the benefit of the presumption as to fixity of rent under S. 50. (*Imam and Chapman*, JJ.) BIRENDRA KISHORE MANIKYA BAHADHUR *v.* FAIZUDDIN, **22 I.C. 943 (Cal.).**

——S. 50—*Landlord and tenant—Suit not under Bengal Tenancy Act.*

The presumption in S. 50 cannot be relied upon when the suit is not one under the Act; but the Court may draw the necessary inference from facts proved and apart from S. 50 of the Act, from the fact of the payment of uniform rent for a long time, the Court can draw an inference that the contract was to hold at fixed rates. (*Chatterjea and Teunon*, JJ.) ASUTOSH RUDRA *v.* GANGA BISHAN BANERJEA. **22 I.C. 367 (Cal.).**

Cf. **10 I.C. 164 (Cal.).**

——S. 50—*Presumption—Fixity of rent—Permanent tenancy.*

Long possession at unvarying rent is evidence of permantent tenancy. 30 Cal. 801, ref. Where the holding is transferred and the rent continues to be paid for 13 years in the name of the original tenant, fixity of rent is not to be presumed. (*Mookerjee and Beachcroft*, JJ.) UDDHAB CHANDRA GHOSE *v.* DHAN KRISHNA BISWAS. **20 I.C. 263 (Cal.)**

——S. 50—*Additional rent—Excess area.*

If the landlord agrees to let and the tenant to take a particular piece of land irrespective of its area, the landlord cannot claim additional rent if the area appears to be greater than one stipulated for, but the landlord would be so entitled if they agreed that a certain number of bighas should be the subject of tenancy. (*Coxe and Chatterjee*, JJ.) AKBAR ALI MIAN *v.* HIRA BIBI. **15 I. C. 332=16 C.L.J. 182.**

——S. 50—*Occupancy holding—Suit or proceeding under the Act—Presumption of permanency—Ejectment suit on the ground that holding is non transferable—Suit, if under the Act—Custom—Transferability—Evidence.*

Even in cases where the section is not directly applicable, the Court may act on a similar presumption, if the facts justify the necessary inference. S. 50 of the B. T. Act has no application to a suit for ejectment by the landlord on the allegation that the tenant of a non-transferable holding has sold it to the deft. and has abandoned the land as such a suit is obviously not a suit or proceeding under the B.T. Act. 10 C.W.N. 930 foll. A custom or usage of transferability of occupancy holdings can be proved by transfers recognized by landlord either without the payment of nazar or upon payment of a nazar also fixed by custom. The landlord need not have made an objection to a transfer unsuccessfully. The usage to be effective must not be a growing usage but one which has already grown up. 10 C.W.N. 197.

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33 Cal. 1094, 12 C.W.N. 878, foll. The usage of transferability after it has grown up affects not merely tenancies created thereafter but also existing tenancies. (*Mookerjee and Teunon*, JJ.) BUZILUL KARIM *v.* SATISH CHANDRA.
15 C.W N. 752=10 I.C. 325=13 C.L.J. 418.

——S. 50—*Presumption.*

Where the suit is not under the Act, the Court may draw any presumption from the circumstances. (*Mookerji and Carnduff*, JJ.) NITYANANDA PAL *v.* NANDA KUMAR.
10 I.C. 163=13 C L.J. 415.

——S. 50—*Presumption—Production of receipts for 33 years is insufficient to raise.*

In order to establish tenancy at fixed rent in perpetuity, the tenants would have to establish that they have been holding at the rate of rent which has not been changed since the permanent settlement. 45 C. 913; 1 Pat. L.J. 67, not followed, 37 C. 30; 54 I.C. 672, followed. The production of rent receipts showing payment of uniform rate of rent for 33 years is not sufficient to prove that the rate of rent has not changed since the date of the permanent settlement. (*Coutts and Das*, JJ.) MAHARAJA BAHADUR KESHO PD. SINGH *v.* RAM JAS PANDE. **2 P. 92=1923 P. 324.**

——Ss. 50 and 115—*Record of Rights—Suit for enhancement long after publication—Presumption.*

Where a landlord brings a suit for enhancement of rent against an occupancy raiyat after the publication of a Record of Rights, the raiyat cannot rely upon the presumption raised in S. 50 as that section is controlled by S. 115. (*Sultan Ahamad*, J.) SHEIKH ABDUL BAQI *v.* KUNJA BEHARI PANDEY. **36 I.C. 818 (Pat.).**

——S. 50—*Fixed rate tenancy—Specific plot—Evidence.*

To enable a Court to come to the conclusion that a tenant is a fixed rate tenant it must be established that it has not been changed from the time of the permanent settlement. The rule laid down in sub-S. (1) of S. 50 of the B. T. Act, is a rule of law, whereas the rule laid down in sub-S. (2) is a rule of evidence raising a presumption that the conditions laid down in sub-S. (1) have been satisfied. In a case where the evidence, if accepted gives rise to a presumption under S. 50 (2) of the B.T. Act, that the entire area is fixed rate holding but it is conceded that a portion of the holding is not held at a fixed rate, the presumption arising under S. 50 (2) is affected and the holding cannot be held to be a fixed rate holding. (*Doss*, J.) LAL MAHAMMED KHAN *v.* KRISHNA DAYAL GIR.
51 I.C. 302 (Pat.).

——Ss. 50 and 105—*Settlement of rent—Presumption.*

After an application is made urder S. 105 as amended by Bengal Acts III of 1898 and I of 1903, for settlement of rent after the final

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publication of the Record of Rights, the tenant can get the benefit of the presumption under S. 50. 37 Cal. 30 rel. (*Chamier*, C.J., *and Jwala Prasad*, J.) PHULCHAND LAL *v.* KARMAN SINGH. **33 I.C. 415 (Pat.).**

——S. 50 (1)—*Settlement of fair and equitable rent—Enhancement—Plea that defendant is a fixed rate raiyat—Evidence.*

Under S. 50, sub-S. (1) where a raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed from the time of the permanent settlement, the rent or rate of rent shall not be liable to be increased except on the ground of alteration in the area of the holding. This embodies a substantive rule of law. Sub. S. (2) lays down that if it is proved in any suit or other proceeding under the B.T. Act, that a raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement. This deals with the mode of proof and raises a rebuttable presumprion. There is no reason why an occupancy raiyat should be excluded from the category of a raiyat for the purposes of this section. A raiyat at a fixed rate is not created by S. 50 which merely furnishes a rule of evidence to enable a person to prove with facility that he is a raiyat at a fixed rate. (*Mookerji and Walmsley*, JJ.) NARENDRA LAL *v.* BENODE BEHARI. **27 C.W.N. 740=1924 Cal. 143.**

——S. 50 (1 & 2)—*Permanent Settlement—Presumption.*

The words "permanent settlement" in S. 50, sub. S. (1) of the B. T. Act, relate to the Permanent Settlement of 1793. The presumption of S. 50, sub-S. (2) of the Act, applies even if the rent was permanently settled at a later date than 1793. To gain the advantage of S. 50 the defendant has to show that the rate of rent has not been changed from the time of the Permanent Settlement of 1793. Even if S. 50 of the B. T. Act, does not apply, the fact that uniform rent has been paid for a period of 20 years might give rise to a presumption in favour of the defendant. 13 C.L.J. 415, rel. (*Greaves and Panton*, JJ.) OSMAN MANDAL *v.* RADHIKA MOHAN ROY. **67 I.C. 294=1923 Cal. 298.**

——Ss. 50 (1) (2) (3) and 105—*Presumption—Acquisition of non-transferable holding—New tenancy—New Kabuliyat stating rent variable.*

Although the purchaser of a non-transferable occupancy holding cannot claim recognition by the landlord as a matter of right yet if he obtains recognition from the landlord whether by payment or otherwise, then in the absence of special circumstances he is admitted into the original tenancy with all its incidents and becomes the successor-in-interest of the vendor.

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The inclusion in a *kabuliyat* executed subsequently to the creation of the holding, of a condition purporting to make the rent variable without any variation in fact does not affect the presumption arising under cl. 2 of S. 50. The true question in such cases is whether the instrument on which the landlord relies is merely confirmatory of the pre-existing interest or tenancy or whether it creates a new tenancy; in the case of a *raiyats* holding, this question must be considered with reference to the provision contained in cl. (3). (*Teunon and Richardson*, JJ.) ABHOYA SANKAR MUZUMDAR *v.* RAJANI MANDAL. **22 C.W N. 904 = 47 I.C. 359 = 29 C L J. 371.**

———S. 50 (1) and (2)—*Enhancement of rent.*

Where a tenure is held at the same rent for twenty years before suit, the tenant is protected from an increase of rent under S. 50 (1) of the Act, unless the contrary required by S. 50 (2) is proved. A kaubliyat does not amount to contrary evidence within S. 50 (2). Rent cannot be enhanced when there has been no alteration in the area of the land held permanently. (*Jenkins and Chatterjee*, JJ.) BISSESWAR RAY *v.* RAJENDRA KUMAR SINGH. **25 I.C. 228 = 18 C W.N. 949.**

———S. 50 (1)—*Landlord and tenant—Presumption—Sub-division or amalgamation.*

A sub-division or amalgamation does not in all cases negative the statutory presumption in favour of tenant under S. 50 (1) of the B.T.Act. A raiyat, claiming the benefit of S. 50 (1) of the Act, must only show that the particular land has been held at unchanged rent since the permanent settlement and he has also to prove the identity of the land. The land need not have remained a separate holding throughout the period. (*Mookerjee and Beachcroft*, JJ.) ADIT SINGHA *v.* SUKHRAJ RAI. **21 I.C. 385 = 17 C.L.J. 435.**

———S. 50 (2)—*Presumption under.*

On the construction of the kabuliat in the case: *Held*, that it proceeded upon the basis that there were pre-existing rights, and consequently it could not be relied upon for the purpose of showing that there had been a change in the rent since the date of the permanant settlement. (*Lord Buckmaster*) KUMAR PRASANNA DEB RAIKAT *v.* UDDHAB CHANDRA.
45 M.L.J. 779 = 33 M L.T 432 (P.C) = 28 C.W N. 753 = 18 L W. 147 = 73 I.C. 556 = 1923 P.C. 86 (P.C.).

———S. 50 (2)—*Holding at uniform rent—Proof of payment not necessary.*

What has to be established to raise the presumption under S. 50 (2), B.T. Act, is not that rent has been actually *paid* at a uniform rate during 20 years, but that the tenant has *held* at a rent or rate of rent which has not been changed during 20 years. Such holding at a uniform rent may be established, even if it is not proved that rent has actually been paid during a portion of the 20 years. (*Mookerjea and Rankin*, JJ.) SATIS CHANDRA BISWAS *v.* NIL MADHAB SAHA. **37 C.L.J. 598 = 73 I.C. 77 = 1923 Cal. 665.**

———S. 50 (2)—*Presumption—When arises.*

Per *Teunon*, J:—Mere demand on the part of the landlord for enchanced rent and refusal to receive or acknowledge the old rent does not enable him to deprive the tenant of the benefit of the previsions of S. 50. The rent at which a tenancy is held continues until a change has actually been effected. Such change can be effected only by consent or by proceedings in Court. The special Judges finding that the tenants have held at rents which have not been obtained for the twenty years preceding the suit and that the presumption thus arising has not been rebutted was affirmed in the absence of majority of *kabuliyats*. Per *Huda*, J.:—The presumption under sub-S. 2 of S. 50 can only arise when the tenant proves affirmatively that he has held at rent or rate of rent which has not been changed during the 20 years immediately before the institution of the suit or proceeding. These words place on the tenant the burden of proving either that he has actually paid rent at a uniform rate for twenty years or that if not actually paid there has been at any rate an agreement between him and his landlord that he should hold at the old rate. Where the holding of uniform rate since the time of the permanent settlement has not been proved, the landlord has a right to demand an increase and in any case to refuse to receive rent at the old rate in order to prevent the presumption under sub-S. 2 of S. 50 arising against him. (*Teunon and Huda*, JJ.) MOHINI KANTA SAHA CHOWDHURY *v.* PREONATH NEOGY. **1922 Cal. 143 = 35 C L.J. 309 = 49 Cal. 551.**

See on LETTERS PATENT APPEAL.

———S. 50 (2)—*Presumption — Proof of actual payment is not necessary to raise.*

Under S. 50 (2) of the B. T. Act, the tenant is not required to establish *actual payment* of rent during the twenty years at a uniform rent, he is to establish that he and his predecessors in interest have *held* at rent or rate of rent which has not been changed during the twenty years immediately before the suit or proceeding. This involves a real distinction for a person may hold as a tenant though he does not actually pay the rent agreed upon to his landlord. When the evidence showed that rent was paid at a uniform rate from 1845-1897, but for 17 years afterwards there was no payment of rent though it had not been altered by mutual agreement or decree of Court. *Held*, the presumption under S. 50 (2) arose. (*Mookerjea, Newbould and Pearson*, JJ.) MOHINE KANTA SAHA CHOUDHURY *v.* PREO NATH NEOGY. **49 Cal. 661 = 67 I.C. 381 = 35 C.L.J. 309 = 1922 Cal. 111.**

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———S. 50 (2)—*Presumption as to fixity—When to be raised.*

In deciding whether a tenant is entitled to a presumption as to fixity of rent in his favour, the question to be considered is whether the tenant or predecessors in interest have held at a rent, which has not been changed during 20 years immediately before suit or proceeding in which the question arises. (*Sanderson*, C.J. *and Richardson*, J.) GOVINDA CHANDRA GANGILI *v.* MANMATHA NATH PAL CHAUDHURI. 62 I.C. 677 (Cal.).

———S. 50 (2)—*Tenant holding at a fixed rent can claim benefit of—Presumption.*

If the tenant is found to have paid a certain rate of rent for over twenty years and there is no proof of variation of rent, the tenant becomes a tenant holding at a fixed rent and can claim the benefit of the presumption of fixity under S. 50 (2). (*Teunon and Newbould*, JJ.) KUMARI DASYA *v.* HEMANTA KUMARI DEBI. 60 I.C. 402 (Cal.).

———S. 50 (2)—*Ejectment—Limitation—Rent—Exhancement—Presumption.*

Defts. Nos. 1 and 3 who purchased a tenure from deft. No. 4 paid rent for about 37 years and it was accepted. *Held*, that plff. could not get *khas* possession of the tenure as his right to do so was barred by limitation. He could not ignore the right of defts. 1 and 3 who were entered in the Record of Rights as tenants. Plff. however produced a *kabuliyat* of the year 1840 executed by the predecessor-in-interest of the deft. No. 4, the vendor of defts. Nos. 1 and 3. There was an express stipulation in the *kabuliyat* that the tenants would pay enhanced rent according to the pargana rate: *Held*, that the *kabuliyat* might be considered either as a new contract under which the tenants agreed to pay enhanced rent or a contract containing the incidents of the tenancy which was in existence from before. The rent was therefore enhanceable. (*N. R. Chatterjee and Newbould*, JJ.) UPENDRA NATH GHOSE *v.* DWARKA NATH BISWAS.
55 I.C. 790=31 C.L.J. 178.

———S. 50 (2)—*Presumption—Rebuttal of statement in rent receipts that holding is* sarasari—*Uniform rent for fifty years.*

The mere statement in some rent receipts that a holding is *sarasari* is not sufficient to rebut the presumption arising under S. 50 (2) of the B.T. Act from the fact that the rent had been unchanged for more than 50 years. (*Fletcher and Panton*, JJ.) SATISH CHANDRA MUSTAFI *v.* ABDUL MAJID MUHAMMAD.
47 I.C. 780 (Cal.).

———S. 50 (2)—*Presumption—Sub-division of tenure—Effect.*

A mere sub-division or amalgamation of an old tenure does not necessarily mean the creation of a new tenure so as to destroy the presumption under S. 50 (2) of the Act as to the fixity of rent. (36 Cal. 287, not foll.) 25 I. C. 228 foll. (*Fletcher and Samsul Huda*, JJ.) PRASANNA DEB *v.* SAFURUDDIN.
46 I C. 433 (Cal.).

———S. 50 (2)—*Resumption—Rebuttal—Amalgamation of tenures—New tenancy.*

Four separate tenures were amalgamated into one in 1853 under a *kabuliyat* which expressly provided that enhanced rent would be paid according to the rate in the village, *held*, that the *kabuliyat* created a new tenancy in 1853 and the presumption arising under S. 50 (2) of the B.T. Act was rebutted. (*N.R. Chatterjea and Newbould*, JJ.) UPENDRA NATH GHOSE *v.* GOPI CHARAN SAHA.
44 I.C. 595=22 C.W.N. 321.

———S. 50 (2)—*Contract—Enhancement of rent.*

A *kabuliyat* of 1840 expressly stipulated that tenants should pay the enhanced rate according to the pargana rate. The *kabuliyat* as a new contract to pay enhanced rent or a contract reciting incidents of former tenancy clearly showed that rent could be enhanced. Therefore it rebutted the presumption in S. 50 (2) of the B.T. Act. (*Chatterjee and Newbould*, JJ.) UPENDRA NATH GHOSE *v* DWARKANATH BISWAS. 44 I.C. 593=22 C.W.N. 322.

———S. 50 (2)—*Rent receipts—Uniform rate for 20 years.*

Where in a suit for enhancement of rent the tenants produce rent receipts showing payment of a uniform rate of rent for over twenty years, the onus lies on the landlord to show that the persons who were formerly on the land were not the predecessors of the tenants and that he has a right to increase the rent. (*Fletcher and Teunon*, JJ.) GOPALCHANDRA BANERJEE *v.* MUHAMMAD SOLEMAN MULLICK.
43 I.C. 856=22 C.W N. 126.

———S. 50 (2)—*Rent—No enhancement for 20 years—Presumption—Contract.*

If a landlord abstains from enforcing enhancement for twenty years or more, this in itself confess no right upon the tenant but merely raises a presumption under S. 50 (2) of the B.T. Act. Where the relationship of landlord and tenant if founded upon a contract, a mere assertion by the tenant in the absence of a clear statutory provision to the contrary cannot confer upon him rights other or higher than those embodied in the contract. (*Sanderson*, C.J. *and Teunon*, J.) BIRENDRA KISHORE MANIKYA BAHADUR *v.* MAHOMAD DOULAT KHAN. 43 I.C. 59=22 C W.N. 856.

———S. 50 (2)—*Presumption where there has been alteration in holding—Duty of tenant to produce rent receipts.*

The presumption under the section may arise even though there has been an alteration in the area of the holding. If the landlord's papers prove that the tenant was holding the land at

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the same rent for more than twenty years before the suit for enhancement, the tenant need not produce his rent receipts in order to avail himself of the presumption under the section. (*Chatterjee and Smither*, JJ.) MADHU SUDAN *v.* JANURUDDIN. **41 I.C. 767 = 22 C.W.N. 999.**

——S. 50 (2)—*Presumption—Rate of rent.*

The section applies to a holding held at a certain rate in which abatement has been allowed in respect of portions of the holding which have gone out of cultivation if the abatement bears to the whole rent the same proportion that the land given up does to the whole area. (*Chitty and Breachcroft*, JJ.) GENU SHEIKH *v.* TARAMANI. **41 I.C. 259 (Cal.).**

——S. 50 (2)—*Uniform rent—Presumption—Non-payment of rent for some years, effect.*

When rent is paid at a uniform rate, the presumption under the section will arise that the tenant held at that rent from the time of Permanent Settlement. A tenant can get the benefit of the presumption under S. 50 (2) although there was no payment of the rent for some of the twenty years immediately before the institution of the suit. (*Fletcher and Richardson*, JJ.) KHSHIROD GOBINDA CHOUDHRY *v.* RAJENDRA NARAIN SHAHA. **38 I.C. 94 = 27 C.L.J. 281.**

——Ss. 50 (2) A. and 115—*Presumption under—Occupancy raiyat.*

An occupancy raiyat, after his name has been so entered in the Record of Rights, is not entitled in view of S. 115 of the Act to the benefit of the presumption arising under S. 50 (2). (*Teunon and Chapman*, JJ.) HARIHAR PERSAD BAJPAI *v.* AJUB MISRI. **22 I.C. 604 = 45 Cal. 930.**

——S. 50 (2)—*Presumption of permanency—Suit not under the Act.*

Though S. 50, Cl. 2 of the B.T. Act applies to suits under that Act, there is nothing precluding the Court from drawing an inference of a *jote* being held at a fixed rent from the Permanent Settlement, from the fact of long payment of rent at an uniform rate. (*Jenkins*, C.J. *and Mookerjee*, J.) PRAN KRISHNA SAHA *v.* MUKTA SUNDARI DASSYA. **21 I.C. 544 = 18 C.L.J. 193.**

——S. 50 (2)—*Presumption—Variation in rent if rebuts—Corresponding variation in area—Effect.*

A small variation in rent though unexplained is not sufficient to rebut the presumption arising under S. 50 (2) of the Act of uniform payment from the time of the Permanent Settlement. A small variation in the rent is sufficiently explained by a very nearly corresponding variation in the area in the absence of circumstances to the contrary. (*Mookerjee and Beachcroft*, JJ.) W.M. GRANT *v.* HAR SAHAY SINGH. **18 C.L.J. 76 = 20 I.C. 53 = 19 C.W.N. 117.**

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——S. 50 (2)—*Presumption.*

Even if a suit is not under the Act, the Court may presume permanency from the facts. A deft, producing even a false pattah is entitled to benefit of presumption of permanency if the facts allow it. *Chatterjea*, J.) MUKATA SUNDARI DASI *v.* CHANDRA BHOWMINI. **10 I.C. 164 (Cal.).**

——Ss. 50 (2) and 103 (b)—*Conflict between—Latter prevails.*

When there is a competition under S. 103 (*b*) and that under S. 50 (2) the former shall prevail, and under S. 115 the tenant cannot ask the Court to draw a presumption from any evidence establishing uniform payment or rent after the permanent settlement. A tenant cannot rely upon the presumption under S. 50 (2) in a suit brought by the landlord a few days prior to the final publication for the enhancement of rent when no question of status was raised in the plaint. (*Das and Bucknill*, JJ.) GOBIND LAL SUJUAR *v* RAM SARAN LAL. **68 I.C. 433 = 2 Pat L.T. 642.**

——Ss. 50 (2) and 115—*Presumption—Effect of.*

S. 115 of the B.T. Act controls S. 50 (2) and an occupancy raiyat is precluded from relying upon the presumption under S. 50 (2) after the publication of the Record of Rights when the landlord brings a suit for enhancement of rent. 26 Cal. 617; 12 C.W.N. 904 and 1 Pat. L.J. 67, dist. 37 Cal. 30; 45 Cal. 930; 22 I.C. 943; 30 C.L.J. 9, foll. (*Coutts and Sultan Ahmad*, JJ.) NARAIN SINGH *v.* BHAGAWAN MAHTON. **54 I.C. 672 = 1 Pat. L.T. 27.**

——S. 51—*Presumption.*

The presumption under S. 51 of the Act applies to successive years but its operation may be arrested at any stage by proof on the part of the tenants that the conditions of the tenancy have altered. (*Mookerjee and Beachcroft*, JJ.) RAJABALA DEBI BAHADURI *v.* SRISH CHANDRA GHOSH. **25 I.C. 552 (Cal.).**

——S. 51—*Prior decision as to amount of rent—Not res-judicata in a subsequent suit for rent.*

The decision in a prior suit for rent as to the amount of rent payable does not operate as res-judicata in a suit for rent for the subsequent year, although it may give rise to a presumption under S. 51 of the B.T. Act; namely, that the rent for the subsequent year remained the same. 5 C.L.J. 92, 12 C.W.N. 904; 11 C.W.N. 1100 distinguished. (*Ross*, J.) PARMESHWAR PRASAD SINGH *v.* NARSING RAI. **72 I.C. 138 = 1 Pat. L.R. 109.**

——S. 52—*Rent claimed on basis of excess in area—Burden of proof.*

In a suit for additional rent on the basis of excess in area the landlord has to prove the excess and this implies he has also to prove what area of land was originally let. The

section is concerned with cases of alteration of area and not miscalculation of area.

As the mere proof that a tenant's rent has been calculated at some date in the past upon the supposition that his holding is of a certain size, a contract cannot be inferred that he is liable at any time to re-assessment upon the actual area. When a letting as the basis of management is proved, the tenant must show the rent was consolidated rent for all land within specific boundaries, but if the landlord fails to prove the original area his suit must fail. (*Rankin and Buckland*, JJ.) MANINDRA CHANDRA NANDI *v.* KAULAT SHAIK.

50 Cal. 957 = 28 C.W.N. 264 = 1924 Cal. 374.

——**Ss. 52 and 105**—*Claim for excess rent for additional area—Enhancement of rent—Question as to, cannot be gone into.*

Where a landlord applied for excess of rent for excess area and also for enhancement of rent, and gave up his claim to the latter but a decree for enhancement of rent was passed, *held*, the Special Judge should not have considered the question of enhancement but should have confined himself to the question of fair and equitable rent having regard to the provisions of S. 52 of the Act. (*N. R. Chatterjee and Pearson*, JJ.) RAM RENU ROY *v.* MIDNAPUR ZEMINDARI CO. LTD. **67 I.C. 1001 = 1923 Cal. 111.**

——**S. 52**—*Enhancement of rent—Excess area—Proof of—Nature of the suit.*

If the landlord can show that since the creation of the tenancy, rent had been assessed, and that when rent was last assessed, the assessment was on the basis of a certain area and that the defendants are in possession of land in which no rent was assessed at the time, then the landlord is entitled to increase of rent. (*Newbould and Panton*, JJ.) RAJA JOGENDRA KISHORE ROY CHOUDHURY *v.* AKTAR.

67 I.C. 998 = 1923 Cal. 278.

——**S. 52**—*Suit for additional rent for excess area—Landlord's duty.*

The landlord must, in a suit for additional rent on account of excess area, prove what the original area was, what was the standard of measurement and that there was excess by the same standard of measurement. If, in a suit for enhancement of rent, the plaintiff also claims additional rent on the basis of the excess area, but gives no necessary evidence under S. 52, he should be allowed to withdraw with liberty to bring a fresh suit. (*N. R. Chatterjee and Panton*, JJ.) INDU BHUSAN SARKAR *v.* JATU MALLIK. **62 I.C. 699 (Cal.)**

——**S. 52**—*Rent — Enhancement of—Increase in area—Proof of.*

To enable a Court to grant an enhancement of rent it must be in a position to find what the area was, at the inception of the tenancy. The landlord must prove that there has been some increase in the area as compared with

the area of th tenancy at its inception. The expression "area for which rent has been previously paid" in S. 52 of the B. T. Act means the area with reference to which the rent previously paid has been assessed or adjusted. (*Beachcroft*, J.) AZIZ KHAN *v.* SARAJBULA DEBI. **35 I.C. 480 (Cal.).**

——**S. 52**—*Rent—Excess area—Additional rent—Onus.*

In a suit under S. 52 of the B. T. Act for additional rent, the onus of proving an increase in "area for which rent had been previously paid" is on the landlord. He may discharge the burden in two ways: (1) By proving that the tenant is in possession of excess land outside the boundaries of land originally settled with him *e.g.*, land obtained by encroachment or alluvial increment; and (2) by proving that the original settlement of the land rent was fixed at a rate per bigha or other unit of measurement or at different rates according to the quality of land and so forth and that in fact and substance the agreement was that the tenant should pay at that rate or at those rates for all the land of which he was put in possession according to its true area, and by further proving that the existing rent is less than the rent payable under such an agreement. The rent might be a consolidated rent, even if it was calculated at so much per measured or estimated bigha. The question would depend upon the intention of the parties, to be gathered in the absence of a written instrument, from all the circumstances. Where, however, it is proved that the tenant is holding land outside and beyond the original boundaries, the question as to the rent being a consolidated rent cannot well arise except possibly in connection with land gained by alluvion. (*Richardson and Walmsley*, JJ.) DHARUPAD CHANDRA KOLEY *v.* HARINATH SINGHA ROY.

27 C.L.J. 563 = 45 I.C. 660 = 20 C.W.N. 824.

——**Ss. 52 and 195**—*Right to apply—Patnidar.*

A patnidar is entitled to make an application under S. 52 of the B. T. Act for abatement of rent. S. 195 of the Act does not prevent S. 52 from applying to the cases. (*Fletcher and Huda*, JJ.) RANJIT SINHA *v.* ABDUR RAHIM KHAN. **45 I.C. 190 (Cal.).**

——**S. 52**—*Holder of temporary tenure—Alluvion and diluvion—Contract not to reduce rent.*

Apart from any question of contract, S. 52 of the B. T. Act is applicable both to tenure-holders and raiyats. But a tenure-holder is at liberty to contract himself out of his right to apply for reduction of rent under S. 52. In the case of a holder of a temporary tenure, S. 52 of the B. T. Act must be read subject to the terms of the contract between him and his landlord. (*Richardson and Beachcroft*, JJ.) SECRETARY OF STATE FOR INDIA *v.* KAMAL KRISHNA PAL. **44 I.C. 222 (Cal.).**

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———S. 52—*Ren — Claim for additional rent—Excess area comprised within boundaries.*

Where rent is fixed for the area within specified boundaries the landlord is not entitled to additional rent on account of excess area merely because the area within the boundaries specified in the pattah is considerably more than the area stated therein. He may however claim additional rent for excess lands outside the boundaries. (*Richardson and Beachcroft*, JJ.) MANJANALI DEBI *v* KAILASH NATH MITRA.
44 .C. 24 (Cal.).

———S. 52—*Applicability of—Permanent lease.*

S. 52 does not apply to a case where there is a permanent lease; but when on measurement it is found to be covered over 1,000 bighas, S. 52 will apply. (*Fletcher and Newbould*, JJ.) RAJA KUMAR MISSRA *v*. RAMA.
40 I.C. 494 (Cal.).

———Ss. 52 and 188—*Suit for rent of areas after they are brought under cultivation permissible and not barred by* S. 188.

Where there was a provision in *akbu yat* permitting free enjoyment of about 50 bighas for two years and stipulating rent thereafter at Rs. 2 per bigha in perpetuity, for so much land as was actually cleared and cultivated and making lessees liable for the rent of the entire area in their possession after the clearing of all the lands, it was held that under the above circumstances a co-sharer landlord could under the general law sue for his share of rent for the entire area only on condition of the other co-sharers being impleaded by him as *pro forma* parties and that the suit would not be barred by S. 188 of the Act, not being one for additional rent for additional area under S. 52 of the Act. 17 Cal. 615; 20 I.C. 659 fol. (*Chatterjee and Newbould*, JJ.) BHOSA *v.* AMINADDI. **21 C.W.N. 371=37 I.C. 847= 22 C.L.J. 46**

———S. 52—*Claim for reduction of rent—Derelict land.*

A tenant is entitled to claim abatement of rent under S. 52 of the Act for partial washing away of his lands save where he expressly waives his privilege in his *kabuliyat*. The benefit of claiming non-liability of rent by a tenant whose lands are washed away for no fault of his, which is based on general principles, is equally available to a tenant holding over. (*Chatterjee and Richardson*, JJ.) RAJENDRA KUMAR ROY *v*. MAHARAJA MANINDRA CHANDRA NANDY. **34 I C. 464= 24 C.L.J 162.**

———Ss. 52 and 188—*Co-sharer's suit.*

A suit by a co-sharer landlord for additional rent is maintainable on the basis of a *kabuliyat* executed prior to this Act. (*Chatterjee and Beachcroft*, JJ.) AHMED ALI *v*. BISSESWAR MUKHTI. **33 I. C. 211 (Cal.).**

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———S. 52—*Addition to holding—Suit for possession or in the alternative for rent.*

In the case of land, not part of the original holding, but subsequently acquired and treated as an addition to the original holding, a suit for possession in the alternative for assessment of rent must be framed under S. 52 of the B. T. Act. (*Jenkins*, C.J. *Mookerjee and Beachcroft*, JJ.) HARACHANDRA MAJUMDAR *v*. RADHA KISHORE MANIKYA.
27 I. C. 19=20 C.L J. 296.

———S. 52—*Suit for additional rent—Excess area—Standard of measurement same—Allowance for difference in system of measurement.*

Where in a suit for additional rent for excess area, it is found that the standard of measurement is the same as when land was let out and a tenant is in possession of the excess area, th Court should not allow any deduction for difference in the systems of measurement. (11 I.C. 212, dist.) (*Coxe and Imam*, JJ.) BAIDYA NATH DUTT *v*. JAWAHIR MANDAL.
23 I.C. 794 (Cal.).

———S. 52—*Applicability—New land taken by tenant.*

S. 52 of the Act applies to cases where the area in excess for which rent had been previously paid is included in the original holding as well as to cases where new land has been taken by the tenant. (*Coxe and Ray*, JJ.) DARIK DHAKAI *v*. ASWINI KUMAR NAG.
20 I. C. 659=18 C.W.N. 952.

———Ss. 52 and 109 (3)—*Question whether excess land is liable to rent or not—Appeal—Second appeal.*

When the question is whether excess land is liable to rent or not, and not what rent should be settled for the excess land, a second appeal is not barred under S. 109 (3) of the Act. (*Richardson and Newbould*, JJ.) GURENDRANATH CHOWDHURY *v*. RAJENDRA KUMAR SINGH. **19 I. C. 924 (Cal.).**

———Ss. 52 and 188—*Suit for alteration of rent—Joint landlords.*

A suit for alteration of rent under S. 52 of the Act is an act which the landlord is authorized to do under that Act within S. 188 and which must be done by all the joint landlords together or by their representative. The representative must, however, be a single individual authorized to act on behalf of the entire body of landlords. Therefore a suit under S. 52 by two members of a Joint Hindu family is not properly instituted. (*Mookerjee and Beachcroft*, JJ.) SATIPROSAD GARGA *v*. RADHA NATH MAITY. **18 I.C. 197=16 C.L.J. 427.**

———S. 52—*Elements necessary for proof under—Land lying within specified boundaries.*

For the operation of S. 52 of the B. T. Act, the landlord must first establish the area for which the tenant was paying rent and then

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the present area occupied by him, the extent of the two being measured according to one and the same standard. The landlord will be entitled to additional rent for excess lands occupied by the tenant unless it is proved that the rent was only a consolidated rent for an area within specified boundaries irrespective of its precise quantity or extent. (*Mookerjee and Carnduff*, JJ.) LAKHI NARAIN *v.* SRI RAM CHANDRA. 15 C.W.N. 921 = 11 I. C. 212 = 14 C L J. 146.

——S. 52 — *Increased area—Landlord is entitled to increased rent.*

If a landlord can prove what was the area upon which rent has been paid and what is the increased area upon which he claims, the Court will give him a decree in respect of the excess. (*Mullick and Bucknill*, JJ.) RADHIKA RAMAN *v.* SATNARAIN KOERI. 74 I. C. 961 (P.).

——S. 52—*Enhancement of rent—Excess area.*

In an enhancement suit, a landlord has to prove simply the excess in the area held by a tenant without the definite direction, under cl. 5, S. 52 of the Act. He cannot claim enhanced rental for excess area where a consolidated *jama* is paid for a holding; but the case is otherwise where rental is paid according to the area held. In both the cases, the measurement must be the same throughout. (*Jwala Prasad*, J.) SHEO KUMAR LAL *v.* RAMPHAL DASS. 68 I.C. 959 (P.)

——S. 52—*Second appeal—Proof of previous measurement, if necessary.*

A second appeal lies where a fair and equitable rent is settlad under S. 52 of the Act. Under the section the question for determination is whether the tenant holds at consolidated *jama* or at a certain rate per bigha. Each party can show whether the tenant holds at consolidated *jama* or at a certain rate per bigha. It is not necessary to show that measurem n was taken when the rate was fixed or even he practice in local area to that effect. (*Mul ck and Jwala Prasad*, JJ.) KESHEO PRASAD SINGH *v.* TRIBUAN.
1 Pat. L.W. 409 = 39 I.C. 611 = 2 Pat. L.J. 276.

——S. 52—*Apportionment of rent—Eviction of tenant.*

No apportionment of rent can be given when the landlord himself evicts a tenant from part of a holding and thus causes its diminution. (*Roe and Jwala Prasad*, JJ.) SHAM NARAIN SINGH *v.* CHANDRA SEKHAR PRASAD.
36 I.C. 528 = 4 Pat. L.W. 86 = 1917 Pat. 346.

——S. 52 (a)—*Enhancement of rent on account of excess area—Claim by landlord—Onus of proof—Existence of prior settlement.*

The tenant's liability to pay additional rent is not limited to cases where the area is in excess of that comprised in the settlement at its inception. It extends to cases where the land is proved by measurement to be in excess of the area for which rent has been previously paid by him under the last settlement. The settlement and record of rights defines the relationship between landlord and tenant in various respects including the area of the holdings for which rent is paid and is presumed to represent what is the relationship between them until the contrary is proved. The effect of such a settlement would be to throw the onus upon the party questioning it, to show that it did not accurately represent the true state of affairs. Where the subsequent settlement shows an area to be in excess of that under the settlement of 1898, the landlord has a right to claim enhancement of rent. (*Miller* C. J. *and Adami*, J.) BISHAN PRAGASH NARAYAN SINGH *v.* ACHAIB DUSADH.
1 Pat. 459 : 66 I.C. 82 = 3 Pat. L.T. 807 = 1922 P. 215.

——Ss. 52 (b), 179 and 188—*Suit by co-sharer tenant—Diluvion—Abatement of rent—Maurasi Mookarari settlement.*

S. 188 has no reference to joint tenants and does not prevent a co-sharer tenant from bringing a suit authorized by the Act. In a *mourasi mokarari* settlement the most reasonable interpretation is that the tenant agreed not to claim reduction on the ground of diluvion. A permanent lease from a person who had made permanent improvements on the property gives permanent rights on the lessee. (*Chatterjee and Mullick*, JJ.) KHETTERIMANI DASI *v.* JIBANKRISHNA KUNDOO. 19 C.W.N 346 = 28 I.C. 510 = 21 C.L.J. 315.

——S. 52 (c)—*Abatement of rent.*

S. 52 (*c*) does not apply when the abetment is claimed not on account of land not found in the possession of the tenant but on account of land included in the tenure out of which some land had to be left uncultivated in order to erect an embankment to protect other land. Though *prima facie* the tenant is entitled to abatement for the whole period when the land lay uncultivated, if the rent has been paid without abatement up to a certain period, he is not entitled to remission for that period but only for subsequent years for which rent has been claimed by the plff. (*Norris and Banerjee*, JJ.) SREE KANTA PERSHAD *v.* IRSHAD ALI SARKAR.
17 I.C. 173 = 16 C.L.J. 225.

——S. 52 (1) (b)—*Suit for rent—Lessee not put in possession of all lands—Abatement of rent can be granted in the suit itself.*

A lessee under a patni lease did not get possession of all the lands comprised in the lease and in a suit for rent he contended that until an enquiry had been made as to the amount of reduction upon a proper apportionment, he was not liable for the rent *Held*, that it was open to the Court in the suit itself to enquire as to

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what reduction of rent should be made upon a proper apportionment, by reason of the deficiency in area. (*Sanderson*, C.J. *and Chotzner*, J.) BENI MADHAB ROY *v.* KRISHNA KAMINI GUPTA. **70 I.C. 177=36 C.L J. 121.**

———**S. 52, Cl. 1 (B)**—*Suit for rent by co-sharer—Application by tenant for reduction of rent.*

Where a co-sharer landlord under an arrangement with the other co-sharer landlords and the tenants, brings a suit for recovery of his share of the rent separately, the tenants are entitled to apply for the reduction of rent on account of reduction in area. 27 C. 417, 21 C.L.J. 315, 17 C. 695, 33 C. 1010, ref. to. (*Coutts and Das*, JJ.) MAHARAJA KESHO PRASAD SINGH *v.* RAMDENI SINGH. **2 Pat 183=4 Pat. L.T. 689=74 I.C. 454=1923 P. 397.**

———**S. 52 (5)**—*Scope of.*

S. 52 (5) is an enabling section prescribing the mode of calculating additional rent for excess area, but it does not preclude other methods of calculation. (*Fletcher and Smither*, JJ.) MIDNAPORE ZAMINDARI COY. LTD. *v.* KRISTO PRASADSUKUL. **46 I.C. 554 (Cal.).**

———**S. 52 (6)**—*"At the time the measurement on which the claim is based, was made"—Meaning of.*

The expression 'at the time, the measurement on which the claim is based, was made' in S. 52 (6) of the Act refers to the measurement upon which the area in excess or defect, is found out before the institution of the suit and not to the measurement at the time of the original settlement or the last preceding adjustment of rent. (*Mookerji*, C.J., *Fletcher*, *Chatterjea*, *Richardson and Ghosh*, JJ.) NILMANI KAR *v.* SATI PRASAD GAYA. **48 Cal. 556=32 C.L.J. 302=61 I.C. 82=25 C.W.N. 230 (F.B.).**

[47 C. 266, overruled].

———**S. 52 (6)**—*Time of measurement—Meaning.*

The words "at the time the measurement on which the claim is based was made" in S. 52 (6) do not refer to the measurement on which the excess area is found out before the institution of the suit for additional rent but refer to the measurement made at the time of the original settlement. Under S. 52 a landlord has to prove that there has been an increase in area for which the rent was previously paid and he must show that the land was measured at the time of the beginning of tenancy by a particular standard of measurement and that there has been an increase in the area by the same standard of measurement. (*N. R. Chatterjee and Duval*, JJ.) UMAD ALI *v.* NAWAB KHAJESH HABIBULLA. **47 Cal. 266=33 I.C. 38=31 C.L.J. 68.**

[Overruled in 48 C. 556=32 C.L.J. 302 (F.B.)]

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———**S. 52 (6)**—*Presumption under—Rent to be determined with reference to area—Consolidated rent.*

If once it be held that the Court was entitled to make the presumption permitted, though not obligatory, by S. 52 (6) of the B. T. Act, it follows that the rent is one to be determined by reference to the area and is not a consolidated rent. (*Jenkins*, C.J. *and Mookerjee*, J.) UMA SINGH *v.* RAI TARINI PROSAD BAHADUR. **25 I.C. 532=19 C.L.J. 457.**

———**Ss. 53 and 57**—*Rent—Contract to pay by monthly instalments.*

A contract to pay rent in monthly instalments and in default to pay interest at 12½ per cent per annum, entered into before the enactment of Ss. 53 and 67 of the B. T. Act, is valid. It is competent to the parties to enter into an agreement for payment of money rent in modification of the provision of four instalments. 18 C. L. J. 175, foll. (*Mookerjee and Rankin*, JJ.) BEHARI LAL BISWAS *v.* NASIMUNNESSA BIBI. **37 C.L.J. 222=73 I.C. 482=1923 Cal. 527.**

———**Ss. 53, 67 and 178 (3) (h)**—*Landlord and tenant—Contract after Bengal Tenancy Act—Rent in monthly instalments.*

Interest on each instalment being illegal after the passing of the Bengal Tenancy Act, a contract entered into between landlord and tenant and providing for payment of rent in monthly kists and for payment of interest on each kist from the time it fell due, is valid only as to the former condition and he cannot claim more than 123 per cent. according to S. 67 and S. 178 (3) (*h*). 22 Cal, 814 P.C., Dist. (*Jenkins* C. J. *and Ray*, J.) MANOHAR MUKHERJEE *v.* KHETRA NATH SABNI. **17 C.W.N. 820=19 I.C. 625=18 C.L.J. 175.**

———**S. 53**—*Rent—Tender — Interest—Cess.*

Under S. 53 of the B. T. Act, the rent for the quarter of the agricultural year becomes due on the first of Aswin when the new year commences. A suit instituted during the currency of the second Bhado is premature in so far as the arrear for the last quarter is concerned. A tender of rent to be valid must include the interest due at the date of the tender though the landlord demanded damages. Under S. 41 read with S. 4 of the Bengal Cess Act, the landlord is entitled to only half an anna in the rupee on rental paid by the tenure holder. (*Coutts and Doss*, JJ.) SYED ABBAS *v.* PREMSUKH DASS. **38 I.C. 878=1 Pat. L.T. 455.**

———**Ss. 53, 65 and 158-B**—*Produce rent—Arrears—Holding.*

Though produce rent is not paid in instalments it can fall into arrears. Under S. 65 of the B.T. Act, holdings do not become liable to sale in execution of a decree for arrears of rent but in execution of a decree for the rent of the holding. So far as S. 65 is concerned there

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seems to be no distinction between a holding which is held on produce rent and a holding held on a money rent. There is no authority for the proposition that only *nagdi* rent can fall into arrear and that as holdings are only liable to sale for arrears of rent, holdings held on produce rent and partly on money rent cannot be sold. (*Coutts and Sultan Ahmed*, JJ.) MANBHARAM RAUT *v.* BABU NOWBAT SINGH. **5 P.L.J. 641=58 I.C. 497=1920 Pat. 257.**

——Ss. 54, 67 and 169 (c)—*Arrears of rent—Interest.*

When rent falls due and is not paid, it becomes an arrear under S. 54 of the B. T. Act, and carries interest under S. 67. The amount payable as interest becomes therefore part of the rent, within S. 169 (c) of the Act. (*Chatterjee and Duval*, JJ.) RAM LAL DAS *v.* BANDI RAM MOOKHOPADHYA. **53 I.C. 996 (Cal.).**

——S. 54—*Tender—Rent—Requisites of a valid tender—Contract Act*, S. 38.

A tender must be unconditional and made at the proper time and place and under such circumstances that the person by whom it is made, is able and willing to do the whole of what he is bound by his promise to do. This rule is good in spite of anything in the B.T. Act. A person making a valid tender cannot be in a worse position than if he had deposited it in Court. (*Holmwood and Chapman*, JJ.) SATI PRASAD *v.* MANMATHANATH.
18 I.C. 442=18 C.W.N. 84.

——Ss. 54 (3), 65 and 158—*Rent decree—Produce rent—Arrears.*

A holding held partly on produce rent and partly on money rents or wholly on produce rent is liable to be sold in execution of a decree for arrears. (*Coutts and Sultan Ahmad*, JJ.) MANHARAN RAUT *v.* NOWBAT SINGH.
5 Pat. L.J. 641=58 I.C. 497=1920 Pat 257.

——S. 55—*Tender of Principal sum without interest is not valid.*

S. 55 of the B. T. Act, does not abrogate the rule that a creditor cannot be compelled to accept any sum in part satisfaction of his dues. That section treats not of tender but of appropriation. Where a tenant tendered the amount of arrears of rent due without the interest thereon, the landlord is not bound to accept even the principal amount of rent. The principal and interest constitute one indivisible and entire claim. A tender must be unconditional or, at all events, free from any condition to which the creditor may rightfully object. (*Mookerjee and Rankin*, JJ.) BEHARI LAL BISWAS *v.* NASIMUNNESSA BIBI. **37 C.L.J. 222=73 I.C. 482=1923 Cal. 527.**

——Ss. 55 (3) and 66—*Ejectment for arrears.*

A landlord receiving rent for one year cannot eject for arrears due previous to that year, as

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the claim for ejectment for non-payment of rent for those years must be deemed to have been waived. (14 Cal. 33; 2 C.L.J. 540, foll.) (*Chatterjee and Teunon*, JJ.) KALANAND SINGH *v.* GUNPAT SINGH. **11 I.C. 974=16 C.W.N. 104.**

——Ss. 56 and 58 (3)—Res judicata—*Rent decree.*

The fact that a decree exists against a tenant for rent in respect of which receipts are claimed under S. 56 of the Bengal Tenancy Act operates as *res judicata* of the fact of its payment in subsequent proceedings held under S. 58 (3) of the Act. (*Mullick*, J.) NAIK PANDEY *v.* BIDYA PANDEY. **1 Pat. L.J. 149=34 I.C. 149=3 Pat. L.W. 415.**

——S. 58 (3)—*Inquiry under—Nature.*

A summary inquiry held by a Collector under S. 58 (3) of the Act on the application by a tenant is a prosecution for an offence within the meaning of the I.P.C. 9 C.W.N. 816, foll. (*Mullick*, J.) NAIK PANDEY *v.* BIDYA PANDEY. **1 Pat. L J. 149=34 I.C. 149=3 Pat. L.W. 415.**

——S. 58 (3)—*Collector, enquiry by, into case of withholding receipt by landlord—Transfer of enquiry to sub-divisional officer—Jurisdiction—Cr. P. C., S. 476.*

A Collector can transfer an enquiry under S. 58 (3) of the Act into a case of withholding receipts by a landlord to a sub-divisional officer who is authorized by the Government to discharge the functions of the Collector under that section. Consequently the sub-divisional officer is within his powers, if, in that enquiry he records a proceeding under S. 476 of the Cr. P.C. (*Sharfuddin and Coxe*, JJ.) PHANINDAR SINGH *v.* EMPEROR. **40 Cal. 465=14 Cr. L.J. 139=18 I.C. 891=17 C.W.N. 871.**

——S. 58 (5)—*Discharge of landlord—Suit for compensation.*

The landlord's right to recover compensation by proceedings in a Civil Court on a tortious action is not barred by his discharge under S. 58 (5) without an award of compensation. (*Mullick*, J.) NAIK PANDEY *v.* BIDYA PANDEY. **1 Pat. L.J. 149=34 I.C. 149=3 Pat. L.W. 415.**

——S. 60—*Ijaradar is not a proprietor—Section does not apply—Bengal Land Registration Act, Ss.* 78, 79, 81.

S. 60 of the B.T. Act deals with cases where rent is due to the proprietor of an estate. Where the rent is not due to the proprietor the plaintiff being not a proprietor but an ijaradar, and as ijaradar, the plaintiff could not get his name registered under the land Registration Act, S. 60 has no application. No doubt "proprietor" is defined in S. 3, cl. (2) of the B.T. Act as a person owning an estate or part of an estate. But S. 60 lays down that the

receipt of the person registered under the Land Registration Act "as proprietor of that estate" shall be a sufficient discharge, so that although a proprietor may be the owner of an estate or a part of an estate the section merely speaks of tha proprietor of that estate which indicates an entire estate. The case where rent is payable to two or more proprietors the extent of whose interest is required to be registered under the Land Registration Act, and which is dealt in the second part of S. 78 of that Act is not dealt with by S. 60 of the Bengal Tenancy Act. The object of S. 60 of the Bengal Tenancy Act appears to be to afford indemnity to tenants who pay rents to the person whose name is registered under the Act, and to prevent them from pleading in defence to a claim for rent by such person that the rent is due to a third person but the section does not appear to have provided for cases where the names of all the part proprietors have been registered under the Land Registration Act. (*Chatterjee and Suhrawardy, JJ.*) PROBODH CHANDRA MITTER *v.* HARISHCHANDRA NASKAR. **27 C.W.N. 888 = 78 I.C. 7 = 1924 Cal. 124.**

———S. 60—*Landlord and tenant—Right of co-sharer to maintain in separate suit for share of rent.*

A co-sharer landlord who has been duly registered under the Land Registration Act can maintain a separate suit for the share of the rent; Section 60 precludes the tenant from setting up the title of a third party to receive the rent sued for. (*Fletcher and Newbould, JJ.*) BHUPENDRA NARAIN DUTT *v.* MANMOTHA NATH MITTER. **41 I.C 859 (Cal.).**

———S. 60—*Landlord and tenant—Suit for rent—Plea of tenant that a portion of rent is due to a co-sharer—Whether sustainable.*

Under S. 60, it is open to a tenant to plead in a suit for rent by landlord who has been registered under the Land Registration Act as the full proprietor of the land that the rent is not payable to the plff. but that part of it is due to a co-sharer of the plff. (*Chatterjee and Richardson, JJ.*) SHYAMA CHARAN *v.* MUSTAFIZAR RAHMAN. **41 I.C. 769 (Cal.).**

———Ss. 60 and 153—*Appeal, second—Conflicting claim to land.*

In a suit for rent where the plff. is a lessee and the tenant deft, claims to pay rent not to the plff. but to his lessor, a question of title between the parties having a conflicting claim thereto is raised on the ground that both parties are claiming to be tenants of the same degree under the same person. But when the plff. is a mere mortgagee, no such question arises. (*Mullick, J.*) MOHAMED HOSAIN *v.* HIRAMAN RAUT. **24 I.C. 118 (Cal.).**

———Ss. 60 and 167—*Landlord and tenant—Sale of patni tenure in execution—Amendment of* darpatni—*Extinction of* se-patni.

A *se-patni* is not a protected tenure under S. 160 of the B.T. Act and is necessarily extinguished by the extinction of the *dar-patni* and the *se-patnidar* cannot thereafter continue to collect rent from the tenants. (*Holmwood and Chapman, JJ.*) MAKHAN DAS *v.* RAM CHANDRA. **18 I C. 372 = 17 C.W.N 1064.**

———S. 60—*Landlord's name registered in a certain share—Collection in larger share—Landlord, if can claim larger share.*

Though the landlord's name is registered in respect of a certain share, still he is entitled to sue for a larger share if it is shown that he has collected rent in respect of a larger share. (*Caspersz and Coxe, JJ.*) SHARASHI MOHAN ROY *v.* RAMESH CHARAN ROY. **18 I.C. 451 (Cal.).**

———S. 60—*Land Registration Act (Ben. VII of 1876), Ss. 78 and 81, how far affect S. 60 of the B.T. Act.*

An unregistered part proprietor of an estate is not entitled to succeed as against the deft. who relying upon S. 60 has discharged his debt by payment of rent to the registered proprietor. S. 60 governs a suit for rent where the plff. claims rent as proprietor of an estate, though rent is sought to be realized on the basis of a contractual obligation. The restrictions imposed by S. 81 upon S. 78 of the Land Registration Act cannot be incorporated by implication into S. 60 of the B.T. Act. (*Mookerjee and Coxe, JJ.*) ADDUR AZAI *v.* KANTHU MULLICK. **38 Cal. 512 = 10 I.C. 467 = 13 C L.J. 693.**

———S. 60—*Fixed rates tenancy—Entry in Record of Rights against tenants—No presumption under S. 50 arises—Payment at uniform rate.*

Where the Record of Rights is against them, the tenants are not entitled to the benefit of the presumption afforded by S. 50, cl. 2 of the Act. Where the tenants could not have the benefit of the presumption of S. 50 (2) of the Act he has to establish by evidence that the rate of rent has not been changed from the time of Permanent Settlement; in other words once the Record of Rights shows that the tenant is not a tenant at a fixed rate of rent, it is for the tenant to establish by cogent evidence that his rent or rate of rent has not been changed from the time of the Permanent Settlement. (*Das and Adami, JJ.*) MAHARAJAH BAHADUR KESHO PD. SINGH *v.* ISSER DUBEY. **71 I.C. 15 = 1 Pat. L.R. 32.**

———S. 60—*Suit by Registered proprietor—Payment to third person is no answer.*

Where the plaintiff is a registered proprietor the defendant cannot plead discharge of the rent by payment to a third person. Payment to such third person for a long time is no answer to the claim for rent. (*Coutts and Das, JJ.*) MT. ADAYABATI *v.* JANARDHAN THAKUR. **3 Pat. L.T. 756 = 68 I.C. 288 = 1922 Pat. 507.**

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———Ss. 60 and 149—*Registered proprietor—Suit for rent—Tenant, if can plead* jus tertii.

The meaning of S. 60 of the Act is that in a suit for rent by a registered proprietor it is not open to the tenant to plead *jus tertii*. He can only deposit the rent under S. 149 and ask that there may be an adjudication as to the claim of the person whose title he sets up. (*Mullick and Bucknill*, JJ.) NAND KOER *v.* JODHAN MAHTON.

2 P L.T. 337=61 I.C. 386=1921 Pat. 201.

———S. 60—*Suit by registered proprietor—Plea that third person is entitled to receive the rent.*

A tenant cannot plead in defence to a suit brought by the registered proprietor that a third person is entitled to receive the rent, nor can he decide to whom he must pay rent. (*Dass*, J.) BABU HIRA SINGH *v.* LALA KESHWAR LAL.

52 I.C. 523 (P.).

———Ss. 60 and 72—*Registered mortgagee—Suit for rent—Plea of payment to a third person.*

Plff. sued the tenants for recovery of rents on the strength of an ijara executed by the original proprietor in his favour. Deft. Pleaded payment to the auction purchaser of the proprietary right sold for arrears of revenue. *Held* that plff. being a registered mortgagee, defts. could not plead payment to a third person under S. 60 of the B. T. Act. S. 72 of the Act had no application to the facts of the case. (*Chamier*, C. J. *and Sharfuddin*, J.) MUKHDUWAN *v.* KHAIRAT AHMED.

43 I.C. 182=3 Pat. L.W. 245.

———S. 60—*Landlord and tenant—Suit for rent—Right of third person to receive rent—whether can be set up by tenant.*

The section must be strictly interpreted as otherwise, the object for which it was enacted will not be gained, that object being to coerce proprietors to register their names under the Land Registration Act. The object is of great importance for the efficient administration of land revenue. (*Chapman and Atkinson*, JJ.) HARDAYAL MAHTON *v.* WAZIR MAHTON.

41 I.C. 97=3 Pat L.W. 351.

———Ss. 61 and 62—*Deposit—One tenancy—Deposit for three tenancies—Deposits accepted by Court—Landlord, if can question validity of deposits.*

If a tenant holds in fact one tenancy under his landlord but makes three deposits in Court on the allegation that he holds three distinct tenancies, it cannot be maintained that the deposits are valid within the meaning of S. 61 the B.T. Act. The landlord can question their validity, although they were accepted by the Court under S. 62. 20 C.L.J. 153, dist. (*Mookerjee and Panton*, JJ.) SATISH CHANDRA DAS *v.* UMES NARAIN CHAUDHURI.

64 I.C. 696=34 C.L.J. 501.

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———Ss. 61 and 62—*Deposit of rent by tenant—Receipt given by Court—Deposit under S. 61—Valid tender.*

The receipt given by the Court on accepting deposit under S. 62 of the B. T. Act cannot operate as a valid acceptance unless the tenant is entitled under S. 61 of the Act to make the deposit. If the tenant deposits his rent without first making a tender or without fulfilling any other conditions which make S. 61 applicable, the landlord's only remedy is to sue for rent ignoring the deposit. The deposit cannot be treated as tender of rent so as to suspend the running of interest. (*Newbould and Panton*, JJ.) JADUPATI CHATTERJEE *v.* KHETRA NATH PAUL.

48 I.C. 448 (Cal.).

———S. 61—*Right of under-tenant to deposit rent.*

Under-tenants directed in their under-lease to pay the rent payable by their lessor to superior landlord, are persons authorized to make deposits of that rent under the section. (*Fletcher and Newbould*, JJ.) SHIBA PRASAD ROY *v.* SAMARENDRA NATH BOSE.

41 I.C. 431 (Cal.).

———S. 61—*Rent payable in cash.*

Where the parties have agreed that upon failure to deliver the rent payable in kind, a fixed sum is to be paid in lieu thereof, the entire rent is payable in cash, and in a case of this description S. 61 of the Act applies. The change in S. 61 of the latter Act from S. 46 of the old Act does not really indicate a change in Law. (*Mookerjee and Beachcroft*, JJ.) SASIBHUSAN DEY *v.* UMAKANTO DEY.

20 C L J. 153=25 I.C. 171=19 C.W.N. 1143.

———S. 61—*Deposit of rent without interest—Whether sufficient deposit.*

A deposit of rent without the interest then due is not sufficient to constitute deposit within S. 61 of the B. T. Act. (*Teunon*, J.) SHYAM CHANDRA *v.* BHANGA DEI.

23 I.C. 777 (Cal.).

———S. 61—*Withdrawal of deposit—Effect.*

Withdrawal of deposit of rent by an authorized agent amounts to a recognition of status as tenants. (*Chamier*, C.J. *and Sharfuddin*, J.) MOTI HARI CONCERN, LTD. *v.* LACHMI PRASAD.

42 I.C. 826=1917 Pat. 83.

———S. 61—*Encumbrance.*

The interest of an unregistered purchaser of an entire occupancy holding is not an encumbrance within the meaning of S. 161. 19 C.W.N. 1217 ref. (*Chamier*, C.J. *and Sharfuddin*, J.) MAHARAJAH SIR RAMESHWAR SINGH BAHADUR *v.* RAGHUNANDAN KHAWAS.

1 Pat. L.J. 403=38 I.C. 337=2 Pat. L.W. 365.

———S. 61 (b)—*Deposit of rent—Application for—Copy of notice to landlord if to be filed.*

A tenant is not bound in an application for deposit of rent, to file also a copy of the notice

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to be served upon the landlord. (*Mookerjee and Teunon*, JJ.) TARA CHARAN MAITY *v.* PARESH CHANDRA MOOKERJEE.
11 I.C. 723=14 C.L.J. 116.

——Ss. 61 (d) and 195 (e)—*Deposit of rent—Patnidar.*

A patnidar can avail himself of S. 61 (*d*) of the Act notwithstanding S. 195 (*e*) of the Act, and he can therefore deposit rent, where he has a *bona fide* doubt as to the person entitled to receive the patni rent. (*Mookerjee and Beachcroft*, JJ.) BATO KRISHNA RANO *v.* JANKINATH PANDE. **41 Cal. 1000=24 I.C. 71=18 C.W.N. 916.**

——Ss. 65, 148 (h) and 195—*Landlord and tenant—Continuance of relationship — Patni tenure—Rent accrued due before sale of zemindari—Sale of tenure — Deposit of rent by darpatnidar—Bengal Regulation* VIII *of* 1819.

The right to bring a tenure or holding to sale under S. 65 of the B. T. Act depends upon the relationship of landlord and tenant both at the date of the decree for arrears of rent and when the decree is sought to be executed under S. 65. A person to whom rents are due and who obtains a decree after parting with his rights as landlord, can enforce it only as a money decree and not under S. 65 of the B. T. Act. When under S. 13 of the Bengal Patni Regulation a darpatnidar has deposited the arrears of rent due to the Zemindar, the lien given to him by S. 13 sub-section (4) is not affected by any proceedings under S. 65 of the B. T. Act, the Patni regulation being a self-contained Act is excluded from the operation of the B.T. Act by S. 195 of that Act. (*Ameer Ali*, J.). FORBES *v.* MAHARAJA BAHADUR SINGH.
41 Cal. 926=25 C L J. 434=23 I.C. 632=18 C.W.N. 747=(1914) M.W.N. 397=27 M.L.J. 4=1 L.W. 1039=41 I.A. 91=12 A.L.J. 653=16 M.L.T. 380 (P.C.).
[On Appeal from 35 Cal. 737=7 C.L.J. 652]

——S. 65—*Scope of—Rent sale—Enforcement of charge.*

S. 65 of the Act intends what is explicitly laid down in subsequent sections of the Act, that is, those in Chap. XIV, namely that the charge should be enforced by the sale of the tenure or holding free of incumbrances, and if in any case, the decree for rent either has not been or cannot be enforced by the sale of the tenure or holding, the charge created by S. 65 cannot be enforced in any other way. 22 Cal. 364 ref. (*Mookerjee and Panton*, JJ.) SITAL CHANDRA MAJAI *v.* PARBATI CHARAN CHAKRABARTHI.
35 C.L J. 1=69 I.C. 841=1922 Cal. 32.

——S. 65—*Decree for rent—Decree-holder ceasing to be Zemindar—Execution.*

The decision of the Privy Council in *Forbes* v. [illegible] *Singh*, 41 Cal. 926 merely [illegible] **60 and 187**—who had ceased to be the [illegible] *Bahadur* in exec[illegible] sued for rent, could decides that a person [illegible] of se-pit as a rent decree. Zemindar at the time he not enforce his decree for ren[illegible]

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It does not decide that the decree was not a decree for rent for other purposes. (*Greaves and Newbould*, JJ.) DWARKA NATH CHAKRAVARTHI CHOUDHURY *v.* AUTUL CHANDRA CHAKRAVARTHI CHOUDHURY.
46 Cal. 870=51 I.C. 922=29 C.L.J. 465.

——S. 65—*Tenure—Liability for arrears—Hindu widow.*

A tenure or holding in the hands of the reversionary heirs after the death of a Hindu widow, remains liable in respect of decrees for its arrears of rent obtained against the widow who held the land as heiress of her husband. (*Teunon and Sheepshanks*, JJ.) ASUTOSH MOOKERJEE *v.* AKHOY KUMARI DEBI.
34 I.C. 581 (Cal.).

——S. 65—*Rent when a first charge—Relationship of landlord and tenant essential.*

Rent is a first charge on the holding only so long as the relationship of landlord and tenant subsists. A landlord who has parted with his proprietary rights is not entitled to invoke the special remedies under S. 65 of the B. T. Act. But he can still execute his decree as a money decree. (*Jenkins*, C.J. *and N.R. Chatterjee*, J.) RAM PRASAD *v.* RAM CHARAN SINGH.
27 I.C 601 (Cal.).

——S. 65—*Bengal Patni Taluqdar's Regulation, S.* 17.

S. 65 of the Tenancy Act, does not contradict S. 17 of the Patni Regulation. (*Mookerjee and Beachcroft*, JJ.) BASANT KUMAR BOSE *v.* KHULNA LOAN COMPANY. **20 C.L.J. 1=26 I.C. 197=19 C.W.N. 1001.**

——S. 65—*Applicability—Decree for rent against original tenant—If can be executed against holding in the hands of purchaser from him.*

Where a landlord obtained a decree for rent against the original tenant for rent due by him before his transfer of it to another and the decree did not in terms provide for sale of the holding in execution of the decree, *held*, that S. 65, B.T. Act, did not apply as under the terms of the decree it was not open to the landlord to execute the decree against the holding. (*Brett and Richardson*, JJ.) SUSILA SUNDARI DASI *v.* INDU BHUSHAN BOSE. **18 I.C. 328 (Cal.).**

——S. 65—*Rent—First charge—Lease of coal lands.*

A decree for rent in respect of coal lands and not agricultural lands, cannot give the decree holder a first charge on the lease-hold property in arrears. (*Chitty and Teunon*, JJ.) SUNDAR DAS KHETRY *v.* RAGHUNATH DAS.
15 I.C. 288 (Cal.).

——S. 65—*Darpatnidar in possession.*

A darpatnidar or his transferee in possession, is himself bound to pay the rent. So he cannot claim a first charge on the sale proceeds of

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the tenure, for the rent so paid by him in case the tenure is sold on account of his default to pay any one instalment. He is not even entitled in equity to subrogation by payment of such rent in such a case because the tenure itself is brought to sale on account of his default. (*Woodroffe and Carnduff*, JJ.) RAM JIBAN *v.* TAJUD-DIN. 9 I.C. 489=15 C W.N. 404.

——S. 65 and Chapter XIV—*Auction purchaser—Not liable to pay antecedent arrears of rent.*

Under the Bengal Tenancy Act the auction-purchaser, purchasing the holding in execution of the decree for rent, is not liable to pay off the antecedent arrears of rent, and any mention or statement of such arrears, which accrue due prior to the date of the suit is wrong, and sale will be set aside on proof of material injury. The tenant judgment-debtor is alone liable for the previous arrears of rent and not the auction-purchaser. The tenure is not liable for the arrears of rent, which accrued due prior to the institution of the suit or between the date of the suit and the date of sale. (*Mullick*, J. *and Bucknill*, J.) SAIYID MOHAMMED JAWAD HUSSAIN *v.* MAHARAJA KUMAR GOPAL NARIN SINGH.
2 Pat. L T. 248.

——Ss. 65 and 158—*Power of sale in execution.*

A holding can be sold in executing a decree passed for arrears of partly *nagdi* and partly *Bhaoli* rent. The decree is rent decree when passed with respect to arrears of a holding held partly on *nadgi* and partly on *bhaoli* rent. (*Coutts and Sultan Ahmad*, JJ.) MANBHARAN RAUT *v.* NOWBHAT SINGH.
5 Pat. L.J. 641=58 I. C. 497=1920 Pat. 257.

——S. 65—*Road cess—Rent—Decree for road cess—Purchaser in execution of the decree—Priority over mortgagee.*

"Rent" includes "road cess" and so under S. 65 a decree for road cess is a first charge upon the tenure. An auction purchaser in execution of such a decree has a title paramount to the mortgagee of the tenure. (*Mullick*, J.) CHIODITTI *v.* QUADRESS.
36 I.C. 498=1 Pat. L.J. 161.

——S. 65—*Landlord assigning proprietary right.*

When the landlord leases his proprietary right in a holding to another and the latter purchases the holding in execution of a decree for rent subsequent to lease against the tenant, there is no interest of the tenant left in the holding for the lessor landlord to proceed against, in execution of a decree against the tenant in a suit brought to recover rent due from the tenant prior to the lease of the proprietary interest. (*Atkinson*, J.) NAG NARAIN *v.* JUNG BAHADUR SAHAI. 34 I.C. 903 (Pat.).

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——S. 66—*Suit for more than one year's rent—Decree for ejectment on default.*

In a suit under S. 66 of the B T. Act, if the landlord asks for more than one year's rent, he disentitles himself to the remedy under the section. A decree under S. 66 of the B. T. Act, directing that the landlord should be entitled to recover possession of the land, four years arrears of rent, decreed in the suit, are not paid is bad. (*Walmsley and Panton*, JJ.) MUKTA KESHI DEBI *v.* GIRI BALA DEVI.
47 I.C. 1006 (Cal.).

——S. 66—*Expiry of time originally fixed—Extension of.*

A Court can grant an extension of the time limited by S. 66 of the B. T. Act, even where the application for the extension is made after the expiry of the period prescribed by the section. (*Teunon and Newbould*, JJ.) SARADA CHARAN BASAR *v.* JURO RAM MANDAL.
44 I.C. 473 (Cal.).

——S. 66—*Withdrawal of a portion of claim—Application on second appeal—Whether may be granted.*

Where in a suit for rent and for ejectment the plff. found that he could not succeed in his prayer for ejectment, unless he withdrew a portion of his claim for rent and therefore prayed in second appeal to withdraw it, the application at that stage was rejected. (*Teunon*, J.) SHYAM CHANDRA *v.* BHANGA DEI.
23 I C. 777 (Cal.).

——S. 66 (2)—*Decree for ejectment executed pending appeal—Payment of, within 15 days after confirmation by appellate Court—Effect.*

Pending an appeal against a decree for ejectment under S. 65 of the B. T Act, the decree was executed and possession taken by the landlord. *Held*, that proceedings in execution could not be nullified by the judgment-debtor's depositing the decretal debt within 15 days of the dismissal of the appeal. The term "date of the decree" in sub-S. (2) of S. 66 of the Act does not mean the appellate decree when the decree appealed against has been executed. 25 Cal. 311, ref. (*N. R. Chatterjee and Panton*, JJ.) ABDUL RASHI MANDAL *v.* SHAHRALI MULLAH. 46 Cal. 1032=54 I.C. 659=23 C.W.N. 974.

——S. 66 (2)—*Non-occupancy raiyat—Ejectment—Under-raiyat paying decretal amount.*

S. 66, cl. (2) of the B. T. Act, contemplates that the payment made, to be a good payment, must be a payment by or on behalf of the judgment-debtor. The Court cannot, therefore accept the tender of the amount by an under raiyat and prevent the execution of the decree. (*Teunon and Newbould*, JJ.) BROJENDRA NATH MITRA *v.* ARMAN SHEIKH.
44 I.C. 977=27 C.L.J. 478.

BENGAL TENANCY ACT (VIII of 1885), S. 66.

——S. 66 (2)—*Decree directing payment of decretal money and ejectment on default—Amendment of—Effect of.*

Where a judgment was passed directing that the arrears for 4 years should be paid within 15 days, and that in default a decree for ejectment should be made, and the judgment-debtor paid one year's arrears and got the decree amended, *held* that "Decretal money" in S. 66 meant only the amount as limited by the amendment and that the amendment was rightly granted. (*Caspers and Sharfuddin*, JJ.) JAGAT CHANDRA *v.* MUNSEFALI.

13 I.C. 671 (Cal.).

——S. 66 (3)—*Scope.*

S. 52 of the Bengal Landlord and Tenant Procedure Act, has no reference to S. 66 (3) of the Act. (*Chatterjee and Newbould*, JJ.) SHEIKH HUNAI *v.* SARAT CHANDRA DUTTA.

38 I.C. 467=21 C.W.N. 749.

——S. 67—*Kabuliyat before the passing of the Act—Section does not apply—Rent sale—Purchaser takes holding with ordinary incidents of tenancy.*

Where a kabuliyat has been executed prior to the B.T. Act the provisions of S. 67 of the Act are not applicable to the case and the interest on arrears of rent must be calculated as provided in the contract. But where the holding has been sold in execution of a rent decree, the purchaser takes the holding with the ordinary incidents of a tenancy. A stipulation for the payment of interest at an exhorbitant rate cannot be supposed to be an incident of a tenancy which would attach to it even after a sale for arrears of rent. The distinction between usual and unusual terms of a contract of tenancy is a distinction which should be taken into consideration in determining whether the incident in question continues to attach to the tenancy notwithstanding its sale for arrears of rent. 26 C. 315; 24 C. 37, Rel. (*Chatterjee and Cuming*, JJ.) ANNADAMOYE DEBI *v.* SAUDAMINI DEBYA. **37 C.L.J. 338= 27 C.W.N. 502=72 I.C. 719= 1923 Cal. 559.**

——S. 67 — *Interest provided for in Kabuliat—Higher rate if barred.*

If the rent fell into arrears, the Kabuliat provided "that the tenant should pay interest at six pies per rupee per mensem on the cash rent and one cotta per rupee per month on the rent payable as paddy." The landlord on the ground that the tenants were holding over since the first term of kabuliyat had expired, the rent having fallen in arrears, demanded higher rate of interest on the ground that a new contract might be deemed to have been entered into by the holding over of the tenants: *Held* no higher rate of interest could be allowed and S. 178 does not help the appellant on the ground that there was a fresh contract. S. 67 is not limited in its application where rent is payable quarterly. There is no reason why

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S. 67 should not be applicable to interests on arrears of paddy rent paid annually, because the definition of arrears of rent in S. 54, cl. 3 is not confined to money rent. (*Newbould and Panton*, JJ.) BRAHAMOYI *v.* SOMARALI.

68 I.C. 109=1922 Cal. 77.

——Ss. 67, 68 and 178—*Kabuliyat before Act—Holding over after Act—Intsrest cannot be claimed at Kabuliyat rate.*

Where an agricultural lease expires before the passing of the Act and the tenant holds over he is not liable after the passing of the Act to pay interest as stipulated in the original *Kabuliyat*. In a suit for arrears of rent for a period subsequent to the passing of the Act the plaintiff claimed interest at 150 per cent. per annum as stipulated in the original lease. *Held*, that the rate was exhorbitant and could not be allowed. (*Chatterjea and Suhrawardy*, JJ.) CHANDRA NATH SARMA *v.* SHEIKH INAMDI. **64 I.C. 118=34 C.L.J. 369.**

——Ss. 67 and 179—*Permanent* mokurari *lease—Evidence of.*

S. 67 of the B.T. Act applies only where the tenancy is not a permanent *mokurari* tenancy situated within a permanent settled area. There were no clear expressions in the *kabuliya* showing that the rent was fixed except a provision that if at any time the land on measurement be found larger in area than that on the basis of which the rent was fixed, the additional rent payable for such additional area would be in proportion to the rent originally fixed: *Held*, that the lease was a permanent *mokurari* lease. (*Shamsul Huda*, J.) KRISTO DAS LAW *v.* KALIMUDDIN BHUIA.

55 I.C. 507 (Cal.).

——S. 67—*Interest on rent—Accrual of.*

Under the B. T. Act interest on rent accrues not from the expiration of the dates on which the instalments are payable according to the kists stipulated in the lease, but from the expiration of the quarters of the agricultural year in which the instalments fall due. (*Fletcher and Huda*, JJ.) SRISH CHANDRA RAY *v.* JADUNATH KUNDU.

45 I.C. 532 (Cal.)

——Ss. 67 and 179—*Interference by Civil Courts in Revenue matters—Hard bargains.*

(*Chatterjee, J.*) In spite of the general rule of non-interference, Civil Courts may, on grounds of equity interfere in cases of unconscionable bargains, *e.g.*, a demand of 75 p. c. interest from a tenant besides damages. S. 179 does not exclude the equitable jurisdiction of Civil Courts. Courts should not interfere unless the extortionate character of the bargain is an evidence of fraud. (*Chatterjee and Richardson*, JJ.) NABA KUMAR CHAKRAVARTHY *v.* ABDUL JABBAR MIAN.

36 I.C. 721=20 C.W.N. 112.

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——S. 67—*Interest on instalment due.*

In a *Kabuliyat* executed before the Act came into force the rate of interest was mentioned but if no mention was made in a subsequent *sulehnamah* which created no new tenancy, the interest would be as in *Kabuliyat*. If it created new tenancy, S. 67 will govern the case. (*Chatterjee and Richardson*, JJ.) ABDUL HAMID *v.* ABDUL MIJI.

32 I.C. 710 (Cal.).

——S. 67—*Applicability of—Interest.*

S. 67 of the Act affects the contract between the parties. The restriction on the liability of the tenants to pay interest is a matter of substantive right and cannot be called a provision applicable to suits. (*Chatterjea and Greaves*, JJ.) KRISHNA LAL *v.* SALIM MAHOMED.

27 I.C. 614=19 C.W.N. 514.

——Ss. 67 and 68—*Interest—Arrears of rent—Contract to the contrary.*

In the absence of any express or implied contract to the contrary, a landlord is entitled to benefit of general law with regard to interest on the arrears of rent (*i.e.*,) to the benefit of Ss. 67 and 68 of the B. T. Act. S. 67 applies to Mokarari leases in the absence of contract to the contrary. (*Teunon*, J.) AJEB BHARTHI *v.* RAM NARAIN SINGH.

23 I.C. 108 (Cal.).

——Ss. 67 and 68—Bhowli *rent—Nature of—Interest on arrears.*

Claim for *bhowli* rent is in the nature of claim for damages for breach of contract, and it becomes ascertained as soon as the Court has adjudicated upon it. S. 67 applies to rents payable quarterly, and not to *bhowli* rent. Interest can be claimed on arrears of *bhowli* rent apart from S. 67, B.T. Act; but the Court may refuse it, having regard to circumstances of the case and the conduct of the plff. (*Mullick and Jwala Prasad*, JJ.) BISESHAR NATH *v.* HUSAIM RAO. 4 Pat. L.J. 282=50 I.C. 506=1919 Pat. 242.

——Ss. 67 and 68—*Interest or damages—Order for — Nature — Evidence — Record of Rights.*

Under Ss. 67 and 68 the Court must either charge interest or damages on the arrears of rent. When Record of Rights is produced in evidence opposite party should be allowed to rebut presumption the arising from it. (*Mullick and Atkinson*, JJ.) KANDHDEO NARAIN SINGH *v.* DEWA SINGH.

36 I.C. 955 (Pat.)

——S. 68—*Interest under.*

Courts refuse to decree interest if deft. has made a proper tender of rent. (*Fletcher and Newbould*, JJ.) BHUPENDRA KUMAR SARKAR RANI KISSORI DASI. 40 I.C. 614 (Cal.).

BENGAL TENANCY ACT (VIII of 1885), S. 70.

——S. 69—*Appraisement—Procedure.*

An application for appraisement or division being generally made when the landlord and tenants are on bad terms. The proper course in such cases is not to depute an amin, but a responsible officer. The division or appraisement must be made by him on the spot at or very near the time when crops are ripe for harvest. (*Gruning*, M. C.) MAHARAJ KUMAR GOPAL SARAN NARAIN SINGH *v.* KESHWAR SINGH. 1 Pat. L R. 128 (Cr.).

——S. 69—*Appraisement — Discretion — Exercise of.*

An order under S. 69, B. T. Act for appraisement of crops depends upon the conditions of sub-clauses (1) (*a*) and (*b*) being fulfilled and thereafter upon the discretion of the Collector. In case of an allegation that the raiyats had deliberately grown a poor crop and misappropriated the same, the landlords are entitled to an enquiry into the allegation. (*Morshead*, M.C.) SHEFAYET HUSAIN *v.* NEMCHAND MAHTON.

1 Pat. L.R. 125 (Cr.).

——Ss. 69 and 70—*Costs separate, order as to—By Sub divisional officer—Jurisdiction.*

A Sub-divisional officer has no jurisdiction in a proceeding under Ss. 69 and 70 of the Act to pass an order for costs; the Commissioner or the Board could set it aside. (*Moude*, J.) *In re* SHEW KULAM.

42 I.C. 482=1 Pat. L.W. 694.

——Ss. 69 and 70—*Jurisdiction to decide the question of the applicability of the system of appraisement or* batai *to a holding.*

A Sub-Divisional Officer has jurisdiction to decide a dispute as to whether the system of appraisement or *batai* applies to a holding. (*Chapman and Roe*, JJ.) THAKUR SINGH *v.* PARDIP SINGH. 39 I.C. 648=2 Pat. L.J. 183.

——S. 69 (3)—*Disobedience of order of Collector—Direction for prosecution can be made by Collector.*

If an order passed by a Collector under S. 69 (3) prohibiting the removal of crops, is disobeyed, he has power to follow the procedure laid in S. 195 or S. 476, Cr. P.C. and to direct prosecution under S. 188, I.P.C. (*Teunon and Ghose*, JJ.) LAKSHAN BOR *v.* NARANARAIN HAZRAH. 48 C. 1086=23 Cr. L.J. 231=66 I.C. 71=25 C.W.N. 617.

——S. 70—*Rent suit if barred by Collector's order under S. 70 without notice to parties.*

A Collector's order under S. 70 of the Act, without hearing the parties is *ultra vires* and is no bar to a subsequent suit for rent. (*Coutts and Sultan Ahmed*, JJ.) DEO LAL MEHTO *v.* BIBI RAKAYIA. 57 I.C. 572 (Pat.)

BENGAL TENANCY ACT (VIII of 1885), S. 70.

——S. 70—*Order enforceable as decree—Meaning*—Batai *amin—Appraisement or division of crops—Omission to give landlord notice.*

Omission to give landlord notice under S. 70 (2) is not a mere irregularity, but is an illegality which vitiates the whole proceeding. An amin appointed to appraise or divide the crops is not entitled to sell them without a final order. An order passed finally and enforceable as a decree is necessary in case of *batai* as in case of appraisements. An order merely directing the deposit of the sale proceeds of crops in the Treasury without direction to pay them to any one is enforceable as a decree within S. 70 (5). 10 C.L.J. 599, appr. (*Atkinson and Coutts, JJ.*) SURAJ PRASAD MAHAJAN *v.* KARU SINGH.
4 Pat. L J. 325=51 I.C. 763=1919 Pat. 400.

——S. 70—*Appraisement.*

An order by a Court of competent jurisdiction properly vested in it cannot be said to be *ultra vires* for want of proper adherence to the small details in the procedure prescribed for its exercise. An order passed under S. 70 of the B.T. Act, is final under Cl. 4 of the section and cannot be attacked in a Civil Court. (*Jwala Prasad*, J.) MOHAN SAHU *v.* SAGUNI SINGH.
49 I.C. 845 (Pat.).

——S. 70—*Jurisdiction of the Sub-Divisional Officer to decide the dispute of the applicability of the system of appraisement to a holding.*

The jurisdiction of a Sub-Divisional Officer to decide a dispute as to the applicability of the appraisement system must be specifically impugned in the plaint and not by researches made from the pleadings of parties by the Court. The decision that a holding is *batai* is final and the action of the Court in that decision is not without jurisdiction. (*Chapman and Roe*, JJ.) THAKUR SINGH *v.* PARDIP SINGH.
39 I.C. 645=2 Pat. L.J. 183.

——S. 70 (5)—*Finality of order.*

Under S. 70 (5) of the B.T. Act, the order of an officer having the powers of a Collector is final, though it is competent the Commissioner to exercise supervision where the officer acts without jurisdiction. (*Gruning*, M.C.) MAHARAJ KUMAR GOPAL SARAN NARAIN SINGH *v.* KESHWAR SINGH.
1 Pat. L.R. 128 (Cr.)

——S. 71 (4)—*Appraisement—Removal of crops by tenant.*

Where tenants remove a crop without having the same properly appraised, a presumption arises against them and the landlord is entitled to the full measure of the crop as at least of the best crop in the neighbourhood of a similar character for that harvest. (*Atkinson*, J.) BALAK MAHTON *v.* MANTURA RAM DUBAY.
52 I.C. 267 (Pat).

——S. 71 (4)—*Wrongful removal of* batai *crops—Penal Code, S. 424.*

BENGAL TENANCY ACT (VIII of 1885), S. 73.

S. 71 (4) of the B.T. Act provides the Courts with a definite rule to determine the value of the crops wrongfully removed by the tenant and if a tenant dishonestly removes the crops of a field which he holds under the *batai* system he is liable to be convicted under S. 424 of the Penal Code. (*Chamier*, C.J. *and Sharfuddin*, J.) KULDIP PANDAY *v.* RAM NATH SINGH.
1 Pat. L.J 353=35 I.C. 491=3 Pat. L.W. 43=17 Cr. L.J. 315=1917 Pat. 71.

——S. 72—*Rent—Suit for—Plea of payment to landlord's vendor—Notice of transfer before payment.*

In a suit for rent by a patnidar vendee the defence was that payment had been made to vendor. *Held*, that if the deft. had in fact notice of the transfer before payment, the plffs. suit must succeed apart from the question of service of notice under S. 72 of the B. T. Act. (*Sanderson*, C. J. *and Panton*, J.) MIDNAPORE ZEMINDARY CO., LTD. *v.* SYAMA CHARAN CHOWDHURY.
49 I.C. 993=28 C.W.N. 855.

——S. 72—*T. P. Act, S. 50—Rent paid to transferee.*

A payment of rent to the landlord though not in good faith under S. 50, T. P. Act, is valid as against a transferee from the landlord unless the transferee has given notice before payment. (*Mookerji and Beachcroft*, JJ.) JHARU CHARAN MAITY *v.* SRIDAN CHANDRA MAHAPATRA. **40 I.C. 655=29 C.L.J. 205.**

——S. 72—*Transferee—Right to rent.*

S. 72 of the B. T. Act, applies to a case in which a transferee claims rent and it protects the tenant to whom the transferee has given notice of the transfer. (*Coutts and Das*, JJ.) MT. ADAYABATI *v.* JANARDAN THAKUR.
3 Pat. L T. 756=68 I.C. 288=1922 P. 607.

——S. 72—*Joint liability of tenant and his transferees for rent.*

S. 73 of the Act provides for the joint liability of both the tenant and his transferees to the landlord for rent. (*Jwala Prasad*, J.) SURAJ NARAIN SINGH *v.* SUGRA.
37 I.C. 842 (Pat.).

——S. 73—*Non-transferable occupancy holding—Acquisition of limited interest—Effect of.*

The provisions of S. 73 of the B. T. Act, cannot be applied by analogy to the case of a non-transferable occupancy holding. Where the transferee of a non-transferable occupancy holding has acquired the title of a tenant by adverse possession of the limited interest, the landlord cannot claim rent from the transferor. (*Beachcroft and Walmsley*, JJ.) JATINDRA NATH SINHA *v.* BINODE BEHARI.
52 I.C. 289 (Cal.).

BENGAL TENANCY ACT (VIII of 1885), S. 74.

——S. 74—*Abwab*—Peishkush—*Legitimate origin—Antiquity—Purpose of payment.*

The levy of *peishkush* by the proprietor of an estate from the *nisfidars*, (holders of resumed *lakheraj* lands) and *lakherajdars* is not illegal, as *peishkush* cannot be regarded as an imposition in the nature of an abwab but a right to it is an interest in the land which can be acquired by prescription. From the peculiar situation and character to the lands of the estates and the antiquity and the purpose of the payment of *peishkush* it may be inferred that a right to levy it had legitimate contractual foundation at its inception. (*Richardson and Beachcroft*, JJ.) LAKSHMI NARAYAN RAI *v.* THE SECRETARY OF STATE.

45 Cal. 866=22 C.W.N. 824=44 I.C. 497=28 C.L.J. 285.

——Ss. 74 and 75—*Abwabs—Several items considered in arriving at consolidated rent in abwabs.*

Where a consolidated rent was noted at the head of a *kabuliyat* as payable by the tenant, *Held*, that the several items excepting what was stated to be *jama* (rent) which were taken into consideration to arrive at the total amount were not abwabs or illegal exactions by the landlord. (*Fletcher and Richardson*, JJ.) NAGENDRA LAL *v.* HAMDOO MIA.

37 I.C. 965 (Cal.).

——S. 74—*Compromise—Enhancement of rent in kind.*

The rent in kind payable according to the Record of Rights was one-half of the produce. The landlord sued for more than half the produce. But the defts. did not resist the claim but entered into a compromise whereby they agreed to give the plff. the share claimed, as they had been doing for a long series of years. *Held*, that the compromise was not illegal. (*Mookerjee and Beachcroft*, JJ.) FAZAL IMAM *v.* SUKOR MAHTON.

25 I.C. 442=19 C.L.J. 333.

——S. 74—*Imposition of illegal cess.*

A *Kabuliyat* provided in addition to the fixed annual rent for payment of certain articles and labour and also that on default of the articles or the labour, plff. may recover a fixed sum in addition to monthly rent. *Held*, the sum which is the equivalent of the articles and labour is in the nature of an imposition. Whether a certain sum claimed is illegal or not depends on the intention of the parties. If on a fair interpretation the sum can be claimed as part of the total rent, the tenant is bound to pay it. Where in a certain lease the rent was described as a certain sum assessed at a valuation per bigha and there was an entirely distinct clause providing for the return of certain articles or their value *held* the latter was an illegal cess. (*Mookerjee and Holmwood*, JJ.) MATHURA PRASAD *v.* TATA SINGH.

40 Cal. 606=17 I.C. 177=16 C.L.J. 296.

BENGAL TENANCY ACT (VIII of 1885), S. 76.

——Ss. 74 and 76—*Abwab—What constitutes.*

When a patni lease, executed before the Act came into operation, provided that the patnidar should supply wood for the cooking of a certain idol, the value of the wood was not incorporated with and did not form part of the rent and so is abwab, 33 Cal. 683; 10 C.W.N. 527; 12 C.W.N. 175 Foll.; 26 Cal. 611, dist. (*Mookerjee and Coxe*, JJ.). RANJIT SINGH *v.* BAHADUR SINGH.

9 I.C. 47=13 C.W.N. 568.

——S. 74—*Abwab—Cash and kind payments.*

Where the consideration for the use and occupation of land was a certain amount of rent in cash and the price of certain other articles, the latter must be considered as part of the *jama* payable for the land. (*Das*, J.) RUDRESHWARI PRASAD SINGH *v.* DHANA MAHTO.

52 I.C. 119 (P.).

——S. 75—Patni taluk—*Money rent—Suit for declaration—Rights of tenant.*

The plffs. alleged that they held a *patni taluq* on payment of certain money rent to the defts. but that the latter took proceedings under the Patni Regulation for realization of the value of certain paddy rents which, they said were payable, for the taluq, and the plffs., in order to save their tenure from sale deposited the amount claimed by the defs. The Plffs. accordingly sued for a declaration that the *taluq* bore money rent and not paddy rent, and for refund of the amount realized from them in excess of the proper rent. *Held*, that S. 75 did not apply and therefore did not bar the suit; first, because the excess rent realized from the plff. by proceedings under the Patni Regulations could not be said to be exacted by the *Zemindar* within S. 75 which evidently contemplated exactions by means other than process of law; and *secondly* because the section did not take away the right of a person, from whom rent had been realised in excess, to recover such excess amount from the landlord within the ordinary period of limitation. (*N. R. Chatterjee and Richardson*, JJ.) NAGENDRA LAL CHOUDHURY *v.* RAJA BIBI.

17 I.C. 304=17 C.W.N. 374.

——Ss. 76 and 182—*Homestead land—Building of permanent house by raiyat is not prohibited.*

It is competent to an occupancy tenant to erect a pucca house on homestead land not held as part of the occupancy holding in the absence of a local custom or usage to the contrary. S. 76 of the B.T. Act does not prohibit the tenant from so building. (*Mookerjea*, A.C.J. *and Fletcher*, J.) SURENDRA NATH SAHA *v.* NAKOOR CHANDRA CHAKRAVARTHI.

64 I.C. 716 (Cal.).

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——— S. 76—*Essentials.*

To make S. 76 applicable it must be shown by the tenants that the tank was excavated for the purpose of agriculture or for the use of men and cattle employed in agriculture. Mere proof that it was for drinking purposes is not enough. (*Ghosh and Pratt*, JJ.) GOBINDA CHANDRA BASU *v.* KAMIJUDDI SOYAL.
17 I.C. 115=16 C.L.J. 127.

———S. 84—*Tenant holding under* kabuliyat *—Custom—Acquisition of land for market.*

If a tenant holding under a *kabuliyat* is bound according to custom, to give up possession of the land in the event of a market being established thereon, the landlord is not bound to adopt the procedure in S. 84 of the B.T. Act for acquiring the land for such a purpose. That section is inapplicable to a contract contained in a *kabuliyat*. If the custom is proved the tenant cannot insist on the landlord taking only a specific portion and no more. (*Chatterjee and Panton*, JJ.) BEJOY CHANDRA ROY *v.* PRODYAT KUMAR TAGORE.
55 I.C. 268 (Cal.).

———S. 85—*Ryot at fixed rate—Can make a permanent settlement with under-ryot.*

It is competent to a ryot holding at fixed rates to make a permanent settlement with the under-ryot or to give the under-ryot a transferable and heritable interest in the land. (*Newbould and Panton*, JJ.) PROBODH CHANDRA DAS *v.* BIRSINHA BAGANI. 71 I.C. 319 (Cal.)

———S. 85—*Under-raiyat — Agreement to accept heritable tenancy is not against section.*

An under-raiyat does not violate the terms of S. 85 by agreeing to accept a heritable tenancy from his landlord and when such an agreement is entered into the landlord cannot ignore the agreement and eject the heirs of the under-raiyat on the ground that the tenancy is not heritable. (*Mookerji*, A.C.J. *and Fletcher*, J.) AMINALLA CHAUDHARI *v.* MAHABA ATI.
60 I.C. 457=25 C.W. 715.

———S. 85—*Sub-Lease—Voidable or void.*

Sub-lease of a holding at fixed rates is not governed by S. 85. A perpetual lease is an encumbrance which could be avoided by an execution purchaser, even if he be the superior landlord, before he can take *khas* possession. (*Newbould*, J.) PRASSANNA DASYA *v.* AMAR CHAND ROY. 57 I. C. 580 (Cal.).

———S. 85—*Occupancy raiyat—Lease—Intermediate tenure—Suit for rent.*

Deft. No. 2 an occupancy raiyat, granted a lease of his holding to deft. No. 1 for a term beyond that allowed by S. 85 of the B. T. Act. Subsequently deft. No. 2 created an intermediate tenancy in favour of the plffs. also unauthorized by S. 85. *Held*, that deft. No. 2 and plffs. having agreed between them that the rent was payable to the plffs., it was not competent to deft. No. 1 to contest the plffs. claim

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for rent. 20 C. L. J. 148, foll. (*Fletcher and Duval*, JJ.) KARTICK MONDAL *v.* MADHAB MONDAL. 55 I.C. 615 (Cal.).

——S. 85—*Suit for possession by under-raiyat—Lease for more than 9 years.*

An under-raiyat having given a lease exceeding 9 years, cannot sue the landlord for possession of the land included in the lease. (*Chatterjee and Panton*, JJ.) PROHLAD CHANDRA SHAH *v.* AMBICA CHARAN SHAHA.
50 I.C. 514 (Cal.).

——S. 85—San ba san *meaning of.*

Where a registered under-rayati lease mad provision for the holding passing from generation to generation and for being sold by the under-raiyat was styled *san ba san* (year to year) lease and it was also stipulated that if the under-raiyat ever reduced the rent by raising an objection he would be liable for eviction without notice. *Held* that the under-raiyati lease was a permanent lease and contravened S. 85 of the B. T. Act, and therefore was invalid. (*Walmsley and Panton*, JJ.) KARIM BAKSH *v.* ABDUL JABBAR MIAJI.
47 I.C. 416 (Cal.)

———S. 85—*Lease in contravention of—Right of grantor to question.*

Per Beachcroft, J.—A sub-lease by a raiyat for a period exceeding nine years, whether registered or not is void, and can be questioned by the grantor or a person claiming through him. Where a *raiyat* giving a permanent sub-lease, in contravention of the provisions of S. 85 (2) of the B. T. Act induces his lessee to accept on the faith of representation that his own status is such as to validate such a sub lease. he cannot afterwards be allowed to prove in a suit against a sub-lease that his status was other than what he represented. (*Mookerjee and Beachcroft*, JJ.) CHANDI CHARAN NATH *v.* SOMLA BIBI.
22 C.W.N. 179=44 I.C. 264=28 C.L.J. 91.

———S. 85—*Under-raiyat—Lease exceeding nine years—Right to recover possession.*

An under-raiyat holding an under-lease for more than nine years has, i he is in possession of the property on the basis of the lease, sufficient to interest in the property sue for its possession. (*Fletcher and Newbould*, JJ.) GURMONDAL *v.* PEARI MAJHI. 43 I.C. 864=22 C.W.N. 61.

———S. 85—*Illegal sub-lease—Registration—Admissibility—Right dispossession.*

When a sub-lease is in excess of the period sanctioned by section and is registered, it is inadmissible in evidence. But when it is followed by possession of the property by the sub-lessee, he can sue for possession if subsequently dispossessed. When a tenant cannot or does not produce his lease in writing he can establish his tenancy from possession and other circumstances. (*Fletcher and Richardson*, JJ.) GONESH *v.* THANDA NAMSUNDARNI RAM.
38 I.C. 489=25 C.L.J. 539.

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———S. 85—*Lease in contravention of,*

A lease granted in contravention of S. 85, clause (1) of the Act is operative as between the grantor and the grantee (*Mookerjee and Cuming*, JJ.) BAMAN DAS BHATTACHARYA *v.* NILMADHAB SAHA. 44 Cal. 771 = 20 C.W.N. 1340 = 33 I.C. 754 = 24 C.L.J. 541.

—— —S 85—*Sub-lease—Renewal.*

In spite of S. 85, a raiyat may agree with under-raiyat to renew the sub-lease, on the same terms, after the expiry of the first term. (*Mookerjee and Chatterjee*, JJ.) LANI MIA *v.* MUHAMMAD ISAM MIAH. 33 I.C. 448 = 20 C.W.N. 948.

———Ss. 85 and 18—*Application.*

S. 85 does not apply if S. 18 applies. (*Mookerjee and Beachcroft*, JJ.) HARI MOHAN PAL *v.* ATUL KRISHNA BOSE. 32 I.C. 503 = 19 C.W.N. 1127.

———Ss. 85, 161-A and 167—'*Sub-Tenancy*' *meaning of—Ejectment of sub-tenant—Notice.*

'Sub-tenancy' under S. 161-A clearly means a tenancy directly under the tenancy which has been purchased. Such an inferior sub-tenancy is not an encumbrance within the meaning of the section. No notice under S. 167 is necessary for the ejectment of an under-raiyat not holding under a registered lease. (*Holmwood and Chapman*, JJ.) SARADA KIRPA LALA *v.* CHATINYA CHARAN D 25 .C. 741 (Cal.).

———S. 85—*Applicability—Permanent tenancy created by one under-raiyat in favour of another—Validity.*

S. 85 does not apply as between an under-raiyat of the 2nd and another of the 3rd degree and consequently the former can validly create a permanent tenancy in favour of the latter. (*Jenkins*, C.J. *and Chatterjee*, J.) GURU DAS *v.* KALI DAS CHANGA. 24 I.C. 287 = 18 C.W.N. 882.

———S. 85—*Sub-lease by raiyat—Rights of landlord.*

The section enables the landlord to impeach a sub-lease granted by a raiyat contrary to S. 85. The under-raiyat therefore holding a permanent lease from the raiyat can sue for possession or defend his possession against the raiyat or his representatives, who cannot contend that the lease was contrary to S. 85. Where the raiyat was an auction purchaser under a money decree and the under-raiyat was a permanent lessee under him, the latter is not bound by the subsequent proceedings to set aside the auction sale if he was no party to it and his lease would not be affected in any way. (*Mookerjee and Carnduff*, JJ.) SADHAN SARDAR *v.* LAKAN MONDAL. 15 I.C. 255 (Cal.).

———S. 85—*Raiyat granting lease to under-raiyat—Stipulation to grant fresh lease on expiry of term, if null and void.*

BENGAL TENANCY ACT (VIII of 18 S. 85.

A stipulation in a lease deed by a raiyat to an under-raiyat to give a fresh lease on the expiry of term is not in contravention of S. 85 of the Act and the under-raiyat could not be ejected without an option given him to take a fresh lease at a fair rent. (*Rampini and Handley*, JJ.) ALI MOHAMMAD *v.* NAYAN RAJAH. 16 C.L.J. 122 = 13 I.C. 912 = 16 C.W.N. 620 (note)

———Ss. 85 and 86 (b)— *Ejectment—Surrender.*

If a raiyat surrenders his holding, the landlord may re-enter by ejecting the under-raiyat without a notice to quit if unprotected by these sections. (*Chatterjea*, J.) MUKTA SUNDARI DASI *v.* CHANDI BHOWMIN. 10 I.C. 164 (Cal.)

———S. 85 (2)—*Sub-lease contrary to the section is inadmissable in evidence—Doctrine of estoppel.*

A sub-lease contrary to S. 85 (2) is in admissible in evidence. A raiyat cannot question the validity of a sub-lease purporting to be a perpetual lease, where it was not vitiated by misrepresentation as to extent of interest or status as raiyat. (*Teunon and Newbould*, JJ.) RAJ KUMAR DAS *v.* PANCH KOERI TALUKDAR. 60 I.C. 507 (Cal.)

———S. 85 (2)—*Sub-lease exceeding nine years, if admissible in evidence—Effect of.*

A sub-lease granted by a raiyat after the passing of the Bengal Tenancy Act for more than nine years is inadmissible in evidence to prove the tenancy of an under-raiyat but it does not take away the right of the under-raiyat to defend possession or recover his possession if dispossessed. (*Chatterjea and Panton*, JJ.) NANDA KUMAR *v.* DINA BHANDU NANDI. 59 I.C. 748 (Cal.).

———S. 85 (2)—*Sub-lease for more than nine years—Registration—Effect of.*

S. 85 (2) of the B.T. Act is a statutory bar to the registration of a sub lease by a raiyat for a term exceeding nine years. The consent of the landlord cannot validate the registration and even if registered it is inamissible in evidence. (*Newbould*, J.) MADAN MONDAL GOCHI *v.* TARINI CHANDRA BANERJEE. 54 I.C. 625 (Cal.)

———S. 85 (2)—*Under-raiyati lease—Term of more than 9 years—If admissible.*

Although an under-raiyati lease for more than nine years cannot be admitted in evidence, the under-raiyat can prove his tenancy *aliunde*, such as by possession and payment of rent. (*Teunon and Greaves*, JJ). NIBARAN CHANDRA MIRDHA *v.* RAM CHARAN MANDOL. 51 I.C. 928 = 29 C.L.J. 479.

———S. 85 (2)—*Evidence Act*, S. 91.

A sub-lease after the Bengal Tenancy Act for over 9 years though registered erroneously

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under S. 85 is inadmissible to prove the tenancy under Evidence Act, S. 91. The sub-lessee may however prove it by other evidence. (*Chatterjee and Richardson*, JJ.) NAZIR ALI SHIKHDAR *v.* BANSI BADAN.
23 C.W.N. 435=42 I.C. 621=29 C.L.J. 388.

——S. 85 (2).

An under-raiyati lease for a term exceeding nine years is wholly void, and the lessee cannot get possession of the land even from a trespasser. (*Chatterjee and Chapman*, JJ). BAISNAB CHARAN DE *v.* SARAT CHANDRA KAR. **38 I.C. 487=24 C.L.J. 538.**

——S. 85 (2)—*Sub-letting—No consent of landlord—Rights of under-tenant.*

Where an occupancy raiyat gave a registered sub-lease of the holding in contravention of S. 85 (2) of the Act, it was inoperative as against the superior land-holders though registered. As deft. was in possession even before the invalid sub-lease, his status was that of the under-raiyat but if he was ejected without the consent of the superior landlords, the sub-lease is invalid against them, consequently the sub-tenancy could not be treated as an encumbrance within S. 161, B.T. Act or as protected interest under S. 160 (c). (*Mookerjee and Beachcroft*, JJ). FAKIR CHANDRA SINGH ROY *v.* BANAMALI SAIN. **18 C.L.J. 252=21 I.C. 104=19 C.W.N. 412.**

——S. 85 (2)—*Sub-lease by raiyat—Validity.*

The effect of S. 85 (2) of the Act is to render invalid and not binding even as between the parties any sub-lease by a raiyat for more than 9 years. (*Carnduff and Beachcroft*, JJ.) TELAM PRAMANIK *v.* ADUSHAIKH.
18 I.C. 791=17 C.W.N. 468.

——S. 85 (2)—*Sub-lease—Registration—Effect of.*

A sub-lease by a raiyat creating tenancy for more than 9 years though registered against the provisions of S. 85 (2) is treated as not registered and therefore the document is not admissible in evidence and does not affect the holding. (*Jenkins*, C. J. *and Chatterjee*, J.) JARIP KHAN *v.* DURFA BEWA.
16 C.L.J. 145=15 I.C. 476=17 C.W.N. 59.

——S. 85 (2)—*Sale of occupancy holding—Reversal of sale.*

An occupancy holding sold in execution of a money decree was leased out to the plff. by the purchaser. The deft. applied for the reversal of the sale in which he did not implead the plff. In a suit to recover possession by the plff., defendant pleaded that the basis of the plff.'s claim having been upset, he had no enforceable title against him. *Held*, that the reversal order did not affect the plff, as he was not a party to the proceedings. (*Mookerjee and Carnduff*, JJ.) SADHAN SARDAR *v.* LAKAN MANDAL. **15 I.C. 255 (Cal.)**

BENGAL TENANCY ACT (VIII of 1885), S. 86.

——S. 85 (3)—*Previously created sub-lease—Duration of.*

A Sub-lease by a raiyat created before the passing of the Act is valid up to 9 years after passing of the Act. Though the title of the tenant may continue beyond that period by reason of possession of the land and payment of rent, the sub-lessee is always liable to be ejected on a proper notice to quit. (*Beachcroft*, J.) SAMARADDI *v.* KALI CHANDRA PAL.
50 I.C. 713 (Cal.).

——S. 85 (3)—*Under-raiyat allowed to hold over—Forcible ejectment—Legality.*

The representative in interest of the *raiyats* who granted lease to under-raiyats are not entitled as between themselves and the under-raiyats to take up the position that the grant was inoperative; Sub-s. 3 applies as between landlord and under-raiyat. The tenancy of an under-raiyat who has been allowed to hold after the termination of nine years from the commencement of B.T, Act and to continue in occupation as tenant is to be terminated in accordance with the provisions of the law and the tenant cannot be forcibly ejected from the land. (*Mookerjee and Caspersz*, JJ.) ARAB ALI *v.* RACHMADDI. **10 I.C. 552=13 C.L.J. 656.**

——S. 86—*Occupancy holding—Surrender of portion of holding sold by tenant to a stranger—Transferee not bound.*

A surrender by a raiyat of a part of his holding which has been already sold to another does not bind the transferee. A person who has parted with his interest in property cannot surrender it in favour of the landlord and he cannot confer upon the landlord a higher right than he could have passed to any other person by assignment. The case of the surrender of the entire holding is different because then the tenancy would cease to exist and the landlord would be in a position to re-enter. (*Chatterjee and Panton*, JJ.) CHAILESH CHANDRA BOSE *v.* UMESH CHANDRA RUDRA. **37 I.C. 574=24 C.W.N. 573.**

——S. 86—*Surrender of portion of holding sold—Ejectment by vendee.*

An occupancy raiyat having sold a portion of his holding surrendered his tenancy in respect of the portion sold, to his landlord who thereupon sued his vendee for *khas* possession: *Held* the vendor having transferred a portion of the holding had nothing left in him in that portion to surrender. (*Beachcroft and Greaves*, JJ.) SHEIK DUSTAR ALI *v.* RAM KUMAR GOPE.
30 I.C. 378=24 C.W.N. 571.

——S. 86—*Surrender of part, if valid.*

Surrender of a part by a joint tenant, if not a valid surrender is a valid transfer where the deed is stamped and registered. (*Chatterjee and Newbould*, JJ.) ABDUL KARIM MEAN *v.* MIAGAN MANJI. **32 I.C. 232 (Cal.).**

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———S. 85—*Non-transferable occupancy holding—Transfer of portion—Forfeiture—Surrender of portion—Re-entry by landlord—Subordinate rights.*

There is no forfeiture where a *portion* of a non-transferable occupancy holding is transferred. On a surrender of a portion of the holding, the landlord is entitled to re-enter that portion notwithstanding any subordinate rights which the *raiyat* may have created upon the portion and notwithstanding the former's being aware of such subordinate's rights. (*Stephenson and Holmwood*, JJ.) GANGA CHANDRA CHOUDHURY *v.* ALAK CHAND SAHA.
18 I.C. 996=17 C.W.N. 698.

———S. 86—*Surrender by registered tenant—Collusion—Right of unregistered co-sharer tenant—Validity of surrender.*

It is not open to a registered tenant of an occupancy holding to surrender, in collusion with the landlord a part of the holding in favour of the latter with the express object of destroying the right of his co-sharers or their transferees and thus prejudice their title and possession; and the surrender cannot be accepted as a good foundation for an action in ejectment by the landlord. 14 C.W.N. 229, dist. (*Harrington and Mookerjee*, JJ.) GOVINDA CHANDRA ROY *v.* UDAY CHANDRA SUT.
15 I.C. 264 (Cal.)

———S. 86—*Surrender—Effect of.*

The rights of surrenderee of a Hindu widow under S. 86, B. T. Act are subject to the rules of Hindu Law on the point. (*Atkinson and Coutts*, JJ.) JUMMA PRASAD SINGH *v.* BASDEO SINGH. 50 I.C. 872=4 Pat. L.J. 548=1919 Pat. 245.

———S. 86 (b)—*Surrender after—Transfer of portion of interest to third party amounts to an assignment—Effect of—Subsequent surrender.*

A surrender by the tenant after he has dealt with a portion of the holding in favour of another person amounts to no more than an assignment in favour of the landlord. But there is no reason why the landlord should be in a worse position than if the assignee were a third party and why he should not acquire all the interest which was left in the tenant at the date of the transfer. (*Chatterjea and Pearson*, JJ.) AMIRUDDIN MAHAMAD *v.* SANKAR BORMAN. 67 I.C. 91=1922 Cal. 56.

———S 86 (1)—*Raiyat—Under-lease not for fixed period—Surrender of holding—Registration—Suit against lessee.*

A raiyat holding under a lease not for a fixed period can surrender the holding under S. 86 (1) of the B. T. Act. Such a surrender need not be by an instrument even though the tenant held under a registered lease. When a raiyat surrenders his holding and the surrender is accepted by the landlord who enters into possession, the tenant cannot sue to recover the holding from persons to whom the landlord has let it after surrender. (*Chatterjee and Duval*, JJ.) POORAN CHANDRA *v.* INDRA SENI. 34 I.C. 752=37 Cal. 129.

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———S. 86 (5) and (6)—*Non-transferable holding—Sale of—Right of landlord to surrender.*

A landlord, to whom a part or whole of a non-transferable holding is surrendered after it is sold, can eject the vendee if he has not been guilty of fraud or collusion. *Per Teunon*, J:—A raiyat surrendering the holding to a landlord after selling a portion to a stranger, does not entitle the landlord to eject the transferee as the transfer of a part of the holding, is an encumbrance or limitation of the raiyat's right in the whole and operates to prevent a surrender. *Per Curiam*:—Courts will not allow a landlord to benefit by his own fraud. (*Teunon and Richardson*, JJ.) DUSTURALI *v.* RAM KUMARI GOPE. 30 I.C. 567=22 C.W.N. 972.

———S. 86 (5), (6) and (7)—*Occupancy holding—Transfer of part of—Surrender.*

A transfer of a part of an occupancy holding does not entitle the landlord to eviot the purchaser though he is not bound to recognize him as a tenant. An occupancy tenant cannot surrender the portion of the holding sold by him to a stranger. (*Woodroffe and Mookerjee*, JJ.) ANANDA MOHAN ROY *v.* GURUDAYAL SINGH. 49 I.C. 979=22 C.W.N. 965.

———S. 86 (6)—*Encumbrance.*

Per *Newbould*, J.—Sale of a part of non-transferable holding does not create an encumbrance within S. 86 (6). (*Chatterjee and Newbould*, JJ.) ZAMIR MUNSHI *v.* BISSESWARI DEBYA. 40 I.C. 544=25 C.L.J. 480.

———S. 86 (6)—*Scope of.*

Per *Richardson*, J.—The section invalidates surrenders by tenant to landlord, so as to defeat claims of encumbrancers. (*Fletcher and Richardson*, JJ.) RAM KUMAR *v.* RAMESHWAR SHAH. 38 I.C. 523 (Cal.).

———S. 86 (6)—*Right of landlord to* khas *possession.*

A landlord is not entitled to khas possession against the transferee, if the transferor has made a surrender without the transferee's consent as the surrender is not valid. (*D. Chatterjee and N.R Chatterjea*, JJ.) HASUNI BIBI *v.* SADIR MAMUND SARKAR.
30 I.C. 252 (Cal.).

———S. 86 (6)—*Encumbrance—Meaning of.*

Per *Woodroffe*, J. *Coxe*, J. (*contra*)—'Encumbrance' is one that is binding between the tenant and the encumbrancer and not binding on a landlord. In case of surrender the landlord is equitably bound by the tenant's transaction by way of a mortgage. Neither landlord

BENGAL TENANCY ACT (VIII of 1885), S. 86.

nor the tenant can derogate against his grant. (*Woodroffe and Coxe*, JJ.) MAHOMED NARASURUDDIN SARKAR *v.* SHEIKH ISAB.
27 I.C. 1003=21 C.L.J. 183.

——S. 86 (6) and 88—*Occupancy holding—Usufructuary mortgage—Encumbrance.*

Where a portion of a non-transferable occupancy holding was usufructuarily mortgaged with a covenant not to surrender, but the mortgagor surrendered it. *Held*, the encumbrance being by a registered deed and surrender being effected with the consent of the plaintiff, it was invalid under S. 86 (6) of the B. T. Act. An encumbrance on a part of a holding is an encumbrance on the whole. (*D. Chatterjee and Beachcroft*, JJ.) RAM UDAR SINGH *v.* MR. WILLIAM COXE.
27 I.C. 564=19 C.W.N. 268.

——S. 86 (6) and (7)—*Tenant surrendering holding to strangers.*

A tenant after surrendering a holding, sold it to a third person and again executed a *kabuliyat* in favour of the landlord. The landlord sued the trespassers on ground of non-transferability. The unauthorised purchase does not create an encumbrance on the holding within S. 86 (6) and (7), and the landlord could eject the purchaser who could evidently recover damages from the tenant vendor. (*Holmwood and Chapman*, JJ.) RAMONI MIHAN ROY *v.* KALUMUDDI. 17 I.C. 682=17 C.W.N. 1101.

——S. 86 (6) and (7)—*Surrender by tenant—Prior transfer of portion of non-transferable holding—Landlord's rights.*

A surrender of a non-transferable holding by an occupancy raiyat to his landlord, where the raiyat has previously transferred a portion of the holding to another person, entitles the landlord to enter upon the whole holding and eject the transferee or to settle it with another tenant. [Case lawfully considered. History of legislation traced and English principles analysed]. (*Miller*, C. J., *Mullick Jwala Prasad, Foster and Macpherson*, JJ.) MT. SHEORAJI KUER *v.* DHANI MIAN.
3 Pat. 1=4 Pat. L.T. 581; 75 I.C. 794=1 Pat. L.R. 402=1923 Pat. 305=3 Pat. 1=1924 Pat. 1 (F.B.).

——S. 86 (6)—*Surrender—May be with or without consideration.*

Where there is a surrender by the tenant to the landlord, the right of the encumbrancer is preserved. A surrender need not be without consideration. Whenever a holding is returned to the landlord by a tenant whether for or without consideration, the act amounts to a surrender on the part of the tenant. (*Ross*, J.) BESHESWAR CHAUDHRI *v.* ALI KARIM.
63 I.C. 500 (Pat.).

——S. 87—*Abandonment—Question of fact.*

Whether there has been an abandonment or not is in each case a question of fact.

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27 C.W.N. 802, ref. to. (*C.C. Ghose and B. Ghose*, JJ.) SARAT CHANDRA MAJUMDAR *v.* PRASANNA KUMAR. 71 I.C. 304 (Cal.).

——S. 87—*Landlord and tenant—Non-transferable occupancy holding—Limitation Act*, S. 18.

Where there is a transfer of a non-transferable occupancy holding the landlord can re-enter only on the theory of abandonment in S. 87 of the Act. Where such abandonment took place 12 years before the landlord's suit to recover *khas* possession, the only way of overcoming the bar of limitation is to establish a case within S. 18, Limitation Act. (*Beachcroft*, J.) MANNULA KOLA *v.* PRASANNA CUMAR SARKAR. 56 I.C. 811 (Cal.).

——S. 87—*Co-sharer's rent decree—Sale in execution—Purchase by decree-holder—Right of other co-sharers.*

If a co-sharer landlord purchases a holding sold in execution of a decree obtained by himself for his share of the rent, the other co-sharer landlords are entitled to joint possession to the extent of their shares in the zamindari. But they would not be so entitled if the decree is one under S. 87 of the B. T. Act. In such a case they would only be entitled to a fair rent to the extent of their shares. (*Chatterjee and Cuming*, JJ.) BEPIN CHANDRA ROY CHOWHURY *v.* PRAFULLA NARAIN ROY.
54 I.C. 787 (Cal.).

——S. 87—*Abandonment of holding—Transfer of whole of non-transferable raiyati holding.*

S. 87 of the B. T. Act, is not exhaustive and there might be other methods of abandonment. To entitle a landlord to eject a transferee of the whole of the non-transferable raiyati holding he must prove either expressly or by inference that the raiyat has left the holding and disclaims any interest in it. The fact that the tenant has sold the entire holding and given possession of it to the purchaser is a sufficient and distinct repudiation and refusal to pay rent need not be proved. (*Chatterjee and Cuming*, JJ.) ASANULLA MOLLA *v.* SANKAR DAS SANYAL. 54 I.C. 548 (Cal.).

——S. 87—*Non-transferable occupancy holding—Abandonment—Mortgage with possession.*

A usufructuary mortgagee of a non-transferable holding from an occupancy raiyat is entitled to maintain his possession against the landlord unless there has been an abandonment of the holding within S. 87 of the B. T. Act, or a relinquishment or a repudiation of the tenancy. (*Fletcher and Huda*, JJ.) PRIONATH BOSE *v.* KUSSAM KUMARI DASSI.
57 I.C. 332 (Cal.).

——S. 87—*Abandonment of holding—Entry by landlord.*

Where a holding has in fact been abandoned the landlord is entitled to re-enter without

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having recourse to the provisions of S. 87 of the B.T. Act. (*Teunon and Richardson*, JJ.) WHAHID ALI BHUYA *v.* MAHAMAD ANSAR ALI. 47 I.C. 147 (Cal.).

——S. 87—*Finding of abandonment.*

There is nothing in S. 87 of the Act, to aid the finding of abandonment by a tenant. (*Chatterjee and Walmsely*, JJ.) PRIYANATH MITTER *v.* ANATH NATH DEY. 37 I.C. 942 (Cal.).

——S. 87—*Lease—Abandonment.*

Abandonment is not by itself sufficient to extinguish the tenancy rights of a transferee of a lessee under the T.P. Act, though it may terminate a tenancy under B. T. Act. (*Newbould*, J.) SAKAYET MOOLAH *v.* ALAM MOLLAH. 33 I.C. 98 (Cal.)

——S. 87—*Tenancy, Splitting of—Abandonment.*

Where tenancy in favour of several tenants is not split up and even one of the original tenants is in possession, the tenancy is not abandoned within the section. (*Mullick*, J.) GOPI SUNDARI DASI *v.* HALADHAR MAZUMDHAR. 30 I.C. 383 (Cal.).

——S. 87—*Abandonment of holding--Mortgage by tenant—Forfeiture—Acceptance of rent under protest—Waiver.*

S. 87 of the B. T. Act, is not exhaustive. The landlord may proceed by suit if he can prove that the facts and circumstances of the case lead to an inference of abandonment. 4 C.W.N. 493; 7 C.L.J. 72, foll. (*Chatterjee and Walmsley*, JJ.) MOTOOKDHARI *v.* JUDGDIP SINGH. 19 C.W.N. 1319= 28 I.C. 343 =21 C.L.J. 261.

——S. 87—*Abandonment — Effect of — Usufructuary mortgage—Creation of.*

S. 87 of the Act is special section and where the conditions mentioned therein are established, a landlord can treat the holding as abandoned on following the procedure laid down therein; mere execution of a usufructuary mortgage is not abandonment but coupled with other facts might be one. Where on such an abandonment the landlord settled the land with the plaintiff: *Held*, that the title of the plff. was completed and he was entitled to recover. (*Jenkins*, C.J. *and Ray*, J.) MONOHARPAL *v.* ANANTHA MOYEE DASYA. 20 I.C. 198= 17 C.W.N. 802.

——S. 87—*Scope of—Land agriculture—Homestead—Ejectment—Non-transferable holdings—Transferee as trespasser.*

S. 87 contemplates cases where there is cultivation of the holding by the tenant, and not where a holding consist partly of agricultural and partly of homestead. If the tenant of a non-transferable holding executes a usufructuary mortgage places the mortgagee, in possession and abandons the holding, the landlord can treat the mortgagee as a trespasser and ask for ejectment though the case is not strictly within S. 87. (*Chatterjee*, J.) SHASHI MOHAN SUTRADHAR *v.* BIPIN BEHARI KARMOKAR. 9 I.C. 20 (Cal.).

BENGAL TENANCY ACT (VIII of 1885), S. 88.

—— S. 87—*Surrender*—Raiyati *holding.*

A Hindu widow can abandon a *raiyati* holding. (*Ross*, J.) DEO NARAIN SAHU *v.* RAMANAND SAHU. 63 I.C. 211 (Pat.).

——S. 87—*Abandonment—Proof of.*

Under S. 87 of the Act, a plaintiff must prove (1) that the *raiyat* voluntarily abandoned his residence without notice, (2) that he did go without arranging for payment of his rent as it fell due, and (3) that he ceased to cultivate the holding by himself or by some other person. (*Das and Adami*, JJ.) RAMJANUN SINGH *v.* KHUB LAL SINGH. 2 Pat. L T. 219= 59 I.C. 908=1921 Pat. 151.

——S. 87—*Mere execution of usufructuary mortgage—Forfeiture or abandonment.*

A tenant continuing to live in the village is not considered to forfeit his tenancy or abandon his holding merely because he executes a usufructuary mortgage and delivers possession under it. (*Jwala Prasad*, J.) AJODHYA PRASAD SINGH *v.* JAGDEO SINGH. 37 I.C 915 (Pat.)

——S. 87—*Abandonment of homestead—Test.*

Test of abandonment of homestead is discontinuance of residence in the village. Purchaser of non-transferable homestead from a tenant is liable to be ejected as trespasser, by the Zemindar. (*Sharfuddin and Roe*, JJ.) RAGHUBAR SINGH *v.* RAM GHULAM MISSIR. 36 I.C. 653=1 Pat. L.J. 502.

——S. 87 (2) and (3)—*Abandonment, when effectual.*

To make an abandonment effectual, notice to Collector under S. 87 (2) is not necessary; the notice is essential for the suit which the tenant can bring under S. 87 (3). A landlord who has not given such notice, can still prove the abandonment. The question of abandonment is a question of fact. (*Richardson and Beachcroft*, JJ.) KAMALA KANTA CHAKI *v.* BEJOYA KANT LAHIRI. 15 I.C. 639 (Cal.).

——S. 88—*Ejectment—Purchaser of an occupancy holding—Decree—Form of.*

S. 88 of the B.T. Act does not warrant a decree for ejectment in a landlord's suit for ejectment of the purchasers of a holding on their failure to jointly and severally attorn to the landlord within a time fixed by the Court. (*Walmsley and Panton*, JJ.) GIRIBALA DASI *v.* KUDRUTULLA PRAMANIK. 47 I.C. 575 (Cal.).

——Ss. 88 and 161—*Holding at fixed rent—Transfer—Landlord's fee not paid—Adverse possession against-tenant—Encumbrance.*

A sale of the whole of a raiyati holding at fixed rent is not invalid merely because the

landlord's fee is not paid. But when the sale is only of a part of such a holding the landlord is not bound to recognise the purchaser, as such a sale constitutes a division of the holding. A title acquired by adverse possession against a tenant is an encumbrance within S. 161 of the B. T. Act. 14 C.L.J. 136, rel. (*Walmsley and Panton*, JJ.) FAZAR ALI MISTRI *v.* AMIR BUKSH MIAN. 47 I.C. 334 (Cal.)

——S. 88—*Consent in writing—"Rent or roll," meaning of*—Jama Wasil baki, *whether rent roll.*

A 'consent in writing' cannot be implied from certain documents. *A jama wasil baki* (an annual statement of the rents payable and received from a particular estate) is not a rent roll within the meaning of proviso to S. 88. The rent roll mentioned therein is a *Jamabandi*, a permanent document kept in the estate office of landlord which contains a list of the tenants and the rents payable by them and which is kept up and amended from time to time. (*Fletcher and Newbould*, JJ.) RAJANI SUNDARI DASI *v.* HARI SUNDARI DASI. 41 I.C. 501=22 C.W.N. 693.

——S. 88—Dakhila *signed by agent showing divison—If binding on landlord.*

A *Dakhila* signed by an agent showing division amounts to consent in writing by the landlord to a sub-division of the Dharpatni lease within the meaning of S. 88 of the Act. 25 Cal. 531, rel. (*Chitty and Chatterjee*, JJ.) RAJKUMAR SARKAR *v.* RAJANI KANTA CHAKRAVARTI. 13 I.C. 449 (Cal.).

——S. 88—*Parties to rent suit.*

A landlord in suing for rent must implead all purchasers, he is aware of. Any purchaser not so impleaded is not bound by the decree. (*Coxe*, J.) AKHOY KUMAR *v.* NARAIN DEY. 9 I.C. 663 (Cal.).

——S. 88—*Road-cess return—Receipt by patwari—Statement in plaint by previous landlord.*

A road-cess return which is not a rent roll within S. 88 of the B.T. Act does not prove that there has been division of holdings especially where the road-cess return has been rejected by the Collector and has not in any way been acted upon. Nor is a rent receipt signed by the Patwari admissible as evidence of such division, inasmuch as giving evidence as to a division of the holding is outside the scope of the authority of a patwari who is a mere Collector. A plaint filed by a previous landlord for recovery of rent, would also not justify such a conclusion. (*Das*, J.) MUNSHI JUTHAN LAL *v.* RAM DAT SINGH. 51 I.C. 995 (Pat.).

——Ss. 88 and 188—*Division of holding—Recognition by landlord—Rent receipts by gumastah—Contract between tenants—Distribution of rent.*

The mere acknowledgment of receipt of rent which is less than the total *jama*, without any indication that it is in respect of a portion only of the holding, cannot constitute consent to a division of the holding, within the meaning of S. 88 even when continued over a number of years; but if it should clearly appear on the face of the receipt itself that the rent is paid in respect of a particular portion only of the holding, this may be sufficient acknowledgment to bind the landlord. The "express consent in writing" required by S. 88 may be given by means of a rent receipt, and in each case the adequacy of the consent must be gathered from all the circumstances. A receipt showing the area of the transferred portion and the rent paid therefor should be sufficient to constitute express consent within the meaning of the section. Where a landlord repudiates the acts of his gumastah in giving receipts the onus is on him under S. 106 of the Evidence Act to prove want of authority. S. 88 of the B. T. Act refers to a sole landlord or the entire body of joint landlords where there are more than one landlord. A division which does not bind the whole body of landlords does not come within the scope of the section. There is no provision in the B. T. Act which requires a landlord to recognise a distribution of rent. The landlord is authorised to do so but the authority is derived not from the Act but from the general law as an incident the ownership of property. (*Miller*, C. J. *and Mullick*, J.) SRIKUSHEN PRASAD *v.* MUSAMMAT JEOHASI KUER. 45 I.C. 295=4 Pat. L.W. 316=1918 Pat. 210.

——S. 88—*Consent of thekadar—Effect.*

When there is no collusion or restriction of authority by contract or by the act of the *Zamindar* or custom, an entry in the thekadar's papers relating to the area of the holding or an assessment of rent means under the section an express consent of the thekadar which binds the *zamindar*. (*Chapman and Roe*, JJ.) MAHAMAD NAZIRUL HUSSAIN *v.* CHUNI KANTI. 1 Pat. L.W. 229=38 I.C. 706=2 Pat. L.J. 151.

——S. 88—*Recognition of transfer—Rent receipts granted by patwari—Effect.*

Rent receipts by patwari and a letter from one patwari to another stating that the rent would be paid by the transferee of the occupancy holding do not mean recognition of the transfer. Per *Chamier*, C. J.—A patwari or rent collector cannot consent on behalf of his master to the transfer of an occupancy-holding. The landlord need not show that his Patwari had no authority to consent to a transfer. Per *Kingsford*, J.:—A division of a holding and distribution of the rent do not bind the landlord unless made with his express consent in writing, 14 W.R. 211; 25 W.R. 19; 25 Cal. 531; 16 C.L.J. 174, Dist. (*Chamier*, C.J. *and Kingsford*, J.) WYATT *v.* SHOGOBIND SAHU. 1 Pat. L.J. 414=36 I.C. 777=3 Pat. L.W. 88.

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———**Ss. 90 and 91**—*Standard of measurement—If can be gone into in a proceeding under Ss. 90 and 91—Landlord and tenant.*

In a proceeding under Ss. 90 and 91 of the Act, a Court cannot deal with the question of the standard of measurement. (*Chitty and Teunon*, JJ.) ASHUTOSH DHAR *v.* JOY LAL SARDAR. 18 I.C. 621=17 C.L.J. 50.

———**Ss. 90 (1) (3), 91 (1) and 158 (2)**—*Measurement of land—Application for measurement of other lands two years after.*

Though a landlord had taken action under S. 158 with respect to *Mal* lands in the occupation of the tenant, he can within two years, apply for measurement of other lands in the occupation of the tenant under S. 90. The period of ten years in S. 90 (3) has to be computed from the date of the last measurement under S. 90 and the local inquiry mentioned in S. 158 (2) is not the measurement contemplated by S. 90 (3). (*Mookerjee and Beachcroft*, JJ.) BAURIKHAN *v.* ALINASH CHANDRA ROY. 19 I.C. 906 (Cal.)

———**Ss. 93, 95**—*Common Manager—Appointment of.*

A common manager can be appointed only to an entire estate or tenure. Such a person cannot be appointed to a portion thereof. (*Newbould and Suhrawardy*, JJ.) BASANTA KUMAR CHAKRAVARTY *v.* ASHUTOSH CHAKRAVARTI. 27 C.W.N. 1040=1924 Cal. 214.

———**Ss. 93, 95 and 98**—*Common manager—Resignation—Dt. Judge can appoint successor.*

When a common manager appointed under the Bengal Tenancy Act has been removed or has resigned or has died the District Judge has inherent power to make a proper order for the appointment of a successor for the benefit of the estate. 10 C.W.N. 437, diss. (*Mookerjee and Panton*, JJ.) BRINDABON CHANDRA CHAKRAVARTY *v.* JNANENDRA NATH. 64 I.C. 819=38 C.L.J. 75.

———**S. 93**—*Separate account in collectorate—Effect—Common manager—Appointment.*

A co-sharer by opening a separate account about his share, in the Collectorate does not thereby cease to be co-owner within S. 93. A dispute among majority of co-owners only, even as regards the management of their shares only, may warrant the appointment of common manager. (*Chatterjee and Richardson*, JJ.) SORADINDU ROY *v.* GIRISH MOHINI DEVI. 36 I.C. 448=21 C.W.N. 240.

———**Ss. 93 and 95**—*Interim receiver appointed pending appointment of a manager.*

Before the final appointment of a common manager under S. 95 of the Act is made, the Court can appoint a Receiver if just and convenient, for managing the property until such final appointment. (*Chatterjee and Beachcroft*, JJ). ASAD ALI *v.* MOHAMAD HUSAIN. 34 I.C. 83 (Cal.).

BENGAL TENANCY ACT (VIII of 1885), S. 95.

———**S. 95**—*Common manager—Suit for account against—Sanction of Dt. Judge—Notice of suit—Acts of officers de facto.*

A suit for accounts against a common manager appointed under S. 95 does not lie without the sanction of the Court which appointed him. A common manager is like a Receiver. The fact that a person ceased to be a common manager has not terminated his liability to render accounts. 40 Cal. 150, ref. Till he has been finally discharged he is still subject to the orders of the Court and his privilege is commensurate with his liability. A common manager appointed under S. 95 is a public officer within S. 2 (17) (*d*) of the C.P. Code, and a suit for accounts against him is not maintainable without notice under S. 80 of the C.P. Code. (*Mookerjee and Panton*, JJ.) BENI MADHAB SUKUL *v.* UPENDRA CHANDRA SINGHA.
24 C.W.N. 188=53 I.C. 747=30 C.L.J. 279.

———**Ss. 95 and 100**—*Suit by common manager for papers and accounts—Maintainability of—Sanction of Dist. Judge—High Court Rules.*

Per *Curiam*: A suit by common manager appointed by a District Judge under S. 95 against an ex-common manager, for account and for recovery of such sums of money as may upon account being taken, be found due, is maintainable, as such a suit is for the purpose of management of the estate under C. C. (3) of S. 98 of the Act. Per *Ghose and Geidt*, JJ., *contra*). Such a suit shall be brought with the sanction of the Dt Judge under r. 4 of the rules framed by the High Court in accordance with S. 100 of the B. T. Act. *Held*, on the facts that the Dt. Judge was cognizant of all the steps taken by the manager and this was a sufficient compliance with S. 98, B.T. Act. Per *Geidt*, J. Rule 4 framed by the High Court under S. 100 of the B.T. Act, is a check on expenditure, and the only necessary consequence of the infringement of the rule, is to make the manager liable for all expenses improperly incurred. (*Ghose and Geidt*, JJ.) MAHAMAD FAIZ CHOWDHURY *v.* E. F. SANDYA. 53 I.C. 737=30 C.L.J. 263.

———**S. 95**—*Common manager—Appointment of, for a portion of estate.*

An appointment of a common manager must be for the entire estate and not for a portion thereof. (*Teunon and Walmsley*, JJ.) MOHINI LAL PAKRASI *v.* NAGENDA NATH PAKRASI. 53 I.C. 672=30 C.L.J. 261.

———**S. 95**—*Common manager—Co-owner—Right to a mortgage his share.*

Though a common manager is appointed, a mortgage by the co-owner of his own share is valid and enforceable. 31 Cal. 305, P.C., rel.

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The fact that plff. claims more than he is entitled to is no bar to his getting a decree for less. (*Teunon and Greaves*, JJ.) MIDNAPUR ZEMINDARY CO., LTD. *v.* ABINASH CHANDRA.
23 C.W.N. 308=50 I.C. 790=29 C.L.J. 297.

——S. 95—*Suit against common manager.*

Where on a petition presented by some of the co-sharers the Dt. Judge passed a general order as follows, 'permission to sue the common manager is granted.' *Held*, that a co-sharer though not a party to the petition can avail himself of the permission and sue the common manager for accounts. (*Chatterjee and Sheepshanks*, JJ.) DURGA PRASANNA ROY *v.* ISHAN CHANDRA. 42 I.C. 461=44 Cal. 800.

——S. 95—*Common manager — How to be appointed—Formalities of section not observed, effect of—Paramount lease by him without sanction—Validity of.*

An appointment of a common manager by the District Judge without complying with the provisions of S. 95 is illegal. A permanent lease granted by a common manager without the sanction of the District Judge is illegal. (*Chatterjee and Walmsley*, JJ.) KAMAI LAL GHOSE *v.* BESIR PRAMANIK.
26 I.C. 498 (Cal.)

——S. 95—*Common manager — Position and powers of—Suit for accounts—Misappropriation—Position of manager.*

A common manager appointed by the District Judge under S. 95 of the B. T. Act who has regularly submitted accounts for the period of his management to the Judge, which accounts have been duly audited and passed by the Judge after giving full opportunity to all the co-owners to examine them and after consideration and disposing of their objections, cannot be sued by one of the co-owners to render a general account for the whole period of his management, after his discharge. Where a co-owner sued a common manager for accounts *Held*, that this was not a suit in which the plff. sought to recover from the deft. certain specific sums of money which were not included in the accounts, and that the allegations in the plaint were vague and indefinite and so the suit should be dismissed on that ground. 39 Cal. 587, dist. A common manager is in a position corresponding to that of a Receiver. Except with the sanction of the District Judge, no suit can be brought against a common manager by a co-owner for misappropriation or retention of certain specific sums, which, in the ordinary course of management, ought to have appeared in the account and which, the co-owner was aware, at the time, were not included in the accounts or with due inquiry might have discovered, were not included in the accounts. A co-owner would not be precluded from bringing a suit against a common manager for acts of misconduct or misappropriation done outside the limits of his authority as such manager under the B.T. Act. (*Brett and Chapman*, JJ.) NABA KISHORE MANDAL *v.* ATUL KRISHNA CHATTERJEE. 40 Cal. 150=16 I.C. 193=17 C.W.N. 846.

BENGAL TENANCY ACT (VIII of 1885), S. 98.

——S. 95—*Common manager—Powers.*

Common manager appointed under S. 95 should not be compelled to hand over the share of rents to a co-owner whose claim is in dispute. He should be directed by District Judge to retain the portion in his hands. (*Sharfuddin and Coxe*, JJ.) BHABONGANA DEBYA *v.* HORINDRA NARAIN ROY. 16 I.C. 48=17 C.W.N. 445.

——Ss. 95 and 98—*Right of common manager to defend suit for possession—Necessity of making co-owners parties.*

A common manager appointed under the Bengal Tenancy Act represents the co-owners for defending a suit for declaration of title and recovery of possession and it is immaterial if the co-ownars are or are not made parties. (*Holmwood and D. Chatterjee*, JJ.) KIRTIBASH DAS *v.* UMESH CHANDRA. 14 C.L.J. 61=11 I.C. 397=16 C.W.N. 26.

——S. 98—*Receiver—Appointment of.*

The provisions of O. XL, r. 1 are not restricted by B.T. Act, S. 95 and so a Receiver may have to be appointed in respect of property in respect of which a common manager has been previously appointed. But in such cases the common manager may himself be appointed Receiver. (*Mookerjee and Teunon*, JJ.) MADHESHWAR SINGH *v.* MOHAMAYA SINGH.
13 C.L.J. 487=9 I.C. 1027=15 C.W.N. 672.

——S. 98—*Power of Dt. Judge—Suit on basis of Dt. Judge's order—Limitation.*

No question of limitation arises in a suit by a retired common manager to recover arrears of his pay on the basis of the Dt. Judge's order for payment inasmuch as the Dt. Judge has ample powers to pass orders in respect thereof under S. 98. (*Fletcher and Smither*, JJ.) TRAILOKYA NATH *v.* DURGA NATH.
46 I.C. 686 (Cal.).

——S. 98—*Common manager—Powers.*

A common manager cannot be sued in respect of misappropriations in the ordinary course of management without the sanction of Dt. Judge as his position is similar to that of a Receiver. But as to acts of misconduct or mismanagement outside the limits of his authority he can be sued by a co-owner without a sanction. (*Brett and Chapman*, JJ.) NABA KISHORE MANDAL *v.* ATUL CHANDRA CHATTERJEE. 40 C. 150=16 I.C. 193=17 C.W.N 846.

——Ss. 98 (3) and (7) and 103—*Common manager—Powers of.*

The powers of common manager under S. 98 (3) of the Bengal Tenancy Act are the same as

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the co-owners jointly might, but for his appointment, have exercised. Cl. (7) of S. 98 giving the Manager power to make any application under S. 103 does not operate as an exception. (*Holmwood and Chapman*, JJ.) BAKTA PRAMANICK *v.* KISHORI MOHAN TALPATRA. 27 I.C. 307 (Cal.).

——S. 99—*Common Manager—Application to Dt. Judge for restoration of management to co-owners.*

In an application by the co-owners under S. 99 of the B. T. Act for restoration of the management of their share, the common manager is not and cannot be made a party to the proceeding. (*Chatterjea and Panton*, JJ.) BHAGABATI DEBYA CHAUDHURANI *v.* NIL KANTHA CHATTERJEE. 39 I C. 191 = 24 C.W.N. 927.

——S. 99—*Common Manager——Part of an estate.*

The Act does not authorise the appointment of a common manager of a part of an estate. (*Chatterjea and Walmsley*, JJ.) KANAI LAL GHOSE *v.* BESIR PRAMANIK. 26 I.C. 498 (Cal.).

——S. 100—*Rules under—Common Manager—Position of—Orders of Dt. Judge—Revision by High Court—Government of India Act, S.* 107.

The High Court having made rules under S. 100 of the Bengal Tenancy Act, defining the powers and duties of Managers, has power under S. 107 of the Government of India Act to revise the orders of a District Judge under Chap. IX. The position of a Common Manager under B. T. Act is analogous to that of a Receiver, appointed by the Court save and except that he is not liable to be sued. 40 Cal. 150, Ref. (*Holmwood and Walmsley*, JJ.) SATYENDRA MOHAN GHOSE *v* RAJ MOHUN GUHA. 29 I C. 177 (Cal.).

——Ss. 101 and 111—*Enhancement of rent—Alteration, suit for—Local area.*

A suit for enhancement of rent under S. 30 of the B. T. Act and a suit of the nature described in S. 52 are included in the expression 'suit for alteration' of rent in S. 111. Under S. 101 of the B. T. Act, an entire district is included in the term 'local area' although an area smaller than an entire estate as a whole is usually meant by the term "local." (*Mookerjee and Chapman*, JJ.) BROJENDRA KISHORE RAI *v.* KHALIL NAGARCHI. 29 I.C. 885 = 22 C.L.J. 489.

——Ss. 101, 102 and 103—*Record of rights—Record of custom—Value of—Presumption—Evidence Act, S.* 35—*Effect of.*

Under S. 101, a Revenue Officer can prepare a record of rights, in respect of lands in any local area notified by the local Government but he cannot record the existence of any local custom that may affect such lands as part

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of the Record of Rights, as under S. 102 a village custom is not one of the particulras to be recorded. If a Record of Rights contains an entry as to custom, there is no presumption under S. 103-B as to its correctness, and although under S. 35, Evidence Act, it is relevant, the burden of proving the existence of a custom lies on the party relying upon it. (*Dass*, J.) SURESH CHANDRARAI *v.* SITARAM SINGH. 57 I.C. 126 (Pat.).

——Ss. 101 (a) 101 (3) and 111-A—*Scope of—Change in wording of section—Effect—Order by local Government on application*—Ultra vires—*Civil Court—Jurisdiction — Notification—Issue of—Civil suit to set aside order barred.*

The expression 'a large proportion of landlords' in Section 101 (2) (*a*) of the Act includes not merely proportion numerically but also landlords having a large interest in the estate. A change in the wording of a section does not necessarily involve a change in the land. S. 111-(A) of that Act does not debar the Civil Court from determining that the Local Government's order under section 101 (2) (*a*) was *ultra vires* and illegal. This discretion to determine if the application is in due form under S. 101 (2) (*a*) rests in the Government and when it has decided that point and issued the Notification, a Civil Court is barred by S. 101 (3) from interfering with the order. (*Brett and Sharfuddin*, JJ.) SECRETARY OF STATE FOR INDIA *v.* PURNENDRA NARAYAN ROY. 40 Cal. 123 = 18 I.C. 939 = 17 C.W.N. 1151.

——Ss. 101 (2) (d), 104 and 192—*Settlement officer—Power to settle rent.*

A Settlement Officer himself could settle fair and equitable rent where settlement was in progress, under B.T. Act, as it stood in 1898. Where Record of Rights had been prepared under Ch. X. Nowabad forms part of Govt. revenue and rent payable to Govt. is land revenue. (*Holmwood and Chapman*, JJ.) DHARMA CHARAN DEY *v.* RAMESH CHANDRA ROY. 24 I.C. 820 (Cal.).

——Ss. 102, 104-H and 188—*Suit under S.* 104-*H—Revised rent roll.*

A suit under S. 104-H of the B.T. Act does not lie on the ground that an enhancement of rent should not have been made by reason of a rise in the price of staple food crops since the special conditions and incidents of the tenancy are mentioned in S. 102 (*h*) whilst the rent payable comes under S. 102 (*e*) of the Act. (*Fleetcher and Smither*, JJ.) KALI PRASONNA MAITY *v.* THE SECRETARY OF STATE FOR INDIA. 31 I.C. 144 = 23 C.W.N. 383.

——Ss. 102, 104 and 106—(III of 1898) B.C., S. 9—*Interpretation of.*

The words "every settlement of rent of decision of a dispute by a Revenue officer" in S. 9 of Act III of 1898 (B. C.) are applicable to only

those cases which a Revenue Officer can try. (*Mookerjee and Beachcroft*, JJ.) BIRENDRA KISHORE MANIKYA *v.* KALITARA DEBI.
43 Cal. 547=22 C.L.J. 155=30 I.C. 953=20 C.W.N. 275.

———Ss. 102 (d) and 106—*Dispute between neighbouring proprietors—Question for decision.*

In a suit under S. 106 of the B. T. Act, to amend a Record of Rights in which the dispute is between two neighbouring proprietors, coming within S. 102 (*dd*), the only question between these two rival proprietors that can be gone into, is the question as to which of them was in possession of the land in question at the date of the final publication of the Record of Rights. (*Fletcher and Huda*, JJ). MAHARAJ BAHADUR SINGH *v.* BHAGWAN DAS. **45 I.C. 781 (Cal.).**

———Ss. 102 (J) and 105 a)) and (c)—*Application for settlement of fair rent—Questions as to liability of land to pay rent and relationship between parties.*

A revenue Court has jurisdiction on an application for settlement of fair rent, to go into the questions whether the land is not liable to pay rent and whether a person who is the occupant of the land stands in the relation of a tenant towards the applicant. (*Chowdhury*, J.) UPENDRA NATH GHOSE *v.* ANANTH BANDHU CHAKRAVARTY. **52 I.C. 406 (Cal.).**

———Ss. 103, 104 — *Rent suit — Plea of dispossession of portion—Maintainable.*

Where in a suit for rent, the tenant pleads that he was dispossessed from a portion of the holding and hence the rent should be suspended he is not prevented from raising it under Ss. 103 and 104 of the B T. Act. The correctness of the entries which is presumed under S. 103-B, the right to challenge it only by a suit under S. 104-H and the conclusiveness of the entry as to area under S. 104-J is not applicable to such a plea. (*Chatterjea and Cuming*, JJ.) PRIYA NATH BASU *v.* TARA CHAND MORAL.
27 C.W.N. 982=1924 Cal. 341.

———S. 103—*Ejectment suit—Record of rights—Entry in.*

A person recorded as occupancy raiyat in the record of rights cannot be ejected by treating him as an under-raiyat unless the entry in the record of rights is rebutted by evidence. (*Greaves*, J.) UMACHARAN *v.* NABIN CHANDRA. **50 I.C. 319 (Cal.).**

———Ss. 103, 106 and 109—*Civ. Pro. Code O. XXIII r.(3)—Withdrawal without permission for fresh suit and subsequent suit for declaration.*

A person may withdraw from a suit, without permission for a fresh suit under S. 106 Bengal Tenancy Act for a declaration as to the correctness of the entry of the deft.'s name in the record of rights as owner of a share and yet subsequently sue in the Civil Court for a declaration of title and possession; but the case is

different under O. XXIII, r. 1 (3), Civ. Pro. Code under which plff. cannot subsequently sue on the same cause of action after withdrawal without permission to bring fresh suit. (*Chatterjee and Newbould*, JJ.) ASWINI KUMAR AICH *v.* SARADA CHARAN BASU. **37 I.C. 253=24 C.L.J. 19.**

———Ss. 103 and 105—*Scope of—Co-sharer landlord—Application whether maintainable—Partition—Mode of effecting.*

There is a fundamental difference between the scope of Ss. 103 and 105. S. 103 contemplates a record of existing facts while S. 105 contemplates an alteration of exising facts. An application under S. 105 for the settlement of joint equitable rent does not lie at the instance of one of several joint landlords; it must be presented by the entire body of persons who are joint landlords. The mere fact that one of the co-sharers is not willing to join the plaintiff in an application under S. 105 does not dissolve the relationship of joint landlords among themselves. The only remedy for such joint landlord is to effect a partition with his co-sharer or to have a common manager appointed. Where a landlord challenges the entry in the record of rights before a Revenue Officer who is competent under S. 105-A to try the issue before trying the question under S. 105 the proceeding is in essence one under S. 105 and not under S. 106. (*Mookerjee and Beachcroft*, JJ.) BEHARI LAL MULLICK *v.* PRIYA SARDAR. **28 I.C. 508=21 C.L.J. 305.**

———S. 103—*Record of rights—Entry in—Presumption—Right to rent.*

An entry in the Record of Rights only raises a presumption of title but it cannot give a person the right to recover rent which is barred by any provision of the Rent Law. Such entry cannot dispense with the procedure laid down by law as a condition precedent to the collection of rent. (*Holmwood and Carnduff*, JJ.) ANGNU GHASI v. CHAITTU PATRAS.
27 I.C. 605=19 C.W.N. 461.

———Ss. 103 and 113—*Rent settled under Chap. X—Enhancement, if can be made.*

Where rent is settled under Chap. X of the Act, it cannot be enhanced under S. 113 for fifteen years even on the ground of prevailing rate. (*Teunon and Chapman*, JJ.) HARIHAR PERSAD BAJPAI *v.* AJUB MISIR.
22 I.C. 605=45 Cal. 930.

———Ss. 103 and 106—*Entry in Record of Rights is presumed to be correct.*

A Record of Rights is presumed under S. 103 of the Act to be correct until the contrary is shown by evidence. In a suit under S. 106, the burden is on the plff. to rebut that presumption. (*Bucknil*, J.) JANKI KOER *v.* WALI MUHAMMED. **61 I.C. 420 (Pat.).**

BENGAL TENANCY ACT (VIII of 1885), S. 103.

——S. 103—*Certificate of Revenue Officer—Effect of.*

Certificate by the Revenue Officer is conclusive evidence of the publication of Record of Rights and of its having been duly made under Chap. X, B. T. Act. (*Das*, J.) KALI SAHU *v.* GIRDHARI MISTRI. 50 I.C. 778 (Pat.).

——S. 103—*Record of rights—Entry in—Bengal Estates Partition Act.*

An entry in the record of rights prepared under the Bengal Estates Partition Act carries a presumption of correctness. (*Mullick and Atkinson*, JJ.) BALDEE *v.* BRAJNANDAN.
43 I.C. 359=3 P.L.W. 266=1918 Pat. 163.

——S. 103—Ijara—*Entry in records—Onus.*

It is on the contesting defts. who rely on an oral *Ijara* recorded in the Record of Rights to prove that it is still subsisting at the date of suit. (*Mullick*, J.) BIBI KANILY FATMA *v.* SARBA LAL. 42 I.C. 414 (Pat.).

——S. 103—*Suit to set aside entry in Record of Rights—Limitation.*

A suit based upon injury done by entry in Record of Rights must be brought within 6 years, but if plff. retains possession, he may bring a suit within 6 years of any fresh infringement of his rights. (*Sharfuddin and Roe*, JJ.) RAMJI RAM *v.* SADHU SARAN LAL.
41 I.C. 11=2 Pat. L J. 493.

——S. 103—*Record of Rights, value of—Presumption about.*

A Record of Rights being evidence not only between landlord and tenant but in all cases where the subject-matter with which it deals, is in dispute, it should be presumed to be accurate until it is proved to be incorrect. (*Atkinson*, J.) MUHAMMAD FARID *v.* HAKIM SHAH ABDUL WAHAB. 38 I C. 424 (Pat.).

——S. 103—*Entry in Record of Rights.*

An entry in the Record of Rights that a person is an occupancy tenant, creates a presumption in his favour so that the onus is on the landlord to prove the contrary. (*Mullick*, J.) BESESWAR SINGH *v.* PARBHOO NATH PATHAK. 34 I.C. 506 (Pat.)

——S. 103-A—*Presumption under, cannot be drawn from papers.*

The inference under S. 103-A of the Tenancy Act can only be drawn from the finally published Record of Rights and not from the khasra papers upon which the finally settled Record of Rights is founded. (*Greaves and Panton*, JJ.) ALTAP ALI CHOUDHURY *v.* SRIMATHI JARINA BIBI. 67 I.C. 871=1923 Cal. 194.

——Ss. 103-A and 106—*Certificate by Revenue Officer—Record of Rights—Presumption.*

A certificate signed by the Revenue Officer is conclusive evidence of the publication of the record, but the presumption as to the correctness of the entry arises from the publication under S. 103-A of the B. T. Act. (*Chatterjee and Newbould*, JJ.) RAJANI NATH PRAMANIK *v.* MANARAM MANDAL.
33 I.C. 968=23 C.W.N. 883.

BENGAL TENANCY ACT (VIII of 1885), S. 103-A.

——Ss. 103-A and 106—*Declarations that lands are* brahmotter *and rent free—Long possession*—Lakhiraj—*Perganah Register, etc.*

Plaintiffs who were recorded under the settlement proceedings as persons in possession of a number of plots, each less than 50 bighas in area, without payment of rent but as liable to pay rent, were sued under S. 106 of the B. T. Act and proved long possession without payment of rent. Defendant produced the Perganah Register, the Kanongo Register, and the Thak map and the Settlement to show by omission of entries of *lakhirajas* therein, that no *lakhirajas* existed in the village. *Held*, that long possession without payment of rent raises a presumption of *lakhiraj* right. (*Mookerjee and Walmsley*, JJ.) BIPRADAS PAL CHOUDHURY *v.* MANO RAM DEBI.
45 Cal. 574=47 I.C. 49=22 C.W.N. 396.

——S. 103-A—*Record of Rights—Correctness of entries open to question.*

S. 103-A of the B.T. Act, merely precludes a Court from going into the question whether the procedure under the chapter has been followed and not from enquiring whether the resultant entry in a Record of Rights is correct. (*Chapman and Newbould*, JJ.) RAMDAS MUKHOPADHYAYA *v.* BIPRADAS PAL CHOWDHRY.
27 I.C. 446=19 C.W.N. 35.

——S. 103-A—*Record of Rights—Presumption of correctness, when arises—Admissibility in evidence.*

It is only when a Record of Rights is finally published that the presumption of its correctness arises. Entries in a draft record are not admissible in evidence. (*Newbould and Roy*, JJ.) GULAB KUER *v.* RAM RATAN PANDEY.
27 I.C. 229=18 C.W.N. 896.

——Ss. 103-A and B—*Draft Record of Rights—Evidence.*

A draft Record of Rights is inadmissible in evidence. (*Das*, J.) SARUP RAI *v.* SRIKANT PRASAD. 1 Pat. L.T. 224=55 I.C. 922=2 U.P.L.R. 49 (Pat.).

——Ss. 103-A and 106—*Record of Rights—Entry in—Suit before Settlement Officer for declaration that entry is incorrect—Custom—Appropriation of trees—Onus.*

An entry having been made in the published Record of Rights that the tenants were entitled to appropriate the trees standing upon their occupancy holdings, the proprietor instituted suits before the Assistant Settlement Officer for a declaration that the entry was incorrect and that he was entitled to half the value of the trees. *Held*, the ordinary law is that the tenant

has the right to cut and the landlord has the right to appropriate ; if the tenant claims any right of appropriation, he must prove a custom to that effect and it was open to the officer who prepared the Record of Rights to enquire whether the tenants had discharged the onus which the law has placed upon them. But as S. 103-B of the B.T. Act provides that the Record of Rights is presumed to be correct until the contrary is proved by evidence, the onus is upon the plff. to show that she had the right to the share. The Record of Rights is no doubt entitled to the benefit of the presumption attached to it but where the Court has before it the evidence upon which the record was prepared and the plff. denied the correctness of the records, the Court is bound to come to a finding whether that evidence is sufficient to justify the entry. (*Mullick and Sultan Ahmed*, JJ.) MAHARANI JANKI KOER *v.* SADAGAR RAM.

1 Pat. L.T. 221=56 I.C. 417=1920 Pat. 177.

———S. 103-B—*Record of Rights — Presumption—Onus.*

It lies on the person who seeks to rebut the statutory presumption that the Record of Rights is correct to adduce strong evidence of his contention. (*Lord Sumner*, J.) RAJANI KANTA GHOSE *v.* SECRETARY OF STATE FOR INDIA. **46 Cal. 90=51 I.C. 226=23 C.W.N. 649=45 I.A. 190 (P.C.).**

———S. 103-B—*Entry in Record of Rights —Rebuttal of presumption as to correctness of entry—Surrounding circumstances.*

The presumption as to the correctness of an entry in the Record of Rights may be rebutted by the surrounding circumstances. *Mr. Ameer Ali.*) DEBENDRA NATH DAS *v.* BIBUDHENDRA MANSINGH BRAHMARBAR ROY.

45 Cal. 805=5 P.L.W. 1=27 C.L.J. 543=22 C.W.N. 674=16 A.L.J. 522=23 M.L.T. 384=(1918) M.W.N. 379=20 Bom. L.R. 743=35 M.L.J. 214=45 I.C. 411=45 I.A. 67 (P.C.)

[Affirming 27 I. C. 432=20 C.L.J. 140.]

———Ss. 103-B and 106—*Record of Rights—Presumptions of correctness—Road cess returns and quinquennial register prepared under Regn.* XLVIII *of* 1793—*Admissibility of.*

In a suit by the landlords for correction of an entry in the Record of Rights to the effect that the rent of a tenure was fixed, the plffs. alleged that the rent was open to enhancement and adduced in evidence quinquennial registers prepared under Regn. XLVIII of 1793 and the tenant produced some road-cess returns to prove that the rents had been unchanged for over 20 years. *Held*, the road cess returns were inadmissible in evidence having regard to provisions of the Bengal Cess Act. To start with, there was a presumption in favour of the defts, from an entry under S. 103-B of the B.T. Act. Therefore the onus of proof rested entirely on the plaintiffs landlords to negative the effect of the said presumption. Assuming the entries in the quinquennial register were admissible in evidence they were not sufficient to negative the presumption under S. 103-B of the B.T. Act. (*Ghose and Chotzner*, JJ.) PROMODE CHANDRA ROY CHOWDHURY *v.* BINAYAKDAS ACHARYA.

27 C.W.N. 548=75 I C. 201=1923 Cal. 611.

———S. 103-B—*Rent entered in rent roll.*

It is not open to the tenant to dispute the amount of the rent settled by the Revenue Officer and entered in the rent roll prepared under Part II of Chap. X of the B.T. Act. (*Newbould*, J.) SARABESWAR NAIK *v.* RAJANI KANTA. **51 I.C. 981 (Cal.).**

———Ss. 103-B and 104—*Jurisdiction—Civil Court.*

Civil Courts cannot question the correctness of the decision of the Revenue Authorities and the Government Notification with respect to the management of Mahals. (*Chatterjee and Newbould*, JJ.) RADHA KANT *v.* SECRETARY OF STATE FOR INDIA. **50 I.C. 94=23 C.W.N. 265.**

———S. 103-B—*Entry in Record of Rights —Presumption—Rebuttal.*

An entry in a Record of Rights is not conclusive, but is presumed to be correct until the contrary is proved by legal evidence. The question whether the presumption of correctness attaching to an entry in a Record of Rights has been rebutted or not, is a matter within the competence of a final Court of fact, and cannot be reviewed by a Court of second appeal. (*Fletcher and Richardson*, JJ.) RAM KUMAR CHUCKERBURTY *v.* BERENDRA KISHOR. **45 I.C. 65=22 C.W.N. 459.**

———Ss. 103-B and 113—*Scope of.*

There is really no inconsistency between S. 103-B and S. 113 and in the case of inconsistency, S. 103 B would be overruled by S. 113. (*Chatterjee and Richardson*, JJ.) MEYAJAN BINAN *v.* JOYMALA.

34 I.C. 32=21 C.W.N. 546.

———S. 103 (B) — *Presumption when rebutted.*

Although plff. held certain lands originally as tenure-holder, he, being in possession for more than 12 years, and being generally held as a ryot, acquired occupancy rights in the lands and the presumption created by S. 103 (*b*) was rebutted. (*Fletcher and Richardson*, JJ.) KUMEDA PROSANNA BHUIYA *v.* SECRETARY OF STATE.

30 I.C. 255=19 C.W.N. 1017.

———S 103-B—*Entries in record—Presumption—Evidence, whether conclusive.*

Under S. 103-B of the B. T. Act, the entries in the record only give rise to the presumption and neither the defendants' failure to rebut it, nor a decision under S. 105 (before 105 A.) can-

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avail to make them conclusive. (*Teunon*, J.) SHASHI BHUSHAN HAZRA *v.* DENAMOYEE DASI. 23 I.C. 615=19 C.W.N. 638.

——S. 103-B—*Final publication — Presumption.*

The Record of Rights shall not be presumed to be finally published until the negative is expressly asserted. (*Jenkins*. C.J. *and Chatterjee*, J.) TARINI CHARAN MAJUMDAR *v.* UMAR MAHTA. 23 I.C. 416 (Cal.)

——S. 103-B—*Record of Rights—Entry—Effect.*

An entry in the Record of Rights must be presumed to be correct until the contrary is shown. But this presumption does not become irrebuttable after six years. (*Coxe*, J.) MINAI NAIK *v.* BANCHNIDHI. 9 I.C. 804 (Cal.).

——S 103 (B)—*Record of Rights—Presumption of correctness is not rebutted by its being against the General law.*

The presumption of correctness attaching to an entry in the Record of Rights cannot merely be rebutted by showing that it is opposed to the general law. Where the question related to the ownership of trees the general law vesting the ownership of trees in the landlord was held not to rebut the entry in the Record of rights which vested the right in the tenants. (*Dawson Miller*, C.J. *and Bucknill*, J.) BISHUN PRAGASH NARAIN SINGH *v.* SHEOSARAN TELI. 1 P. 368=64 I.C. 866= 3 P.L.T. 818=1922 P. 497.

——S. 103 (B) and S 50 (2)—*Conflict between—Former prevails.*

When there is a competition under S. 103 (b) and that under S. 50 (2) the former shall prevail, and under S. 115. The tenant cannot ask the Court to draw a presumption from any evidence establishing uniform payment of rent after the permanent settlement. (*Das and Bucknil*, JJ.) GOBIND LAL SIJUAR *v.* RAM SARAN LAL. 68 I.C. 433= 2 Pat, L.T. 642.

——S. 103-B—*Court's finding on one-sided evidence is not legal.*

If in a suit for correcting the entry in the Survey Record of Rights, the plff. has in his favour the presumption of the Record of Rights prepared under Estates Partition Act and the deft. has the presumption under S. 103 (b), the Court must look to the evidence of both parties and a finding of possession based on evidence adduced by deft. alone, is illegal. (*Jwala Prasad*, J.) DEBILAL SAH *v.* RAM BIBEKI SINGH. 63 I.C. 194 (Pat.)

——Ss. 103-B and 105—*Tenant holding over.*

The tenant holding over for 3 years was a non-occupancy raiyat and the plff. could have sued both for fair and equitable rent or for

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enhancement of rent. But once the tenant had already become an occupancy tenant, a suit for fair and equitable rent is not maintainable. (*Miller*, C. J. *and Mullick*, J.) DAYAL KUNDU *v.* MALHU PATHAK. 57 I.C. 558=5 Pat. L.J. 406.

——S. 103 (B)—*Evidence prior to publication.*

Evidence of a date prior to the publication of Record of Rights is admissible and ought to be taken into consideration by a Court in determining whether the presumption created by an entry in the Record of Rights has been rebutted. (*Das*, J.) BHIKHAN QASSAB *v.* MARDAN ALI. 56 I.C. 40. (Pat.)

——S. 103-B—*Record of Rights—Effect of entry.*

Where the entry in the Record of Rights conflicts with established law, the latter prevails. (*Atkinson and Jwala Prasad*. JJ.) RAGHUBER MISSER *v.* BHAJAN SINGH. 40 I.C. 987=2 Pat. L.W. 27.

——S. 103-B—*Admissibility of record.*

Whether or not the "*faid rewaj bhaoli*" is part of the Record of Rights to which a presumption of correctness is attached under S. 103-B part of the Bengal Tenancy Act, it is admissible under S. 35 of the Evidence Act, being a public Record pepared by the Revenue Officer as part of the Record of Rights. (*Chamier and Sharfuddin*, JJ.) SHEO PRASAD SINGH *v.* LAL BABU. 39 I.C. 503= 1 Pat. L.W. 677.

——S. 103-B—*Presumption of correctness.*

No presumption as to correctness is attached to *Faid Rewaj Bhaoli* under the section, as they do not appear to be published under Ch. X of the Act. (*Chamier*, C. J. *and Sharfuddin*, J.) TULSI MAHTON *v.* JHANDOO PANDEY. 1 Pat. L.W. 238=38 I.C. 176= 2 Pat. L.J. 187.

——Ss. 103-B, 147-B and 74—*Legality of Katihari charge entered in the Record of Rights.*

The presumption in the case of *Katihari* (charge on looms) entered in the Record of Rights as payable by the tenant, is that it is legal and under S. 74 of the above Act does make a *Katihari* charge payable for working looms in plff's house. It is not an illegal cess. 27 All. 183, rel. (*Jwala Prasad*, J.) BHAGWATI PRASAD *v.* MAHBUB MOMIN. 37 I.C. 813 (Pat.)

——S. 103-B (3) — *Record of Rights—Entries are presumed to be correct.*

Entries in a Record of Rights are presumed to be correct under S. 103-B. (3) of the Act and the burden of proving that they are incorrect, lies on the person alleging it. (*Mookerjee and Buckland*, JJ.) JOGENDRA *v.* JAGADINDRA. 67 I.C. 170= 35 C.L.J. 133.

BENGAL TENANCY ACT (VIII of 1885), S. 103-B.

———S. 103-B, sub-sec. (3)—*Record of rights—Entry as to—Non-agricultural land—Presumption not of much weight.*

If an entry has been made in the Record of Rights with regard to land which does not come within the scope of the B. T. Act, and with regard to which the Revenue Officer, had no jurisdiction to make the entry the presumption under S. 103-B (3) of the B. T. Act is not of such great weight as would be the case if the entry were with regard to matters which are rightly and properly included in the Record of Rights. (*Sanderson*, C.J. *and Chotzner*, JJ.) RAJA SASI KANTA *v.* SANDYA MANI DASYA.
65 I.C. 4=34 C.L.J. 504.

———S. 103-B. (3)—*Entry under—Incorrectness of mode of proof.*

An entry in the Record of Rights can be proved to be incorrect as having been based upon materials not admissible in evidence. (*Mookerjee and Walmsley*, JJ.) BAGHA MOWAR *v.* RAM LAKHAN MISSER.
41 I.C. 804=27 C.L.J. 107.

———S. 103-B (3)—*Presumption—Rebuttal—Evidence.*

Proof that entry is incorrect may consist of facts prior to date of publication of Record of Rights, though subsequent events may be also of some importance. A declaration in a suit that plff. had *Zemindari* rights in the disputed land, simply means that the disputed land lies within plff's. estate but not that defts. or their predecessors were ever plff's. tenants. Where defts. prove occupation of land without payment of rent, a claim for assessment of rent is barred. (*Mookerjee and Beachcroft*, JJ.) BIRENDRA KISHORE *v.* KAILAS CHANDRA SARKAR. 30 I.C. 937=22 C.L.J. 140.

———S. 103-B, Cl. (5)—*Defts. recorded as under-raiyats in settlement record—Presumption—Relationship of landlord and tenant.*

Where defts. were recorded as under-raiyats of the plffs. in the Settlement Record, there is a presumption that the relationship of landlord and tenant exists which, however, could be rebutted. (*Holmwood and Sharfuddin*, JJ.) NADER ALI HOWALDAR *v.* ASIMADDI SARDAR. 23 I.C. 244 (Cal.).

———S. 104—*Record of Rights—No presumption when Settlement Officer acts without jurisdiction.*

Though there is an irrebuttable presumption in favour of an entry in the Record of Rights under S. 104 of the B. T. Act the presumption does not apply where the proceedings of the Settlement Officer were carried on without jurisdiction. 17 C. W. N. 155; 23 C.W.N. 516: 46 C. 90; 23 C.W.N. 860, Rel. (*Mookerjee and Cholsner*, JJ.) JYOTI PRAKAS CHATTORAJ *v.* BAGALA KANTA CHOWDHURI. 70 I.C. 822=36 C.L.J. 124=1922 Cal. 274.

———S. 104—*Entry in Record of Rights is conclusive.*

BENGAL TENANCY ACT (VIII of 1885), S. 104.

An entry in a Record of Rights is conclusive unless altered by means of a suit instituted under S. 104 (2), B. T. Act within 6 months from the date of the certificate of final publication of the Record of Rights or if an appeal has been presented to a revenue authority under S. 104, then, within 6 months of the disposal of such appeal. (*Mookerjee and Cuming*, JJ.) PRATAB CHANDRA *v.* SECRETARY OF STATE.
67 I.C. 375=35 C.L.J. 304=1922 Cal. 101.

———Ss. 104 to 104-J and 192—*New estate from accretions—Tenants bound to pay rent fixed.*

When a new estate is formed by accretion by the Revenue authorities and a new tenure rent is settled under B.T. Act and no proceedings are taken to obtain modification or reversal of the decision of the Revenue Officers, the tenants are liable to pay rent according to Ss, 103 to 104-J read with S. 193. (*Teunon and Asutosh Chowdhary*, JJ.) KUMAS ARUNX CHANDRA SINHA *v.* JOGENDRA LAL. 60 I.C. 391 (Cal.).

———S. 104—*Court Fees Act, S. 7, cl. iv, (c)—Suit for declaration that plff. is occupancy raiyat and for settling fair rent under S. 104 of the B.T. Act.*

A suit under S. 104 of the B.T. Act is a suit for a declaration which asks for further relief and *ad valorem* Court fee should be levied. (*Holmwood and Chatterjee*, JJ.) PAJIRUDDIN *v.* SECRETARY OF STATE FOR INDIA.
17 I.C. 919=16 C.L.J. 383.

———S. 104—*Settlement of fair rent—Revenue Officer.*

The deft. was an under-raiyat of plff. in a *khasmahal* of Govt. and the deft. had by a contract made previously to the Record of Rights, agreed to pay to the plff. rent at Rs. 10-2-0. The Revenue Officer fixed the fair rent payable by the deft. at Rs. 12, in preparing the Record of Rights. *Held*, that under S. 104, the Revenue Officer could settle a fair and equitable rent, that his decision had the force of a decree and was *res judicata* between the parties and that the plff. was entitled to a decree at the rate of Rs. 12. (*Chitty and Chatterjee*, JJ.) GIRISH CHANDRA *v.* INDRA KUMAR.
9 I.C. 360 (Cal.).

———S. 104 (2)—*Alteration of record—Settlement Officer—Power to review his decision.*

A decision of a Settlement Officer under S. 104, Sub-s. 2 of the B. T. Act as it stood before its amendment in 1898 operates as a decree. He has therefore jurisdiction to review the decree on the ground that it is erroneous. *Quaere*:—Whether every Court has inherent power to review an erroneous decision. (*Mookerjee and Carnduff*, JJ.) RAMPRASAD *v.* DAUD DURSI. 58 I C. 39=30 C.L.J. 1.

———S. 104 (3) (e)—*Tenure-holder—Raiyat.*

In a suit under this section the Court must remember the rules of evidence to determine

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whether the tenant is a tenure-holder or a raiyat. (*Fletcher and Teunon, JJ.*) SECY. OF STATE *v.* GOBINDA PRASAD BARIK.
39 I.C. 934=21 C.W.N. 503.

——S. 104 (4)—*Suit for declaration—Parties—Under-raiyats.*

The under-raiyats of plff. in a suit for declaration of his status as tenant are proper though not necessary parties. (*Teunon and Chaudhuri, JJ.*) SECRETARY OF STATE FOR INDIA *v.* JADAY CHAUDHURI MISRA.
39 I.C. 409=21 C.W.N. 452.

——S. 104-A. to F. and J.—"*Shall be deemed to have been correctly settled.*"

The words "Shall be deemed to have been correctly settled" in S. 104 create an irrebuttable presumption as to the correctness of rent settled in accordance with S. 104-A to 104-F. (*Fletcher and Shamsul Huda, JJ.*) BAIKUNTA NATH *v.* SODANANDA MOHAPATRA.
46 I.C. 287=23 C.W.N. 516.

——Ss. 104-A to F and H—*Settlement, Record of Rights—Claim for additional rent.*

Section 104-J gives the Record of Rights a finality which cannot be disturbed except by a suit under S. 104-H and the only way to alter it, is to sue under 104-H A landlord cannot maintain a suit for additional rent for excess area, after the settlement of rent made under Ss. 104-A to 104-I unless a suit is brought to alter the entry in the Register. (*Chatterjee and Newbould, JJ.*) AFIZADDI *v.* PROSANNA KUMAR KAPALI. 38 I.C. 341 (Cal.)

——Ss. 104-A to 104-F, H. and 113—*Record of Rights—Entries in—Suit.*

Unless a suit under S. 104-H to alter the entries in the Record of Rights settling rent according to the provisions of S. 104-A to 104-F is determined successfully, the entries shall prevail. A tenant got a *Kabuliyat* from a landlord for a certain area of land at a fixed rental, with the stipulation that excess will be paid for excess in area held. Afterwards Record of Rights being finally published the tenant was found occupying excess land; but the rent fixed was the same. The landlord brought a suit for the arrears of enhanced rent. *Held*:—(i) that S. 113 does not apply to such suits and consequently does not bar the plff's claim; and (ii) that S. 104-J made the entry in the Record of Rights conclusive and barred the plff's. claim beyond the amount fixed. (*Carnduff and Chapman, JJ.*) PRASANNA KUMAR ADHIKARY *v.* RACHIMUDDIN HOWALDAR.
18 I.C. 327=17 C.W.N. 183.

——S. 104-G—*Record of Rights prepared before amending Act.*

Where a Record of Rights was finally published before Act (III of 1898 B.C.) came into force, no proceedings could be taken under S. 104 G. of the B.T. Act for the alteration of such record. (*Mookerjee and Beachcroft, JJ.*) BEHARY LAL PANDIT *v.* NARAIN MISRA.
31 I.C. 127=29 C.L.J. 237.

BENGAL TENANCY, ACT (VIII of 1885), S. 104-H.

——Ss. 104-H and 111-A—*Claim under former section barred—Suit under latter section not barred.*

A suit under S. 111-A can be maintained although the claim under S. 104-H may be barred by limitation. 45 C. 645, 651. foll. (*Chatterjee and Panton, JJ.*) PALAN MEAH *v.* THE SECY. OF STATE FOR INDIA.
65 I.C. 669 (Cal.)

——S. 104-H.—*Rent settled in Record of Rights is final.*

The section confers finality on the rent settled in the Record of Rights. A deft. in a rent suit cannot urge a plea of title contrary to the entry in the Record of Rights. (*Newbould and Panton, JJ.*) MANMATA NATH *v.* KIROD GOBINDA CHOWDHARY.
60 I.C. 501 (Cal.)

——Ss. 104-H and 111-A—*Scope of—Limitation—Reliefs within S. 111-A—Limitation Act, Art. 120.*

S. 104-H. of the B.T. Act only refers to suits by persons aggrieved by an entry of rent settled in a settlement Rent Roll prepared under Ss. 104-F to 104-H or by an omission to settle such a rent. Suits falling under that section, are governed by the special limitation provided by Art. 120 of the second schedule to the Lim. Act. 15 C.W.N. 896, foll. (*Woodroffe and Huda, JJ.*) RAJANI KANTA MOOKERJEE *v.* SECRETARY OF STATE FOR INDIA.
47 I.C. 820=45 Cal. 645.

——S. 104-H—*Suit under — Exclusion of time of notice—Limitation—C. P. C., S. 80.*

The period of two months of notice under S. 80, C.P.C., cannot be excluded in reckoning the limitation for a suit under S. 104-H of the B.T. Act. (*Fletcher and Huda, JJ.*) SECRETARY OF STATE *v.* LAKHI NARAIN DAS.
46 I.C. 899 (Cal.)

——S. 104-H—*Scope of—Suit under.*

In a suit under S. 104-H of the B.T. Act, it is not sufficient for the Court to hold that the entry in the settlement rent roll as to the status or the rent is erroneous. The Court must affirmatively determine the exact conditions and incidents of the tenancy as also the rent to be settled on such basis. (*Mookerjee and Walmsley, JJ.*) SECRETARY OF STATE FOR INDIA *v.* DIGAMBAR NANDA.
45 I.C. 43=27 C.L.J. 334.

——S. 104-H—*Suit under — Settlement Officer—Rent.*

In a suit under this section the rent settled by Settlement Officer cannot be disturbed except on proof of incorrect entry as to the status of the tenant, which is to be determined by reference to the rent laws. (*Fletcher and Teunon, JJ.*) SECY. OF STATE *v.* GOBIND PRASAD BARIK.
39 I.C. 934=21 C.W.N. .

BENGAL TENANCY ACT (VIII of 1885), S. 104-H,

——— **S. 104-H**—*Rent free title decided by Settlement Officer before the Amendment Act—Not* res judicata.

A decision of a settlement officer on a question of rent free title given before, but embodied in records after the Amending Act, will not operate as *res judicata* between the parties in a suit for assessment of rent of the same lands before a Civil Court. (*Mookerjee and Beachcroft*, JJ.) BIRENDRA KISHORE MANIKYA *v.* KALITARA DEBI. **22 C.L.J. 155 = 30 I.C. 953 = 20 C.W.N. 275 = 43 Cal. 547.**

——— **Ss. 104-H and 111-A**—*Record of Rights — Court bound by — Re-settlement—Arrears of rent.*

A "re-settlement" or a new contract of lease contemplates a new obligation and a new contract to pay new rent and is not the same cause of action as the rent which becomes due under the original contract of letting. It is not open to a Court to go behind the Record of Rights to ascertain the true nature of the tenancy between the parties. A Record of Rights prepared during the Settlement of Government Revenue under S. 104-H and 111-A of the B.T. Act is conclusive, subject to the tenant's right to sue under S. 104-H (3). (*Fletcher and Mullick*, JJ). BISESHWAR RAY *v.* JUDHISTHIR NATH. **29 I.C. 437 (Cal.).**

——— **S. 104-H — Lakhiraj — Pirottar—***Meaning of.*

The term *lakhiraj* is applied to revenue free and rent free lands. The term *pirottar* may show that the land was revenue free. (*Mookerjee and Beachcroft*, JJ.) BAURI KHAN *v.* ALINASH CHANDRA ROY. **19 I.C. 906 (Cal.)**

——— **Ss. 104-H and 111-A**—*Suit for declaration that plff. is an occupancy raiyat—Limitation.*

A suit for a declaration that the plff. is an occupancy raiyat and not a tenure holder as erroneously described in the Record of Rights is a declaratory suit coming under the category of suits under Chapter VI of the Specific Relief Act referred to in section 111-A of the Bengal Tenancy Act; and the period of limitation for such a suit is six years. (*Chitty and N. R. Chatterjee*, JJ.) PROMODA NATH ROY *v.* ASIRUDDIN. **11 I.C. 262 = 15 C.W.N. 896.**

——— **S. 104-H (3)**—*Scope—Nature of relief.*

Under S. 104-A, the plaintiff can only claim alteration of an entry of rent settled or about to be settled. Though the Court will examine the grounds given by plaintiff for such alteration, it will not grant declaration in respect of matters referred to in rule S. (3). Plaintiff cannot in a suit under S. 104-A, ask for a declaration that part of land is *nij jote* or that certain tenants have not acquired occupancy rights therein. The landlord or tenant, whoever be the aggrieved party, may sue under S. 184-A, against the person benefitted by the entry, usually the Secretary of State. The under-

BENGAL TENANCY ACT (VIII of 1885), S. 104-J.

tenants are not necessary parties. (*Mookerjee and Holmwood*, JJ). JOGENDRA NATH SINGH *v.* SECRETARY OF STATE. **16 C.L.J. 385 = 17 I.C. 921 = 17 C.W.N. 885.**

——— **S. 104-H (4)**—*Tenure holder, rent of, not settled—Suit for settlement of fair rent.*

Where the rent of a tenure-holder has not been settled but has been fixed on the basis of rent payable by *raiyats* to proprietors, a suit by the tenure-holder for settlement of fair rent will lie under S. 104-H. (3), cls. (*d*) and (*e*) and the Court has, under sub-S. (4) power to settle a fair rent. (*Chatterjee and Panton*, JJ). PROFULLA NATH TAGORE *v.* SECRETARY OF STATE. **63 I.C. 892 = 26 C.W.N. 100.**

——— **S. 104-H (4)**—*Settlement of fair rent by Court—Considerations.*

In settling a fair rent under S. 104-H (4) of the B. T. Act, what the Court has to consider is the rent of other holdings of the same class comprised in the same Settlement Rent Roll. The mere fact of the villages being neighbouring ones does not necessarily show that they are comprised in the same Settlement Rent Roll. (*Chatterjee and Duval*, JJ). MANMATHA NATH KAR *v.* SECRETARY OF STATE FOR INDIA. **54 I.C. 718 (Cal.).**

——— **S. 104 (J)**—*Entry as to rent in Record of Rights—No Evidence to contradict can be given.*

S. 104 (J) precludes any evidence from being given to contradict the statement as to the rent mentioned in the Record of Rights where a Settlement roll has been prepared under the provisions of S. 104-A to 104-F. It does not matter whether the evidence is in writing or by matter of record or otherwise. The provisions of the statute are conclusive that no evidence can be given to contradict matters which fall within S. 104-(J) (*Fletcher and Cuming*, JJ.) PARAFULLA NARAIN MAJUMDAR *v.* PALKU MAHAMMAD, **53 I.C. 122 = 23 C.W.N. 860.**

——— **S. 104-J** — *Presumption—Rate and amount of rent—Scope of.*

The presumption in S. 104-J merely has reference to the rate and amount of interest, so that the mere fact that a certain rate of rent was found to be payable to the plff. by the deft's father, raises no presumption that the deft. is the plff.'s tenant. (*Holmwood and Sharfuddin*, JJ.) NADER ALI HOWALDAR *v.* ASIMADDI SARDAR. **23 I.C. 244 (Cal.).**

——— **S. 104-J and 113**—*Scope of.*

The section means that unless an entry in Record of Rights made according to Ss. 104-A to 104-E shall prevail till it is altered by a suit under S. 104-H. Therefore where a tenant held 96 bighas under a *kabuliyat* at Rs. 220 and promised to pay excess for surplus land in his possession but at the settlement his rent was fixed at Rs. 220 for 117 bighas. *Held*, that though S. 113 does not bar the landlord's claim

BENGAL TENANCY ACT (VIII of 1885), S. 105.

for excess, the S. 104-J does. (*Carnduff and Chapman*, JJ.) PRASANNA KUMAR ADHIKARI *v.* RACHIMUDDIN HOWALDAR.
16 I. C. 327 = 17 C.W. N. 153.

——S. 105—*Maurasi Makrari patta—Provision to assess excess land—Enhancement.*

Where a *maurasi makrari* patta is granted, a perpetual grant on a fixed rent is implied when the patta provides that excess lands as per measurement should be assessedat the rates fixed in the lease. The nature of tenancy is not altered. (*Mookerjee and Chotzner*, JJ.) BHAIRAB CHANDRA DAS *v.* MIDNAPORE ZEMINDARI CO., LTD. **38 C.L.J. 372 = 1924 C. 513.**

——S. 105—*Proceedings under—Purchaser of rent sale bound by subsequent decision.*

Any one who buys a holding at an auction must be taken to know perfectly well that he is buying a holding, the rent of which may be enhanceable. If it is subsequently increased by proper process beyond the figure in the sale certificate of previous decree, the question of estoppel is not in point. The question is not of encumbrance created by the tenant and binding his own interest only. (*Rankin*, J.) KHETRA MOHAN DE *v.* SATISH CHANDRA GIRI.
1923 Cal. 488

——Ss. 105, 107 and 109—*Suit for ejectment—Prior decision in proceedings under S. 106 of the B.T. Act*—Res Judicata.

Where a landlord brings a suit in ejectment alleging that the defendant is not a tenant but a trespasser, the decision that the defendan was his tenant in a previous proceeding by the landlord under S. 106 of the B.T. Act, operates as *res judicata*. 3 Pat L.J 379, followed 16 C.L.J. 67; 9 I.C. 651, referred; 30 C. 339. distinguished. (*Chatterjee and Parson*, JJ.) JATINDRANATH CHOWDHURY *v.* AZIZUR RAHAMAN SHANA.
71 I.C. 307 = 50 C. 79 = 1923 Cal. 433.

——S. 105—*Purchase of jote by landlord in execution of rent decree—Eviction of tenant not wrongful.*

In execution of a decree for rent obtained by his predecessor-in-interest a landlord caused seven jotes held by the tenant to be sold. The plots were divided into two jotes and the landlord purchased both of them. The sale as regards one of the jotes was set aside on the objection of the tenant and the sale as regards the other was made absolute as no application had been made by the tenant to set aside the sale. On a question arising as to the legality of the dispossession of the tenants consequent upon the sale, *Held*, that there was no wrongful eviction of the tenant at the instance of the landlord, as the decree for rent was valid and binding and had not been impeached. (*Ghose and Chotzner*, JJ.) DEBY PRASAD BHAKAT *v.* OFFICIAL TRUSTEE OF BENGAL.
37 C.L.J. 315 = 72 I.C. 1013 = 1923 Cal. 333.

——S. 105—*Settlement of fair rent—No retrospective effect.*

BENGAL TENANCY ACT (VIII of 1885), S. 105.

The settlement of fair rent under S. 105 of the B.T. Act, has no retrospective effect on the liability for rent incurred in respect of a period prior to the decision under the section. (*Mookerjee and Cuming*, JJ). RAJENDRA NARAIN MAZUMDAR *v.* SHEIK KALIM.
26 C.W.N. 758 = 49 Cal. 875 = 87 I.C. 813 = 1922 Cal. 575.

——Ss. 105, 105-A—*Lands held at fixed rate of rent—Enhancement.*

Where lands are held at a fixed rate of rent according to the terms of the deed of grant, an application for the settlement of a fair and equitable rent is not maintainable. (*Mookerjee and Chotzner*, JJ. MAHOMED JANU MIA *v.* MAJUBALI CHOUDHURI.
27 C.W.N. 328 = 70 I.C. 273 = 36 C.L.J. 196 = 1922 Cal. 461.

——Ss. 105 and 109-A. (3)—*Enhancement of rent—Appeal to High Court is competent.*

In an appeal before a Special Judge in a proceeding under S. 105, the landlord contended in favour of enhancement while the tenants to the contrary; *held*, that the judgment of the Special Judge disposing of the appeal was not merely 'a decision settling a rent' within S. 109, and hence an appeal to the High Court was competent. (*Sanderson*, C.J. *and Richardson*, J.) GOBINDA CHANDRA GANGULI *v.* MANMATHA PAL CHAUDHURI.
62 I.C. 677 (Cal.)

——S. 105—*Application under—All landlords must join.*

An application under S. 105 of the Act, for settlement of fair and equitable rent, must be made by all the landlords and cannot be maintained if made by some of the joint landlords even though they constitute a joint Hindu family. (*Chatterjee and Panton*, JJ.) SATI PROSAD GORGA *v.* SANATAN DHARA.
61 I.C. 549 = 25 C.W.N. 38.

——S. 105—*Burden of proof—Order of Settlement Officer not a decree if procedure of Civ. Pro. Code, not followed.*

In a suit to recover rent at the rate determined by a Settlement Officer under S. 105, the plff. need not show that the requirements of the Act were fulfilled at the time of the decision of the Settlement Officer. If the Settlement Officer does not follow the procedure in C.P.C., in a proceeding under S. 105, his order is not a decree. Before passing an *ex parte* decree against some defts. on the strength of a compromise entered into by other defts, the first set of defts. should be given an opportunity to give evidence in support of their refusal to join in a compromise. (*Newbould*, J.) JANADA GOBINDA CHOUDHURY *v.* BONOMALI SAH.
57 I.C. 969 (Cal.)

——Ss. 105, 105-A, 107 and 109—*Proceedings under S. 105—Issue as to whether land is*

BENGAL TENANCY ACT (VIII of 1885), S. 105.

mal or lakhiraj—*Rent settled—Suit by tenant for declaration of title.*

Plff's holding was recorded in the Record of Rights as *mal* land liable to assessment of rent. Deft. landlord applied for settlement of fair and equitable rent under S. 105 of the B.T. Act. Plff. pleaded that his holding was his *nishkar lakhiraj*. An issue was raised on the point but owing to the plff's failure to adduce evidence, the Settlement Officer proceeding upon the Record of Rights assessed the holding to rent. Plff. then instituted the present suit for declaration of his *nishkar lakhiraj* title: *Held*, that the Settlement Officer had recorded a decision on the issue within S. 107 of the B.T. Act. The suit was barred under S. 109 of the Act. It is not necessary for the application of S. 109 of the B.T. Act, that the matter in issue should have been raised by the applicant himself before the Settlement Officer, 21 C.W.N. 1004 and 18 C.W.N. 604, dist. (*Chatterjee and Duval*, JJ.) APURBA KRISHNA ROY *v.* SHYAMA CHARAN PRAMANIK.
54 I.C. 952=24 C.W.N. 223.

——Ss. 103 and 195—*Perpetual lease—Engagement with tenant—Entry of occupancy rights.*

Where tenants holding land under a lease for a fixed rent payable by them in perpetuity merely because they allow themselves to be entered in Record of Rights as occupancy tenants, they do not lose their rights under lease nor are they estopped by their action. Their rent cannot be enhanced under the B.T. Act. (*Newbould*, J.) RAKHAL CHANDRA CHATTERJEE *v.* BHABADEB CHATTERJI.
53 I.C. 271 (Cal.)

——Ss. 105, 105-A, 106 and 107 (2)—*Scope of—Record of Rights—Application for settlement of rent—Power of Settlement Officer to decide status of tenant.*

On an application by a landlord under S. 105 for the settlement of the rent, though no formal issue was framed as to the status of the tenants, the Settlement Officer was bound to try and decide the question of the status of the tenant, as the question was one of the kind described in clause (*e*) of S. 195-A. The word "issue" in S. 105-A of the B. T. Act, cannot mean merely an issue framed and recorded according to law. The object of S. 105 of the B. T. Act, is to give the deft. in proceedings under S. 105. the right to raise questions which would properly form the subject-matter of proceedings under S. 106. Therefore although in such a case the tenant does not apply under S. 106 to have the entry corrected, the Settlement Officer should order a correction of the entry to be made in the Record of Rights. (*Walmsley and Huda*, JJ.) JATINDRA NARAIN *v.* MALU HAJI. 51 I.C. 969 (Cal.).

——S. 105—*Application withdrawn—Subsequent suit—Non-payment of rent for a period—No bar for the assessment of rent—Lim. Act. Art.* 130.

An application made under S. 105 of the B.T. Act withdrawn, is to be treated as one never made and does not bar a subsequent application under the same section. 40 Cal. 428, foll. Mere non-payment of rent for a certain period does not bar a landlord's right to have the rent assessed and to recover rent from his tenant. Art. 130 of the Lim. Act, does not apply unless the tenure is found to be rent free. (*Teunon and Richrdson*, JJ.) SRIMATI KAMINI SUNDARI CHAUDHURANI *v.* ABDUL HABIN MOULVI. 47 I.C. 420=28 C.L.J. 264.

——S. 105—*Deduction of measurement—Appellate Court's powers.*

In an appeal in a proceeding under S. 105, a deduction of the measurement, on the ground that the measurement was not a scientific one, can be made by the appellate Court. (*Fletcher and Smither*, JJ.) MIDNAPORE ZEMINDARY COY., LTD. *v.* KRISTO PRASAD SUKUL.
46 I.C. 544 (Cal.)

——S. 105—*Sale of tenure—Enhancement of rent—Purchaser, liability of.*

Where the plff. purchased a tenure at an auction sale pending a proceeding under S. 105 for enhancement of rent and the rent was enhanced afterwards, *held*, that he was bound by the proceeding unless he was able to prove want of knowledge thereof at the time of his purchase, and even then his right was only to set aside the sale and not refuse to pay the enhanced rent. (*Fletcher and Shamsul Huda*, JJ.) RASIK CHANDRA MUKHOPADHYA *v.* SHYAMA KUMAR. 46 I.C. 136 (Cal.).

——Ss. 105 and 109-A.—*Decision Settlement Officer—Schedule directed to prepared by judgment—Limitation for appeal.*

A Settlement Officer, in an order on an application for the settlement of fair rents arrived at certain findings and laid down certain principles, in accordance with which fair rents were to be ascertained and entered in a schedule directed to be prepared by the order. *Held*, that limitation for preferring an appeal against the decision of the Settlement Officer began to run from the date on which the schedule was signed by the Settlement Officer, and not from the date on which the order was made in as much as the schedule settling the rent was clearly a part of the decision. (*Teunon and Newbould*, JJ.) DHARAM KANTA LAHIRI *v.* AMIR SHEIKH. 44 I.C. 152 (Cal.)

——S. 105—*Variation of contract.*

So long as a contract of tenancy is in force no party can obtain a variation thereof though he persists long enough in his assertion that one of the terms is not what it really is. (*Mookerjee and Beachcroft*, JJ.) BIRENDRA KISHORE MANIKYA *v.* FULJAN BIBI.
38 I.C. 169=25 C.L.J. 167.

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——Ss. 105 and 108-A—*Revenue Courts—Jurisdiction—Where landlord disputes as to entry in Record of Rights about the status of tenants.*

The Revenue Courts cannot refuse to try the justice on the excuse of non-joinder of sub-tenants whose joinder is proper but not necessary. In settling fair rent under S. 105, the terms of contract between landlord and tenant may be considered. (*Richardson and Smither*, JJ.) JOGENDRA MOHAN DAS *v.* JANAKI NATH SAHA. 36 I.C. 795=21 C.W.N. 427.

——S. 105—*Scope of.*

S. 105 of the Act has not altered the law; it is essential to establish that the Civil Court has for its decision a matter which has already formed the subject of an application under S. 105 to invite the operation of S. 109. (*Mookerjee and Cuming*, JJ.) NAWAB BAHADUR OF MURSHIDABAD *v.* AHMAD HUSSAIN. 44 Cal. 783=35 I.C. 695=28 C. L. J. 556=21 C.W.N. 1004.

——Ss. 105 to 108, 111 and 111-B—*Jurisdiction of Civil Court.*

Jurisdiction of Civil Courts is totally barred in cases decided upon by Revenue Courts under Ss. 105 to 108. Ss. 111 and 111-B bar their jurisdiction only for periods specified therein and in respect of certain classes of cases but not for good. However, a suit filed within the period is not liable to be dismissed. (*Chatterjee and Richardson*, JJ.) PRAN KRISHNA SAHA *v.* KRIPA NATH. 21 C. W.N. 209=35 I.C. 76=29 C.L.J. 17.

——S. 105—*Settling rent—Enhancement.*

The expression "settling rent" in S. 105 (4) includes "enhancement." Decision of a Settlement Officer enhancing rent under S. 105-(4) is not subject to second appeal. (*Chapman and Mullick*, JJ.) RAMPAT MAHATO *v.* RAM GULAM SINGH. 32 I.C. 982 (Cal.).

——Ss. 105 and 50—*Proof of rebuttal of fixed rent*—Jama Wasil Baki.

Jama wasil baki papers are admissible in evidence and their genuineness could be presumed under S. 90 of the Evidence Act. (*Chatterjee and Beachcroft*, JJ.) NIROD KRISHNA GHOSE *v.* PRODAT KUMAR TAGORE. 32 I.C. 794 (Cal.).

——S. 105—*Second appeal.*

A second appeal lies to the High Court against the judgment of a Special Judge confirming the decision of the Assistant Settlement Officer in a case by the landlord under S. 105 for enhancement of rent, in which the decision depended on whether the raiyat was an occupancy raiyat or one at fixed rate, the question being one as to the incidents of the tenancy. 37 Cal. 30, Foll. (*Holmwood and Walmsley*, JJ.) AKBAR ALI KHAN *v.* SYED ABBAS. 32 I.C. 164=19 C.W.N. 1328.

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——Ss. 105 and 109—*Settlement officer's decision—Final as to settling rent—Statutory bar.*

When a Settlement Officer goes wrong in deciding the question under S. 106, which does not arise, his decision so far as it is a decision settling rent cannot be interfered with and on such a point no second appeal will lie. It is impossible to go behind the statutory bar raised by S. 102, to the rent fixed in proceedings under S 105 so far as the proceedings have been properly conducted. (*Holmwood and Chapman*, JJ.) SHASHIBHUSHAN HUZRA *v.* ASWINI KUMAR SAMANT. 28 I.C. 981=19 C.W.N. 637 (note).

——Ss. 105 and 109-A—*Appeal—Enhancement of rent—Application by landlord.*

The Bengal Tenancy Act does not apply and the Special Judge has no jurisdiction to enhance the rent of a tenant holding land as *Korfa* for residential purposes. S. 109-A is no bar to an appeal in a case of settlement of rent in which a question of jurisdiction is definitely raised. (*Chapman and Newbould*, JJ.) RAMDAS MUKHOPADHYA *v.* BIPRADAS PAL CHOWDURY. 27 I.C.446=19 C.W.N. 35.

——Ss. 105 and 188—*Joint landlords—Revenue paying estates—Lands falling under more than one estate—Revenue Sale of one estate.*

Where one of three revenue paying estates in the occupation of the defts. was sold for arrears of revenue and was purchased by the plff. and the estate purchased comprised an ½ undivided share of the plots included in the various tenancies. *Held*, that the plff. is not in the position of a joint landlord along with the proprietors of the estates which have not been sold and that the plff.'s suit under S. 105 of the Act for settlement of fair rents is not barred by S. 188 of the Act. (*Mookerjee and Beachcroft*, JJ.) ASKARAN SATIYA *v.* SATISH CHANDRA. 24 I.C. 281 (Cal.).

——S. 105—*Construction of patta—Enhancement of rent.*

A patta which does not limit the period but provides for a certain rate of rent from a certain year onwards, creates a permanent tenure. The consolidation of two items payable by the tenant does not constitute a variation or enhancement. (*Teunon*, J.) HARDAS *v.* ABHOY CHARAN. 24 I.C. 58 (Cal.).

——Ss. 105, 105-A and 106—*Rent suit—Entry in record—Objection as to correctness—How taken.*

A tenant cannot question the correctness of entries in the record, in proceedings on an application by the landlord under S. 105 before the enactment of S. 105-A; but he can do so by a suit under S. 106 or by a suit for declaration in Civil Courts. (*Teunon*, J.) SHASHI BHUSHAN HAZRA *v.* DENAMOYEE DASI. 23 I.C. 618=19 C.W.N. 638.

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———S. 105—*Record of Rights*—Khatian—*Non-registration of proprietor's name as owner—Application for settlement of rent.*

The mere fact that the proprietor's name did not appear in the *Khatian* of the Record of Rights as owner of the tenure is no ground for holding that he was not entitled to apply under S. 105 of the B.T. Act for settlement of a fair and equitable rent. (*Chatterjee and Walmsley*, JJ.) UPENDRA NATH GHOSE *v.* JAMINI MOHUN-LAL. 21 I.C. 37=18 C.W.N. 268.

———Ss 105, 106, 109 and 158 (d)—*Scope of.*

S. 109 merely prohibits suits regarding matters already subject of proceedings under S. 105 or S. 106. Where at the final publication of the record of rights, the proprietor took proceedings under S. 106 of the Act and the Revenue Officer directed that the lands should be recorded as liable to payments of rent, and thereupon the proprietor instituted a suit for the assessment of fair rent, in the Civil Court as it was then too late to apply under S. 105 of the Act. *Held*, that the suit is maintainable if not under the general law as a suit in the nature of declaratory suits, then as an application under S. 158 (*d*) of the Act. 19 Cal. 182, Dist. (*Richardson and Newbould*, JJ.) BARHAMDAT MISSIR *v.* KRISHNA SAHAY.
20 I.C. 910=18 C.W.N. 466.

———Ss. 105 and 106—*Landlord and tenant—Settlement of fair rent.*

A Settlement Officer can settle fair rents and the Special Judge on appeal can direct settlement of fair rent on excess lands on a proceeding under S. 105 of the Act even before the amendment of Act (III B.C. 1898). Even if the case be taken to come only under S. 106, the Revenue Officer and the Special Judge on appeal can assess rent on the excess land although the proceedings might have been headed as being one under S. 105. The word 'in respect of the land held by tenants' includes excess lands held by the tenant. 37 Cal. 30 at 41 Rel. on. (*Chatterjee and Walmsley*, JJ.) DHUNMUN PANDEY *v.* NEWAS PRASAD.
20 I.C. 841=18 C.W.N. 165.

———Ss. 105 and 109—*Application for enhancement of rent—Withdrawal without leave to file fresh application—Suit—C.P.C., O. 23, R. 1.*

An application under S. 105, B.T. Act which can be withdrawn under O. 23, C.P.C., is not a suit and a suit for enhancement of rent is maintainable even if the plaintiff withdraws previous application under S. 105, B.T. Act, without leave to file a fresh one. (*Chitty and Teunon*, JJ.) A.B. CHIODITH *v.* TULSI SINGH.
40 Cal. 428=18 I.C. 130=17 C.W.N. 467.

———S. 105—*Proceedings under.*

A proceeding may be instituted under S. 105 even where there is no rent payable to the landlord or where the rent is fixed by the contract of tenancy. (*Mookerjee and Beachcroft*, JJ.) AKTOWLI *v.* TARAK NATH GHOSE.
16 C.L.J. 328=17 I.C. 266=17 C.W.N. 774.

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———Ss. 105 and 109—*Suit in Civil Court.*

Suit concerning subject-matter of an application and proceedings under S. 109, cannot be entertained by Civil Courts under S. 109. (*Jenkins*, C.J. *and Doss*, J.) SHEODHANI PANDEY *v.* BENI PERSHAD KOERI.
16 I.C. 935=16 C.L.J. 67.

———S. 105—*Existing rent—Second appeal.*

Where it was found that the rents had not been paid for over a generation it was held that there was no existing rent to attract the presumption under cl. (1) and there had been no increase or reduction of rent but merely the fixing of fair and equitable rent. A proceeding under S. 105 is not subject to second appeal. (*Chitty and Chatterjee*, JJ.) KALI SANKAR *v.* KALOO MOLLAH. 9 I.C. 493 (Cal.).

———S. 105—*Settlement of rent—Application filed by all landlords, but signed by some—Maintainability.*

Whether proceedings under S. 105, B.T. Act are suits is open to question. An application being filed by all landlords, but withdrawn by some afterwards, the point still remains undecided as regards who desire to proceed with it. An application is not deemed void by reason of a flaw in the signature or if any one of the proprietors is not mentioned in it. (*Miller*, C. J. *and Kulwant Sahay*, J.) HAZAR LAL SAHU *v.* AMBICA GIR. 3 Pat. 67=1923 Pat. 273=1924 P. 104.

———Ss. 105 and 109—*Matters not raised, nor decided are not—Not res judicata.*

It cannot be held on the analogy of the doctrine of constructive *res judicata* that the jurisdiction of the Civil Court has been constructively excluded even when a point has been neither raised nor decided under S. 105 read with S. 105-A. of the B.T. Act, 44 C. 783 Rel. (*Das*, J.) MAHARAJA BAHADUR KESHO PRASAD SINGH *v.* BHAGWA SARAN PANDE.
67 I.C. 710=1923 P. 174.

———Ss. 105, 108 and 109—*Suit for rent—Compromise—Different rate entered in record of rights—Suit for rent on basis of record of rights*—Res judicata.

Where in accordance with a compromise in a proceeding under S. 105 the rate of rent was fixed and in a subsequent suit for recovery of rent a lesser rate was decreed on the basis of an entry in the record of rights, the decision in that suit does not operate as *res judicata*. (*Coutts and Ross*, JJ.) MAHARAJA SIR RAMESHWAR SINGH BAHADUR *v.* YOUNUS MOMIN. 3 Pat. L.T. 130=(1922) Pat. 68=65 I.C. 474=6 Pat. L.J. 588=1923 P. 101.

———S. 105—*Decision settling fair and equitable rent is not open to second appeal.*

The decision of a special Judge settling a fair and equitable rent under S. 105 of the B.T. Act is not open to second appeal but if he decides that the proceedings are maintainable

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under S. 105 then his decision would be open to second appeal. (*Adami and Bucknill, JJ.*) MADHAVA SURENDRA SAHI *v.* AWADH MISSER. 3 Pat. L.T. 316 = 65 I.C. 349 = 1923 P. 86.

——Ss. 105 and 103—*Enhancement of rent—Proceedings for—Limitation.*

It is not necessary to sue for a declaration that an entry in the Record of Rights that the defendants were *raiyats* at fixed rates is wrong, before instituting a proceeding for enhancement of rent under the Bengal Tenancy Act. If a suit is substantially such a declaratory suit as is contemplated in the proviso to S. 111-A of the Bengal Tenancy Act, then the plaintiff cannot, by adding a prayer for confirmation of possession, escape the six years' rule. The point from which limitation is to run is the date of the publication of the adverse entry in the Record of Rights unless there has been any subsequent invasion of the plaintiff's right, in which case, it starts from the later date. (*Bucknill, J.*) SHEOPRATAP DUBEY *v.* SHEOGULAM LAL. 72 I.C. 781 (Pat.).

——Ss. 105 and 109-A—*Rent settled in a proceeding under S.* 105—*Road cess return showing lesser rate filed prior to such proceeding—Effect of.*

The Landlord has a right to recover rent at a higher rate than that entered in the road-cess returns, if subsequent to the lodging of the road-cess return rent is enhanced. S. 20 of the Cess Act is no bar to such right. (*Coutts and Ross, JJ.*) NAZIR RAI *v.* KESHO PRASAD SINGH. 6 P.L.J. 622 = (1922) Pat. 57 = 4 U.P.L.R. Pat. 23 = 3 Pat. L.T. 141 = 65 I.C. 3 = 1922 P. 55.

——S. 105—*Standard of measurement in a suit for fair and equitable rent.*

In a suit for settlement of fair and equitable rent where the defts. were not in possession of any excess area, the landlord must show what was the standard of measurement in the contemplation of parties at the time the lands were demised. (*Dass, J.*) KESHO PRASAD SINGH *v.* AKLU MEHTON. 57 I.C. 502 = 2 U.P.L.R. Pat. 179.

——Ss. 105 and 109—*C. P. Code, S.* 11—*Conditions of* res judicata.

In spite of an application under S. 105 for rent, the Courts can try the question as to the rate of rent in a subsequent suit, if it is pleaded and not objected to under S. 109. (*Dass, J.*) MAHARAJA OF DHARBHANGA *v.* YOUNAS MOMIN. 57 I.C. 48 (Pat.).

——Ss. 105 and 109-A—*Order settling fair rent—Appeal.*

Decision of Special Judge settling a fair rent under S. 105 is not open to second appeal. (*Jwala Prasad, J.*) MAHABIRLAL *v.* MALEKUDDIN. 38 I.C. 32 (Pat.).

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——S. 105 (3)—*Appeal from order under—Court-fee to be levied on each tenancy.*

In an appeal from an order under S. 105 (3), B.T. Act a stamp of 8 as. is to be levied in respect of each tenancy not in respect of each tenant who may be one of a group of tenants who hold a particular tenancy. (*Mookerjee, J.*) SACHIDANANDA THAKUR *v.* MAHES CHANDRA DAS. 50 Cal. 903 = 28 C.W.N. 116 = 1924 Cal. 345.

——Ss. 105-A and 109—*Settlement of rent—Decision on status of tenant—Civil Courts.*

A Settlement Officer, when hearing an application for settlement of fair rent has jurisdiction to enquire as to whether a tenant belongs to the class to which he was shown in the Record of Rights. It is not competent to a Civil Court under S. 109 of the B.T. Act to enquire into the status of a tenant, which was the subject of enquiry before a Settlement Officer. (*Fletcher and Teunon, JJ.*) BEPIN KRISHNA KUMAR *v.* HARI DAS GHOSE. 44 I.C. 862 = 27 C.L.J. 210.

——S. 105-A—*Claim of rent free tenure—Jurisdiction of Revenue Court.*

Where a claim of rent free tenure has been made before a Settlement Officer, he has jurisdiction to enquire whether rent has been paid at any time for the land in dispute. (*Prinsep and Stephen, JJ.*) NIKUNJA BEHARI CHUNDA *v.* RADHA KISHORE MANIKYA. 30 I.C. 944 = 22 C.L.J. 148.

——S. 105-A—*Lease by one co sharer—Jungle and waste land.*

One of the co-sharers granted a lease for reclamation of jungle and waste land to a tenant and the tenant remained in possession for about ten years without objection, *held*, the tenant becomes a raiyat of all the co-sharers. (*Mookerjee and Beachcroft, JJ.*) DAKHYAYANI DEBI *v.* MANA ROUT. 19 C.W.N. 407 = 22 I.C. 666 = 19 C.L.J. 113.

——Ss. 105-A and 106—*Scope of—Section* 105-*A*.

The intention of section 105-A of the B.T. Act is that where a party without resorting to S. 106 applies for settlement of fair rent under S. 105 and the issues mentioned in S. 105-A are raised they shall be tried and settled by the Revenue Officer and rent settled accordingly. (*Chatterjee and Walmsley, JJ.*) UPENDRA NATH GHOSE *v.* JAMINI MOHUN PAL. 21 I.C. 37 = 18 C.W.N. 268.

——Ss. 105 (a) and 109—*Applicability of—Suit in Civil Court—Bar.*

In order to attract the operation of S. 109 of the Bengal Tenancy Act, which contemplates creating a bar to the jurisdiction of the Civil Courts under certain circumstances, it is essential to establish that the Civil suit had for its subject a matter which had already formed the subject

of an application under S. 105 of the Bengal Tenancy Act. The introduction of S. 105 (*a*) has not altered the scope of S. 109 which has to be construed on the same line as before the introduction of that sub-section. (*Bucknill*, J.) SHEOPRATAP DUBEY *v.* SHEOGULAM LAL.
72 I.C. 781 (Pat.).

——Ss. 105-A and 190-A—*Limitation*—Per *Curium*. (*Jwala Prasad*, J., *dissenting*.):—

Limitation runs from the date of the decision of the Revenue Officer and not from the date of addition of a memorandum of costs to the decision. (*Mullick*, C.J. *and Jwala Prasad and Sultan Ahmed*, JJ.) GULAB *v.* JANKI KUZAR. 1 Pat. L.T. 403=57 I.C. 286=5 Pat. L.J. 472 (F.B.).

——Ss. 105-A. and 109—*Decisions under* S. 105-*A*—*Suit for ejectment against persons not parties to proceedings.*

A decision in a proceeding under S. 105-A that certain persons are tenure-holders is no bar to a suit by those persons against certain other persons who were not parties to the previous proceeding under S. 105-A for ejectment of the latter on the ground that they are trespassers. (*Dass*, J.) RAMYAD PANDE *v.* GENDA TEWARI. 56 I.C. 998 (Pat.).

——Ss. 105 A. and 107—*Settlement of dispute.*

A dispute settled under S. 105-A of the Act is barred for all time by S. 107 as amended from being re-opened or challenged. 29 Cal. 707 (P. C.) Ref. to. (*Mullick and Atkinson*, JJ.) MAHENDRA NARAYAN *v.* GIRIS CHANDRA KAR. 46 I.C. 125=3 Pat. L.J. 379.

——Ss. 106 and 109—*Suit withdrawn with liberty to sue afresh—Effect of.*

A suit under S. 106 of the B.T, Act allowed to be withdrawn with liberty to bring a fresh one, is to be treated as one never instituted and S. 109 is no bar to the institution of suit : 33 C. L.J, 304 ; 40 Cal. 428 ; 28 C.L.J. 254, Ref. (*N. R. Chatterjea and Suhrawardy*, JJ.) SOROJ KUMAR ACHARJI *v.* UMED ALI.
35 C.L.J. 19=1922 Cal. 251.

——S. 106—*Entry in record of rights—Suit for amending—Question of possession alone should be decided.*

Where a suit is instituted under S. 106, Bengal Tenancy Act, for amending an entry in the Record of Rights as regards the possession of a parcel of land, the only matter to be decided is the question of possession and not of title. (*Mookerjee*, A.C.J. *and Fletcher*, J.) GOBINDA RANI DASYA *v.* MOHIM CHANDRA ROY.
35 C.L.J. 195.

——S. 106—*Enhancement of rent—Old tenancy—Right of landlord.*

On an application for enhancement of rent the facts were found to be these. At the time of which any historical knowledge was available, the tenure in question was created the lands were not all cultivable and had to be

reclaimed. The rent was therefore fixed not on the quantity of the lands let out but on the quantity of land that could be brought under cultivation by the Talukdar. It was specifically mentioned in the Kabuliats of 1223 (B.S.) that the rent payable at the time was to be paid on the quantity of the land under cultivation until there was a measurement. A later document of 1249 contained no terms as regards enhancement. *Held*, that the document of 1249 was merely a recognition of the original tenancy created in 1223 and the rent could be increased according to the terms embodied in the Kabuliat of 1223. (*Suhrawardy and Cuming*, JJ.) JOY CHANDRA CHAKRABURTHY *v.* SRIJUT KUMAR ARUNCHANDRA SINHA. 67 I.C. 241 (Cal.).

——Ss. 106 and 109—*Suit for correction of record dismissed for default—Subsequent civil suit is barred.*

Where a suit by the plaintiff under S. 106 of the B.T. Act for the correction of any entry in the Record of Rights after establishment of plaintiff's rent free title is dismissed for default by a revenue Court, a subsequent suit in a civil Court for declaration of plff.'s rent free title is barred. (*Walmsley and Greaves*, JJ.) APURBA KRISHNA ROY *v.* ATARMANI DASI.
64 I.C. 889 (Cal.)

——Ss. 106 and 109—*Withdrawal of suit with liberty—Fresh suit, not barred.*

Where a suit under S. 106 is withdrawn with liberty to bring a fresh suit, it should be treated as not having been brought and a fresh suit brought according to the permission of the Court is not barred under S. 109 of the Act. (*Chatterjea and Suhrawardy*, JJ.) SARAJ KUMAR ACHARJI *v.* UMED ALI.
25 C.W.N. 1022=63 I.C. 954=35 C.L.J. 19.

——S. 106—*Scope of.*

A Revenue Officer deciding disputes under S. 106, is confined to the question of possession only. (*Cuming*, J.) SEBA DAS JANA *v.* NIRODA BALA DASI. 63 I.C. 602 (Cal.).

——S. 106—*Proceedings under does not bar civil suit to rectify Record.*

The fact that a proceeding under S. 106 of the Act for correcting an entry in the Record of Rights was commenced and withdrawn is no bar to a civil suit to correct the entry in the Record of Rights. (*Greaves and Newbould*, JJ.) MAHOMMED AYEJUDDIN MIA *v.* PRODYOB KUMAR TAGORE. 48 Cal. 359=61 I.C. 503=25 C.W.N. 13.

——Ss. 106 and 113—*Rectification of Record does not bar suit under S.* 113.

The rectification of the Record of Rights as regards the existing rights according to S. 106 does not amount to a settlement of rent so as to bar a suit under S. 113. (*Chaudhuri and Ghosh*, JJ.) MANINDRA CHANDRA NANDI *v.* UPENDRA CHANDRA HAZRA.
60 I.C. 959=47 Cal. 1006.

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——S. 106—*Mirasi tenure — Rent—Enhancement of rent—Patni taluk.*

A suit to enhance rent proceedings on the presumption that a zemindar, holding under the perpetual settlement has the right from time to time to raise the rents of all the rent paying lands within the zemindary according to the pergannah or current rates unless either he is precluded from the exercise of that right by a contract binding on him or the lands in question can be brought within one of the exemptions recognised by Regn. (VIII of 1793). It also assumes that the defts., had some valid tenure or right of occupancy in the lands which are the subject of the suit. The mere fact of a tenure being hereditary does not show that the rent of the tenure has been fixed in perpetuity. The use of the expression 'patni taluk' in the contract of tenancy does not necessarily create a patni taluk, *i.e.*, a taluk subject to the summary procedure for realization of rent provided by Regn. (VIII of 1819). (*Mookerjee*, C.J. *and Fletcher*, J.) RAJA NIROD CHANDRA SINGHA SARMA *v.* HARIHAR CHAKRAVARTHI CHAUDHURI. **38 I.C. 867=32 C.L.J. 19.**

——S. 106—*Record of Rights—Entry in—Presumption.*

When correction of the Record of Rights is sought in a suit under S. 106, B.T. Act, it is primarily presumed in defendants' favour and the plaintiff must show that the entry is wrong. (*Newbould*, J.) HARI KANTA DAS BARMAN *v.* BIBI NURRANNESSA. **53 I.C. 625 (Cal.).**

——S. 106—*Entry in Record of Rights—Joint landlords—Suit for partition—Onus.*

Plff. and his co-sharers were entered as joint landlords in the Record of Rights. There had been a partition between them long before the Record of Rights and plff. had been in sole possession since the partition. *Held*, that though there was nothing to show what were the precise terms of the partition still in the absence of any evidence on deft.'s side to show that the plff's. possession was as a co-sharer on his behalf, the plff. should be recorded as the sole landlord. (*Chitty and Walmsley*, JJ.) BROJENDRA KISHORE ROY CHOWDHURY *v.* JUGENDRA KISHORE ROY CHOUDHURY. **47 I.C. 5 (Cal.).**

——S. 106—*Suit under — Possession—Title, whether can be gone into.*

In a suit under the section, where the dispute is between rival proprietors, only the question of possession can be gone into. (*Fletcher and Newbould*, JJ.) SURENDRA KRISHNA ROY CHOUDHURY *v.* PEARY MOHAN RAI. **41 I.C. 698 (Cal.).**

——S. 106—*Suit under—Plff.'s evidence.*

The plff. in a suit under S. 106 must prove not only incorrectness of the entry in Record of Rights but also in what respect it is incorrect and also he must show how it can be corrected, otherwise his suit must fail. (*Mookerjee and Cuming*, JJ.) DURJENDRA NATH ROY *v.* AJLABUDO SARDAR. **28 C.L.J. 53=39 I.C. 209=21 C.W.N. 492.**

——Ss. 106 and 109—*Scope of.*

S. 109 of the B.T. Act, is a bar only in regard to matters forming the subject of investigation under Chap. X of the Act; and a Revenue Officer's jurisdiction under S. 106 of the Act does not include questions of title and recovery of possession of immoveable property. (*Chatterjee and Newbould*, JJ.) ASWINI KUMAR *v.* SARDAR CHARAN. **37 I.C. 253=24 C.L.J. 79.**

——S. 106—*Amendment Act* (III *of* 1898), *S.* 9—*Order under the former Acts as* res judicata *being a decree under the latter.*

The order of a Settlement Officer in the Survey and Record of Rights under S. 106, Bengal Tenancy Act, 1885 is a decree under S. 9 of Act (III of 1898) and hence operates as *res judicata*. (*Prinsep and Stephen*, JJ.) NIKUNJA BIHARI CHUNDA *v.* RADHA KISHORE MANIKYA. **30 I.C. 944=22 C.L.J. 148.**

——S. 106—*Standing timber—Tenant's rights—Custom.*

A custom in permitting the appropriation of timber trees on a holding by the tenant is not unreasonable.

Where there is nothing unfair or dishonest or contrary to the public good in a custom, the custom is not unreasonable. (*Chapman and Walmsley*, JJ.) GURAI KAR *v.* KAURMONI SINGHA. **29 I.C. 312=19 C.W.N. 1188.**

——S. 106—*Suit under—Question of title—Jurisdiction of Civil Court.*

A person not in possession of land claimed as rent free at the date of the Record of Rights, cannot have the mere question of his title to hold the land rent free tried in a suit under S. 106 of the B.T. Act (VIII of 1885). Nor can he obtain possession of the land in a suit under that section.

If the plaintiff has a title and his claim to possession is not barred by limitation, he is entitled to possession. But he cannot get all the reliefs in a suit under S. 106, whereas he can get a complete relief by a suit in the Civil Court. (*N. R. Chatterjee and Greaves*, JJ.) PRANKRISHNA SAHA *v.* TRILOKHYANATH CHOWDHURY. **27 I.C. 883=19 C.W.N. 911.**

——Ss. 106 and 109-A (3)—*Suit for amendment of Record of Rights—Tenants occupying excess land—Order of Court—Appeal.*

In a suit under S. 106 of the Act by the tenants against the landlord for amendment of the Record of Rights as to an entry in respect of rent, the special Judge can amend the entry and add a note to the effect that the tenants are in occupation of excess land; such a decision is not one settling a rent within S. 109 of the Act but rather a decision on the question

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of the extent of land comprised in the tenancy, and is therefore appealable. 15 I.C. 332 Rel. on. (*Mookerjee and Beachcroft*, JJ.) MANIK BISWAS *v.* JAGADINDRA NATH ROY.

24 I.C. 283 (Cal.).

——S. 106—*Scope of—Record of Rights—Dispute as to entry in such record.*

When a settlement of land revenue is not being or about to be made, a dispute as to an entry in the Record of Rights should be decided by the machinery provided by S. 106 of the B.T. Act, though there has been no settlement of rent. (*Jenkins*, C.J. *and Mookerjee*, J.) KESHAB PANDA *v.* BHOBANI PANDA.

21 I.C. 538=18 C.L.J. 187.

——S. 106—*Scope of—Questions of title and possession between rival proprietors.*

The questions of title between rival proprietors cannot be gone into by the Court under S. 106 of the Act though the question of possession can be. The question of title is open for examination in a civil suit. 12 C.W.N. 8, Foll.; 14 C.W.N. 884; 14 C.W.N. 897; 15 C.W.N. 57; 15 C.W.N. 474, Rel. (*Mookerjee and Beachcroft*, JJ). RAM CHANDRA BHANG DEO *v.* NANDA NANDANANDA DEB. **19 C.L.J. 197= 20 I.C. 298=18 C.W.N. 938.**

——S. 106—*Transfer of case to Civil Court—Power to decree possession.*

Where a suit under S. 106 of the Act, is transferred to a Civil Court for trial it cannot, in that suit, pass a decree for possession inasmuch as the Revenue Officer, if he had tried the suit himself, cannot pass such a decree. (*Jenkins*, C.J. *and Mullick*, J.) NILMONI KUMAR *v.* KEDAR NATH GHOSH. **20 I C. 151= 17 C.W.N. 780.**

——S. 106—*Scope of—If question of title between rival tenants can be disposed of.*

Under S. 106 of the Act only the question of possession between rival proprietors can be considered but it does not preclude question of title arising between rival tenants or between a landlord and tenant being decided. 12 C.W.N. 8 at 15, Rel. (*Carnduff*, J). ENSAR ALI *v.* YAKUB ALI. **13 I.C. 311 (Cal.).**

——S. 106—*Scope of suit under—Suit for declaration and title—Jurisdiction—Civil or Revenue Courts.*

A suit for a declaration of title and for possession without any claim to correct an entry in the Record of Rights, is not one under S. 106 of the Bengal Tenancy Act and must therefore be brought in a Civil Court and between landlords of neighbouring estates, the only question is one of possession at the date of final publication of the list and Revenue Courts have therefore no jurisdiction to determine the same. (*Chitty and N. R. Chaterjee*, JJ). KALI SUNDARI *v.* GIRIJA SANKAR.

11 I.C. 184=15 C.W.N. 974.

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——S. 106—*Decision in settlement proceedings—Finality.*

A Civil Court is precluded from entertaining a suit concerning matter in respect of which proceedings have already been taken before a Settlement Officer. 12 C.W.N. 1032, Ref. (*Woodroffe and Carnduff*, JJ.) KAMALANAND SINGH *v.* PREM LAL GANESHI. **9 I.C. 651 (Cal.).**

——S. 106—*Suit under—Record of Rights—Onus on plff.*

Where a suit is instituted under S. 106 the plff., must prove that the entries in the Record of Rights are not correct. When a certain time is given to do a certain act, and the person bound to perform it, is by an act or order of the Court, prevented from carrying it out, he can deduct the time so spent. Where a suit is filed on the re-opening day, it is within time if excluding the days on which the Court was closed, it would have been in time. 18 Cal. 231, Foll. In a Record of Rights, *mal* lands may be recorded as *Malik*, in the sense that lands forming part of the revenue paying lands of an estate are held rent free. (*Chatterjee*, J.) LACHMI NARAYAN *v.* SUKHRAJ RAI. **9 I.C. 181 (Cal.).**

——S. 106—*C. P. Code, O. XXIII, r. 1—Withdrawal—Subsequent suit.*

C.P.C., S. 373 (O. XXIII, r. 1 (3), precludes the plff., only from bringing a fresh suit in that or any Court of similar or co-ordinate jurisdiction without the permission of the Court. It does not preclude the plff. withdrawing a suit under S. 106 of the Bengal Tenancy Act, from an ordinary action in the Civil Courts. (*Casperss*, J.) ALTAP ALI *v.* SHEIKH MOHATAP.

9 I C. 4 (Cal.).

——S. 106—*Suit involving question of title—Settlement officer can't transfer.*

Under S. 106 of the B. T. Act a Revenue Officer is competent to decide the question, whether the relationship of landlord and tenant subsists, if the question is not one between neighbouring estates. Where a recorded tenure-holder brought a suit under S. 106 of the B.T. Act for declaration that the entry in the survey was wrong and that he was himself the proprietor, the suit raised a question of the title between rival proprietors. Where a settlement officer has no jurisdiction to entertain a suit under S. 106 of the B. T. Act; he has no jurisdiction to transfer the case to a competent Court for trial and the Civil Court cannot try the case. (*Das and Bucknill*, JJ.) MOORE *v.* RAI BABU GULAB CHAND SAHIB.

4 Pat. L.T. 68=1 Pat. L.R. 157= 73 I.C. 5=1923 P. 218.

——S. 106—*Entry in Record challenged—Court should find if the evidence justifies entry.*

Where the Court has before it, the evidence upon which the record was prepared and where the plff. denies the correctness of the record, the Court must come to a finding as to the

sufficiency of the evidence to justify the entry. (*Ross*, J.) JANKI KUAR *v.* USMAN SAIN. 62 I.C. 417 (Pat.).

——S. 106—*Nature of suit.*

A suit under S. 106 of the Act has no legal concomitants which differentiate it from any other ordinary civil suit. (*Bucknill*, J.) JANKI KOER *v.* WALI MUHAMMAD. 61 I.C. 420 (Pat.).

——Ss. 106 and 109—*Dismissal for default—Subsequent suit—No bar.*

A proceeding under S. 106 of the B. T. Act, which is dismissed for default, does not operate as a bar to a subsequent suit by virtue of the provisions of S 109 of the Act. Since in order to operate as a bar to a subsequent suit it presupposes the existence of a decision by the Settlement Officer on the merits of the claim. (*Atkinson*, J.) BIBI SALEHA *v.* ANTU RAM. 43 I.C. 973 (Pat.).

——S. 107—*Decree of Revenue Officer—If final.*

The decree of a revenue, Officer in suits under S. 106 of the Act as to the liability of the defts. to pay rent in respect of certain lands is made final by S. 107 of the Act and the defts. cannot in any subsequent proceedings or suits by the proprietor for assessment of fair rent to contest that decree. 29 Cal. 707 P.C. dist. (*Richardson and Newbould*, JJ.) MISSIR BERHANDAL *v.* KRISHNA SAHAY. 20 I. C. 910=18 C.W.N. 466.

——S. 107—'*Decision*'—*Order of dismissal for default.*

The word 'decision' in S. 107 of the Act implies an adjudication on the merits and does not include an order of dismissal for default. (*Mookerjee and Beachcroft*, JJ.) PARBALI *v.* TOOLSI KAPRI. 18 C L.J. 128= 20 I.C. 1=18 C.W.N. 604.

——Ss. 107 and 109—*Decision by Special Judge—Order—Appeal—Limitation.*

G was recorded as a raiyat at fixed rate by the survey authorities and J the landlord claimed an enhancement of rent under S 30 (*a*) (*b*) of the B T. Act. The Revenue Officer decided the case on 30-10-1916 and J appealed to the Special Judge who on 4-2-1919 held that G was an occupancy raiyat and not fixed rate tenant, and allowed the appeal with costs and on 8-5-1919 of his own motion fixed Rs. 13-8-0 as costs of this appeal. No separate decree was drawn up and G filed a second appeal to the High Court on 8-8-1919. *Held*, that the appeal was barred by limitation as the time ran from 2-4-1919, the date of the judgment and not from 8-9-1919 the date of the additional order defining the amount of the costs awarded under the previous order. The order of 4-2-1919 in so far as it gave reasons for the findings was a 'judgment' and in so far as it made a declaration or order, it had the effect and force of a decree. The additional order as to the costs was not an amendment of the judgment

under S. 152 of the C. P. Code but it may be taken as an amendment of the decree but under Art. 156, time runs from the date of the original judgment and not from the amendment and S. 5 of the Lim. Act was not applicable unless the grounds on which the appeal is based, are intimately connected with the amendment. *Per Sultan Ahmad*, J.—The word 'decision' in S. 107 of the B.T. Act means 'an adjudication on the merits'. The order for payment of costs having already been made by the first order dated 4-2-1919, the subsequent order stating the amount of costs was simply interlocutory and therefore not a part of the final judgment. The indulgence which can be shown under S. 5 of the Lim. Act must be based upon proper materials. *Per Jwala Prasad*, J.—O. 20, R. 6 (2) requires a statement of the amount of costs incurred in the suit and the Revenue Officer has to give his directions as to costs in his decision in any proceeding under Ss. 105, 105-A and 106 S. 143 (2) of the B.T. Act making applicable S. 35 of the C. P. Code read with O. 41, R. 35. The subsequent order of 8-5-1919 was not an amendment of the decision but it was a completion of the decision. A party intending to appeal from a decision is entitled to wait till the order as to costs is made in order to see if he will have to take objection as to the costs while appealing from the decision, and the time for appeal runs from that date. The appellant having been misled by the practice to prepare a decree as to memo. of costs separately, S. 5 of the Lim. Act was applicable. 32 Cal. 908, Foll. (*Mullick, Jwala Prasad and Sultan Ahmad*. JJ.) SHEIKH GULAB *v.* MAHARANI JANKI KUER. 1 Pat. L T. 403=87 I C 236= 3 Pat L J. 472 (F.B.).

——S. 108—*Revenue Officer—Power of revision of any order under Ss.* 105 *to* 107.

Under S. 108 of the Act a Revenue Officer specially empowered by the Local Government in this behalf has the power of revising any order or decision passed under Ss. 105, 105-A. 106 or 107 made by himself or any other Revenue Officer. This power is not restricted to revision of the decision or order on the merits. (*Chatterjea and Mullick*, JJ.) DHAKESWAR PRASAD NARAIN SINGH *v.* ISWARDHARI SINGH. 30 I.C. 862 (2)=22 C.L.J. 57.

——S. 108—*Revision by Revenue Officer——If competent.*

S. 108 of the Act should not be given a restricted interpretation. A specially empowered Revenue Inspector cannot only correct, arithmetical, or clerical errors patent on the face of the record, but can review, on the merits, his own order or revise the orders made by another officer. (*Mookerjee and Beachcroft*, JJ.) MST. PARBATI *v.* TULSHI KAFRI. 20 I.C. 301=18 C.L.J. 125.

——Ss. 108-A. and 109-A.—*Correction of entries in a Record of Rights—Inherent power of Court for preservation of accuracy of record.*

BENGAL TENANCY ACT (VIII of 1885), S. 108-A.

A Record of Rights had been prepared accurately but an unauthorized interpolation had been made and was corrected by the Settlement Officer. The entry had not been made owing to a *bona fide* mistake of the Settlement Officer or of any of the parties within S. 108-A of the Act and no appeal lay to the Special Judge under S. 109-A, therefore there was no second appeal or revision to the High Court. But if it be held that the Settlement Officer purported to act under S. 108-A, an appeal lay to the Special Judge and for his action under S. 109-A (2) a second appeal lay to the High Court. (*Mookerjee and Beachcroft*, JJ.) BAULCHANDRA SEN *v.* SIRISH CHANDRA SEN. **19 I.C. 916 = 19 C.L.J. 281.**

———**S. 108-A.**—*Scope.*

S. 108-A of the Bengal Tenancy Act applies only to the Revenue Officers specially empowered by the Local Govt. and in substance authorises him to reconsider the matter on the amendments. (*Mookerjee and Beachcroft*, JJ.) RAJ MOHAN GUHA *v.* ALAM GAZIPATWARI. **16 C.L.J. 339 = 17 I.C. 279 = 17 C.W.N. 625.**

———**Ss. 109, 105**—*Withdrawal of Application for settling rent—Subsequent civil suit does not lie.*

Where after applying for the settlement of a fair rent under S. 105, B.T. Act, before a Revenue Court, the same is withdrawn and a suit is filed for enhanced rent in a Civil Court, S. 109, B.T. Act operates as a bar. (*Walmsley and B.B. Ghose*, JJ.) SASI KANTA ACHARJA *v.* SALIM SHEIKH. **50 Cal. 626 = 27 C.W.N. 987 = 74 I.C. 1001 = 1923 Cal. 624.**

———**S. 109**—*Second appeal—Decision of special Judge is open to.*

The decision of a special Judge is substantially a decision on the question of the status of a tenant and is open to second appeal. 43 C. 603 Ref. (*Mookerjee and Cuming*, JJ.) SARAT CHANDRA DE DAS *v.* TARAPRASANNA BHUTTACHARJYA. **36 C.L.J. 333 = 70 I.C. 437 = 1923 C. 141.**

———**S. 109**—*Scope of—No bar to entertainment of defence.*

Under S. 109 of the Bengal Tenancy Act what is barred is the entertainment of an application or suit and not the entertainment of a defence to an application or suit. (*Mookerjee and Cuming*, JJ.) RAJENDRA NARAIN MAZUMDAR *v.* SHEIK KALIM. **49 Cal. 875 = 67 I.C. 813 = 26 C.W.N. 758 = 1922 Cal. 575.**

———**S. 109**—*Decision merely settling rent—Decision as to extent of area and liability to enhancement is not such.*

Where the decision of the special Judge involved a determination of two fundamental questions in connection with the tenancy held by the defendant, *viz.*, the extent of area and their liability to enhancement, it is not a decision merely settling rent within S. 109-A of

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the B. T. Act and a second appeal lies therefrom. (*Mookerjee and Cuming*, JJ.) THE MIDNAPUR ZEMINDARY CO., LTD. *v.* SRIDHARI MAHATA. **36 C.L.J. 96 = 49 Cal. 866 = 67 I.C. 775 = 1922 Cal. 152.**

———**Ss. 109 and 105**—*Dismissal or withdrawal of application under S. 105 operates as a bar.*

An application for enhancement of rent under S. 105 of the Act which is withdrawn or dismissed for default is an application under S. 109 of the same Act, and a Civil Court has no jurisdiction to entertain a suit relating to the same subject-matter. (*Mookerjee*, C.J. *and Fletcher*, J.) ABEDA KHATUN *v.* MAJUBALI CHOUDHURI. **24 C.W.N. 1020 = 48 Cal. 157 = 59 I.C. 760 = 33 C.L.J. 304.**

———**Ss. 109 and 105**—*Assessment of fair rent—Subsequent suit by tenant.*

After the assessment of fair rent under S. 105 of the Act, a subsequent suit by the tenant for a declaration that the proceedings under Chapter X of the Act were fraudulent and that they were *maurasi mokurrari* raiyats and not tenure-holders and that the lands held by them constitute not one tenure but distinct raiyati holdings, is not barred by S. 109, but S. 109 bars the plff's. prayer for a declaration that the landlord cannot realise the rent assessed under S. 105. The jurisdiction of a Civil Court is not excluded by S. 109 in regard to a point which, though it might and should have been raised in a proceeding under S. 105 read with S. 105-A has neither been raised nor decided in the proceeding under that section. (*Mookerjee and Cuming*, JJ.) NAWAB BAHADUR OF MURSHIDABAD *v.* AHMAD HUSSAIN. **44 Cal. 783 = 25 C.L.J. 556 = 35 I.C. 695 = 21 C.W.N. 1005**

———**S. 109**—*Record of Rights—Entry in—Made after decision of dispute—Correctness—Presumption of—Adverse possession.*

When the entry in the Record of Rights was made, after the decision of a dispute, before the B.T. Act was amended by Act III of 1898, no presumption of correctness can apply to it. It is open to the parties to agree in repudiating the entry. (*Mookerjee and Beachcroft*, JJ.) SOBHAN BAKSH *v.* MAHARAJA BIRENDRA KISHORE MANIKYA BAHADUR. **30 I.C. 939 = 22 C.L.J. 145.**

———**Ss. 109 and 106**—*Decision of settlement officer—Effect of.*

The Settlement Court's decision is binding and conclusive unless it is clearly the subject of an application under Ss. 105—108. The Revenue Court's duty is to ascertain fair rent from the Record of Rights and so a suit for a declaration of lands as *Lakheraj* or held as fixed rates is not barred. No forfeiture takes place for mistakes in selecting Civil Courts

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instead of the Revenue Court for relief. (*Fletcher and Teunon, JJ.*) SHASHI BHUSAN HAZARAN *v.* ISABAR ALI. 29 I.C. 122 = 19 C.W.N. 636.

——Ss. 109 and 105—*Constructive*—Res judicate.

Where the tenant claimed abatement of rent under S. 52 but no such question was raised or investigated in the proceeding under S. 105, on a plain and literal reading of S. 109, the position could not be maintained that the suit concerned a matter which had already been the subject of an application under S. 105. The appellant urged a wider construction to be put upon S. 11. Where it was contended that as in a case where S. 11, C.P.C., is applicable, a question which might and should have been raised is deemed to have been raised and decided the High Court should hold under S. 109 that a matter has been the subject of an application under S. 105 whenever it might, if the defendant had so chosen, have been raised and decided under S. 105 read with S. 105-A. *Held* that this contention was unsound. If the construction put forward by the appellant were accepted, words which are not found there would have to be read into S. 109. It would be held on the analogy of the doctrine of constructive *res judicata*, that the jurisdiction of the Civil Court had been constructively excluded even when a point had been neither raised and decided under S. 105-A. (*Das, J.*) MAHARAJAH BAHADUR KESHO PRASAD SINGH *v.* BHAGWAT SARAN PANDE. 67 I.C. 710 = 1923 P. 174.

——Ss. 109, 50 and 105—*Fair and equitable rent—Second appeal—Maintainability.*

No appeal by tenants for determining whether certain tenants were fixed rate tenants or not, could lie when they have not appealed to the Special Judge and the High Court could only determine fair and equitable rent. S. 50 does not touch a case where the variation is 6 annas on a rental of Rs. 2-8-0 per bigha. (*Chamier C.J. and Mullick, J.*) RAJA SINGH *v.* KISHEN BEHARI LALL. 41 I.C. 499 = 1917 Pat 261.

——Ss. 109, 105 and 105-A—*Conflict between Civil and Revenue Courts avoided by S. 109 of the Act.*

The object of S. 109 being to avoid a conflict between Revenue and Civil Courts, a Civil Court cannot entertain under the section, a suit regarding the status of persons which has already been determined by a competent Revenue Court in proceedings under S. 105 of the above Act. 16 C.L.J. 67, approved. (*Atkinson and Kingsford, JJ.*) RAM DAYAL PANDEY *v.* GENDA TEWARI. 1 Pat. L.J. 479 = 37 I.C. 641 = 3 Pat. L.W. 69.

——S. 109-A—*Appeal lies—Order of special Judge refusing to set aside abatement of appeal.*

S. 109 (A) of the Bengal Tenancy Act is no bar to an appeal from an order of a special Judge refusing to set aside an abatement of an appeal. 45 C 638, foll. (*Cuming and Panton, JJ.*) KRISHNADAS ACHARJEE CHOWDHURY *v.* SAMSAN ALI SHEIKH. 37 C L.J. 189 = 74 I.C. 925 = 1923 Cal. 431.

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——S. 109-A—*Second appeal from Special Court decision.*

The decision of a Settlement Officer as regards the increase of rents of a tenancy after measurement was reversed on appeal by the Special Judge on the ground that the land of the tenant is not proved to be in excess of the area for which rent has been previously paid. The finding of the Judge involving a question of fact as well as of law could be challenged in second appeal. Per *Sanderson*, C. J.:—Second Appeal lies with reference to particulars in respect of which the rent settlement decision is given. Per *Mookerjee*, J.:—Second Appeal lies provided the decision is not a 'decision settling a rent' scheme of Chapter X discussed. Per *Holmwood, J.*—No general rule can be laid down. Each case depends on its circumstances. Cases going beyond simple decision are open to Second Appeal. (*Sanderson*, C.J. *Woodroffe, Mookerjee, Holmwood and Chatterjee, JJ.*) JNANADA SUNDARNI *v.* ABDUR RAHMAN, 43 Cal. 603 = 20 C.W.N. 428 = 33 I.C. 148 = 23 C.L.J. 281.

——Ss. 109-A and 157—*Decision—Settling rent—Appeal.*

Special Judge's decision that he has no jurisdiction to fix fair rent as the deft. is a trespasser and that the plff. may sue under S. 157, is not a decision settling rent and second appeal from it is not barred by S. 109-A. (*Holmwood and Chapman, JJ.*) KALI PROSANNA LAO *v.* BHAGABAN WALI. 17 C.W.N. 348 = 17 I.C. 587 = 17 C.L.J. 431.

——S. 109-A—*Decision fixing area—Appeal.*

The section does not bar an appeal from a decision fixing the area for which the tenant must pay rent. (*Cox and Chatterjee, JJ.*) AKBAR ALI MIAN *v.* HIRA BIBI. 15 I.C. 832 = 16 C.L.J. 182.

——S. 109-A—*Decision settling rents.*

A decision determining the enhancement of rent is a "decision settling the rents" within S. 109-A of the B. T. Act and therefore no appeal lies against it. (*Chamier*, C.J., *and Sharfuddin*, J.) SAJIWAN MAHTO *v.* GULABCHAND LAL. 35 I.C. 678 = 1 Pat. L.J. 409.

——S. 109-A. (3)—*Second Appeal—High Court—Question of fact—No jurisdiction to disturb—Power of High Court subject to limits prescribed by S. 584 of the C. P. Code of* 1882 (*S. 100 of C. P. Code* 1908.)

The right of appeal to the High Court by S. 109-A sub-S. 3 of the B. T. Act, 1885 is subject to S. 584 of the C. P. Code, 1882 and can only be exercised upon the grounds therein mentioned. The High

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Court has therefore no jurisdiction under the sub-section to set aside the decree of a Dt. Judge upon the ground that he had applied the wrong standard of measurement to land of which the rent was in question. (*Lord Buckmaster.*) NAFAR CHANDRA PAL *v* SHUKUR SHEIKH. **46 Cal. 189=23 C.W.N. 345=9 L.W. 552=51 I.C. 760=45 I.A. 183 (P.C).**

——Ss. 109-A. (3) and 30 (a) (b)—*Application for enhancement of rent—Second appeal.*

When the Appellate Court only dealt with the question as to whether the enhancement of rent was to be under S. 30 (*a*) or 30 (*b*) the case is one to which S. 109-A applies and the judge's decision being one merely settling the rent, no second appeal lies to the High Court. (*Chapman and Atkinson*, JJ.) JALDHARI SINGH *v.* SHAM LAL MAHTO. **2 Pat L.W. 574=42 I.C. 342=4 Pat. L J. 60.**

——S. 109 (b)—*Applicability of.*

S. 109-B of the Act which was inserted into the Act only in 1907 does not apply to a case where the agreement was made long before the settlement proceedings. (*Mookerjee and Beachcroft*, JJ.) BATA MANDAL *v.* MANINDRA CHANDRA NANDI. **19 C.W.N. 321=25 I.C. 829=21 C.L.J. 325.**

——S. 109—*Contract against section—Fair rent—Settled on basis of, cannot be enforced.*

In every case where the provisions of S. 109 (c) of the Bengal Tenancy Act are invoked, there should be a strict compliance with its requirements. The settlement officer has to determine in the first place whether the terms of the agreement are really such that if they were embodied in a contract, they would not be enforced under the Act. If the conclusion is in the affirmative, he is to satisfy himself that the rent agreed upon is fair and equitable. It is only in the event of his being so satisfied, but not otherwise, that he can settle such rents as fair and equitable. Where the Revenue Officer instead of complying with the terms of S. 109 (c) passed an order in these terms "The tenant agrees. Though the increase is rather large, the attested compromised rent may be settled as fair and equitable." *Held* that S. 109 (c) did not contemplate settlement of fair and equitable rent on the basis of such an ambiguous order and in accordance with a contract, which contravenes the provisions of the B.T. Act. (*Mookerjee and Cholzner*, JJ.) MOYDHANNESSA BIBI *v.* SATIS CHANDRA GIRI. **37 C L.J. 118=70 I.C. 895=1923 Cal. 435.**

——S. 109 (c)—*Mortgagee in execution of mortgage decree becomes purchaser — Whether mortgagee auction-purchaser bound by such agreement under S. 109 (c), B.T. Act.*

Where a mortgagor while in possession made an agreement under S. 109 (*c*) of the Bengal Tenancy Act with the tenants that they would pay thenceforth nagadi rent instead of product rents and the rate settled on compromise was found considerably lower than the fair rent

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which would have been settled on commutation and where it was found that the low rate was entered into on condition of a heavy nazarana because the mortgagor saw no means of saving his property: *Held*, that the mortgagee who subsequently purchased the property in execution of his mortgage decree was not bound by the said agreement made under S. 109 (*c*) of the Bengal Tenancy Act. (*Coutts and Sultan Ahmed*, JJ). MATHURA RAI *v.* BABU MANDIL DAS. **1 P.L J. 392=56 I.C. 805=3 U.P.L.R. (Pat.) 39=(1921) Pat. 165.**

——S. 111—*Suit for alteration of rent—Statement as to rent in previous suit, if admissible in evidence.*

In a suit under S. 111, B.T. Act for alteration of rent, the statement of the deft. in a previous suit as to rent paid by them is admissible in evidence. Though no finding as to rent was given in the previous suit and the present suit for alteration of rent was brought 3 months after the final publication of the Record of Rights, the suit should not be dismissed but sent back for trial *de novo* on the merits. (*Chatterjee and Walmsley*, JJ.) HIRA KOER *v.* LACHUMAN GOPE. **21 I.C. 958=19 C.W.N. 1141.**

——S. 111-A—*Maintainability of, suit under.*

Suit under S. 111-A is maintainable although a claim under S. 104-H is barred by limitation. (*Chatterjee and Panton*, JJ.) SALAN MEAH *v.* SECRETARY OF STATE FOR INDIA. **65 I.C. 669 (Cal.).**

——S. 111-A—*Application of.*

The proviso to S. 111-A applies only where the Record of Rights was framed in pursuance of an order made under S. 101 sub-section (2) (d). (*Mookerjee and Cuming*, JJ.) NAWAB BAHADUR OF MURSHIDABAD *v.* AHMAD HUSSAIN. **44 Cal. 783=35 I.C. 695=25 C L.J. 536=21 C.W.N. 1004.**

——S. 111-A—*Limitation.*

A plff. who had appealed against the entries in the Record of Rights, and the appeal having failed, filed a suit. The suit came under S. 111-A. (*Fletcher and Richardson*, JJ.) KUMEDA PROSANNA BHUIYA *v.* SECY. OF STATE. **30 I.C. 255=19 C.W.N. 1017.**

——S. 111-A — *Limitation — Record of Rights—Suit to correct—Bengal Tenancy Act.*

The period of limitation for getting declaratory relief in respect of entries in a Record of Rights is six years from the date of publication of the Record of Rights. (*Mullick*, J.) AMIRUDDIN *v.* SAIDUR RAHMAN. **35 I.C. 433=1 P.L.J. 73.**

——S. 111-A. Proviso—*Construction.*

The Proviso to S. 111-A of the Act must be strictly construed. (*Sanderson*, C.J. *and Mookerjee*, J.) MIDNAPUR ZAMINDARI CO. *v.* SECRETARY OF STATE. **44 Cal. 352=40 I.C. 96=21 C.W.N. 834.**

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———**S. 111-B**—*Effect of.*

The effect of S. 111-B of the Act is that subject to S. 109, the landlord and tenant are at liberty after three months from the date of the certificate of final publication of the Record of Rights, to seek any remedies open to them in the ordinary Civil Courts. (*Richardson and Beachcroft*, JJ.) DHANANJOY MANJHI *v.* UPENDRANATH DEB. 46 I.C. 428 = 22 C.W.N. 685.

———**S 111-B**—*Record of Rights, publication of—Suit within three months, for determining whether relationship of landlord and tenant arises—If lies.*

A suit raising substantially the question whether the relationship of landlord and tenant exists between the plffs. and defts. must fall under S. 111-B of the Act if brought within 3 months of the final publication of the Record of Rights. (*Richardson and Newbould*, JJ.) ARATU MIRA *v.* MANI JENA, 20 I.C. 505 (Cal.).

———**S. 111-B (b) and (c)**—*Scope of—C. P. Code, O. 7, Rr. 10 and 11.*

A suit involving issues mentioned in (*b*) and (*c*) should not be dismissed but should be treated as if instituted on the day following the expiration of the period of three months after the publication of Record of Rights. The plaint however should be returned or rejected under Rr. 10 or 11. (*Chatterjee and Richardson*, JJ.) PRAN KRISHNA SAHA *v* KRIPA NATH. 21 C.W.N. 209 = 35 I.C. 76 = 29 C.L.J. 17.

———**S. 113**—*Increase of rent of waste.*

Where waste lands are included in the holdings of a tenant for purposes of reclamation and it is stipulated that on their being cultivated, they should be assessed at settlement rate of rent, neither S. 113 nor any section will bar the increase in the rental. (*Casperss and Doss*, JJ.) JOGESH CHANDRA RAY *v.* MAKBULAB. 25 C.L.J. 128 = 38 I.C. 595 = 21 C.W.N. 534.

———**S. 113**—*Applicability—Scope of.*

S. 113 applies to the rents finally settled under the provisions of Chap. X but it does not apply to rents otherwise settled, nor to mere entry of existing rent in a Record of Rights. It is not limited to cases where there was no dispute between the landlord and the tenant as to the correctness of rent settled. (*Chatterjea and Richardson*, JJ.) MEYAJAN BINAN *v.* JOYMALLA. 34 I.C. 32 = 21 C.W.N. 546.

———**S. 114**—*Cost of survey and settlement is an assessment on persons in respect of land.*

A *putni* lease under the plff. ran thus:—"Should any tax, toll or rent or whatever sum under whatever denomination, be assessed in future, the same should be paid by the lessee if they were assessed on the two *taluks* but it

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was to be payable to the lessor if it was assessed on the lessor's income.' Under Chap. X of the B. T. Act the plff. had to pay to Government his share of the cost of Cadastral Survey and Settlement under S. 114. In a suit by plff. against the deft. for the sum, *held*, that the assessment under S. 114 was not upon the land but upon certain persons in respect of the land and so was not recoverable under the *patni* lease terms. (*Mookerjee*, A.C.J. *and Fletcher*, J.) BEJOY SINGH DUDHURIA *v.* HEM CHANDRA CHAUDHURI. 62 I.C. 925 = 38 C.L.J. 349.

———**S. 115**—*Scope of.*

S. 115 of the B. T. Act does not come into operation at all until all possible proceedings under Chap. X have been exhausted. If discontinuous receipts for rent produced by the tenant show that rent has been paid at the same rate for the years covered thereby, the Court may, by an application of the principle of continuity, infer that there has been no change in the intervening periods. 36 C.L.J 336, Rel. (*Mookerjee and Walmsley*, JJ.) NARENDRA LAL CHOWDHURY *v.* BENODE BEHARI SADHU KHAN. 27 C.W.N. 740 = 1924 Cal. 143.

———**Ss. 115 and 50**—*Clash of presumptions—Presumptions as to fixity of rent—Entry in record of rights.*

S. 115, Bengal Tenancy Act, provides against clashing of presumptions. It will not permit the presumption under S. 50 of the Act to override that raised from the record of the particulars under Chap. X. It will not be reasonable to suppose that the Legislature intended by enacting S. 115 to preclude evidence of uniform payment of rent for the statutory period in support of the entry of fixity of rent in the record of rights where such entry is presumably based on the evidence of such uniform payment. It will be shutting out a very valuable piece of evidence in favour of a comparatively weak one. If the tenant succeeds in proving a uniform payment of rent from the time of the Permanent Settlement, the rent shall not be liable to be increased whereas the presumption of the correctness of an entry in the record of-rights though based on such uniform payment is only a rebuttable one. (*Richardson and Suhrawardy*, JJ.) RASH BEHARI GUHA *v.* DWARKA NATH BANDOPADHYA. 27 C.W.N. 936 = 76 I.C. 401 = 1923 Cal. 365.

———**Ss. 115 and 50**—*Record of rights—Finality of—Presumption does not arise.*

Once the record of right becomes final, a tenant cannot in view of the provisions of S. 115 of the B. T. Act claim the presumption under S. 50 of that Act. In S. 115 the expression "thereafter" means after the particulars have been finally recorded after recourse to all the provisions contained in Chap. X for the attainment of finality in this respect. 37 C. 30, foll.; 45 C. 930; 51 I.C. 552, Ref.; 12 C.W.N. 904,

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not Foll. (*Mookerjee and Cuming*, JJ.) PRASANNA KUMAR SEN *v.* DURGA CHARAN CHAKRABARTY.
36 C.L.J. 291=49 C. 919=70 I.C. 537=26 C.W.N. 947=1922 Cal. 146.

——S. 115—*Presumption under S. 50 cannot be rebutted after publication of record.*

Rebuttal of presumption under S. 50 is permitted before the publication of Record of Rights. Tenant is precluded after the publication of the Rights under this section. (*Chattarjee and Panton*, JJ.) BAMAN DAS *v.* SADHU MAJHI. **64 I.C. 445 (Cal.).**

——S. 115—*Damages—Use and occupation—Suit for—Title of plaintiff declared.*

A suit for damages for use and occupation without asking for a declaration of title is maintainable where the plff.'s title was declared in a previous suit as against the deft. and he obtained symbolical possession and had also asserted successfully on previous occasions his right to get such damages. (*Mookerjee and Carnduff*, JJ.) GIRI NARAIN CHATTERJI *v.* MODHU SUDAN MOOKERJI. **18 I. C. 751=17 C.W.N. 324.**

——S. 115—*Presumption under S. 50 cannot be relied on after publication of record.*

Under S. 115 a tenant cannot rely upon the presumption under S. 50 (2) after the final publication of the record of rights except in a suit instituted under S. 106 challenging the entry itself within three months from the date of its final publication. (*Das and Bucknill*, JJ.) GOBIND LAL SIJUAR *v.* RAM SARAN LAL. **68 I. C. 433=2 Pat. L.T. 642.**

——S. 115—*Scope of.*

The section aims at concluding once for all the question of tenant's status so far as uniform payment of rent for 20 years is concerned, but it does not bar the proof of tenancy from the time of permanent settlement by any other means as for example by producing original grant. (*Jwala Prasad*, J.) JANKI KUER *v.* HIRANAND PANDE. **68 I.C. 23 (Pat.).**

——S. 116—Khas Khamar *Tenants.*

The term 'non-occupancy raiyats does not include tenants of *khas khamar* lands. (*Woodroffe and Chowdhri*, JJ.) DWARKANATH CHOWDHURI *v.* TAFAZAR RAHAMAN.
44 Cal. 267=39 I.C. 64=20 C.W.N. 1097.

——Ss. 116 and 181—Khudkast—Zerait *land—Jagir—Service—Tenure.*

"*Khudkast*" does not mean *zerait* or private lands of the proprietor within S. 116 of the B. T. Act. Nor do the words "*jagir khudkasht* land" necessarily mean a service tenure within S. 181 of the B. T. Act. (*Jwala Prasad*, J.) DEONATH MISRA *v.* AMAR SINGH.
45 I. C. 418 (Pat.).

——S. 116, Sch. III, Art 1 (a)—Zerait *Land—Non-occupancy rights — Accrual of—Ejectment.*

BENGAL TENANCY ACT (VIII of 1885), S. 120.

S. 116 is no bar to the accrual of non-occupancy right in *Zerait* land and a suit to eject a tenant of *Zerait* land on the ground of efflux of time must be brought within 6 months from the expiration of the term, as provided in Sch. III, Art 1 (*a*) of the Act. (*Chamier*, C.J.) JANKI SINGH *v.* JAGARNATH DASS.
3 P.L.W. 105=42 I.C. 177=1917 Pat. 318.

——S. 116—*Acquisition of occupancy right* in zerait.

Where the land is *serait* land and a person occupies it like a licensee, S. 116 applies and occupancy rights are not acquired. (*Mullick and Jwala Prasad*, JJ.) UDAI CHAND *v.* JANG BAHADUR SINGH. **2 Pat. L.J. 353=40 I.C. 500=2 Pat. L.W. 118.**

——S. 116—*Occupancy right in* Zerait *lands.*

Sch. III, Art. 1 is not applicable in the case of *zerait* lands. No right of occupancy or non-occupancy can be acquired in *serait* lands. Hence Sch. III, Art. 1 does not apply to a suit for ejecting a tenant from such lands as that article only applies where occupancy rights exist. (*Atkinson*, J.) JANKI SINGH *v.* JAGAN NATH DAS. **39 I.C. 389 (Pat.)**

——S. 120—*Zerait land—Occupaacy rights cannot be created by contract or grant—Evidence—Section does not exclude any evidence relevant under the Evidence Act.*

The Bengal Tenancy Act does not pretend to enumerate the different modes by which rights of occupancy could be acquired at the time when the Act came into force; it merely saves such rights as had already been acquired. The acquisition of occupancy rights by grant was, up to the passing of the B.T. Act, foreign to the law of Bengal. There is nothing in either S. 20 or S. 21 or in any other section of the B.T. Act which provides that a right of occupancy can be acquired either by grant or by contract. An occupancy right is inherent in the status of the raiyat and is not the landlord's to grant. If a landlord confers occupancy right on a tenant in zerait land that does convert the zerait into raiyati land for all time. If a question arises as to the character of the land purchased by the landlord from the tenant there must be an enquiry as to the original character of the land. If it was originally raiyati land the landlord cannot by getting *khas* possession treat it as zerait. But if it is proved that the land was zerait land within the meaning of S. 120 of the B.T. Act, the land regains its character as such if it comes into the possession of the landlord. The tenant with whom the land is settled subsequently cannot acquire the rights of occupancy in it. When a question arises as to whether the land which is claimed to be zerait land is in fact zerait land an assertion of title on the part of the landlord and communicated to the tenant before 2-3-1883 will be conclusive evidence in his favour. Assertions after that date though not conclusive may be taken into consideration as evidence in favour of the

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landlord. There is nothing in S. 120 which tells the Civil Courts definitely and clearly that they are to exclude from their consideration that which is relevant evidence under the Evidence Act, and when they are bound to regard under S. 120 paragraph (3), of the Act. (*Das and Kulwant Sahay*, JJ.) MAHARAJAH KESHO PRASAD SINGH *v.* PARAMESHRI PRASAD SINGH. **2 Pat. 414=1923 Pat 65=4 Pat. L.T. 125=1 Pat. L.R. 111=71 I.C. 902=1923 P. 276.**

——**S. 120**—*Zerait land—Recital in Lease—Is no evidence—Survey record, presumption from, is a rebuttable one.*

A description of a land as *serait* in a lease will not be any evidence to show that the land was really *serait* for there must be evidence under S. 120 to show either that the land was held in the *seer* cultivation of the landlord for 12 continuous years immediately before the passing of the Act or that it was recognised by village usage as proprietor's Khamar, zerait, Seer Nig Jote or Kamat. Clause 2 of S. 120 allows the evidence of the land being specifically let as proprietor's private land, before the 2nd of March 1883. The presumption afforded by the survey of record of rights is a rebuttable one. (*Jwala Prasad and Bucknill*, JJ.) BENI CHOUDHURI *v.* TRILOKENATH TEWARI. **1922 P. 425.**

——**S. 120**—*Recitals in deed—Not excluded.*

The recital in a mortgage by the landlord that the mortgage property is *zerait* land is admissible in evidence against him as an admission. Recitals in a mortgage deed in favour of a third person are not excluded by S. 120. (*Coutts and Sultan Ahmad*, JJ.) RAM KHELAWAN *v.* RAM NATH. **1 Pat. L T. 640.**

——**S. 120 (2)**— "*Any other evidence*" *meaning of—Policy of—Legislature.*

An admission by a tenant in his previous deposition is admissible "as any other evidence" under S. 120 (2). Assertions of witness to the effect that the land was cultivated by the landlord as *serait* are admissible and the mere execution of *kabuliyat* is no evidence that the land was *serait* though it might be taken into consideration along with other evidence. The Policy of the Legislature is to prevent a Zemindar from absorbing the *raiyati* lands of estate and converting them into his private lands. (*Mookerjee and Carnduff*, JJ.) AKHJU SINGH *v.* JAGANNATH PRASAD. **13 I.C. 1 (Cal.).**

——**S. 120 (2)**— "*Any other evidence*"—*Admissions in* Kabuliyat—*Inadmissibility—Right of occupancy not barred by agreements.*

S. 120 (2) (*a*) of the B. T. Act makes inadmissible in evidence, documents executed between landlord and tenant containing admission as to proprietor's *Kamat* rights and the absence of occupancy rights in the tenants. Where the terms of a lease contemplate that the land was to be cultivated by the lessee and

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rent in cash or kind was to be paid to the lessor, the lessee becomes a raiyat and not tenure-holder. The words "*khudkast*" does not conclusively connote proprietor's private or *serait* lands "Any other evidence that may be produced" in S. 120 (2) of the B.T. Act should not be construed in a restricted sense especially where the question is raised before a Civil Court. Sub-S. (2) merely directs a Revenue Officer as to the evidence for which he is to look in coming to a decision. 20 C.W.N. 14, 17 Cal. 466, 7 C.W.N. 400, 13 C.W.N. 661, 13 C.W.N. 135, 1 C.L.J. 456, Ref. (*Coutts and Adami*, JJ.) SUKAN SAO *v.* KARU MAHTON. **3 Pat. L.J. 87=(1920) Pat. 131=54 I.C. 652=1 Pat. L.T. 13.**

——**S. 120 (2) (a)**—"*Evidence*"—*Recital in a* Kabuliyat *after* 1893—*If admissible to prove*—Zerait.

The words "any other evidence" that may be produced in section 120 (2) (*a*) does not include evidence contained in an agreement between landlord and tenant. The recital in a *kabuliyat* executed by the tenant after 2nd March 1883 is not admissible in evidence to prove that the land is *zerait*. (*Mookerjee and Beachcroft*, JJ.) GANPAT MAHTON *v.* RISHAL SINGH. **33 I.C. 978=20 C.W.N. 14.**

——**S. 121**—*Distraint on 2nd December for rent due on 1st is valid—Penal Code, Ss. 143, 424.*

Order of distraint under S. 121, made on 2nd December for rent payable on 1st December is not illegal. Hence if the raiyat's crops are attached and he goes to the land and cuts the crops in spite of the attachment and protest of the attaching officer, he is liable to be prosecuted under Ss. 143 and 424 of the Penal Code. (*Sanderson*, C J. *and Mookerjee*, J.) SUPDT. AND REMEMBRANCER OF LEGAL AFFAIRS *v.* KAJAL HOALDAR. **33 C.L.J. 24=23 C.W N. 209=62 I.C. 187=22 Cr. L.J. 491.**

——**S. 140**—*Scope of—Distraint—Remedy against.*

S. 140 of the B.T. Act does not afford the only remedy against a distraint made erroneously or on insufficient materials. (*Holmwood and Carnduff*, JJ.) MADHAVANAND RAM *v.* MADHU MAHTO. **27 I.C. 812 (Cal.).**

——**S. 143**—*Suit for* katiari *dues and for rent—Distinction—Small Cause Court—Jurisdiction.*

A suit for *Katiari* dues is a suit for money and is thus cognizable by Sm. Cause Court. It is not the same thing as a suit for agricultural rent. (*Roe*, J.) RAMESHWAR SINGH *v.* BIKAN MAMIN. **36 I.C. 600 (Pat.).**

——**S. 147-A**—*Scope of.*

S. 147-A of the Bengal Tenancy Act gives effect to the whole scheme of the Act, *viz.*, to prevent the landlord from circumventing the

provisions of the Act to the detriment of the illiterate tenant. (*Suhrawardy and Cuming*, JJ.) NAFAR CHANDRA PAL CHOWDHURY *v.* BHASI MOLAX. 65 I.C. 881 (Cal.).

——S. 147-A — *Non-compliance with—Objection cannot be taken in execution proceedings.*

Under a compromise in a rent suit, the deft. took some more land and entire rent was fixed for the whole land, original and additional. The Court did not in passing the decree, comply with S. 147-A. *Held*, that the objection could not be taken in execution proceedings. (*N.R. (Chatterji and Newbould*, JJ.) HEMCHANDRA CHOUDHARI *v.* CHANDRA MOHAN NAMODAS. 60 I.C. 204 = 24 C.W.N. 1070.

——S. 147-A—*Raiyat holding under fixed rent—Compromise.*

A tenant in possession of a holding for a long time and having acquired a right of occupancy cannot by any agreement contract himself out of that right nor can a compromise decree not passed in accordance with S. 147-A of the B.T. Act have that effect. (*Huda*, J.) SHEIKH NASARAT *v.* KALI DAS CHUCKERBUTTY. 54 I.C. 750 (Cal.).

——S. 147-A.—*Compromise decree not complying with terms of the section is a nullity.*

Where the provisions of S. 147-A of the B.T. Act have not been complied with a compromise decree fixing the rent as between a landlord and tenant is a nullity and no effect can be given to it. 17 C.W.N. 496, Ref. The fact that the rate of rent recorded in the compromise was also recorded in the partition proceedings can make no difference. Where the original rate of rent is known or proved (as by an entry in the Record of Rights) it is not open to the parties to effect an enhancement of rent under the cloak of a compromise. (*Ross*, J.) KUNJ BEHARI CHAUDHURY *v.* CHARAN SINGH. 72 I.C. 40 (Pat.).

——S. 147-A—*Applicability—Suit between landlord and trespasser is not governed by section.*

If a tenant who holds over after the expiration of the term of his tenancy is sued *bona fide* in ejectment as trespasser and the suit is compromised by recognition of the tenant as occupancy tenant from the date of the compromise, the enhancement is not illegal under Ss. 29 and 147 of the B.T. Act as the suit is between landlord and trespasser and not between landlord and tenant. (*Coutts and Adami*, JJ.) SHEOGOBIND SINGH *v.* MAHABIR MISSER. 4 Pat. L.T. 301 = (1922) Pat. 319 = 71 I.C. 143 = 1922 P. 654.

——S. 147-A—*Consent decree in contravention of—Not a nullity.*

A consent decree passed as between a landlord and tenant in contravention of the provision of S. 147 (*a*) of the B.T. Act is not a nullity and it cannot be set aside in a separate

suit or questioned in collateral proceedings. (*Das and Adami*, JJ.) DEOLAGAN SINGH *v.* MT. GULBANSI KOER. 69 I.C. 616 = 1 Pat. L.R. 48.

——S. 147-A—*Compromise—Legality.*

A compromise decree, if passed in contravention of S. 147 is a nullity, 17 C.W.N 496, Foll. (*Kingsford*, J.) CHAND GORAIN *v.* KHUB LAL MAHTON. 35 I.C. 445 (Pat.).

——S. 147 A (2)—*Compromise—Repudiation before decree—Power to record compromise.*

A Court can inquire into and give effect to a lawful compromise even if one of the parties repudiates or recedes from it in Court. S. 147-A, Cl. (3) of the Act provides for such power. (*Miller*, C.J. *and Jwala Prasad*, J.) UTTIM SAHU *v.* ARZANI. 46 I.C. 229 (Pat.).

——S. 147-B—*Record of Rights—Presumption as to.*

The presumption of accuracy attaching to an entry in the Record of Rights is rebutted by evidence of a long course of conduct to the contrary. (*Mookerjee and Beachcroft*, JJ.) FAZAL IMAM *v.* SUKOR MAHTON. 25 I.C. 442 = 19 C.L.J. 333.

——S. 148—*Procedure under, is summary—Questions of title may be gone into.*

The procedure under S. 148, Bengal Tenancy Act is not a special but a summary one. There is no rigid rule of law that in a rent suit properly so called and filed under S. 148, a question of title may not be determined if it arises. Even if a claim which is not for rent is included in a suit tried under that section, there is no lack of jurisdiction on the part of the judge to deal with the claim. Where a suit for rent against the tenant and an alternative claim for money had, and received, was tried under the summary procedure prescribed by S. 148, the jurisdiction of the Court is not in any way affected and the decision will be binding. (*Rankin and Buckland*, JJ.) KRISHNA KUMARI BASU *v.* NAGENDRA PRASAD BASU. 27 C.W.N. 716 = 50 C. 807 = 1923 Cal. 699.

——S. 148—*Ex parte rent decree—Relationship of landlord and tenant—Presumption of continuity—Evidence Act, S. 109—Proof to the contrary—Onus.*

Where a plff. obtained a decree against the predecessors of the defts. for rent, the decree established that, at the time it was passed the relationship of landlord and tenant existed between the parties and in the absence of proof by the defts, that relationship had ceased to exist since the passing of the decree, it must be presumed to be finally determined between the parties that the relationship of landlord and tenant existed between them. (*Jenkins*, C.J. *Coxe and Ray*, JJ.) MOHAMMAD GOWHAR ALI *v.* SAMIRUDDIN SHEIKH. 22 I.C. 383 = 18 C.W.N. 33.

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——Ss. 148-A, 158-B and 169—*Rent sale—Occupancy holding—Auction purchaser of an interest—Co-sharer landlord suing for his share of rent—Entire body of landlords suing for rent—Auction purchaser of share not made a party—Effect of.*

Co-sharer landlords having separate realisation of rents in respect of their shares, are entitled to realise their share of rent separately. But such an arrangement expressed or implied merely affects the right to sue separately and in no other respect modifies the terms of the holding and the rights to bring the tenure to sale for arrears of rent remains intact. 35 Cal. 331 Ref. In the absence of any sub-division of the occupancy holding with the consent of all the landlords, the right of the entire body of landlords to put up the entire holding to sale is not affected by the purchase of the holding at the sale held in execution of the decree obtained by some of the co-sharer landlords for their shares of rents. A purchaser of a share of an occupancy holding in execution of a decree for rent obtained by some of the co-sharer land lords, is in the position of an unregistered transferee. 9 C.W N. 134 Ref. He is not a necessary party to a suit brought by the entire body of landlords for entire rent. S. 149-A of the Act is an enabling section. A co-sharer landlord is given the right to proceed with the suit for his share only of the rent where he is unable to ascertain whether any amount is due to the other co-sharer. A co-sharer landlord has a right to claim the whole rent on behalf of the entire body of landlords. 35 Cal. 331 (344, 345) ref. It is only in a case so framed that the decree has the effect of a rent decree. The mere fact that something was claimed that was not properly due will not make the decree any the less a rent decree; 8 C.W.N. 172 Ref. (*Chatterjee and Pearson, JJ.*) SASTI CHARAN CHAKRABARTY *v.* AKUBJAN BIBI. 26 C.W.N. 639 = 35 C.L.J. 30 = 64 I.C. 891 = 1922 Cal. 243.

——S. 148-A—*Nature of Suit under.*

A suit under S. 148-A of the Act should be to recover the whole of the arrears due and not the entire rent payable for the holding. 18 C.W.N. 1016 foll.; 27 C.L.J. 101, dist. (*Chatterjee and Pearson, JJ.*) PROFULLA CHANDRA GHOSE *v.* BABURAM MANDAL. 63 I.C. 1 = 34 C.L.J. 462.

——Ss. 148-A and 158-B—*Sale of tenure in execution of rent decree.*

A sale of a tenure in execution of a decree for rent without serving a notice under S. 158-B upon the co-sharer landlords is not a nullity but has the effect of a sale under a money decree. (*Chatterjee and Panton, JJ.*) NORENDRA BHUSHAN ROY *v.* JOTINDRA NATH ROY. 55 I.C. 402 (Cal.)

——S. 148-A—*Co-sharer Landlord—Right to apply.*

When some co-sharer landlords brought the defaulting tenure to sale under a decree for

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rent in a suit framed under B. T. Act S. 148-A the remaining co-sharer landlords can apply under C.P.C. O. 21, R. 90. (*Teunon and Cuming, JJ.*) WARENDRA BHUSAN ROY *v.* JATINDRA NATH ROY. 50 I.C. 329 = 23 C.W.N. 619.

——S. 148-A—*Rent—Collection of by some co-sharers—Liability of others.*

When some of the co-sharers have recovered the whole rent, asserting only an eight annas interest in the superior right, they are bound to make over half of the rent collected to the owners of the other half of the proprietary right. (*Newbould and Panton, JJ.*) ISWAR DALIN *v.* GIRINDRA KUMAR NAG. 48 I.C. 726 (Cal.).

——S. 148-A—*Co-sharer landlord—Separate share of rent—Total rent—Decree, form of.*

Co-sharer landlords who by arrangement with the tenants collect their shares separately and have in previous years brought separate suits for recovery of their dues, can sue jointly for the total amount due to them under the terms of the original lease, which can be enforced by all the co-sharers together, without the consent of the tenants. But if a plaintiff seeks to avail himself of the special provisions of S. 148-A of the Act, he must in his plaint seek to recover the entire amount due to himself and his co-sharers. The nature of the decree to be made in the suit depends upon its true character. If it is a suit for the share of the rent recoverable by the plaintiff separately by reason of the fact that he has on previous occasions collected that sharer of the rent separately from this co-sharer, the decree will be a money decree; if, on the other hand, it is a decree properly framed under S. 148-A, the decree will operate as a rent decree capable of execution under the special procedure prescribed by the Bengal Tenancy Act. (*Mookerjee and Walmsley, JJ.*) BAIKANTHA NATH SEN *v.* RAMAPATI CHATTERJEE. 45 I.C. 767 = 27 C.L.J. 101.

——S. 148-A—*Tenant of a co-sharer landlord—Under separate agreement—Effect of such tenancy on the co-sharer landlord.*

Where a tenant of a co-sharer landlord has executed *Kabuliyat* respecting his share of the lands in his holding and enters into a separate agreement of tenancy, such co-sharer landlord will be considered, not as a joint landlord but separate landlord. (*Jenkins, C.J. and Chatterjee, J.*) SAFARUDDI *v.* FAZAL HUQ. 30 I.C. 414 = 21 C.L.J. 592.

——Ss. 148-A and 158-B—*"Rent Due"—Explained—Suit for whole of the arrears—Effect Co-sharer landlord's, meaning of.*

"Rent Due" in S. 148-A of the Act is not the rent payable under the contract but the rent actually in arrears, so that a suit for recovery of the whole arrears due is in essence a suit for rent due to all co-sharers and if a decree is obtained, the holding will under S. 158-B pass to the purchaser in execution. The co-sharer

landlords are the entire body of persons entitled to collect rent andit is not necessary that the interest of each should be of the same degree. (*Mookerjee and Beachcroft*, JJ.) BROHMANDA NATH DEH *v.* HEMCHANDRA MITRA.

23 I.C. 981=18 C.W.N. 1016.

———**Ss. 148-A—and 188**—*Co-sharer landlords—Suit for rent by one when lies.*

Where a tenant makes a contract by which he is liable to pay rent to several co-sharers jointly, one co-sharer cannot maintain a suit for the whole rent. S. 188 of the B. T. Act demands that landlords shall do jointly anything which they are under the Acts required or authorised to do, but there is nothing to prevent one co-sharer from bringing a suit for the whole rent after making the co-sharers who refused to join as plaintiffs, defendants in the suit. 35 C. 331 Ref. Again if a co-sharer can prove that there is a contract express or implied by which a tenant is liable to pay him his share of the rent separately, then he may bring a suit for that part of the rent without joining his co-sharers as defendants, but the decree obtained by him is to be executed as money and not a rent decree. On the other hand, notwithstanding such arrangement for separate collection all the co-sharers may sue jointly for the whole rent. To further facilitate the recovery of arrears of rent due to a co-sharer who is in dispute with his tenants or with his fellow landlords, the legislature enacted S. 148-A of the Bengal Ten. Act. The section requires firstly, that the co-sharer shall sue to recover the rent due to all the co-sharer landlords in respect of the entire holding, secondly, that he must make all the remaining co-sharers parties to the suit, and thirdly, that he must state that he is enable to ascertain what rent is due for the whole tenure or holding or whether the rent due to either co-sharer landlords has been paid owing to the refusal or neglect of the tenant or of the co-sharer landlords, defendants in the suit, to furnish him with direct information on these points or on either of them. In such a case the plaintiff co-sharer will be entitled to proceed with the suit for his share only of the rent and a decree-obtained in a suit so framed shall be as effectual as a decree obtained by the sole landlord in a suit brought for the rent due to all the landlords. If in the suit it is found that the co-sharer landlords have realised rent in excess of their shares, then they will be liable to reimburse the plaintiff to the extent of the excess realised by them. 4 Pat. L.J. 500 Rel. (*Miller*, C.J, *and Mullick*, J.) RAJGIRI SINGH *v.* JADUNATH SINGH.

1922 Pat. 355=4 P.L.T.39=1923 P. 41.

———**S. 148 (a)**—*Nature of suit under.*

The essential principles underlying S. 148 B.T. Act are that the suit should in form be for the whole rent and in substance for the separate share of rent in arrears and the whole body of landlords should be impleaded with the allegation that the plff. has not been able to ascertain what

rents, if any, are due to the former. In such cases the whole rent due must, in the nature of things be always a matter of speculation for the plaintiff and he can assert that he believes that his share of the rent due is the entire rent due and decide on the accuracy of that belief, if and when the impleaded co-sharers appear and claim any arrears as due to themselves. 27 C.L.J, 101, diss; 4 Pat. L. J. 500, foll. (*Jwala Prasad and Bucknill*, JJ.) MAULAVI MASUD AHMAD *v.* JAGAN SINGH. **3 Pat. L.T. 439=68 I.C. 625=1922 P. 360.**

———**Ss. 148-A, 188-B, and 188**—*Co sharer landlords—Suit for rent by one.*

The principles underlying S. 148-A of the B. T. Act, are that the suit should in form, be for the whole rent and in substance for the separate share of the rent, in arrears; and that the whole body of landlords should be impleaded with the allegation that the plff. has not been able to ascertain what, if any, rents are due to the former. 27 C.L.J. 101, dist. 8 C.W.N. 472; 29 Cal. 219; 35 Cal. 331 and 18 C.W.N. 1016, ref. (*Atkinson and Manuk*, JJ.) RAM DHYAN SINGH *v.* PARDIP SINGH.

53 I.C. 91=4 Pat. L.J. 500.

———**S. 148-B.**—*Suit for rent—Parties—Identification of property in arrears.*

It is not competent to a landlord to choose arbitrarily some out of several representatives of the original tenants and to institute a suit for rent against such selected persons. 7 I.C. 340, foll. If in a suit for rent the defendant asserts that he is not in possession of lands for which rent is claimed nor able to identify them, the plaintiff should be made to comply with Cl. (*b*) of S. 148 of the B. T. Act. (*Mookerjee and Beachcroft*, JJ.) SATYA BHUSAN GHOSHAD *v.* MONMOTHO NATH MITTRA BAHADUR. **27 I.C. 313 (Cal.).**

———**S. 148 (b) (1)**—*Proviso.*

In all cases wherein the Court admits a plaint in a rent suit without any statements as to rental, the Court shall require the Collector to supply a certified copy of Record of Rights relating to the tenancy. (*Jenkins*, C.J. *and Chatterjee*, J.) TARINI CHARAN MAJUMDAR *v.* UMAR MAHTA. **23 I.C. 416 (Cal.).**

———**S. 148-H**—*Assignee of decree for rent, whether can execute.*

Clause (*h*) of S. 148 forbids the assignee of a decree for arrears of rent to make any application for execution of the decree even as a simple money decree under the Code. 26 Cal, 176, foll. (*Richardson and Walmsley*, JJ.) SUDHANYA KUMAR PODDAR *v.* GOURANGA CHANDRA. **41 I.C. 542 (Cal.).**

———**S. 148-H**—*Landlord's interest—Meaning of.*

The phrase "landlord's interest" in S. 148 (*h*) of the Act means the interest of the person

entitled to receive the rent from the tenant at the date of the application for execution of the decree. (*Jenkins*, C. J., *Harrington*, *Stephen*, *Mookerjee* and *Holmwood*, JJ.) SHAMBUNATH SINGH *v.* SHEO PROSHAD SINGH. 40 Cal. 462=17 C.L.J. 227= 18 I.C. 689=17 C.W N. 276 (F.B.).

——S. 149—*Payment of amount claimed in Court—Suit by third person if rendered infructuous by plff. in rent suit obtaining a decree.*

The word "pleads" as used in S. 149 of the B. T. Act does not mean that the tenant should set up a valid plea or a plea that is open to him in accordance with law. If the tenant hands in the amount claimed, the Court will serve notice on the third party and unless the third party brings his suit within three months, the plaintiff in the first suit will be entitled to the money. A suit instituted in accordance with clause 33 of S. 149 of the B. T. Act by the "third person" mentioned in that section is not rendered infructuous by the fact that owing to the Court's delay before that suit is tried out the plaintiff in the original rent suit got a decree against the defendant. (*Fletcher and Huda*, JJ.) HEMANTA KUMAR KAR *v.* BIRENDRA NATH ROY. 47 I.C. 1003 (Cal.).

——S. 149—*Rival landlords—Decision as to title—Onus.*

Where in a suit purporting to be under S. 149 of the Act, a decree for money is asked for and an issue of title as between the rival landlords is raised, it was held that the suit was not one exclusively under S. 149 and that the question of title was properly raised. (*Jenkins*, C.J. *and N. R. Chatterjee*, J.) TIRTHABASI SINGH RAI *v.* PURNA CHANDRA NAG. 16 C.W.N. 558= 14 I.C. 230= 15 C.L.J. 501.

——S. 149 (3)—*Arrears of rent.*

In a suit for arrears of rent, money includes entire sum deposited in Court and no question of apportionment is to be raised or decided. The question of apportionment not being within the scope, the determination of the part in possession of the Court for the landlord although admitted by the tenant, cannot be made. (*Mookerjee and Richardson*, JJ.) AMBIKA CHARAN BEPARI *v.* ASWINI KUMAR. 29 I.C. 883=21 C.L.J. 485.

——S. 149 (3)—*Suit under—Issue as to title raised—Effect.*

In a suit purporting to be under clause (3) of S. 149 of the Act, a decree for money was prayed for and the issue was, whether the land in dispute appertained to the plaintiff's or to the defendant's taluq; *held* that the suit was not one exclusively under S. 149, that the question of title was properly raised and decided and that the onus was on the plaintiff. (*Jenkins*, C.J. *and Chatterjee*, J.) TIRTHBASI SINGH ROY *v.* PURNA CHANDRA NAG. 16 C.W.N. 558=14 I.C. 230= 15 C.L.J. 501.

——S. 153—*Suit for cess—No Second appeal.*

S. 153, Bengal Tenancy Act bars a second appeal in suits for rent where the decree is passed by a District Judge, Additional District Judge or Subordinate Judge and the amount claimed in the suit does not exceed Rs. 100 unless a question of special character has been decided by the decree under appeal. *Held* that in cases where the plff. has not published the notice under the Bengal Cess Act, no second appeal lies from the decision of the Dt. Judge deciding the question of the liability of the deft. to pay cess. (*Mookerjee and Chotzner*, JJ.) MAHARAJA BIRENDRA KISHORE MANIKYA BAHADUR *v.* TRAILOKHYA NATH ROY. 37 C.L.J. 321=74 I.C. 347= 1923 Cal. 673.

——S. 153—*Revisional power of District Judge—Transfer to Additional District Judge—Jurisdiction.*

An Additional District Judge to whom a District Judge transfers for disposal an application under S. 153-B, T. Act, is quite competent to dispose of the same, as the District Judge is empowered to assign work for him under the Civil Courts Act. (*Richardson and Ghose*, JJ.) LAL BEHARI BASAK *v.* AKHIL CHANDRA SANTRA. 27 C.W.N. 315= 72 I.C. 794=1923 Cal. 469.

——S. 153—*Irregularity and fraud established—Appeal lies.*

Where there are both fraud and irregularity established, the fact that they are coupled together does not exclude an appeal. Unless there is irregularity alone untainted by fraud an appeal lies, 19 C.W.N. 953, foll. (*Greaves*, J.) JAIRAM GAYAN DAS *v.* DINONATH SAMANTHA. 1922 Cal. 163.

——S. 153—*Rent suit—Relationship of landlord and tenant—No appeal.*

Decision in a rent suit valued at less than fifty rupees deciding the question whether plff. is entitled to whole rent or only 2/5 as asserted by deft. decides a question of amount of rent annually payable within S. 153 and is appealable. (*Mookerjee and Panton*, JJ.) SUDHANYA SANTRA *v.* BASANTA KUMAR SARKAR. 64 I.C. 733=49 Cal. 538= 1922 Cal. 417.

[Reversing 61 I.C. 194 (c.)]

——S. 153—*Exception—'Rent' does not include interest.*

(*Buckland and Cuming*, JJ.) HAFIZULLA *v.* LATEFEUNESSA. 63 I.C. 529 (Cal.).

——S. 153—*'Question of amount of rent—Payment of money or in kind.*

A question as to the payment of money in default of payment in kind 'is a question of the amount of rent annually payable by a tenant' within S. 153. (*Sanderson*, C.J. *and Richardson*, J.) HAMED ALI *v.* RAM KUMAR. 62 I.C. 639 (Cal.).

BENGAL TENANCY ACT (VIII of 1885), S. 153.

———S. 153—*Rent suit:— Only question being the existence of relationship of landlord and tenant—No appeal lies.*

Where in a rent suit tried by a Munsif specially authorized in this behalf the sole issue decided was as to the existence of the relationship of landlord and tenant between the parties no appeal lies from the decision of the Munsif. (*Newbould*, J.) SUDHANYA SANTRA *v.* BASANTA KUMAR SARKAR. 26 C.W.N. 96=61 I.C. 194=34 C.L.J. 579 (Cal.).

[Reversed on L P. Appeal *See* 64 I C. 733.]

———S. 153—*Second appeal—Grounds.*

Where the subject-matter of the suit is less than Rs. 100, the decree on appeal of the District Judge not deciding any question on merits and holding that the appeal was incompetent, is not subject to second appeal. (*Mookerjee*, A. C. J. *and Fletcher*, J.) KEDAR NATH *v.* DWIJENDRA NARAIN ROY. 57 I.C. 756 (Cal.).

———S. 153—*Suit for rent valued at less than* 50 *rupees—Appeal.*

In a suit for rent valued at less than Rs. 50 the trial Court held that the relationship of landlord and tenant did not exist between the parties and that one of the defts. was also a landlord of the tenant defendant and on that ground dismissed the plff.'s suit: *Held*, that an appeal lay to the District Judge from the decision. 8 C.W.N. 434, foll. (*Walmsley, J.*) MONI MOHAN BANERJEE *v.* ANORADDI CHOUKIDAR. 55 I.C. 212 (Cal.).

———S. 153—*Second appeal—Suit for rent below Rs.* 50—*Title of* pro forma *deft.*

Where in a rent suit below Rs. 50 in value the principal deft. sets up no title of his own except that of tenant under *pro froma* deft. there is no second appeal from the decree. In such a case, the Appellate Court cannot be said to have decided a question of title to the land, or some interest in land, as between the parties having conflicting claims thereto. (*Chatterjee and Walmsley*, JJ.) RAJA KRISHNA DAS LAW *v.* GOLAM NABI MUNSHI. 55 I.C. 92 (Cal.).

———S. 153—*Suit for rent—Finding as to adverse possession of third parties—Second appeal.*

In a rent suit a decision about adverse possession which point, does not arise at all, is not a question of title and not open to second appeal. A decision deciding a question not in issue is inoperative. (*Newbould*, J.) PROSUNNA BASU ROY *v.* ASGAR. 58 I.C. 576 (Cal.).

———S. 153—*Rent suit for less than Rs.* 100 *—No question of title—Second appeal.*

No second appeal lies against a decree passed in a suit for rent in which the amount claimed does not exceed a hundred rupees and in which no question of title has been decided, 10 C.L.J. 629, dist. (*Newbould*, J.) KRISTO DAS LAW *v.* BYOMKESH CHUCKERBUTTY. 53 I.C. 64 (Cal.).

BENGAL TENANCY ACT (VIII of 1885), S. 153.

———S. 153—*Suit for rent or assessment fair and equitable rent.*

S. 153 of the B. T., Act does not apply to a suit for recovery of rent, with an alternative prayer for assessment of fair and equitable rent. 10 C.L.J. 629, rel. (*Newbould*, J.) JOTINDRA NATH ROY *v.* ISAF GOLDER. 53 I.C. 19 (Cal.).

———S. 153 — *Rent — Suit for less than Rs.* 100—*Dispute as to share of plff.—Second appeal.*

In a suit for the recovery of rent of a holding less than Rs. 100, the defence was that the plff. was entitled to only half a share of the rent: *Held*, that as there was a dispute as to the share of the plff. there was a dispute as to the amount of rent annually payable by the deft. and a decision having been given on that point a second appeal was competent. (*Beachcroft*, J.) BASHIRAM NATH *v.* DINA NATH DEY. 51 I.C. 397 (Cal.).

———S. 153—*Second appeal to the High Court—Title—Rent.*

The dismissal of rent suit, on the ground of the result of a title suit, does not amount to a decision on a question of title so as to be open to second appeal. The expression. "decision of question of the amount of rent" does not include apportionment of rent between two persons. (*Greaves*, J.) JOGESH CHANDRA ROY *v.* NIBRAN CHANDRA PODDAR. 50 I.C. 276 (Cal.).

———S. 153—*Decision as to title—Dismissal of raiyat's objection to sale of occupancy holding—Appeal.*

An order deciding the objection filed by a tenant to the sale of his occupancy holding in execution of a money decree obtained by the landlord against him, is not a decision as to title between the parties, having conflicting claims thereto and no appeal lies against it under S 153 of the B. T Act. (*Teunon and Cuming*, JJ.) NAWAB BAHADUR OF MURSHIDABAD *v.* KHANDKHAR MOHAMED HOSSAIN. 49 I.C. 465 (Cal.).

———S. 153—*Rate of rent—Determination of—Second appeal.*

Plff. did not prove the rate of rent claimed by him and the lower Court gave a decree at the rate admitted by the deft. *Held*, that there was no decision of the question as to the amount of the annual rent payable and therefore no second appeal could be filed. (*Beachcroft*, J.) BENODE BEHARI MUKERJEE *v.* MAIZUDDIN SARENG. 49 I.C. 255 (Cal.).

———S. 153—*Second appeal — Claim for rent.*

In suits for rent, if the debatable question be only the existence of relation between a landlord and tenant, no special appeal lies if the

BENGAL TENANCY ACT (VIII of 1885), S. 153.

claim does not exceed Rs. 100. (*Fletcher and Shamsul Huda*, JJ.) JAHIRAL HAQUE *v.* SADAR ALI. 47 I.C. 103 (Cal.).

——S. 153—*Appeal—Question of title raised but not decided.*

Under S. 153 of the B.T. Act, it is not sufficient merely that there should be a controversy on the question of title as between parties having conflicting claims to land but the section requires that some question of title should be decided as between such parties. Therefore, where in a suit for rent the Lower Court does not decide the question of title which is raised between parties having conflicting claims thereto, no appeal lies under S. 153 of the B.T. Act. (*Richardson and Beachcroft*, JJ.) JILLOR RAHMAN *v.* EBRAHIM KHAN.
44 I.C. 558 (Cal.).

——S. 153—*Appeal, if lies in rent suits when the amount claimed does not exceed Rs.* 50.

An appeal lies in a rent suit in which the amount not exceeding Rs. 50 is claimed if the defence is that the defdt. is not the tenant of the plff. and that no settlement was made with him. (*Fletcher and Richards*, JJ.) AIMULLA PRAMANIK *v.* NASIBULLAKHAN.
39 I.C. 721 (Cal.).

——S. 153—*Rent suit.*

If in a suit by plff. for rent below Rs. 100 against defdt. claiming that defdt. is an *under-raiyat* under plff., a *raiyat*, the defdt. denies his being an *under-raiyat*, but claims to be a *raiyat* under the landlord, a second appeal lies against a decree for rent passed against defdt. as an *under raiyat*. (*Chamier*, C.J. *and Sharfuddin*, J.) BABUA *v.* MUST. SARLI.
39 I.C. 238=20 C.W.N. 1352.

——S. 153—*Appeal—Rent suit—Order not relating to title to land, nor to matters in S.* 153 *not appealable.*

An execution order in a suit of not more than Rs. 100 in value, not relating to questions of title to land or to any matter specifically mentioned in S. 153 of the above Act is not appealable to High Court. (*Sanderson*, C.J.) PRAFULLA KRISHNA DEBI *v.* NASIBANNESSA BIBI. 37 I.C. 425=24 C.L.J. 331.

——S. 153—*Decree passed without jurisdiction, if appealable.*

A munsif, empowered to exercise final jurisdiction under S. 153 of the Bengal Tenancy Act, not having decided the question of title to suit land raised by the parties having conflicting claims thereto, in a suit for rent below Rs. 50 the question was decided by the Appellate Court, though the competency of appeal was contended. *Held*, that though no appeal lay from the decision of the Munsiff, an appeal lay to the High Court from the decision of the 1st Appellate Court as it had decided a question of title between the parties. 12 C.W.N. 835 and 29 Cal. 60, expl. and dist. 11 Mad. 26 (P. C.), 16 I. C. 910, rel. on. (*Sanderson*, C.J. *and Mookerjee*, J.) GANGADHAR KARMAKAR *v.* SHEKHARBAINI DASYA. 20 C.W.N. 967=35 I.C. 348=24 C.L.J. 235.

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——S. 153—*When appeal from a rent decree is not barred under.*

In a suit for rent, when the Court after considering the question whether the tenants are entitled to an abatement or are bound to pay the full rent, makes a decree for the full rent, the decree decides the amount of rent annually payable and as such an appeal against it is not barred under S. 153 of the Act. (*Chatterjee and Richardson*, JJ.) DINANATH DOSS *v.* SARAT CHANDRA.
34 I.C. 851 (Cal.)

——S. 153—*Appeal—Claim for rent—Claim for money.*

The law as to an appeal in S. 153 cannot be avoided by joining a claim for money with a claim for rent. (*Mookerjee and Beachcroft*, JJ.) JAMADAR SINGH *v.* JAGAT KISHORE.
34 I.C. 697=23 C.L.J. 537.

——S. 153—'*Order*' *includes interlocutory orders.*

The term "order" in S. 153 does not only cover final orders but includes interlocutory orders such as orders of remand; therefore no appeal lies against an order of the first Appellate Court remanding a suit, valued at less than Rs. 100 for re-trial without deciding any of the special questions in S. 153. 4 C.W.N. 44 foll. (*Sanderson*, C.J. *and Mookerjee*, J.) SASHI BHUSAN *v.* DENO MOYEE DASI.
34 I.C. 301 (Cal.).

——S. 153—*Appeal.*

Where a suit decides whether the defdt. was a sub-tenant of plff., it decides a question relating to title to land and an appeal lies against the decision even though the claim is below 50 Rs. 8 C.W.N. 434, foll. (*Richardson and Imam*, JJ.) SATISCHANDRA CHAKRAVARTHY *v.* AMIRUDDIN KHADIM. 32 I.C. 784 (Cal.).

——S. 153—*Second appeal lies where there are conflicting claims to landlord's right.*

A second appeal lies where the plff.'s title is challenged by successors of the previous landlord and thus causing a conflict of claims to landlord's title. (*Sharfuddin and Chapman*, JJ.). PEARY MANDER *v.* ANANDRAM.
32 I.C. 593 (Cal.)

——S. 153—*Appeal—Rent suit.*

No appeal either first or second, lies from the decision of a Court in a rent suit for an amount less than Rs. 50 where the relationship of landlord and tenant was found against, on the ground that no rent had ever been collected, 12 C.W.N. 835, foll. (*Holmwood and Mullick*, JJ.) GANGADHAR KARMARKAR *v.* SHEKHAR BASINI DASYA. 31 I.C. 812=23 C.L.J. 235.

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——— **Ss. 153 and 40**—*Second appeal—Commutation of rent—Occupancy raiyat.*

The question of *Bhowli* or *Naqdi* rent is one the decision whereon, may be challenged by way of appeal under S. 153 of the Bengal Tenancy Act. The propriety of commutation of rent of a holding or of the amount fixed cannot be called in question in a Civil Court. A decision in a dispute as to the status of the tenant decided by the Revenue Authorities in a commutation proceeding under S. 40 is not final and conclusive between the parties and the Civil Court has jurisdiction to go over it. (*Mookerjee and Richardson*, JJ.) KALI KRISHNA BISWAS *v.* RAM CHANDRA BAIDYA. **19 C.W.N. 823=29 I.C. 896=21 C.L.J. 487.**

——— S. 153—*Amendment of—Scope—Question relating to title—Execution sale—Irregularity—Fraud.*

An order setting aside or refusing to set aside a sale in execution of a decree for rent (where the decree-holder is the purchaser) is an order deciding a question relating to title to land as between parties having conflicting claims thereto. It falls within the proviso to S. 153 of the Act, and is, therefore, appealable though there is no appeal from the decree in the suit on account of the prohibition contained in the section. Irregularity in publishing or conducting a sale under S. 153 Expln., is not the same as fraud. Per *Mullick*, J.—An irregularity in publishing or conducting a sale, may be with or without fraud. S. 153 Expln. does not expressly exclude from its scope an irregularity tainted by fraud. (*N. R. Chatterjee and Mullick*, JJ.) NOBIN CHANDRA *v.* BEPIN CHANDRA ROY. **19 C.W.N. 953=29 I.C. 803=22 C.L.J. 244.**

———S. 153—*Jurisdiction of Dt. Judge—Whether revisional or appellate.*

The jurisdiction of a Dt. Judge under S. 153 of the B.T. Act is of revisional and not appellate character, so that where a Dt. Judge treats the matter before him as an appeal, High Court will interfere with his order. (*Mookerjee and Beachcroft*, JJ.) SURANGINI DASSI *v.* NEKARADDI MULLICK. **23 I.C. 844 (Cal.).**

———S. 153—*Second appeal—Amount of rent.*

Where in a suit valued at less than Rs. 100, the question was as to the amount of rent annually payable by tenants and the lower appellate Court decided that the rate of rent was not proved but amount of rent to be paid annually was fixed, *held* the decision referred to the amount of rent annually payable by tenant, within S. 153 and was subject to second appeal. (*Jenkins*, C.J. *and Chatterjee*, J.) TARINI CHARAN MAJUMDAR *v.* UMAR MAHTA. **23 I.C. 416 (Cal.).**

———S. 153—*Appeal—Order refusing to rehear ex parte appeal—Suit valued at less than Rs. 100.*

BENGAL TENANCY ACT (VIII of 1885), S. 153.

An appeal against order refusing to re-hear an appeal heard *ex parte* from a decree in a rent suit valued at less than Rs. 100 is barred by S. 153 of the B. T. Act.

An application to re-hear an appeal is an application in the suit for the term "suit" includes appeal. 25 Cal. 146 rel. (*Mookerjee and Beachcroft*, JJ.) SAMED SHEIKH *v.* NABA NEPAL. **19 C.L.J. 310=23 I.C. 12=19 C.W.N. 359.**

———S. 153—*Suit by lessee under landlord for rent—Suit dismissed on the ground that the lease was invalid—Suit valued at less than Rs. 100—Second appeal if lies.*

Where a suit by a lessee of a landlord against the tenants for rent is dismissed on the ground that the lease is invalid and consequently the relation of landlord and tenant did not exist between the plff. and defts. the decision is upon a question relating to title to land or some interest in land as between parties having conflicting claims thereto within the meaning of S. 153 of the B.T. Act and therefore a second appeal would lie. (*Jenkins*, C.J. *Coxe and Ray*, JJ.) MOHAMMAD GOWHAR ALI *v.* SAMIRUDDIN SHEIKH. **22 I.C. 383=18 C.W.N. 38.**

———S. 153—*'Interest in land between parties having conflicting claims'—Rent suit—Right to receive rent as between plff. and third party—Second appeal.*

In a rent suit where the defence is that a third party is entitled to the rent, the question whether the plff. or the third party is entitled to receive the rent, is one falling under S. 153 of the Act and is open to second appeal. (*Richards and Newbould*, JJ.) KAMPTE PRASAD RAI *v.* KULDIP RAI. **20 I.C. 70 (Cal.).**

———S. 153—*Rate of rent—Second appeal—Rent suit—Defence of eviction by title paramount—If a valid one.*

A decision as to the annual rate of rent directly or incidentally is enough to give a right of second appeal under S. 153 of the B.T. Act and no contest on the point is necessary. The defence of non-liability for rent on the ground of eviction by a paramount title might be taken in a rent suit. But the defence must be taken at the proper time and not in second appeal. (*Holmwood and Chapman*, JJ.) NOURJANI *v.* BIMALA SUNDARI. **18 I.C. 87=18 C.W.N. 552.**

——— **Ss. 153 and 174**—*Explanation.*

The explanation to S. 153 does not overrule 32 Cal. 957 (F.B.) but it limits its scope considerably. The explanation does not apply where the question is whether the judgment-debtor has complied with S. 174 for reversing the sale. (*Mookerjee and Carnduff*, JJ.) BASU MADHAB RAY *v.* BISSESWAR BHARATI. **16 C.L.J. 542=15 I.C. 436=17 C.W.N. 85.**

BENGAL TENANCY ACT (VIII of 1885), S. 153.

———S. 153—*Second appeal in suit for rent, if lies under.*

Where a suit for rent against two persons, one of whom is a tenant and the other an under-tenant whose tenure is alleged to have been annulled under Ss. 11 and 15 of the Patni Regulation, is dismissed on the ground that the annulment of the under-tenure was not made by a suit, a second appeal lies under S. 153; such a suit would itself amount to annulment of the under-tenure. (*Coxe*, J.) KRISHNA PROMODA DASI *v.* PARASULLA.
11 I.C. 83 (Cal.).

———S. 153—*Execution of decree.*

The order made by an officer not specially empowered is open to appeal although the decree was made by one specially empowered. The test of order being appealable is the qualification of officer who passed the order and not of one who passed the decree. (*Mookerjee and Caspersz*, JJ.) SHEO PARSEN RAI *v.* BISHUN PARGASH NARAIN. **10 I C. 539 = 13 C.W.N. 760.**

———Ss. 153 and 186-A—*Second appeal—Rent—Damages.*

***Quære.*—Whether a decree in a rent suit for an amount less than Rs. 100 is open to second appeal by reason of award of damages under S. 186-A.** (*Woodroffe and Carnduff*, JJ.) SIBU SANT *v.* NETAI CHARAN DAS.
9 I.C. 806 = 15 C L.J. 114.

———S. 153—*Decision on admission of rent is not Decision as to amount of rent.*

In a suit for rent the deft. did not admit the plaintiff's claim but alleged some other amount to be the rent payable. The Court, however without deciding the rate of rent gave a decree for a lump sum on the defendant's admission. *Held* there was no decision as to the amount of rent within S. 153 of the B.T. Act. 1 C.W.N. 711, Ref. (*Miller*, C. J. *and Mullick*, J.) RAJGIRY SINGH *v.* JADUNATH RAY.
4 P.L.T. 39 = (1922) Pat. 355 = 1923 P. 41.

———S. 153—*C. P. Code*, O. 9, r. 13 *and* O. 47, r. 1—*Setting aside* ex parte *decree—Deposit.*

S. 153 bars an application under O. 9, r. 13 or O. 47, r. 1, unless the application states the injuries sustained by the applicant on account of the decree or judgment, and he deposits in Court, the amount of rent admitted by him to be due. If no rent is admitted to be due, no deposit is needed. (*Jwala Prasad*, J.) CHANDRA DHUR DEV. *v.* BHOLU RAI.
2 Pat. L.T. 372 = 62 I.C. 80 = 1921 Pat. 301.

———S. 153—*Claim for deduction of certain sums from rent involves the question of rent annually payable—Second appeal lies.*

The question of tenant's claim to deduct from the rent certain sums is a question of rent annually payable and the section does not bar a second appeal from the decision on the point.

BENGAL TENANCY ACT (VIII of 1885), S. 153.

(*Miller*, C.J. *and Mullick*, J.) JAGDISH MISER *v.* RAMESHWAR SINGH. **57 I.C. 621 = 1920 Pat. 241.**

———S. 153—*Second appeal—Suit for rent below Rs.* 100.

S. 153 (*a*) of the B.T. Act bars a second appeal in a suit for rent less than Rs. 100 whether the rent is payable in money or in kind and whether the plff. is a co-sharer landlord and the others are *pro forma* defts. (*Jwala Prasad*, J.) MATHURA SINGH *v.* RATAN BARHI. **54 I.C. 662 (Pat.).**

———S 153—*Second appeal*—Nagdi *or* bhowli *rent—Conflicting claims to title.*

Where the question whether the deft. is liable to pay *nagdi* or *bhowli* rent, a second appeal is not barred by S. 153 of the B.T. Act. Where there is a conflicting claim to title in and between one of the parties in suit and a stranger, no second appeal lies under S. 153 of the B.T. Act. (*Jwala Prasad*, J.) SHEIKH WAZIR ALI *v.* MUSSAMMAT MAHIMMUNISA.
43 I C. 777 = 4 Pat. L.W. 72.

———S. 153—*Second appeal*—Ijaradar *and co-sharer landlord—Title.*

Where the decree decided a question of title as between a co-sharer landlord and *Ijaradar* who were parties with conflicting claims, a second appeal lies. (*Mullick*, J.) BIBI KANING *v.* SARBAN LAL. **42 I.C. 414 (Pat).**

———S. 153—*Rent suit not exceeding Rs.* 100 *—Second appeal whether lies unless any decision in respect of interest in land is given.*

In a suit for rent of the value of less than Rs. 100, a second appeal would lie where a question relating to some interest in land is decided. The question of under-tenure is a question relating to some interest in land. S. 153 would apply only when the decision is between parties having conflicting claims thereto. Suit for rent by a transferee of an entire estate of a landlord and not of arrears of rent only is a rent suit governed by S. 153 of the Act. (*Chapman*, J.) GANGA SINGH *v.* RAGHUNANDAN DAS.
39 I.C. 748 = 1 Pat. L.W. 548.

———S 153—Mafi *if rent—Decision as to* mafi *not a decision as to rent.*

A mafi allowed to *Jeth raiyats* for duties to be performed is not rent, because it is not a sum payable by the landlord to the tenant and so a decision determining the amount of mafi is not one as to annual rent payable by the tenant under the above section. (*Sharfuddin and Roe*, JJ.) SAFAIT HOSSAIN *v.* WAIZUDDIN. **20 C.W.N. 1207 = 1 Pat. L.J. 304 = 37 I.C. 670 = 3 P.L.W. 92.**

———S. 153 (1) (b)—*Decree or order of specially empowered officer—Not appealable.*

A decree or an order by an officer specially empowered under S. 153 (1) (*b*) of the B.T. Act is not appealable but is open to revision. (*Beachcroft*, J.) GOGI DIDHUR FAKIR *v.* BARADA KANTA BOSE. **55 I C. 653 (Cal.).**

BENGAL TENANCY ACT (VIII of 1885), S. 153-A.

——S. 153-A—Ex-parte *decree for rent—Application to set aside.*

An application for setting aside an *ex parte* rent decree is not maintainable unless the injury sustained by the applicant by reason of the decree is mentioned therein. (*Fletcher and Smither*, JJ.) NARESH NARAYAN ROY *v.* MIDNAPORE ZEMINDARI CO., LTD.
41 I.C. 800 (Cal.).

——S. 153-A—'*Amount claimed.*'

The expression "amount claimed in the suit" must be read with the words "in any suit instituted by a landlord for the recovery of rent," and means rent for the recovery of which the suit is filed. (*Mookerjee and Batchelor*, JJ.) JAMADAR SINGH *v.* JAGAT KISHORE. **34 I.C. 697=23 C.L.J. 557.**

——S. 153-A—*Scope of—Deposit—Admission of amount due.*

The admission of rent contemplated by S. 153-(*a*) of the B.T. Act is an admission that is due in respect of the holding for which the suit is instituted. A person is not bound to make any deposit where he does not admit that any money is due from him to the plaintiff in respect of the holding for which rent is claimed. (*Mukerjee and Roe*, JJ.) TARA SANKER GHOSE *v.* NASARUDDI.
29 I.C. 476=19 C.W.N. 970=22 C.L.J. 589.

——S. 153-A—'*Amount claimed in the suit.*"

The costs of the suit are not part of the "amount claimed" in S. 153 (*a*) of the B.T. Act. Nor can interest *pendente lite* be included in the "amount claimed." 8 M.I.A. 262; 8 M.I.A. 166 and 24 All. 174; rel. (*Mookerjee and Holmwood*, JJ.) SARAT CHANDRA CHOWDHURI *v.* KESHAB CHANDRA.
16 I.C. 422 (Cal.).

——Ss. 153-A and 193—*Suit for rent of Jalkar—Applicability*—Ex-parte *decree, how set aside.*

Section 153-A of the Bengal Tenancy Act is, by virtue of S. 193, applicable to a suit for recovery of rent of a Jalkar. Where an *ex parte* decree is passed in respect of the same, the same can be set aside only on the applicant depositing the money which he admits to be due. (*Holmwood and D. Chatterjee*, JJ.) ANNODA PROSONNO MUKERJEE *v.* NIL MADHAB PARUI. **11 I.C. 123=18 C.L.J. 52.**

——S. 153-A—*Deposit*—Ex parte *decree.*

Though no special mode is prescribed, the deposit under S. 153-A may be applied towards satisfaction of the landlord's decree made at the re-trial. For the balance of the judgment-debtor, execution may be given. (*Mookerjee and Caspersz*, JJ.) SHEO PRASAN RAI *v.* BISHUN PARGASH NARAIN. **10 I.C. 839=13 C.W.N. 760.**

——S. 153-A, Cls. (a) and (b)—*Application to set aside* ex parte decree—*No deposit made—Procedure.*

BENGAL TENANCY ACT (VIII of 1885), S. 155.

Where an application is made to set aside an *ex parte* decree for rent and the tenant denies that any rent is due, and therefore no deposit is made under S. 153-A (*a*) the Court should not admit the application without recording under S. 150-A (*b*), in writing that it is satisfied that the deposit is not necessary. (*Beachcroft*, J.) AMANULLA *v.* AYFARJAN BIBI.
62 I.C. 444 (Cal.).

——S. 153 (b)—*Dismissal of rent suit on the ground that relationship of landlord and tenant had not been proved.*

If in a suit for rent for less than Rs. 50 the Munsif dismisses the suit on the ground that there was no relationship of landlord and tenant between the parties in respect of the *jama* sued for, the decision of the Dt. Munsif was not appealable. (*Newbould and Panton*, JJ.) MUKINDA LAL ROY *v.* BABASUNDARI DEBYA. **47 I.C. 922 (Cal.).**

——S. 153 (b)—*Landlord and Tenants Procedure Act, S. 102—Difference.*

S. 153 of the B.T. Act provides for an appeal from decision, involving a question as to the amount of rent, while S. 102 of Act (VIII of 1869) has no such provision. (*Chatterjee and Roe*, JJ.) DINANATH SARMA *v.* SARAN RAM DEB. **30 I.C. 277 (Cal.).**

——S. 153 (b)—*Appeal entertained without jurisdiction.*

A munsif invested with powers under S. 153 (*b*) tried rent suits in both of which the amount claimed, was less than Rs. 50. No appeal lay to the Sub-Judge and if the appeal is wrongly entertained, the question of jurisdiction can be taken before the High Court though not raised in the Lower Appellate Court. The High Court can grant a rule on a simple petition when the two decrees were made the matter of a single appeal. (*Stephen and Richardson*, JJ.) SARAT CHANDRA BISWAS *v.* ASHRAF ALI.
15 I.C. 669 (Cal.).

——Ss 154 and 158—*Suit for enhancement of rent—Parties—Suit by one co-sharer landlord—Severance of tenancy—Evidence of.*

It is not competent to one of several co-sharer landlords to sue for enhancement of rent or for additional rent in respect of additional area alleged to be comprised in a jote. The mere fact that a tenant agrees to pay a rent to one of the co-sharer landlords separately, does not constitute a severance of the tenancy. If, however, there is a separate kabuliyat in favour of one of the co-sharer landlords it is evidence of a separate tenancy. (*N R. Chatterjee and Newbould*, JJ.) MONMOTHA PAUL CHAUDHURY *v.* MOHENDRA NATH BOSE. **65 I.C. 469=1922 Cal. 284.**

——S 155—*Misuse of tenancy—Notice not requiring tenant to remedy the misuse is not valid—Compensation.*

A notice under S. 155 not requiring the tenant to remedy the misuse, though it is capable of

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remedy, but only asking for compensation to remedy the misuse, is not valid. (*Woodroffe and Ghose*, JJ.) SHIB CHARAN CHAKRABURTHY v. BIPIN BEHARY CHAKRABURTHY.
27 C.W.N. 144=1923 Cal. 149 (1).

——S. 155—*Limitation Act, Art.* 32—*Suit for ejectment and compensation — Former claim time-barred.*

Where in a suit for compensation and ejectment under S. 155, the claim for ejectment is time-barred, the claim for compensation is maintainable only if it is in time according to Art. 32, Limitation Act as the two claims are independent of each other. (*N. R. Chatterjee and Newbould*, JJ.) KRISHNA DAS RAY v. MOHENDRA CHANDRA SIL.
62 I.C. 779=23 C.W.N. 930.

——S. 155—*Notice—Sufficiency of.*

If the misuse specified in S. 155 of the B. T. Act is in fact incapable of remedy, the notice is sufficient although it does not require the tenant to remedy the misuse. A suit which is based on such notice will stand, even if there be absence of proper notice. (*Teunon and Newbould*, JJ.) BEPIN BEHARI CHAKRABURTY v. SIB CHARAN CHAKRABARTY.
43 I.C. 801 (Cal.).

——S. 155—*Tenancy continues, how long—Time extension of.*

The 'relief' granted under the section includes the meaning that the forfeiture has not taken place, *i.e.*, as soon as the relief is granted, the forfeiture disappears as if it never existed. The tenancy continues till the tenant fails to comply within the time prescribed by the decree in the ejectment suit. The Court can give relief against forfeiture. Extension of time may be granted after the expiry of the period specified in the decree and even after the decree-holder has applied for execution. (*Mookerjee and Cuming*, JJ.) SHYAM MANDAL v. SATINATH BANERJEE. 44 Cal. 954=38 I.C. 493=24 C.L.J. 523=21 C.W.N. 776.

——S. 155—*Lessee breaking covenant.*

Where a lessee acts contrary to his covenant by mortgaging his interest, he is not a tenant entitled to claim the procedure laid down in S. 155 of the B.T. Act or to a notice to quit under the T.P. Act in the absence of any act done by the landlord amounting to a recognition of the transfer. 6 I.C. 147, ref. (*Sanderson*, C.J. *and Mookerjee*, J.) DWARKANATH ROY v. MATHURA NATH ROY. 24 C.L.J. 40=34 I.C. 833=21 C.W.N. 117.

——S. 155—*Notice—Object of.*

The object of a notice to quit under S. 155 of the B.T. Act is to give the tenant an opportunity of remedying the breach if capable of being remedied, or of paying reasonable compensation if not capable of being remedied and thus avoid ejectment. A notice requiring the tenant to remedy the breach or to pay compensation for misuse or breach of contract and to surrender the land, is not valid to support an action for

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ejectment. (*Chatterjee and Richardson*, JJ.) KALICHANDRA v. KALI KUMAR MAJUMDAR.
34 I.C. 537=23 C.W.N. 569.

——S. 155—*Covenant by tenant not to assign—Damages.*

In an action for breach of a covenant not to assign, the measure of damages is such a sum as would place the landlord in status *qua ante*. *Williams* v. *Earle*, 3 Q.B. 739, foll. (*Mookerjee and Beachcroft*, JJ.) KESHAB LAL NAG MUZUMDAR v. JNANENDRA NATH GHOSH.
24 I.C. 538=20 C.L.J. 332.

——S. 155—*Direction for payment of a sum of money to landlord—Extension of time.*

A Court can entertain an application by a tenant judgment-debtor for extension of time to pay a sum of money awarded under S. 155 of the B.T. Act, even if the decree-holder has applied for execution of the decree and has obtained possession of the property in execution. (*Dass*, J.) MAHABIR SINGH v. DEOKI RAI.
32 I.C. 137 (Pat.).

——S. 155 (1)—*Notice—Claim for compensation.*

A notice intimating to the tenants that they should, within one month from the date of service, restore the land to its original condition and that, if they failed to do so, a suit would be brought against them for ejectment and damages does not fulfil the requirements of S. 155 (1) of the B.T. Act as there is no claim for compensation either in addition or as an alternative to a demand on the tenant to remedy the misuse or breach. A notice does not become insufficient, because it is open to criticism on an unusual examination of some of the phrases employed. (*Mookerjee and Beachcroft*, JJ.) MAHARAJ BAHADUR SINGH v. MAKHAN CHANDRA GHOSH. 31 I.C. 385=29 C.L.J. 430.

——S. 155 (b)—*Ejectment decree—When can be had.*

A decree for ejectment under S. 155 (*b*) can be had only if the tenant fails to remedy the breach complained of or fails to deposit the sum in Court which has been fixed by the Court (and the Court is always so bound to fix a sum of money in lieu of the remedy) as reasonable compensation for the breach. S. 155 applies even when the suit for ejectment is based on the breach of conditions in a contract made before the passing of the Bengal Tenancy Act, even when there is a provision for re-entry. (*Beachcroft and Newbould*, JJ.) AFILADDI v. SATISH CHANDRA BANERJI. 34 I.C. 497=29 C.L.J. 40.

——S. 157—*Possession suit with alternative claim for rent does not affect limitation.*

Alternative claim for rent does not affect the question of limitation if the claim is based on S. 157 of the Act. (*Jenkins*, C.J. *Mookerjee and Beachcroft*, JJ.) BIRENDRA KISHORE MANIKYA v. GIRISH CHANDRA NAG.
30 I.C. 959=22 C.L.J. 154.

BENGAL TENANCY ACT (VIII of 1885), S. 158.

——S. 158—*Landlord and tenant—Incidents of tenancy—Separate leases.*

An application under S. 158 of the Act for the determination of the incidents of a tenancy cannot be made by or against a co-sharer landlord. 17 Cal. 538, rel. on. Where a tenant took leases from different landlords of their respective undivided interests in the same land, the landlord can collect their rent separately from the tenant, but there is only one tenancy. 11 Cal. 96; 17 Cal. 695; 25 Cal. 917; 1 C.W.N. 521, rel. on. (*Coxe and Roy*, JJ.) HARI MOHAN *v.* SRI MOHAN. **20 I.C. 820 = 18 C.W.N. 168.**

——S. 158—*Tenure held since* 1848—*There shall be no increase or diminution of rent—Increase once as result of litigation.*

A tenure was held from 1848 under a distinct provision in the lease that there shall be no increase or diminution of the rent of Rs. 17. Subsequently, as the result of litigation and possibly to buy peace, the tenant agreed with Zamindars that if he restored him to the right to which he was entitled, he would pay the rent of Rs. 108 and odd. The tenancy was identical with the original tenancy, and not a new one. *Held*, that this increased rent did not disturb the provision against increase and that the effect of the whole arrangement was that in place of Rs. 17, Rs. 108 was the rental and therefore, the rent of the tenure was not liable to enhancement. (*Jenkins*, C.J. *and N.R. Chatterjee*, J.) RAMANUJA MAHANTA *v.* MIDNAPORE ZEMINDARI CO., LTD. **14 I.C. 729 = 16 C.W.N. 725.**

——S. 158—*Assessment of rent—Application for—Dismissal for default—Subsequent suit for compensation—Not barred.*

A claim for assessment of rent under S. 158 of the B.T. Act was dismissed for default under O. 9, r. 8, C. P. Code in the year 1915. The landlords subsequently instituted a suit against the defendant claiming compensation for occupation of the same land and a determination of the annual rent payable by the defendant. *Held* that an application under S. 158 of the B.T. Act was not a suit and its dismissal for default did not bar the subsequent claim for the determination of the annual rent payable by the defendants. (*Miller*, C.J., *and Mullick*, J.) JANKI RAY *v.* RAJA KALANAND SINGH. **74 I.C. 464 = 2 Pat. 193 = 4 Pat. L.T. 703 : 1923 Pat. 381.**

——S. 158-B.—*Notice to co-sharer landlord—Absence of—Effect.*

The omission to serve upon a co-sharer landlord the notice required by S. 158-B of the Bengal Tenancy Act need not necessarily make the rule null and void. If the co-sharer landlord adopts the sale and withdraws his portion of the purchase-money, the sale is equally valid as the provision is not based on grounds of public policy but for the benefit of the individual who can waive the same. (*Mookerjee and Chotzner*, JJ.) RAJANI KANTA GHOSE *v.* SHEIKH RAHAMAN GAZI. **27 C.W.N. 765 = 37 C.L.J. 447 = 1924 C. 408.**

BENGAL TENANCY ACT (VIII of 1885), S. 158-B.

——Ss. 158-B and 159—*Sale under Rent decree—Tenure itself passes to auction purchaser—Art.* 139, *Lim. Act does not apply.*

Article 139, of the Limitation Act is applicable only where the purchaser acquires the right, title and interest of the judgment-debtor. But the rights of a purchaser at a sale under a decree for rent must be governed by the Bengal Tenancy Act. When a rent decree has been properly obtained, the tenure itself passes to the purchaser and not the right title and interest of the judgment-debtor only. The rights of the purchaser must be determined by the provisions of the B.T. Act under S. 158-B and S. 159. (*Woodroffe, Walmsley and Suhrawardy*, JJ.) JANENDRA MOHAN DUTT *v.* UMESH CHANDRA GUHA. **26 C.W.N. 985 = 1922 Cal. 544.**

——S. 158-B—*Rent sale—Decree for rent—Unrecorded tenant not a party—Sale—What interest passes.*

A landlord obtained a decree for arrears of rent of a tenure against all the recorded tenants and sold the holding in execution. *Held*, that the entire tenure, and not merely the interest of the recorded tenants, passed by the sale in execution of such a decree. The unrecorded tenant, though he was not a party to the rent suit, cannot sue for a declaration of his right on the ground that his share in the tenure did not pass by the sale. (*Chatterjee and Newbould*, JJ.) PRAFULLA KUMAR SEN *v.* NAWAB SIR SALIMULLAH BAHADUR. **52 I.C. 304 = 23 C.W.N. 530.**

——S. 158-B—*Failure to give notice—Sale invalid.*

S. 158-B. of the B.T. Act is imperative and requires the giving of notice to the co-sharer landlords before the sale of a holding in execution of a rent decree obtained by one co-sharer. The failure of the Court to serve such notice renders the sale invalid. (*Fletcher and Newbould*, JJ.) SARIP LOCHIN *v.* TILLETAMMA DEBI. **43 I.C. 3 (Cal.).**

——S. 158-B—*Sale in execution under B.T. Act granted by first Court—Lower Appellate Court directing sale under C.P.C.—Effect—Revision—High Court's power.*

Where the first Court granted an application for sale in execution under B.T. Act, S. 158-B. (1) but on appeal, the sale was directed to be held under the Civ. Pro. Code, which would be without jurisdiction, the High Court will interfere in revision. 25 Bom. 337, P.C. ref. to. (*Mookerjee and Beachcroft*, JJ.) BROHMANDA NATH DEB *v.* HEM CHANDRA MITRA. **23 I.C. 981 = 18 C.W.N. 1016.**

——S 158-B—*Sale of holding in execution of decree—Necessary parties.*

Ordinarily all tenants of a holding are necessary parties to a suit in order that a decree and

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the sale in execution thereof may have the consequences mentioned in Chapter XIV of the Act. Where one of a number of tenants is put forward by the rest as their representative, he can be regarded as a sole tenant. Whether he can be a representative, is a question of fact. (*Jenkins*, C.J. *and Mullick*, J.) CHAMAT KALINI DASI *v.* TRIGUNA NATH SARDAR.
19 I.C. 989=17 C.W.N. 833.

——S. 158-B—*Suit against real though not recorded tenant—Decree-against, if one for rent.*

A decree passed in a suit by a landlord against a real though not a recorded tenant who was in possession is a rent decree and not a money decree. 22 W.R. 334 and 9 C. 908, rel. (*Holmwood and Chatterjee*, JJ.) BANBIHARI KAPUR *v.* KHTERAPAL SINGH ROY.
38 Cal. 923=13 I.C. 785=
16 C.W.N. 259.

——S. 158-B—*Rent decree— Co-sharer's suit for rent—Other sharer parties—Decree for his share only—Money decree or rent decree.*

Where in a suit by co-sharer landlord for arrears due in respect of the whole estate making other sharers *pro forma* defts. a decree was passed for plff.'s share of the rents. *Held*, that it was a money decree only and could not be executed as a rent decree under the Bengal Tenancy Act. (*Casperse and D. Chatterjee*, JJ.) PROMODA NATH *v.* ALAMGIR KHAN.
13 I C. 82 (Cal.).

——S. 158-B.—Ticcadar—*Right to sell holding—Transfer of interest.*

Obiter.—If a *ticcadar* obtains a rent decree after the period of his *ticca* all that he can sell is the right, title and interest of the tenant and not the tenure. (*Coxe*, J.) NATABAR JANA *v.* RUDRA NARAYAN. 9 I.C. 625 (Cal.).

——S. 158-B—*Execution sale—Decree for consolidated rent of two holdings.*

Where a suit has been brought for the consolidated rent of two holdings upon the purchaser no greater title is conferred upon the purchaser by a subsequent sale in execution of the decree than the right, title and interest of the judgment-debtor. There is nothing in S. 158-B of the B.T. Act which would give the purchaser the right to acquire the rights therein mentioned except by a purchase of the holding. (*Miller*, C.J. *and Mullick*, J.) DIPA MAHTON *v* LALA SHEONANDAN PRASAD. 1 Pat L.R. 467 (Civ.).

——S. 158 (b)—*Sale contrary to—Suit for declaration of invalidity is governed by Art.* 120 *of the Lim Act.*

(*Dass*, J.) GHANSHYAM *v.* BASDEB JHA.
60 I.C. 529=3 U.P.L.R. (Pat.) 27.

——Ss. 158-B and 159—*Decree for rent against holding of tenant—Joinder of all the co-tenants—Necessity for—Money decree.*

If a landlord wants to obtain a rent decree good against the land under the B.T. Act, he must ordinarily implead all the co-tenants including the heirs and the legal representatives of a deceased co-tenant. If, however, he is content with a money decree, he is free under S. 43 of the Contract Act to sue any or all of the tenants, as each of the tenants is liable to pay the whole rent. 22 C.W.N. 289 foll.; 15 C.W.N. 191, not foll.; 1 Pat. L.J. 190, dist. (*Coutts and Adami*, JJ.) BERADAR SINGH *v.* BACHA MAHTO. 3 Pat. L.J. 32=1 Pat. L.T. 55=
54 I.C. 39=1920 Pat. 9.

——S. 158-B—*Rights of purchaser at an execution sale in rent decree when, landlords are not the same in number during the period for which the rent is due.*

Purchaser at a sale in execution of a decree for arrears of rent obtained by a sole landlord acquires the full title in the holding sold even though the landlord was a co-sharer with others some time during the period for which the rent is due. (*Chapman and Roe*, JJ.) SARUP SAHU *v.* JAGRAHATH MODDI.
2 Pat. L.J. 194=39 I.C. 672=
3 Pat. L.W. 420.

——Ss. 158-B, 159, 163 and 167—*Effect of omission to state the holding would be sold free of all encumbrances—Right of purchaser to annul encumbrances.*

A rent decree being passed under S. 158-B of the Act, the omission to state that the holding would be sold free of all encumbrances in a sale under the decree does not deprive the purchaser of the right of annulling the encumbrances. (*Chamier*, C.J. *and Sharfuddin*, J.) MAHABIR PRASAD *v.* BAIJWA LAL. 1 Pat. L.W. 351=
2 Pat. L.J. 176=39 I.C. 230=
1917 Pat. 143.

——S. 158-B—*Requirements of the section with regard to a decree for rent.*

Where in a decree for rent the entire body of landlords are on record at the time of making the decree, it matters little even if the whole body of landlords at that time is not the same as at some time during the period for which the rent is due. (*Chapman and Roe*, JJ.) RAM KISHEN *v.* MAHABIR RAI.
39 I.C. 219=1 Pat. L W. 342.

——S. 158-B (2)—*Omission to serve notice of sale—Decree obtained by a co-sharer landlord on other co sharer landlords.*

If a co-sharer wants to have the sale of a tenure of holding, S. 158 (2) (*b*) of the B.T. Act which is mandatory must be complied with and the failure of the Court to serve notice thereunder renders the sale invalid. The purchaser at such a sale is invalid. The purchaser at such a sale is in the position of an ordinary purchaser under a money decree. (*N.R. Chatterjee and Panton*, JJ.) AHMED BISWAS *v.* BEJOY BHUSAN GUPTA.
53 I C. 515=23 C.W.N. 931.

——Ss. 159 and 161 — *Encumbrance—Includes—Prescriptive title.*

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Per *Woodroffe*, J.—The word encumbrance as used in Ss. 159 and 161 of the Bengal Tenancy Act includes a statutory title acquired by a trespasser by adverse possession of the land of a defaulting tenant. (*Woodroffe, Walmsley and Suhrawardy*, JJ.) JNANENDRA MOHAN DUTT *v.* UMESH CHANDRA GUHA.
26 C.W.N. 983=1922 Cal. 544.

——Ss. 159, 161 and 167—*'Incumbrance —Adverse possession of a part of lands of defaulting tenure.*

The word "incumbrance" as used in Ss. 159 and 161 of the Bengal Tenancy Act includes statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure or holding and such incumbrance cannot be annulled in any manner other than what is provided in S 167. (*Mookerjee and Panton*, JJ.) ISAN CHANDRA *v.* SEFATULLA.
26 C.W.N. 703=68 I.C. 219=35 C L.J. 36=1922 Cal. 331.

——S. 159—*Sale for arrears of rent—What passes.*

When in execution of a decree for arrears of rent a tenure is sold, the tenure is not extinguished, there is a transmission and not an extinction of interest. The purchaser takes the existing tenure subject to protected interests, but with power to annul incumbrances thereon by recourse to the prescribed procedure. (*Mookerjee, Newbould and Pearson*, JJ.) UDAI KUMAR DAS *v.* KATYAYINI DEBI.
35 C.L.J. 292=69 I.C. 126=49 C. 948=1922 Cal. 87.

——Ss. 159 and 160 (c)—*Lease for a term of years—Betel plantation—Rights of purchaser in execution sale.*

Even in the absence of a permanent lease the interest of a tenant in land on which *boraj* or betel plantation has been made is a protected interest within S. 160 of the Act although he does not hold the land under a permanent lease. 18 C.W.N. 349, Rel.; 46 Cal. 730, dist. The purchaser of the tenure at a sale in execution of a decree for rent due in respect of land on which there is a *boraj* or betel plantation made by a tenant holding over on payment of rent, takes subject to the protected interest of the tenant. (*Chaudhuri and Cuming*, JJ.) ABHOYA CHARAN LATABAIDYA *v.* KAMINI PROBHANAG.
53 I.C. 188 (Cal.).

——S. 159—*Rent sale—What passes under.*

Where a landlord decree-holder continues to be the sole landlord at the date of application for execution of his rent-decree, and in that capacity takes steps for sale of the defaulting under-tenure under the chapter, the effect of the sale is to pass the under-tenure and not merely the right, title and interest of the tenant to the purchaser even though the landlord has lost his interest partially or entirely as landlord before the actual sale. Procedure under Ch. XIV discussed. (*Mookerjee and Beachcroft*, JJ.) SYEDUNNESSA KHATUM *v.* AMIRUDDIN.
45 Cal. 294=41 I.C. 353=21 C.W.N. 847=25 C.L.J. 529.

BENGAL TENANCY ACT (VIII of 1885), S. 159.

——Ss. 159 and 161 (a)—*'Encumbrance'.*

The word incumbrance in Ss. 159 and 161 (*a*) of the Act includes a statutory title acquired by a trespasser in adverse possession of the land of the defaulting tenure provided such act of possession commenced after the creation of the tenure. 14 C.L.J. 136; 16 C.L.J. 539, rel. on. (*Mookerjee and Beachcroft*, JJ.) KALIKNANDANA MUKHERJEE *v.* BIPRO DAS PAL CHAUDHURY.
19 C.W.N. 18=26 I.C. 436=21 C.L.J. 265.

——Ss. 159 and 161 (a)—*'Encumbrance'—Usufructuary mortgage by under-tenant—If can be annulled by purchaser at sale for arrears of rent.*

A purchaser at a sale for arrears of rent cannot annul a usufructuary mortgage not created by the defaulting tenant but by the under-tenant, as it is not an 'encumbrance' within S. 161 (*a*) of the Act. 3 C.L.J. 222; 33 Cal. 1094; 12 C.W.N. 878, dist. (*Mookerjee and Beachcroft*, JJ.) DEBI RAUT *v.* ASUTOSH BATTACHARJEE.
20 I.C. 55 (Cal.).

——Ss. 159—160 (d) and 161 (a)—*Burden of proof—"Protected interest"—Incumbrance.*

It rests upon the auction-purchaser to show that the interest which he wishes to annul is 'incumbrance' but if this is established, the onus shifts on to the encumbrancer to prove "protected interest." 7 I.C. 919, Rel.; 1 I.C. 596, Ref. (*Carnduff and Chatterjee*, JJ.) HARI MONI DEBI *v.* MOTI SHEIKH.
15 I.C. 30=16 C.W.N. 779.

——Ss. 159 and 160 (g)—*Protected interest.*

When P granted a permanent lease to B, authorising him to grant sub-leases and B granted a permanent lease to G, who granted sub-leases to H. *Held*, that the interest of G, and therefore that of H were protected interests within the meaning of S. 160 (*g*) of the Act. (*Jenkins*, C.J. *and Chatterjee*, J.) AFAZUDDI KHAN *v.* PRASANNA GAIN.
14 I.C. 991=39 Cal. 138.

——Ss. 159 and 161 — *Incumbrances — Meaning of—Title acquired by trespasser by adverse possession.*

The word "Incumbrance" in Ss. 159 and 161 of the B.T. Act includes the prescriptive title of a trespasser acquired by adverse possession of the land of a defaulting tenant. 11 I.C. 453, foll. (*D. Chatterjee and N.R. Chatterjee*, JJ.) ARSADULLA *v.* MUNSEB ALI.
16 C.W.N. 831=14 I.C. 349=16 C.L.J. 539.

——Ss. 159, 161 and 167—*Title of adverse possessor, if an incumbrance—Annulment, how effected.*

BENGAL TENANCY ACT (VIII of 1885), S. 159.

Title acquired by an adverse possessor on the part of a tenure, is an incumbrance within the meaning of Ss. 159 and 161, and it can be annulled only under S. 167. (*Mookerjee and Carnduff*, JJ.) GOKUL BAGDI *v* DEBENDRA NATH SEN. **11 I.C. 453 = 14 C.L.J. 136.**

——— **Ss. 159, 160**—*Rent decree—Execution sale—Mortgage decree by landlord—Purchase by third party in execution—Rent decree by landlord—Purchase by landlord in execution of rent decree—Priority.*

Held, that although ordinarily the purchaser at the rent decree sale would be entitled to preference over purchasers at the mortgage decree sale, still where the landlord advertised the holding for sale in execution of his own mortgage decree when he knew at the time that the interest passing at the sale was valueless, as it could be put an end to, by the sale in execution of the rent decree, the stranger purchaser should be given priority. (*Coxe*, J.) SATIS CHANDRA GHOSE *v.* PUTU MULLICK. **10 I.C. 54 (Cal.).**

——— **Ss. 159 B and 160**—*Sale in execution of rent decree—Purchaser—Liability of arrears.*

The purchaser of a tenure at a sale held in execution of a decree other than a decree for rent must in the absence of anything to the contrary be responsible for all arrears of rent due thereon. (*Chatterjee and Richardson*, JJ.) MATHURA MOHAN SHAH v. NABIN CHANDRA DUTT. **20 C.W.N. 749 = 34 I.C. 180 = 24 C.L.J. 34.**

——— **Ss. 159, Proviso. Cl. (b) and 179**—*Restraint of creation of subordinate rights by Darpatnidar.*

S. 159, proviso Cl. (*b*) is controlled by S. 179 and a contract of permanent tenancy between a *patnidar* and a *darpatnidar* with a stipulation restraining the creation of subordinate rights by the darpatnidar is a valid contract operative not only between the grantors and the grantees but also between their representatives-in-interest. Such a restriction does not contravene S. 10, T.P. Act. (*Mookerjee and Beachcroft*, JJ.) MADHU SUDAN MAHATO v. MIDNAPORE ZAMINDARI CO., LTD. **45 Cal. 940 = 46 I.C. 129 = 27 C.L.J. 511.**

——— **Ss. 160, 167** — *Occupancy* raiyat—Raiyat *at fixed rate—Existence of both status in one person.*

A *raiyat*, who holds at a fixed rate of rent for more than 12 years continuously, becomes "a settled *raiyat* of the village" and as such acquires a right of occupancy in all lands held by him as *raiyat*, and such right is protected under S. 160, and cannot be annulled by notice under S. 167 of the Act. Per *Sanderson, C.J.*—A right of occupancy and the right of a *raiyat* holding at a fixed rate may exist in the same person in respect of the same land at the same time. Per *Richardson*, J.—The higher status would supersede so much of the lower as might be inconsistent with it and either status might be used as a shield so far as it extends. (*Sanderson*, C.J. *and Richardson*, J.) SARHESWAR PATRA *v.* BIJOY CHAND MAHATAP. **26 C.W.N 15 = 63 I.C. 986 = 34 C.L.J. 233.**

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——— **S. 160**—*'Lease of land'—Meaning.*

'Lease of land' in S. 160 means a valid lease. (*Beachcroft*, J.) HARI CHARAN DUTTA *v.* NIBARAN CHANDRA DAS. **50 I.C. 37 (Cal.).**

——— **S. 160** — *Protected interest under—Onus of proof lies in.*

Where a landlord put up the sale of a tenure in execution of a rent decree without mentioning that an under-tenure namely the *masat taluk* therein was his own property and the deft. auction purchaser set up that that under-tenure also passed to him under the sale, the onus lies on the plff. to show that the *masat taluk* was a protected interest within the meaning of the B.T. Act. (*Maclean*, C.J. *and Banerji*, J.) JOGESH CHANDRA *v.* ROHINI KUMAR ROY. **34 I.C. 215 = 21 C.L.J. 65.**

——— **S. 160**—*Protected interest—Revenue Sale Law* (*Act* XI *of* 1859).

The protection provided by S. 37 of Act XI of 1859) extends to all classes of occupancy rights under Bengal Tenancy Act. (*Holmwood and Chapman*, JJ.) ABDUL GANI *v.* MAKBUL ALI. **42 Cal. 745 = 31 I.C. 19 = 22 C.L.J. 223 = 20 C.W.N. 185.**

——— **Ss. 160 and 161**—*Under-raiyat induced without landlord's consent—No sub-lease.*

Where the under-tenant was inducted upon the land without the landlord's consent, there is no sub-lease under S. 85 of the B.T. Act. It is not an encumbrance within S. 160 or a protected interest under S. 161. (*Mookerjee and Beachcroft*, JJ.) FAKIR CHANDRA SINGHA ROY *v.* BANAMALI SAIN. **18 C.L.J. 252 = 21 I.C. 104 = 19 C.W.N. 412.**

——— **S. 160**—*'Protected interest' — Occupancy right — Under-raiyat with occupancy right—If can be ejected by purchaser at sale for arrears of rent.*

A right of occupancy is a 'protected interest' under S. 160 of the Act not liable to be annulled by a purchaser at a sale for arrears of rent. An *under-raiyat* with a right of occupancy cannot therefore be ejected by such a purchaser. (*Mookerjee and Beachcroft*, JJ.) DEBI RAUT *v.* ASUTOSH BHATTACHARJEE. **20 I.C. 65 (Cal.).**

——— **S. 160**—Boraj *plantation—Protected interest.*

Land on which betel leaf plantation (*boraj*) is made, is a protected interest. (*N. R. Chatterjee*, J.) BANKO BEHARI DAS *v.* KRISHNA CHANDRA BHOWMIK. **18 C.W.N. 349 = 9 I.C. 528 = 18 C.L.J. 170.**

———S. 160 (b)—*Auction purchase at a rent sale—Howladar and tenants—Annulment of incumbrances—Suit for recovery of possession.*

Where it was contended relying on the entries in the settlement Khatian that the howladars are protected by virtue of the provisions of S. 160 (*b*). *Held* reliance cannot be placed on the entry in the record of rights. The sale having been made, notices issued to annul the incumbrances, and the suit commenced before the record of rights was published, the entries made in the record of rights cannot affect the rights of the auction purchaser purporting to have been acquired by virtue of the annulment made by the notices. (*Greaves and Ghose*, JJ.) SRIMATO JOHARA BANOO *v.* GANGA CHANDRA CHOUDHURY. **1922 Cal. 222.**

———S. 160 (c)—*Betel leaf plantation—Protected interest—Permanent.*

The word 'plantation' in S. 160 (C) of the B.T. Act means an assemblage of growing plants of any kind and would therefore include a betel leaf plantation. It is largely a question of fact whether any particular assemblage of plants comes within the term "plantation" (*Jenkins*, C.J. *and Mookerjee*, J.) BANKO BEHARI DAS *v.* KRISHNA CHANDRA BHOWMICK.

18 C.L.J. 170=21 I.C. 419=18 C.W.N. 349.

———S. 160 (g)—*Protected interest—Meaning and conditions of creation—Landlord's consent.*

A *se patni* created by a darpatnidar is a protected interest within S 160 (*g*). Landlord's express written permission at the time of creation, is not needed for creating it. (*Sanderson* C.J. *and Mookerjee*, J.) BIDUMUKHI *v.* ASMATULLA. **24 C.L J. 180=36 I.C. 669=21 C.W.N. 829.**

———S. 160 (g)—Se patni—*Created by darpatnidar with general authority—Whether protected interest.*

A *se patni* created by a *darpatnidar* with general authority in his patra expressly stating that he may grant *se patni* settlements, is a protected interest under S. 160 (*g*) of the B. T. Act and no special permission is required in each case. (*Mullick*, J.) BIDHUMIKHI CHOWDHURRANI *v.* ASMALULLA. **23 I.C. 899 (Cal.).**

——— S. 160 (g)—*Protected interest—Mortgage of patni.*

A mortgage of a *patni* from a *patnidar* is not a protected interest within S. 160 (*g*) of the Act. (*Brett and Carnduff*, JJ.) KRISTO DAS *v.* JATINDRA NATH. **14 I.C 145=16 C W.N. 561.**

———S. 161—*Incumbarance—What is.*

Quœre. Whether an interest not directly created by the *talukdar*, but allowed to grow up by his sufferance and negligence is an incumbrance within the definition given in S. 161

of the Act. (*Lord Phillimore.*) BIPRADAS CHOWDHURY *v.* KAMINI KUMAR. **41 M.L.J. 638=15 L.W. 180=49 C. 27=30 M.L.T. 138=26 C.W.N. 465=66 I.C. 674=4 U.P.L.R. (P.C.) 53=48 I.A. 499=1922 P.C. 48 (P. C.).**

———S. 161—*Incumbrance—Meaning of—What it includes.*

'Incumbrance' in S. 161 includes a statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure. (*Mookerjee and Panton*, JJ.) ISAN CHANDRA *v.* SAFTULLA SIKDAR. **26 C.W N. 703=68 I.C. 219=35 C.L.J. 36=1922 Cal. 331.**

———S. 161—*Incumbrance—Meaning of.*

'Incumbrances' in S. 161 is some interest created or suffered to be acquired as in the case of adverse possession by the tenant on his tenure or in limitation of his own interest therein, and does not refer to the creation of an interest by a tenure holder of an inferior grade. (*N. R. Chatterjee and Greaves*, JJ.) MONMOTHA NATH MITTER *v.* ANATH BUNDHU PAL. **61 I.C. 469=25 C.W.N. 106.**

———S. 161—*Sale of portion of non-transferable occupancy holding—Encumbrance.*

The sale of a portion of a non-transferable occupancy holding is not an encumbrance within the meaning of S. 161 of the B.T. Act. An exchange is not for all purposes a sale. (*Fletcher and Cuming*, JJ.) KRIPA SINDHU MUKERJEE *v.* SURENDRA NATH BANERJEE. **46 Cal. 891=51 I.C. 285=3 O C.L J. 4.**

———S. 161—*Adverse possession—Encumbrance.*

Plffs. Zemindars purchased a patni in which deft.'s lands were situate, at a rent sale and sued for *khas* possession of the lands within 12 years of their purchase. *Held*, that the adverse possession of the defts. if any, was arrested by the sale of patni. (*Chatterjee and Greaves*, JJ.) MANMATHA NATH MITTER *v.* ANATH BANDHU PAL. **50 I.C. 222=23 C.W.N. 201.**

———Ss. 161 and 167—*Encumbrance—Mortgagee purchaser of a holding.*

The interest of a mortgagee of a part of a holding in execution of his mortgage decree is an encumbrance within S. 161 of the B.T. Act. Such a mortgagee-purchaser cannot be ejected by the purchaser of the holding in execution of a rent decree until his encumbrance is annulled under S. 167 of the B.T. Act. (*Fletcher and Huda*, JJ.). INDRA NARAIN RAY *v.* NABIN CHANDA BANERJEE. **47 I.C. 847 (Cal.).**

———Ss. 161, 167 and 103-B—*Sale of patni—Rent free lands — Encumbrance —Record of Rights—Entry in—Onus.*

Plff. in execution of a rent decree purchased a patni taluk created in 1807 and sued to eject the deft. on the ground that his interest was

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an encumbrance within S. 161 of the B.T. Act. *Held*, having regard to S. 103-B of the B. T. Act and the pleadings of the plff. and to the fact that there was no evidence to show that any rent had ever been realised in respect of those lands and that the deft. and his predecessors-in-title had been in possession for a long period without payment of rent, plff. must show that the zamindar was in possession of the lands in dispute at the date of the creation of the patni and that the encumbrance of the deft. came into existence after that date. (*N. R. Chatterjee and Greaves, JJ.*) BIPRODAS PAL CHOUDHURY *v.* KEDAR NATH ROY.
47 I.C. 765 = 23 C.W.N. 182.

——— **Ss. 161 and 167** — *Encumbrance — Mortgage of portion of non-transferable holding—Purchaser at rent sale—Right to annul mortgage—Notice.*

The sale in execution of a rent decree, of a non-transferable occupancy holding, a part of which is under a mortgage, is subject to the mortgage and the auction purchaser can annul the mortgage under S. 167 of the Act. Such a mortgage though only of part of the holding is an encumbrance within S. 161 and cannot be ignored by the landlord. A notice under S. 167 for its annulment is necessary. (*Walmsley and Greaves, JJ.*) PRAN KRISHNA PAN *v.* ATUL KRISHNA. **45 I C 176 = 22 C.W.N. 662.**

——— **Ss. 161 and 167**—*Tenure*—Miras.

A tenure-holder granted a *Miras* (under-tenure) of the entire tenure at permanent rent of Rs. 45 and subsequently sold to the *Mirasdar* the right to receive rent to an extent of Rs. 33 out of Rs. 45. The tenure was sold in execution of a rent decree and the purchaser brought a suit against the *Mirasidar* for the full rent of Rs. 45. *Held*, the assignment was an encumbrance within S. 161, which is necessary for the auction purchaser to have annulled under S. 167. (*Chatterjee and Richardson, JJ.*) BISENDRA KISHORE *v.* AHAMAD ALI.
41 I.C. 687 (Cal.).

——— **Ss. 161 and 167** — *Mortgage of non-transferable holding.*

Where a non-transferable occupancy holding is mortgaged, usufructuarily or by conditional sale, the mortgagee's interest is not an encumbrance within S. 161. The interest operates only against the tenant. (*Fletcher and Smither, JJ.*) ABDUL GAFUR MOLLA *v.* GOLAM RAHAMAN NASKAR. **39 I.C. 460 (Cal.).**

——— **S. 161**—*Encumbrance.*

The interest of an unregistered purchaser of the patni is not an encumbrance under S. 161. (*Jenkins, C. J. Chatterjee and Mullick, JJ.*) ABDUL RAHMAN *v.* AHMADAR RAHMAN.
43 Cal. 558 = 19 C.W.N. 1217 = 31 I.C. 554 = 22 C.L.J. 356.

BENGAL TENANCY ACT (VIII of 1885), S. 162.

——— **S. 161**—*Encumbrances.*

A mortgage by a tenant is a lien upon the tenure and if the mortgagee obtains a decree, his lien does not cease and his interest after the decree continues to be an encumbrance. 31 Cal. 863; 2 C.L.J. 202; 7 C.L.J. 1, rel. on.; 1 C.W.N. 458; 9 C.W.N. 670, dist. (*Mookerjee and Carnduff, JJ.*) JOG NARAIN SINGH *v.* BADRI DAS. **13 I.C. 144 = 16 C.L.J. 186.**

——— **S. 161**—*Lien—Encumbrance.*

A lien created by a tenant on his holding is an encumbrance within S. 161. (*N.R. Chatterjee, J.*) CHATTARDHARI LAL *v.* BIRANCHILAL. **9 I.C. 248 (Cal.).**

——— **Ss. 161 and 86 (6)**—*Incumbrancer—Purchaser of portion of holding is not.*

The purchaser of a portion of a non-transferable occupancy holding from an occupancy raiyat is not an incumbrancer within the meaning of Ss. 161 and 86 (6) of the B.T. Act and hence the landlord after a surrender can eject him. (*Miller, O.J. Mullick, Jwala Prasad, Foster and Macpherson, JJ.*) MT. SHEORAJI KUER *v.* DHANI MIAN.
4 Pat. L.T. 581 = 75 I.C. 794 = 1 Pat. L.R. 402 = 1923 Pat. 305 = 3 Pat. 1 = 1924 P. 1 (F.B.).

——— **Ss. 161 and 170** (3)—*Rent decree—Occupancy holding, sale of—Usufructuary mortgagee, if entitled to deposit decretal amount.*

A usufructuary mortgagee in possession of a non-transferable occupancy holding advertised for sale in execution of a rent decree against mortgagor, has an encumbrance which is voidable on sale of the holding, entitling him to deposit the decretal amount under Sec. 170 (3). (*Coutts and Adami, JJ.*) SHEIKH AZMAT *v.* BIBI TAMZAN. **3 Pat. L.J. 83 = 55 I.C. 490 = 1 Pat. L.T. 108.**

——— **S. 161**—*Bengal Land Rev. Sales Act,* (XI *of* 1859)—Mokarari—*Not an encumbrance.*

Mokurar is not an encumbrance at all except for the purpose of the Bengal Land Rev. Sales Act. (*Coutts and Dass, JJ.*) LALA NATHUNI PRASAD *v.* SYED ANWAR KARIM.
53 I.C. 16 (Pat.).

——— **S. 161 (a)**—*Encumbrances—Interest of purchaser of a portion of non-transferable occupancy holding.*

An encumbrance implies a limitation of the rights of a tenant and not a total extinction of them. A landlord purchaser at a sale in execution of his rent decree need not annul the interest of a purchaser of a portion of a non-transferable holding. 11 C.L.J. 16, foll. (*Chitty and Walmsley, JJ.*) FAZARALI MAHALDAR *v.* PERRO MIAN. **48 I.C. 300 = 28 C.L.J. 266.**

——— **Ss. 162 and 163**—*Application—Order.*

Decree-holder's application under S. 162 and an order thereon under S. 163 mean an assertion by him that the property about to be sold

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is an occupancy holding. A purchaser on this assertion cannot be attacked by the decree-holder that the holding is the interest of an under-raiyat only. (*Mookerjee and Beachcroft*, JJ.) ABDUL SAWAN *v.* NEKBAR.

16 I.C. 632=17 C.L.J. 652.

——Ss. 162 and 163—*Rent decree—Execution—Mode of—Intention of decree-holders.*

Where the holder of a rent decree takes every necessary step under the B.T Act to execute it as a rent decree, failure of Court to issue simultaneously the order of attachment and proclamation cannot make the decree any the less a decree for rent. But the decree-holder must intend to take execution proceedings as in a decree for rent and any omission to take such steps, would deprive the decree of the effect as a rent decree. (*Dass*, J.) DHUNNUM SINGH *v.* LATCHMI LAL. 57 I.C. 492 (Pat.).

——S. 163—*Material irregularity—Setting aside sale.*

The omission to state that the holding will be sold free of all encumbrances as required by S. 163 of the Act may amount to an irregularity and would be ground for setting aside the sale on proof of substantial inquiry. (*Chamier*, C.J. *and Sharfuddin*, J.) MAHABIR PRASAD *v.* BAIJA LAL. 1 Pat. L W. 351=39 I.C. 230=2 Pat. L.J. 176=1917 Pat. 143.

——Ss. 164, 165 and 167—*Tenure—Purchaser at sale—Annulment.*

In a suit for possession of a tenure purchased at a sale in execution of a decree for arrears of rent, the purchaser is entitled to recover it even if the tenure is encumbered, which encumbrance stands good, if not annulled within one year from the date of the notice in the manner prescribed under S. 167 of the B.T. Act. Where the landlord and tenants agreed to effect a division by mutual agreement, divided the land and evidenced the fact by a compromise on which a decree is based, the agreement is binding without invalidating it because of its incorporation in the decree. (*Ghose and Pratt*, JJ.) GOPINATH *v.* RADHA SHYAM.

38 I.C. 671=24 C.W.N. 637.

——S. 164—*Sale—Execution of.*

If a holding put up to auction under S. 164 fetches a lower price than the decretal amount, the sale cannot be held under that section and if the sale takes place without a second proclamation, it is not valid and only the right, title and interest of the judgment-debtor will pass to the purchaser. (*Holmwood and Chatterjee*, JJ.) BANBIHARI *v.* KHETRA PAL SINGH.

38 Cal. 923=13 I.C. 785=16 C.W.N. 259.

——Ss. 164 (1), 168 and 165.

A decree-holder, by following the procedure in S. 167 is entitled to the benefits of S. 164, although he does not avail himself of S. 165.

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The consequence of the sale is independent of the value of the bid. (*Mookerjee and Newbould*, JJ.) SALIMULLA BAHADUR *v.* RAHINUDDI. 43 Cal. 263=30 I.C. 68=21 C.L.J. 659=20 C.W.N. 156.

——S. 165—*Object of.*

A decree-holder may proceed under S. 165, if the sale on first notification does not yield sufficient sum to satisfy the decree and costs. The section is for the decree-holder's benefit and so he may or may not avail himself of this special remedy. (*Mookerjee and Newbould*, JJ.) SALIMULLAH BAHADUR *v.* RAHINUDDI.

43 Cal. 263=30 I.C. 68=21 C.L.J. 659=20 C.W.N. 156.

——S. 167—*Presumption — Origin subsequent to creation of*—Patni Taluk *must be shown—Notice, where valid.*

For a plaintiff to avail himself of S. 167 of the Act and to annul the claims of tenants as incumbrances, he must show an origin subsequent to the creation of the *Patni Taluk*. Otherwise the presumption would arise, that the origin ran back to a period antecedent to the creation of the Taluk and were rent free. A notice under S, 167 to be valid must be served within one year from the date of the sale or the date on which he first had notice of the incumbrance which ever was later. (*Lord Phillimore.*) BIPRADAS CHAUDHARI *v.* KAMINI KUMAR.

41 M.L.J. 638=66 I.C. 674 P.C.=15 L.W. 180=30 M.L.T. 138=26 C.W.N. 465=49 C. 27 ; 4 U.P. L.R. P.C. 53=48 I.A. 499=1922 P.C. 48.

——S. 167—*Patni—Sale of—For arrears of revenue—Notice of annulment of encumbrances—Service, mode of.*

A patnidar committed default in paying the rent to the Zemindar and the latter obtained a decree against him and in execution put up the estate for sale by auction subject to a *darpatni* granted by him. But as no bids approaching the amount due were offered, he issued under S. 165 of the B.T. Act, a fresh proclamation for sale with power to avoid all encumbrances. The estate was purchased by the respondents. They gave notice through the Collector of the District to avoid the *darpatni* under S. 167. The darpatnidar took no heed of the aforesaid notice ostensibly on the ground that it was not served as required by law. *Held*, that the service of the notice through the Collector was in the manner prescribed for the service of a summons on a defendant under the C. P. Code and the notice was properly served under S. 167 of the B.T. Act (*Sir John Edge.*) ANANDA GOPAL GOSSAIN *v.* NAJAR CHANDRA PAL CHOWDHURI. 18 C.W.N. 259=21 I.C. 928=26 M.L.J. 86 (P.C.).

[See 35 Cal. 618=12 C.W.N. 545=8 C.L.J. 168].

BENGAL TENANCY ACT (VIII of 1885), S. 167.

——S. 167—*Annulment of encumbrance—Notice essential.*

Before an encumbrance could be validly annulled it is essential under S. 167 of the B. T. Act that a notice should be served as provided in the section. (*Sanderson*, C.J. *and Ghose*, J.) JATINDRA MOHAN CHAKRAVARTHI *v.* BIJOY CHAND MAHATAB. 71 I.C 284 (Cal.).

——S. 167—*Sale of under-tenure in auction—Suit for possession by plff. purchaser—Lim. Act does not apply.*

An under-tenure held by the defendant from the plaintiff was sold in execution of a rent-decree to a stranger but the purchaser never obtained possession. In execution of a rent-decree against the stranger, the under-tenure was again sold more than twelve years after and purchased by the plaintiffs who sued for possession. *Per Woodroffe held* that none of the articles of the Limitation Act applied to the case but that the suit was barred under S. 187, B. T. Act. (*Woodroffe and Suhrawardy*, JJ. *Contra.*)

26 C.W.N. 965=1922 Cal. 544.

——S. 167—*Incumbrances—Annulment of—Procedure.*

An encumbrance cannot be annulled in any manner other than what is provided in S. 167. (*Mookerji and Panton*, JJ.) ISUR CHANDRA *v.* SAFTULLA SIKDAR. 26 C W.N. 703= 1922 Cal. 331=68 I.C. 219=35 C.L J 36.

——S. 167—*Incumbrance—Annulment of can be effected only by the method provided by section—Sale for arrears of rent does not cancel mortgage.*

A sale for arrears of rent does not *ipso facto* cancel a mortgage on the holding, being an incumbrance. 24 Cal. 746, Rel. The procedure provided by S. 167 of the B. T. Act is the only mode of annulling the incumbrance, and the purchaser must have recourse to the prescribed mode within the specified period, if he desires to annul the incumbrance. 22 Cal. 364, foll. A landlord purchaser, at a rent sale is, like any other purchaser, bound to follow the provisions of S. 167. If the mortgage is not annulled on the expiry of one year from the date of the rent sale or from the date when the landlord has notice of the incumbrance, the holding in the hands of the landlord-purchaser remains subject to the mortgage no longer liable to be impeached or extinguished. 24 C.W.N. 961, Ref. The relative rights of the purchaser at the rent sale and the mortgagee should be determined with reference to their position at the time of the rent sale. If the purchaser at the rent sale has not availed himself of the privilege of annulling the mortgage within the prescribed period, he holds the property subject to the mortgage and is entitled to redeem. The mortgagee purchasing the property in execution of a decree obtained by him in the suit instituted on the mortgage in which the landlord-purchaser was not made a party, does not lose his right to be redeemed by the purchaser at rent sale. 14 M.I.A. 144, Ref. (*Mookerjee and Panton*, JJ.) SITAL CHANDRA MAJHI *v.* PARBATI CHARAN CHAKRABARTI. 35 C.L.J. 1=69 I. C. 841=1922 Cal. 32.

——S. 167—*Annulment of incumbrance.*

Where in execution of a mortgage decree, *D* purchased the interest of one of the tenants of a holding, the whole of which was subsequently purchased by *P* in execution of a rent decree, *held*, that *D* became, by his purchase, the owner of the property and could not maintain that his mortgage still remained an incumbrance thereon which *P* was bound to annul under S. 167 of the Act. (*Chatterjee and Newbould*, JJ.) SABJAN MANDAL *v.* HARIPADA SAHA. 66 I.C. 103=25 C.W.N. 424.

——Ss. 167 and 161—*What has to be annulled is the* darpatni *— Incumbrance.*

Possession as a tenant cannot be adverse and does not constitute an incumbrance which must be annulled under S. 167 of the Act. The interest of a person in adverse possession is an incumbrance only when the adverse possession has continued for the statutory period. There may be a chain of subordinate interest in a *patni* and there may be incumbrances, *e.g.*, adverse possession for the statutory period on each of these various grades of subordinate tenures but a purchaser of the *patni* at a rent sale is not to find out all these interests and serve notices upon each of them under S. 167 of the Act. The sub-tenancy created by the tenant is the *dar-patni* that is an incumbrance under S. 161 and that only has to be annulled under S. 167. What, therefore, has to be annulled under S. 167 is the sub-tenancy created by the *patnidar*, *i.e.*, the *dar-patni* as it was created and which would include all the interests created or carved out of it. (N. R. *Chatterjee and Greaves*, JJ.) MONMOTHA NATH MITTER *v.* ANATH BUNDHU PAL.

61 I.C. 469=25 C.W.N. 106.

——S. 167—*Rent decree and mortgage decree against holding—Purchaser in execution of, former decree must redeem mortgage within the time fixed by section.*

Where a holding is sold under two decrees first under a rent decree and second under a mortgage decree, the purchaser under the rent decree is entitled to possession but with the condition that he redeems the mortgage which still subsists, within the time prescribed by S. 167 of the Act. (*Chatterjee and Newbould*, JJ.) BIDHUMUKHI DASI *v.* BABA SUNDARI DASI. 59 I.C. 868=24 C.W.N. 961.

——S. 167—*Appeal.*

A Court of appeal has no discretion to assume that the whole of the requisite evidence was put in the case on a point neither raised before the trial Court nor put in issue. If the defect of the service of notice of annulment of encumbrance under S. 167, B. T. Act is cured within one year from the date of its

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knowledge by the plff. according to the reservation in the judgment passed on a suit for possession of the land with encumbrance, the suit is not barred by limitation. (*Beachcroft*, J.) EASIN v. INTIGERENESSA BIBI.
58 I.C. 745=24 C.W.N. 659.

——S. 167—*Purchaser—Encumbrance set up in written statement—Suit for ejectment.*

Where the purchaser at a rent sale, suing in ejectment became aware of the existence of an encumbrance in favour of the deft. only when the latter set it up in his written statement, a decree for possession in plff.'s favour subject to the reservation that the encumbrance would stand good if not annulled within one year of the plff.'s knowledge thereof could be passed. (*Ghose and Pratt*, JJ.) GOPI NATH BISWAS *v.* RADHASHYAM PODDAR.
38 I.C. 671=24 C.W.N. 657.

——S. 167 — *Annulment of interest — Notice—Proof of service.*

Before the interest of a party can be terminated under S. 167 of the B. T. Act service of notice in accordance with the statutory procedure laid down in the section should be proved. (*Fletcher and Duval*, JJ.) BADANUDDIN BISVAS *v.* HERAJTULLA JOORDAR.
54 I.C. 797 (Cal.).

——S. 167— *Notice annulling encumbrance—Mode of service—Sufficiency of.*

It is essential that a notice annulling an encumbrance under S. 167 of the B.T. Act wherever practicable be served personally. A finding that a notice annulling an encumbrance under S. 167, B.T. Act was properly served not being a pure finding of fact is open to be questioned in second appeal. (*Fletcher and Cuming*, JJ.) RAM GOBINDA CHOWDHURI *v.* RAJANI KANTA DAS. 53 I.C. 570 (Cal.).

——S. 167 —*Landlord and tenant—Mortgage by tenant—Rent decree—Execution—Mortgage decree—Purchaser—Rights of.*

Where there is a contest between the purchaser of tenant's interest in execution of a mortgagee decree and the purchaser in execution of a rent decree obtained against the tenant, the latter has priority over the former and the latter must annul the encumbrance in order to support the priority of his purchase under the rent decree. (*Fletcher and Cuming*, JJ.) KEDAR NATH SEN *v.* IDU KHAN.
51 I.C. 746 (Cal.).

——S. 167—*Application of.*

S. 167 does not apply, where the superior landlord of an occupancy raiyat, is the auction purchaser of the holding and service of notice is not necessary to eject a sub-tenant whose tenancy is invalid as against the landlord. (*Beachcroft*, J.) HARI CHARAN DUTT *v.* NIBARAN CHANDRA DAS. 50 I.C. 37 (Cal.)

——S. 167—*Annulment of encumbrances—Procedure—Service of notice—Proof of—Single suit for rent of entire taluk, after it was split up.*

BENGAL TENANCY ACT (VIII of 1885), S. 167.

The destruction of valuable encumbrances is a very severe measure which the law allows, only if a certain procedure is strictly followed, and the claimant must show that he has strictly followed the procedure laid down. An entry in the order sheet that notice has been served is not sufficient proof of service of notice. 7 C.L.J. 262, ref. Where, what was formerly once a taluk was split up into several taluks, a sale of the entire taluk in execution of a decree obtained in a single suit, for rent due upon the entire taluk, is not a sale for the arrears of rent. (*Chitty and Smither*, JJ.) PARFULLA NATH TAGORE *v.* SHITAL KHAN. 47 I.C. 97=22 C.W.N. 788.

——S. 167—"*Date of sale*".

The "date of sale" in S. 167 is the date of the confirmation of the sale and not of actual sale. It specially applied to a sale under C.P.C., (1882), where the purchaser had no interest until the sale certificate was granted. (*Fletcher and Newbould*, JJ.) NANDA LAL *v.* UMESHCHANDRA DAS. 45 Cal. 151=26 C.L.J. 328=22 C.W.N. 86=40 I.C. 996=Cf. 17 C.W.N. 440=16 C.L.J. 131=15 I.C. 430 and 18 C.W.N. 849=9 I.C. 528=18 C.L.J. 170.

——Ss. 167 and 172—*Bid by judgment-debtor.*

According to S. 173 a judgment-debtor cannot bid for or purchase his holding sold in execution of a rent decree; if he does, he is liable under S. 185, Penal Code. (*Holmwood and Walmsley*, JJ.) MUHAMMAD SADIQUE *v.* DURGA PRASAD. 39 I.C. 189=21 C.W.N. 342.

——S. 167—Benamidar *should give notice.*

Per *Maclean*, C.J. A *benamidar* is the proper person to give the notice under S. 167 of the Act if the sale certificate were made out in his name. (*Maclean*, C J. *and Banerji*, J.) JOGESH CHANDER *v.* ROHINI KUMAR ROY CHOWDHARY. 34 I.C. 215=21 C.L.J. 65.

——S. 167—*Person acquiring prescriptive title against—Sub-tenant is an 'incumbrancer' and is entitled to notice.*

Where a person has by adverse possession against a sub-tenant acquired a statutory title to the lands in the sub-tenancy, he stands in the position of an 'incumbrancer' and is entitled to notice from the purchaser of a superior tenancy seeking to annul the sub-tenancy under S. 167 of the B. T. Act. (*Sanderson*, C.J. *and Mookerjee*, J. BHUSAN CHANDRA GHOSE *v.* SRIKANTA BANERJEE.
23 C.L.J. 486=21 C.W.N. 155=33 I.C. 957=45 C. 756.

——S. 167—*Annulment—Interest of unregistered purchaser.*

A purchaser at a sale held in execution of a rent decree against the recorded patnidar is not required to annul the interest of an unregistered purchaser of a portion of patni tenure under

BENGAL TENANCY ACT (VIII of 1885), S. 167.

S. 167. (*Jenkins*, C.J., *Chatterjee and Mullick*, JJ.) ABDUL RAHMAN *v.* AHMADAR RAHMAN. 43 Cal. 558=19 C.W.N. 1217=31 I.C. 554= 22 C.L.J. 356.

——S. 167—*Rent decree — Execution—Stranger purchaser—Right of.*

The rights of a stranger purchaser at a sale held in execution of a decree under Chap. XIV of the B.T. Act enable him to annul a subtenancy on taking proper steps. (*Mookerjee and Roe*, JJ.) JANAKI NATH HORE *v.* PRABHASSINI DASI. 19 C.W.N. 1077=43 Cal. 178= 30 I.C. 898=22 C.L.J. 99.

——Ss. 167 and 195 (c)—*Scope of.*

The restriction mentioned in S. 195 (c) of the Act had nothing to do with the applicability of S. 167 to the lands in this suit. (*Mookerjee and Beachcroft*, JJ.) KALIKANANDH *v.* BIPRO DAS LAL. 19 C.W.N. 18= 26 I.C. 436=21 C.L.J. 265.

——S. 167—*Notice under section.*

A plff. brought a suit to enforce a mortgage security. The land mortgaged was purchased by deft. at a sale in execution of a decree for arrears of rent. After his purchase, he served a notice upon the plff. mortgagee under S. 167. The result was that the mortgage was extinguished, the purchase being under a rent decree and not a money decree. (*Mookerjee and Beachcroft*, JJ.) CHANDRA MOHINI DEBI *v.* KINARAN CHITI. 19 I.C. 776=12 C.L.J. 324.

——S. 167—*Landlord and tenant—Rent—Suit for notice.*

Once the relationship of landlord and tenant is established, such relation must be presumed to continue so long as the tenant continues to hold the land, until it is proved that it has ceased to exist. If once the relation is established, the mere fact of non-payment of rent is not sufficient to show that the relationship has ceased. If the landlord elects to treat the deft. as a tenant, the mere fact of his having served a notice under S. 167 of the B.T. Act does not preclude his suing the deft. for rent. (*Chatterjee and Beachcroft*, JJ.) RAJ KUMAR ROY CHOWDHURY *v.* ALIMADDI. 16 I.C. 911=17 C.W.N. 627.

——S. 167—*Notice under.*

Where after a notice under S. 167, B.T. Act was served on one A, for giving up possession, A was sued for possession, but on the death of A, during the pendency of suit, her sons were made defts. *Held* the retention of possession was a tortious act by A, and therefore A, was personally liable. Her sons are liable for mesne profits before her death to the extent of her estate that has come to their hands, and as to mesne profits after her death, they were personally liable. (*Brett and Sharfuddin*, JJ.) NAFAR CHANDRA PAL *v* KAMINI KUMAL LAHIRI. 16 I.C. 205 (2)=18 C.W.N. 542.

BENGAL TENANCY ACT (VIII of 1885), S. 167.

——S. 167—*Rent sale—Law applicable to.*

A rent decree was obtained before the B.T. Act came into force. The execution sale had taken place after the Act came into operation: *Held* the parties' rights are determinable under the Act and not under Bengal Rent Act VIII of 1869. A zemindar purchased an under-tenure in execution sale but failed to annul it under S. 167 of B.T. Act,. *held*; he could not acquire a valid title as against the under-tenure-holder. (*Mookerjee and Carnduff*, JJ.) BIRENDRA KISHORE *v.* AHMED ALI. 15 I.C. 479= 17 C.W.N. 619.

——S. 167—*Encumbrance— Annulment of —"Date of sale"—Notice.*

In S. 167 of the B.T. Act, the words "date of the sale," mean the actual date of the sale, and not the date of the confirmation of sale. The words "has notice" mean, has knowledge or information "and not has received a notice". The incumbrance shall be annulled from the date on which the notice is served on the incumbrancer and not from the date on which the application for service of notice is made to the Collector. (*Brett and Sharfuddin*, JJ.) YUSUF GAZI *v.* ASMATULLAH. 17 C.W.N. 440=15 I.C. 430= 16 C.L.J. 131= Cf. 40 I.C. 996=43 Cal. 151.

——S. 167—*Mortgagee purchaser—Rent sale purchaser.*

Where a mortgagee of a tenure purchases the holding in execution of his own decree, a landlord who has obtained a decree for rent, cannot oust the mortgagee purchaser without having the encumbrance annulled under S. 167 of the Act. (*Holmwood and Chatterjee*, JJ.) BANBIHARI KAPUR *v.* KHETRA PAL SINGH ROY. 38 Cal. 923=13 I.C. 785= 16 C.W.N. 259.

——S. 167—*Notice signed by Deputy Collector.*

The mere circumstance that a notice under S. 167 is signed by a Deputy Collector will not invalidate it, if he acted on behalf of the Collector. 32 C. 911; 29 C. 813, Foll. (*Mookerjee and Teunon*, JJ.) GIRISH CHANDRA GUHA *v.* KHAGENDRA NATH. 13 C.L.J. 613= 9 I.C. 1001=16 C.W.N. 64.

——S. 167—*Date of sale.*

Date of sale means the date on which the sale is confirmed and not that on which it is held. (*N. R. Chatterjee*, J.) BANKO BEHARI DAS *v.* KRISHNA CHANDRA BHOWMIK. 18 C.W.N. 349=9 I.C. 528= 18 C.L.J. 170= Cf. 40 I.C. 996=43 Cal. 151.

——S. 167—*Annulment of encumbrances—Limitation.*

Time for an application for annulment of encumbrance runs from the date of sale. (*Chatterjee*, J.) GOVIND CHANDRA LAHA *v.* TARA PADA BHATTACHARJEE. 9 I.C. 503 (Cal.).

BENGAL TENANCY ACT (VIII of 1885), S. 167.

———S. 167—*Auction purchaser at rent sale.*

An auction purchaser at a rent sale must annul mortgages created by the tenant under S. 167. The mortgage is not annulled of itself, and it stands, until a notice under S. 167 is served on the incumbrancer. If it is not annulled within the period of limitation, it can be enforced against the purchaser. Production of order sheet of a proceeding under S. 167 is not a proof of annulment. The proceedings before the Collector being summary, do not preclude Civil Courts from going into the question of annulment, (*N. R. Chatterjee*, J.) CHATTARDHARI LAL *v.* BIRANCHI LAL.

9 I.C. 248 (Cal.).

———S 167—*Notice—Rival purchasers.*

A subsequent purchaser of a holding under a mortgage decree cannot oust a prior purchaser under a rent decree even though there has been no notice under S. 167 B. T. Act. He might be regarded as a second mortgagee. (*Roe and Coutts*, JJ.) SURAT LAL *v.* MURLIDHAR.

46 I.C. 921=4 Pat. L.J. 362.

———S. 167—*Proper Court for making petition for annulment of encumbrance.*

S. 167 of the Act requires that an application for annulment of an encumbrance should be made to the Collector of the District. The mere fact of issue of notice by the Deputy Collector does not invalidate the proceedings provided he acts on behalf of the Collector. (*Roe and Jwala Prasad*, JJ.) RANI PROTAP MARWARI *v.* JHEOMAK JHA.

39 I.C. 943=1 Pat. L.W. 440.

———S. 169—*Purchaser—Not liable for arrears of rent—Right of landlord.*

Under S. 169, the property passes into the hands of the purchaser free of all charges of arrears of rent. The landlord decree-holder is entitled to satisfy his claim for arrears of rent, which have been due since the date on which the suit was instituted, from the surplus sale proceeds. (*Mookerjee and Carnduff*, JJ.) JADOO NATH *v.* ASWINI KUMAR.

16 I.C. 974=16 C L.J. 98.

———S. 169—*Application made more than two months after confirmation—Rate of interest to be allowed—Costs not recoverable from surplus sale proceeds.*

An application under the section, made more than two months after the date of confirmation of sale is maintainable. When the judgment debtor disputes the landlord's right to receive interest as part of the sum due on account of rent, the Court will determine the dispute and such a determination shall have the force of a decree. Interest may be added to the sum due as rent at the statutory rate of 12½ per cent. per annum. The costs of the application cannot be added to the sum to be deducted from the surplus sale proceeds. (*Sharfuddin and Roe*, JJ.) RAMESWAR SINGH *v.* MUHAMMAD WAIZ.

2 Pat. L.J. 722=41 I.C. 784=2 Pat. L.W. 97=1917 Pat. 270.

BENGAL TENANCY ACT (VIII of 1885), S. 170.

———S. 169 (c)—*Sale of darpatni for non-payment of Rent—Patnidar is entitled to rent only up to date of sale—Interest on rent is part of rent.*

In execution of a decree for rent due to a patnidar, a darpatni interest was sold in execution and the decree was satisfied by the proceeds of the sale. Subsequently, the patnidars applied for payment to them of the rent which had fallen due after the date of the suit and till the date of the confirmation of the execution sale from the surplus sale proceeds. *Held*, that the patnidars were entitled to rent only up to the date of the sale and could be paid only the amount of rent due up to that date. Under S. 54 rent becomes an arrear, as soon as it falls due and under S. 67 it carries interest thereafter. Consequently, interest on an arrear of rent becomes part of the rent and a decree-holder should recover the rent and interest together without the necessity of a fresh suit for interest. 11 C.W.N. 1106; 22 C.W.N. 523, Ref. (*Chatterjee and Duval*, JJ.) RAM LAL DAS *v.* BANDIRAM MUKHOPADHYA.

26 C.W.N. 511.

———S 169 (c)—*Rent decree—Disposal of sale proceeds.*

Under S. 169 (*c*) the landlord is entitled to arrears of rent since, suit, with interest under the Act out of the sale proceeds of the sale of the tenure in execution of a rent decree. (*Fletcher and Smither*, JJ.) PRAFULLA NATH TAGORE *v.* MATARADDIN MANDAL.

26 C.L.J. 322=42 I.C. 881=22 C.W.N. 323.

———S. 169 (c) and Sch. III, Art. 2—*Arrears of rent for period between institution of suit and confirmation of sale.*

The legislature could not have meant to apply the limitation prescribed in Sch. III, art. 2 to the express provisions of clause (*c*) of S. 169, because the limitation only provides for suits and not applications. A landlord is entitled to arrears of rent between the institution of suit and the date of confirmation of sale under S. 169 (*c*). (*Chatterjee and Chapman*, JJ.) NARENDRA LALKHAN *v.* LOBIN BEHARI.

21 C.L.J. 535=28 I.C. 133=19 C.W.N. 582.

———S. 169, Cl. (c)—*Scope—As affected by S. 65 of the new C. P. Code.*

The scope of cl. (*c*) of S. 169 of the Act is limited to rents due up to the date of sale of the property and in view of S. 65 of the new C. P. Code, the liability of the proceeds under cl. (*c*) does not extend beyond the date of sale. (*Jenkins*, C. J. *and Roy* J.) BEJOY CHAND *v.* SHASHI BHUSHAN.

23 I.C. 101 18 C.W.N. 186.

———S. 170—*Decree for rent—Attachment of holding—Claims under O. 21, R. 58.*

When the jurisdiction of a Court is sought to be excluded on the ground that the property attached is of a particular description, it is open

to the Court to ascertain the true nature of the property. The Court executing the decree can go into the question whether the decree was a decree under the provisions of the Bengal Tenancy Act so as to bring into play the operation of S. 170 of the Act and prevent a claim being preferred to the property attached. (*Richardson and Ghose, JJ.*) JOTINDRA MOHAN PAL *v.* BHOLA NATH BHAKAT.

27 C.W.N. 817=1923 Cal. 715.

——S. 170 — *Landlord's withdrawal of decretal amount of rent deposited by purchaser of holding is no recognition of transfer.*

When a purchaser in execution of a money decree of a non-transferable occupancy holding, finding that the same holding is brought to sale by the landlord in execution of a decree for rent, deposits the decretal amount in Court, with the proviso that he was reserving his right to realise the amount from the tenant without admitting that the amount so deposited was payable by him, and the amount so deposited was withdrawn by the landlord. *Held* that the withdrawal did not operate as a recognition of the purchaser's rights as purchaser and did not pass any title in the holding to him as against the landlord. (*Mookerjee and Newbould, JJ.*) SURENDRA NARAIN *v* JAGAL KISHORE.

34 I.C. 76 (Cal.).

——S. 170—*Rule of evidence.*

The section is a rule of evidence and not of procedure and hence has no retrospective effect. (*Coxe, J.*) AHMED ALI *v.* ROSSHAN ALI.

9 I.C. 619 (Cal.).

——Ss. 170 and 171—*Occupancy holding—Collusive decree between landlord and tenant—Mortgagee's right to question.*

Mortgagee of an occupancy holding who is allowed after contest to deposit arrears of rent under Ss. 170 and 171 has a sufficient interest in the holding to maintain a suit for declaration that the collusive decree obtained by the landlord against the tenant for enhancement of rent does not bind him. (*Chamier, C. J. and Mullick, J.*) BARHMA DEO LAL *v.* SHEO PRASAD LAL.

2 Pat. L.J. 561=1917 Pat. 222=41 I.C. 237=1 Pat L.W. 674.

——S. 170 (2)—*Decree-holder — Application to certify satisfaction*—Bona fides *of applicant need not be gone into.*

Under S. 170 (2) of the B. T. Act no enquiry is needed, as to whether an application by the decree-holder to certify satisfaction is *bona fide* or not. The only condition laid down is that the application should have been made before the tenure or holding is knocked down to the auction purchaser. (*Jwala Prasad, J.*) JAGDHARI RAI *v* LANGAT GOPE.

4 Pat. L.T. 495=75 I.C. 676 (2)=1923 Pat. 572.

——S. 170 (3)—*Transferee of non-transferable occupancy holding has no right to make a deposit.*

The transferee of a non-transferable occupancy holding is not entitled under S. 107, sub-section (3) of the B. T. Act to make a deposit to avoid a sale in execution of a decree for rent. (*Panton, J.*) RADHA BENODE MONDAL *v.* NITAI CHAND SANT.

38 C.L.J. 147=76 I.C. 358=1924 Cal. 185.

——S. 170 (3)—*Right to make a deposit—Execution of decree against Hindu widow—Reversioner cannot make a deposit.*

The words "an interest in the tenure or holding voidable on the sale" in S. 170 (3) of the Bengal Tenancy Act mean "an interest which is in existence at the time of the sale and which will become liable to be avoided on the sale taking place at the option of some one." Where a decree for rent put into execution, was one obtained against a Hindu widow, the reversionary heir expectant of her husband, on her death did not have an interest in the tenure or holding voidable on the sale within the meaning of S. 170 of the Bengal Tenancy Act. (*Sanderson, C.J. and Chotzner, J.*) MOHENDRA NATH *v* BAIDYA NATH TRIPATHI.

26 C.W.N. 167=70 I.C. 127=1922 Cal. 95.

——S. 170 (3)—*Rent sale—Deposit of money for release of holding—Benamidar of original tenant.*

A purchaser at a sale in execution of a rent decree, who is not a party to a subsequent decree for rent, obtained by the landlord against the original tenant, cannot under S. 170 (3) of the B. T. Act deposit the decretal amount due under the latter decree, his interest not being voidable on the sale in execution of the decree against the original tenant. If such a purchaser is a benamidar of the original tenant, he has got no interest at all in the holding voidable or otherwise, and therefore, cannot make the deposit. (*Fletcher and Walmsley, JJ.*) JOGENDRA NATH *v.* SHIB NARAYAN.

48 I.C. 965 (Cal.).

——S. 170 (3)—*C. P. Code, O. 21, R. 89—Execution under—Difference.*

Under both the Acts any person other than the judgment-debtor, having an interest in the holding or property wishing to pay the landlord's dues or decretal amount, may do so, before the date of sale, but while under the former Act, the individual can insist on a decision about his interest in the property, the Court is not required to decide any such question in the latter case. (*Mookerjee and Newbould, JJ.*) SURENDRA NARAIN MAHATA *v.* JAGAL KISHORE GHOSE.

34 I.C. 76 (Cal.).

——S. 170 (3)—*Deposit made by transferee of non-transferable property does not amount to a transfer.*

A withdrawal by a landlord of the deposit of rent made under S. 170 (3) of the B. T. Act, by a transferee of a non-transferable holding on behalf of the *raiyat* is not a

transfer of the holding, even if the transferee describes himself as the "Man in possession by virtue of purchase." (*Holmwood and Imam*, JJ.) JOGENDRA NATH HALDAR *v.* JOGESWAR MONDAL. 33 I.C. 718 (Cal.).

——S. 170 (3)—*Sub-lessee from lessee, a permanent term-holder.*

A sub-lessee from a raiyat at fixed rate, to whom a house is let on fixed and enhanceable rent of Rs. 5 a year, can make a deposit under S. 170 (3) to avoid a sale in execution of decree obtained by landlord against the lessee. (*Mookerjee and Beachcroft*, JJ.) HARI MOHAN PAL *v.* ATUL KRISHNA BOSE. 32 I.C. 503 = 19 C.W.N. 1127.

——S. 170 (3)—*Deposit under—Purchaser of non-transferable holding can make a deposit.*

A deposit under S. 170 (3) of the B. T. Act can be made by a purchaser of a portion of non-transferable occupancy holding. (*Chatterjee and Walmsley*, JJ.) BHAGRAJ SINGH *v.* METHUR SINGH. 27 I.C. 424 (1) (Cal.).

——S 170 (3)—*Mortgagee of portion of non-transferable holding if can deposit money under S.* 170 (3).

A mortgagee of a portion of a non-transferable holding has sufficient interest in the holding to entitle him to deposit money under S. 170 (3) of the Act to prevent the sale of the holding. 12 C.L.J. 609; 16 C.W.N. 632, rel. on. (*Mukerjee and Beachcroft*, JJ.) SATISH KANT ROY *v.* SUFAN MULLICK. 24 I.C. 9 (Cal.).

——S. 170 (3)—*Stranger to proceedings applying to deposit money—Notice.*

No judicial order could be made so as to affect the interest of a party, unless he has had a reasonable opportunity of being heard, S. 170 (3) does not expressly require notice; yet if a stranger applies to deposit money, notice must be given to both the decree-holder and judgment-debtor and any contest must be decided in their presence. 16 C. L. J. 546, Rel. (*Mookerjee and Beachcroft*, JJ.) RAMNATH *v.* RUDRA MAHANTI. 21 I.C. 409 = 18 C.L.J. 142

——S. 170 (3)—*Purchaser from judgment-debtor—Purchaser in occupation—Recognition by landlord—Subsequent suit for rent against old tenant—Deposit by purchaser.*

A person offered to deposit the amount on the allegation, that he had purchased the holding long ago, that he was in occupation long before the decree, and that his purchase had been recognised by the landlord: *Held*, that he was not the judgment-debtor, for the decree was not made against him, nor had he an interest in the holding voidable on the sale within S. 170 (3). The decree against the registered tenant did not bind him and any sale in execution of the decree could not possibly extinguish his interest and that, therefore, he was not entitled to make the deposit under S. 170, clause (3). If the purchase had not been recognised by the landlord, then he was

competent to make a deposit and it was not material to consider whether he had acquired an interest in a transferable holding or whether he had acquired by possession for a period longer than 12 years the status of a tenant of a non-transferable holding. (*Mookerjee and Beachcroft*, JJ.) TARAK DAS *v.* HARISH CHANDRA. 17 C.W.N. 163 = 16 I.C. 977 = 16 C.L.J. 548.

——S. 170 (3)—*Occupancy holding—Transfer of—Deposit by purchaser.*

A private purchaser of a non-transferable occupancy holding is competent to make a deposit under S. 170 (3) to prevent the landlord from selling the holding in execution of a decree for arrears of rent, as his interest is such, as is voidable on the sale. 16 I.C. 977, Foll. (*D. Chatterjee and Walmsley*, JJ.) AHMATULLAH *v.* HARKARU SAHA. 22 C.L J. 106 = 27 I.C. 176 = 20 C.W.N. 39.

For a case of purchaser *see* (*D. Chatterjee and Walmsely*, JJ.) BHAGRAJ SINGH *v.* METHUR SINGH. 27 I.C. 424 (Cal.).

Contra [43 Cal. 558 rel. Authorities reviewed]. (*Chamier*, C J. *and Chapman*, J.) MAHADEO LAL *v.* LANGHAT SINGH 1 Pat. L.W. 504 = 1917 Pat. 169 = 40 I.C. 267 = 2 Pat. L.J. 457 (F.B.)

Contra (*Stephen and Coxe*, JJ.) NALINI BEHARI *v.* FULMANI. 16 C.W.N. 421 = 13 I.C. 487 = 15 C L.J. 388.

——S. 170 (3)—*Deposit — Purchaser of non transferable holding has no right to.*

A purchaser of a non-transferable occupancy holding is not entitled to make a deposit under S. 170 (3), B.T. Act to void a sale of the holding in execution of a rent decree obtained by the landlord, in as much as such purchaser acquires no right to the holding under his purchase. (*Stephen and Coxe* JJ.) NALINI BEHARI ROY *v.* FULMANI DASI. 16 C.W.N. 421 = 13 I.C. 487 = 15 C.L.J. 388.

——S. 170 (3)—*Purchaser of holding before rent-decree—Right of deposit to prevent sale.*

The transferee of a holding before a rent decree is passed, cannot make a deposit but he can do so, where previous similar deposits had been withdrawn by the landlord decree-holder. (*Caspersz and Chatterjee*, JJ.) BRINDARANI *v.* ANNODA MOHAN RAY. 13 I.C. 328 = 16 C.W.N. 95.

——S. 170 (3)—*C.P C., S.* 115—*Rent decree by co-sharer landlord—Holding advertised for sale—Application by prior purchaser to deposit money to avert sale summarily rejected—Remedy of applicant—Revision if lies.*

(Per *Coxe and Teunon*, JJ. *contra*). No revision lies against an order summarily dismissing an application under S. 170, cl. (3) to deposit money to avert a Court sale of a tenant's holding in execution of a rent decree

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against him. An order rejecting such an application would amount but to an error of a law and the High Court cannot interfere under S. 115, C.P.C. (*Coxe and Teunon*, JJ.) UPENDRA BHUSAN *v.* NANDA LAL. 11 I.C. 126 (Cal.).

——S. 170 (3)—*Deposit—Duty of Court.*

On an application for a deposit under S. 170 of the B.T. Act, notice must be given to the judgment-debtor and the decree-holder and it is the duty of the Court to decide whether the applicant has or has not a *locus standi* to deposit. (*Bucknill*, J.) KUNJA SINGH *v.* BARHO RAY. 4 Pat. L.T. 247; 73 I.C. 12=1923 P. 858.

——Ss. 170 (3) and 161—*Usufructuary mortgage—Encumbrance.*

An usufructuary mortgagee in possession of a non-transferable occupancy holding has an encumbrance voidable on the sale of the holding, entitling him to make a deposit under S. 170 (3) of the B.T. Act. (*Coutts and Adami*, JJ.) SHEIKH AZMAT *v.* BIBI TAMZAN.

5 Pat. L.J. 83=56 I.C. 490=1 Pat. L.T. 108.

——S. 170 (3)—*Unregistered transferee is not entitled to make a deposit.*

An unregistered transferee of the whole holding is not entitled to make a deposit under S. 170, sub-S. 3 of the Bengal Tenancy Act. (*Roe and Jwala Prasad*, JJ.) RAMESWAR SINGH BAHADUR *v.* MAHABIR SINGH.

38 I.C. 832 (Pat.).

——S. 170 (3)—*Right to make deposit.*

An unregistered transferee of an occupancy holding is not entitled to make a deposit under S. 170 (3). 16 C.W.N. 421, 42 Cal. 172 rel. (*Chamier*, C.J. *and Sharfuddin*, J.) MAHARAJAH SIR RAMESHWAR SINGH BAHADUR *v.* RAGHUNANDAN KHAWAS. 1 Pat L J. 403=38 I.C. 337=2 Pat. L.W. 364.

Also (*Roe and Jwala Prasad*, JJ.) RAMESWAR SINGH *v* MAHABIR SINGH.

38 I.C. 832. (Pat.)

——Ss. 170 (3) and 161—*Interest voidable.*

Interests voidable on the sale of occupancy holding referred to in S. 170 are those interests which are encumbrances within the meaning of S. 161. (*Chamier*, C.J. *and Sharfuddin*, J.). RAMESHWAR SINGH *v.* RAGHUNANDAN KHAWAS. 1 P.L.J. 403=38 I.C. 337=2 P L W. 364.

——S. 171—*Rent-decree against* darpatnidar—*Deposit by* se-patnidar—*Effect.*

Where in execution of a rent decree against a *darpatnidar*, a *se-patnidar* deposits the amount due, he is entitled to possession against both the *dar-patnidar* and his representatives in interest and can set off the deposited amount, against the rent recoverable from him and is further entitled to interest on the sum deposited at 12% per annum under

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S. 171 (1) (*a*) of the Act. (*Mookerjee and Buckland*, JJ.) JNANENDRA NATH SINGHA RAY *v.* BHUBONESWARI DEBI.

63 I.C. 1004=33 C.L.J. 495.

——S. 171—*Execution of decree—Civil Procedure Code*, S. 47.

The decision of the Court, as regards a controversy in execution of a decree against a tenant for arrears of rent between a usufructuary and a simple mortgagee, is not appealable being not within the scope of S. 47 of C. P. Code nor should such deferences be determined summarily under S. 171. (*Mookerjee and Beachcroft*, JJ.) DWARKA NATH DAS *v.* KANGALI CHARAN SAHU.

52 I.C. 980=29 C.L.J. 416.

——S. 171—*Unrecognised transferee of holding—Right of.*

An unrecognised transferee of a non-transferable occupancy holding, can deposit decree amount to save property from sale in execution of a rent decree against the raiyat. (*Fletcher and Walmsley*, JJ.) JOTE COOMAR *v.* MONOHAR. 50 I.C. 596 (Cal.).

——S. 171—*Unregistered co-sharer in occupancy holding.*

An unregistered co-sharer in an occupancy holding is not entitled to the benefit of S. 171 against the holder of which, the decree for rent was obtained, by paying into the Court the amount necessary to prevent the sale of the holding in execution of a decree. (*Woodroffe and Chaudhuri*, JJ.) HARISH CHANDRA BOSE *v.* RAM GOBINDA NANDY. 35 I.C. 584 (Cal.).

——S. 171—*Deposit by person having no "interest voidable under the sale."*

A person who avoids a sale in execution of a rent decree of a holding by depositing the decretal amount in Court on the ground that he has a mortgage subsisting in his favour on the holding cannot recover the amount either under S. 69 or 70 of the Contract Act, if it is found that his mortgage document was not valid for "he had no interest voidable under the sale" to be entitled to act under S. 171. (*Sanderson*, C.J. *and Mookerjee*, J.) PAUCHKORI *v.* HARI DAS. 21 C.W.N. 394=34 I C. 341=25 C.L.J. 325.

——S. 171—*Rent sale, money pa d avert mortgage money—Deposit.*

S. 171 does not mean that the sum paid f the protection of the property from a rent sa becomes part of the mortgage-money, so as to entitle the mortgagee to treat it as included in the amount remaining due on his mortgage under S. 83 of the T. P. Act. (*Mookerjee and Beachcroft*, JJ.) MANMATHA NATH *v.* SARATH CHANDRA. 29 I.C. 929=21 C.L.J. 429.

——S. 171—*Rights to deposit.*

The Court should not under S. 171 allow a person to deposit the amount without enquiring

whether he has any interest voidable on the sale. (*Sharfuddin and Coxe*, JJ.) GOVIND SUNDAR SINGH *v.* CHAND MEAH.
16 I C. 202=17 C.W.N. 602.

——S. 171—*Rent decree against several* darpatnidars—Se-patnidar *paying off decree—Charge—Nature of—Effect where charge is split up.*

A *se-patnidar* paying off a rent decree of a patnidar against several *dar-patnidars* gets a one and entire charge on the whole estate, which cannot be split up; where such a charge is split up an appellate Court can modify the decree and make the charge one and entire. (*Petheram*, C. J. *and Banerjee*, J.) BENI MADHUB *v* PURNA CHANDRA.
11 I.C. 897=14 C.L.J. 134.

——S 171—*Rent decree against co-tenants—One co-tenant paying up decree amount—Whether has any lien on the share of other.*

A tenant paying up a decree against himself and another co-tenant jointly has no lien on the share of the other; S. 171 does not apply to such a case, the tenant so paying being himself a judgment-debtor. (*Holmwood and D. Chatterjee*, JJ.) ASHUTOSH *v.* ABINASH CHANDRA. 11 I C. 501=15 C.W.N. 782.

——S. 171—*Deposit—Arrears of rent.*

An under-tenure holder making a deposit to save superior tenure from sale for arrears of rent is entitled to recover the amount even if the impending sale was brought about by reason of his default. The deft. is however entitled to an equitable defence. The plff. is not entitled to recover it, if it is established that the deposit was payable by him to the landlord. (*Mookerjee and Carnduff*, JJ.) HEMENDRA KUMAR GHOSH *v.* RAJENDRA BALA DASSI.
10 I.C. 270=13 C L J. 454.

——S. 171—*Right to deposit.*

Where a plff. alleging to be a mortgagee paid the amount under a decree against the mortgagor deft. but it was found that the plff. had no valid mortgage, *held* the plff. had no right to make deposit under S. 171. (*Coxe*, J.) HARI DAS *v.* PANCHKOWRI. 9 I C. 615 (Cal.).

——S 171—*Payment into Court—Payment direct to decree-holder.*

Where, on an application to make payment into Court under S. 171 of the B. T. Act, the Court permits the applicant to pay directly to the decree-holder, the provisions of the section have been complied with. (*Coutts and Das*, JJ.) MOSAFIR LAL DAS *v.* GANESH JHA.
4 Pat. L T. 134=(1922) Pat. 317=71 I.C. 473=1922 P. 656.

——Ss. 171, 166 and 167—"*Interest voidable on sale*"—*Reversioner or donee—Deposit.*

The words "interest voidable on the sale" in S. 171 are confined to such interests as the auction purchaser might, by due application under Ss. 166 and 167 of the Act avoid or annul. A reversioner of or donee from a tenant of holding having no such interest, is not competent for a deposit under S. 171 of the B. T. Act. (*Roe and Imam*, JJ.) GOPAL RAY *v* HITNARAYAN SINGH. 3 Pat. L.J. 145=43 I.C. 23=4 Pat. L.W. 85.

——S. 171—*Recognition of transferee by landlord.*

Where a landlord withdraws under protest the money deposited by a transferee of an occupancy holding under the section, he does not thereby recognize the transferee as his tenant. (*Atkinson*, J.) SHEO PRASAD LAL *v.* BARHAMADEO LAL. 38 I.C. 366 (Pat.).

——S. 171 (1) (b)—*Scope of.*

Whether a person making advance of arrears to a defaulter patnidar is entitled to salvage lien under S. 171, sub S. (1), cl. (*b*) is doubtful. At any rate, he is bound to elect between this remedy and the remedy under S. 13 of Patni Regulation. (*Woodroffe and Carnduff*, JJ.) RAM JIBAN *v.* TAJ-UD DIN
15 C.W.N. 404=9 I.C. 489.

——S. 173—*Execution sale—Setting aside—Appeal*—Benamidar *of judgment-debtor.*

An order setting aside an execution sale under S. 173 of the B. T. Act on the ground that the auction purchaser is a *benamidar* for the judgment-debtor is not appealable by the benamidar either under the B. T. Act or under S. 47, C. P. C. as the latter section does not apply to a *benamidar*. 3 C.W.N. 184. foll. (*Fletcher and Newbould*, JJ.) DHIRAMOJI *v.* ANANT RAM. 46 I.C. 748 (Cal.).

——S. 173 (2)—*Purchase by judgment-debtor in execution—Sale is voidable.*

Where the purchaser at the execution sale is the judgment-debtor himself, the sale is not void but only voidable. (*Mullick and Bucknill*, JJ.) SAIYID MUHAMMAD AMIRUL HASAN *v.* MUHAMMAD JEWAD HUSAIN
74 I.C. 769=5 Pat. L.T. 18.

——S. 173 (3)—*Sale in execution of rent-decree set aside—C. P. Code, S 47 and O. 21, R. 90.*

One of the grounds on which the sale of a tenure in execution of a rent decree was set aside by a Munsiff, was that the judgment-debtor purchased the property through a *benamidar*. The case is not within S. 173 (3) as there were other grounds for setting aside the sale, *i.e.*, irregularity and fraud which are governed by S. 47 and O. 21, R. 90, C. P. Code. In such a case the Court must not adopt the summary procedure laid down in S. 173 of the B. T. Act, but try the case under the C.P. Code. Its decision is open to appeal and second appeal. (*Holmwood and Imam*, JJ.) SRINATHA HALDAR *v.* BEPIN BEHARI MAL.
33 I.C. 574 (Cal.

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——S. 173 (3)—*Applicability of—Purchase of tenure.*

S. 173 (3) applies only when a tenure or holding sold in execution of a decree is purchased by the judgment-debtor either by himself or through some one else. (*Sultan Ahmed*, J.) JAGADAR MISSER *v.* DHORAI KHATWA. 57 I C. 405 (Pat).

——S. 174—*Applicability.*

S. 174, B. T. Act, applies to a rent sale, under the Bengal Rent Recovery Act, of property in Orissa. (*Lord Dunedin.*) KSHETRABASHI MAHANTI *v.* RATNAKAR.
73 I.C. 278=38 C.L.J. 229 (P.C.).

——S. 174—*Extension to Orissa—Sale for arrears of rent—S. 174, if applicable.*

After the extension of the Act to Orissa, S. 174 applies to suits under the Old Rent Law in Revenue Courts. (*Lord Dunedin*) LAKSHMIDAR MAHANTI *v* RATNAKAR MAHA PATRE. 48 I A. 123=25 C.W.N. 1009=
40 M.L.J. 546=14 L.W. 358=
1921 M.W.N. 399=
3 U P.L.R. P.C. 25=61 I.C. 1=
2 Pat. L.T. 453 (P.C.)

——S. 174—*Order under—Suit to set aside does not lie.*

18 Cal. 481, foll. (*Walmsley and Greaves*, JJ.) BRINDABUN BEHARI ROY *v.* BHUPALI BHUSAN ADHIKARI.
62 I.C. 743 (Cal.).

——S. 174—*Appeal — Application to set aside sale—Deposit falling short—Mistake of Court—Revision.*

An application was made under S. 174 to set aside a sale on deposit of the amount within 30 days from the date of sale. The amount deposited fell short by a few rupees of the amount of the compensation due to the purchaser, through the mistake of the Court. As soon as the mistake was found out, the deficit amount was deposited by the applicants. An application for setting aside the sale, made by the purchaser, in which the decree-holder was no party, was rejected by the primary Court. *Held*, that no second appeal lay; and the High Court is not competent to revise the proceedings under S. 115 of the C.P. Code, (*Chatterjee and Panton*, JJ.) KARAMALI *v.* TAMIJUDDIN. 58 I.C. 816=32 C.L.J. 12.

——S. 174—*Deposit by judgment-debtor—Transferee if can make.*

A deposit made under S. 174 of the B. T. Act must be made by the judgment-debtor himself and transferee of a judgment-debtor cannot validly deposit. (*Sharfuddin and Richardson*, JJ.) SURENDRA NARAYAN SINGH *v.* LACHMI KOER. 29 I.C. 840=
43 Cal. 100.

Also (*Mookerjee and Beachcroft*, JJ.) RANJIT KUMAR GHOSE *v.* JOGENDRA NATH ROY.
15 I.C. 561=16 C.L.J. 546.

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——S. 174—*Deposit by judgment-debtor for setting aside sale—Effect — Subsequent withdrawal of money by judgment-debtor, if permissible—Procedure when so permitted wrongly.*

A judgment-debtor who, under S. 174 pays the requisite amount into Court, and gets an order setting aside the sale in his favour, cannot be permitted to withdraw the money deposited by him and if so permitted, he should forthwith be called upon to replace the same, failing which, the money should be realised by executing the order as if it were purely a money decree against the judgment-debtor. (*Mookerjee and Beachcroft*, JJ.) MIRTANUND DAS *v.* UDAY NARAIN. 22 I.C. 885=18 C.W.N. 175.

——S. 174—*Extension of time—Power of Court—Lim. Act, S. 18.*

The Court has no power to extend the time prescribed by S. 174 of the Act. Lim. Act. S. 18 is not applicable to a proceeding under S. 174, B. T. Act. 17 Cal. 263; 29 Cal. 813, Rel. (*Mookerjee and Beachcroft*, JJ.) RADHA SAHAJAM KAR *v.* DINBHANDAN BISHWAL.
18 C L J. 583=20 I C. 760=18 C.W.N. 31.

——S 174—*Transferee from judgment-debtor cannot make a deposit.*

A deposit under S 174, of the B. T. Act must be made by the judgment-debtor himself and by no other person. (*Mookerjee and Beachcroft*, J.) RANJIT KUMAR *v* JOGENDRA.
15 I.C. 561=16 C.L J. 546.

——S. 174—*Order reversing sale—Appeal.*

An appeal lies from an order under S. 174 reversing a sale under a decree by an incompetent Court and directing that judgment-debtor is not bound to deposit poundage fee since under the High Court rules the decree-holder has a right to a refund of the sum deposited by him if the sale is reversed. (*Mookerjee and Carnduff*, JJ.) BENI MADHAB ROY *v.* BISSESWARA BHARTI.
11 C.L J. 542=15 I.C. 436=17 C.W.N. 81.

——S. 174—*Application to set aside sale—Dismissal of—Appeal by judgment-debtors—Sale set aside—Second appeal by decree holder—Judgment-debtor if can object.*

Where a judgment debtor appealed against an order refusing to set aside a sale under S. 174 of the B. T. Act, and the sale was set aside on appeal and the decree-holders appealed against the appellate order *held*, that the judgment-debtor could not in that case raise the objection that no appeal lay, because firstly, he must be presumed to have acted in the Lower Court under the belief that the original order was of a particular description and appealable, and that it was not open to him to take up inconsistent positions; and secondly, the order of the original Court is one under S. 47, C.P.C., and hence open to second appeal. 26 Cal. 449; 11 C.L.J. 202, rel. on.; 38 C. 339, dist. The Court cannot extend time to allow a judgment-debtor to make a deposit under S. 174 of the B. T. Act unless the party is prevented by an

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act of the Court. 12 C.L.J. 62; 13 C.L.J. 432, dist; 10 I.C. 51; 10 I.C. 880; 10 I.C. 148; foll. A judgment-debtor applying under S. 174 to set aside a sale is bound to pay 5 per cent. of the purchase money even in cases where the decree-holder is the purchaser and the purchase money is set off against the judgment debt. A decree-holder auction-purchaser is not entitled to charge the amount spent in payment of the poundage fee as part of the costs, mentioned in section 174. (*Mookerjee and Carnduff*, JJ.) RAGHUBAR DAYAL *v.* JADU NANDAN.
15 C.L J. 89=13 I.C. 385=16 C.W.N. 736.

——S. 174—*Act* X *of* 1859—*Act* VIII *of* 1865—*Rent decree—Execution sale, how set aside.*

A sale under Act VIII of 1865 (B.C.) read with Act X of 1859 in execution of a rent decree can be set aside under the section by depositing the decretal amount, &c., Chapter XIV of which has been extended to the District where the sale took place. (*Mookerjee and Carnduff*, JJ.) BAIKAL PARIDA *v.* JOGENDRA NATH.
14 C.L.J 168=11 I.C. 239=16 C.W.N. 811.

——S. 174—*Setting aside sale—Deposit of amount—Validity of deposit—Mistake.*

A judgment-debtor who was permitted to deposit the decretal amount with costs and compensation, went to the execution moharir who drew up an account and showed that the amount paid in by the judgment-debtor petitioner was correct and on the basis of that account he deposited the sums specified. It was found that no order had been passed by the Court as to what the costs were and the judgment-debtor came well within the time allowed for the deposit and obtained the permission of the Court to deposit the amount. He also obtained an order in the order sheet from the Court that he had deposited the full decree amount with costs and compensation. He was therefore premitted to believe that he had paid the full amount until after the time allowed for the deposit had elapsed, when the decree-holder came forward and pointed out that the amount was not sufficient. *Held*, that the judgment-debtor having been misled by an honest mistake ought to be allowed to deposit the deficiency in the amount and that the sale should be set aside on such deposit being made. An executing Court is lacking in the due discharge of its duty in entertaining an application to set aside a sale until it has satisfied itself that the statutory condition provided by S. 174 of the B.T Act have been fulfilled. It is the duty of the executing Court, before entering in the order sheet that the full decretal amount with costs and compensation had been deposited to satisfy itself as to what were the costs to be paid by the judgment-debtor and where owing to this neglect of duty on the part of the Court, the petitioner was lulled into security, and the amount of shortage was not very great the judgment-debtor should not be prejudiced on account of the default on the part of the Court. (*Adami*, J.) DIDAR ALI *v.* KUSUM KUMAR.
71 I.C. 925=4 Pat. L.T. 642.

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——S 174—*Order under, Suit to set aside does not lie.* (*Miller*, C.J. *and Ross*, J.) PAHLED SINGH *v.* SAJIWAN RAI.
6 Pat. L.J. 16=61 I.C. 126=2 Pat. L T. 66.

——S. 174—*Notice, service of.*

On the conditions imposed by the section being complied with, service of notice was not necessary and the Court was under obligation to set aside the sale. (*Das*, J.) PAHALAD SINGH *v.* SAJIWAN RAI. 52 I.C. 982 (Pat.).

——S. 174—*Scope of—C.P. Code*, S. 47.

S. 174 of the B.T. Act and O. 21, R. 90 of the C.P. Code, have a limited scope and application, and an application which raises questions as to the execution of a decree, clearly beyond their scope, ought to be dealt with under S. 47 of the Code. (*Jwala Prasad and Adami*, JJ.) SHEIKH ABDUL RAHIM *v.* GUJESHAR MAHTO. 52 I.C. 514 (Pat.).

——S. 174—*Deposit—Decree amount and costs.*

The amount to be deposited by the judgment-debtor under S. 174 of the B.T. Act is the amount recoverable under the decree with costs, and not the amount specified in the proclamation. (*Imam and Thornhill*, JJ.) MAKRU RAI *v.* SARJUG PERSHAD.
47 I.C. 634=4 Pat L J. 55.

——S. 174—*Sale in execution of rent decree—Third party purchaser—Deposit of decretal amount—Suit by third party purchaser—Maintainability—C.P. Code, O. 21, Rr. 89, 90, 91 and 92.*

A purchaser at a sale held in execution of a rent decree can sue for a declaration that a third party alleging to have purchased the holding at an execution sale has no right to deposit the decree amount under O. 21, R. 89 of the C.P. Code. O. 21, R. 92 (3) of the C.P. Code prohibits a suit by a person against whom an order is passed under O. 21, Rr. 89, 90 or 91 but there is no such provision in the B.T. Act. (*Chamier*, C.J. *and Roe*, J.) SHEIKH FIDA HUSSAIN *v.* GULAB CHAND ROY.
3 Pat. L W. 264=3 Pat .L.J. 122=44 I.C. 532=(1919) Pat. 399.

——S. 174—*Appeal.*

An appeal lies against an order dismissing an application of judgment-debtor seeking to deposit decretal amount where the decree-holder is the auction-purchaser. (*Chapman and Atkinson*, JJ.) AKHOURI PREM NARAIN *v.* FAHIMUNNISA. 2 Pat. L J. 525=3 Pat. L.W. 18=40 I.C. 662=(1917) Pat. 245.

——S. 174—*Application to set aside—Officers of Court, whether bound to give information to the parties—Wrong information supplied,*

BENGAL TENANCY ACT (VIII of 1885), S. 174.

Deposit of decretal amount—C. P. Code, O. 21, R. 89.

No application to set aside a sale under S. 174 of the Act can be maintained, until the statutory conditions provided by the section have been fulfilled. 18 Cal. 255 and 25 Cal. 216, not foll. The High Court can set aside an order under S. 174 if made without jurisdiction. The section does not impose any duty on the officers of the Court to give information to the parties and therefore no relief can be given to a party who has been misled by wrong information, given by an officer of a Court. Relief can only be granted where a party has been misled by an 'act of the Court' that is, 'an act of a prescribed officer' acting under prescribed rules of the Court. 26 Cal. 449 (F.B.), rel. A deposit of the decretal amount together with the statutory five per cent. on the purchase money, in order to be valid and within the Court's jurisdiction, must be made within thirty days of the sale. (*Atkinson and Jwala Prasad*, JJ.) SERJOO PRASAD MISSIR *v.* NANOO RAI. 1 Pat. L J. 459 = 35 I.C. 779 = 3 Pat. L.W. 48.

——S. 174 (1) "*Judgment-debtor*" *Meaning of—Setting aside sale—Right of third person.*

A judgment-debtor in S. 174 (1) is one against whom a decree has been made so that a person against whom no decree has been passed cannot apply to have an execution sale set aside. (*Mookerjee and Coxe*, JJ.) ABDUL SOBHAN *v.* MONABALI. 14 I C. 453 = 15 C.L J. 170.

——S. 174 (2)—*Proviso—Application to set aside sale for irregularity—Subsequent application to set aside sale on deposit—Effect.*

The judgment-debtor applied on 23rd August to have a rent sale set aside for material irregularity; on that application notice was issued to the decree-holder and the auction-purchaser. On September 17th the judgment-debtor applied under S. 174 and the Court ordered him to make the deposit of the decree-holder's and the auction-purchaser's amount which was done. The case under R. 90, O. 21 of the Code came up for hearing on Sep. 24th and on that date the judgment-debtor applied for withdrawal from proceedings. *Held*, per *Coxe*, J. (*Teunon* J., *dissenting*) that under the proviso of S. 174 the judgment-debtor could not apply and that the application itself does not amount to withdrawal from the proceedings under O. 21, R. 90, C.P.C., so as to justify the setting aside, of the sale on acceptance of the deposit. 13 C.W.N. 591; 11 C.L.J. 202, dist. (*Coxe and Teunon*, JJ.) MANGAL *v.* BEJOY CHAND. 11 I.C. 757 (Cal.).

——S. 178—*Tenancy on new terms—Acceptance by raiyats at fixed rates of rent.*

S. 178 of the B.T. Act does not affect the validity of a contract creating a tenancy on new terms entered into between the landlord and tenants who had the status of raiyats at a fixed rate of rent in 1890. (*Mookerjee and Cuming*, JJ.) SARAT CHANDRA DE DAS *v.* TARAPRASANNA BHATTACHARYA. 70 I.C. 437 = 36 C L.J. 333 = 1923 Cal. 141.

BENGAL TENANCY ACT (VIII of 1885), S. 178.

——S. 178—*Bar to acquisition of occupancy rights.*

A lessor leased out a holding permanently with a reservation that the lessee will have to give up his possession if the lessor resumes cultivation after 12 years. *Held*, that the reservation being inconsistent with the lessee's interest created, was bad for remoteness and contravened the provisions of S. 178 tending to bar the acquisition of an occupancy right by the lessee. (*Mookerjee and Carnduff*, JJ.) BANAMALI CHOUDHURY *v.* RAM KINKAR. 15 I.C. 575 (Cal.).

——S. 178—*Agreement in lease not to set up occupancy right—Validity of.*

An agreement in lease not to set up rights of occupancy in lands in which such rights have accrued is void under S 178. (*Das and Adami*, JJ.) JOHN PIER SPENT *v.* RAMJEE RAM. 5 P.L J 302 = 56 I.C. 366 = 1 P.L.T. 310 = 1920 Pat 168.

——S. 178 (1) (a)—*Contract against compensation.*

A term in contract of lease, that if the land is acquired by a public body the tenant will not get compensation for the same is not affected by S. 178 (*a*) nor does it affect the tenant's status. (*Mookerjee and Buckland*, JJ.) ASHUTOSH CHANDRA MITRA *v* HARIPADA GANGULI. 62 I.C. 793 (Cal.).

——Ss 178 (1) (d) and 194—*Scope of.*

S. 178 (1) (b) is controlled by S 194. (*Mookerjee and Beachcroft*, JJ.) AKSHOY KUMAR *v.* AKMAN MOLLA. 19 C.W.N 1197 = 27 I C. 397 = 20 C.L J. 551.

——S. 178 (1) (e)—*Ejectment, provision for, legality of.*

Even when a tenancy is created by a consent decree of the Court providing for a provision for ejectment, the tenant cannot be ejected under the consent decree, if it is contrary to the provisions of the Bengal Tenancy Act, under which alone, a tenant can be ejected. (*Mookerjee and Panton*, JJ.) GOPAL *v.* KIPURTH. 66 I.C. 766 = 34 C.L.J. 157.

——S. 178 (3)—*Contract without consideration for enhancement of rent is void.*

An agreement to pay enhanced rent in consideration of a non-existing obligation is void under S. 178 (3) of the Bengal Tenancy Act. (*Miller*, C.J. *and Adami*, J.) GRANT *v.* EKLAL JHA. 3 Pat. L T. 386 = 67 I.C. 49 = (1922) Pat. 177 = 1922 P. 171.

——S. 178 (3) (a)—*Contract of tenancy after passing and before commencement of Act—Effect of.*

S. 178 (3) of the Act refers to contracts made after the passing of the Act and not after the

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commencement of the Act and a contract of tenancy executed between those two dates cannot therefore be treated as operative in so far as it takes away the right of the *raiyat* to transfer his holding in accordance with local usage under S. 178 (3) (d) of the Act. (*Mookerjee and Beachcroft*, JJ.) SATISHKANT ROY *v.* TUFAN MULLICK. **24 I.C. 9 (Cal).**

——— **Ss. 178 (3) (h) and 67**—*Applicability of sections in the case of arrears of rent agreed to be paid by instalments by executing a mortgage—Validity of an agreement to pay interest.*

Where the tenant agreed to pay the arrears of rent in instalments by mortgaging his *raiyati* lands as security for payment to the landlord, they cease to be in the relationship of landlord and tenant and Ss. 178 (3) (*h*) and 67 which fix a certain rate of interest between them, have no application to the agreement to pay the interest contained in the bond. (*Chapman and Atkinson*, JJ.) HARI PRASAD LAL *v.* DAMEAR SINGH. **2 P.L J. 367=39 I.C. 736=3 P.L.W. 337.**

——— **S. 178, Proviso (3)**—*Horticultural holding—What is.*

Land, possessed by the lessee by enjoying the fruits of the trees standing thereon and also growing new trees, of which no portion is under cultivation for horticultural purposes, is not a horticultural holding. The Bengal Tenancy Act does not apply to an orchard. The question whether a holding is horticultural or not is a question of fact. (*Fletcher and Newbould*, JJ.) RAJ KUMARI NALI *v.* MOHESH CHANDRA GUHA. **42 I C. 580 (Cal.).**

———**S. 179**—*Scope of.*

A security bond executed by the representatives of the original patnidars does not amount to a fresh lease and S 179 of the B.T. Act is of no assistance. (*Mookerjee and Coxe*, JJ.) RANJIT SINGH *v.* BAHADUR SINGH. **9 I C 47=18 C.W.N. 568.**

———**Ss. 179 and 29**—*Kabuliyat—Permanent* mukarari *interest*

In a kabuliyat, a tenant agreed to pay an enhanced rent for which the landlord passed a *mukarari* interest in his land within S. 179. Afterwards the tenant served a notice on the landlord to sink a pakka well as promised in the *kabuliyat*. The kabuliyat having created a permanent *mukarari* interest. S. 29 was inapplicable. The notice ratified the *kabuliyat* and estopped the tenant from pleading undue influence. (*Mullick*, J.) GUR SAHAI MAHTO *v.* KESHWAR SAHU. **35 I.C. 487=1 P.L.J. 76.**

———**S. 180**—*Utbandi tenures.*

An unregistered lease of a chur land for a definite number of years is not a tenancy of an *Utbandi* nature. It is a non-occupancy holding governed by Chap. VI of the B T. Act. (*Fletcher and Newbould*, JJ.) MITA *v.* AMRITA LAL SEN. **42 I.C. 546 (Cal.).**

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———**S. 180**—*Submersion of land.*

A part of the holding of the deft. was submerged for irregular periods of time. Deft. had paid rent for the entire holding for more than twelve years and had been in possession during the period. The lands by reason of the submersion did not cease to be held by deft. or form part of the tenancy or holding and the fact of submersion did not destroy the right of the deft. to acquire occupancy right therein. (*Mullick and Atkinon*, JJ.) KESHO PRASAD SINGH *v.* JIRDHAN OJHA. **38 I.C. 670=2 P.L J. 48.**

——— **S 182**—*Homestead—User for keeping agricultural cattle—Ejectment.*

The deft. was found to be a settled raiyat of the village where the disputed land was situated. He was also found to have lands under cultivation ; he got these lands cultivated by hired labourers whom he supplied with his own cattle and ploughs. He had also his granary and khamar within his own homestead, *held* on these circumstances it was plain that as the deft. was a raiyat, the disputed land was governed by either S. 182 or by the other provisions of the B. T. Act. It cannot be maintained that because a settled raiyat takes settlement of a piece of land, adjacent to his homestead though for purposes not agricultural, the tenancy of the new plot of land is governed by S. 182 of the B.T. Act. (*Mookerjee and Chotzner*, JJ.) GIRIS CHANDRA BHATTACHARYA *v.* BHABATARAN SHAKARI **37 C.L.J. 525=74 I.C. 852=1923 Cal. 667.**

———**S. 182**—*Applies only when land is held as Homestead.*

S. 182 is not applicable unless the land is held as homestead ; in other words, it is not sufficient for a *raiyat* that the character of land is such as would justify its use as a homestead and must be established that the land is used by the *raiyat* as his homestead. (*Mookerjee and Rankin*, JJ.) MAHARAJAH BAHADUR SIR PRODYOT KUMAR TAGORE *v.* UMESH CHANDRA SAHA. **72 I.C. 640.**

——— **S 182**—*Homestead lands if subject to the operation of S.* 30.

Homestead lands are subject to the operation of S. 30 but it is open to the tenant to prove that the rent of the Homestead land by custom or local usage is not liable to be enhanced under S. 30. (*Cuming and Panton*, JJ.) RAJA RESHEECASE LAW *v.* CHINTAMONI DALAI. **36 C L.J. 305=70 I C. 535=27 C.W.N. 962=1922 Cal. 510.**

——— **S. 182**—*Homestead land—Protection of tenant.*

To obtain the protection of S. 182, B.T. Act in respect of his homested, the raiyat need not hold other land as a raiyat in the same village. It is enough if he is a raiyat of some land. (*Beachcroft*, J.) SHADAYA CHANDRA SHAHA *v.* KALI NATH SAHA. **49 I.C. 267 (Cal.).**

BENGAL TENANCY ACT (VIII of 1885), S. 182.

——S 182—*Occupier of homestead for more than 12 years—Raiyat.*

Before a person can become a settled raiyat of a village, he must be a raiyat. Mere occupation of a homestead of a village for more than 12 years would not make the occupier a settled raiyat of the village. (*Chitty and Walmsley*, JJ.) KAMAL BAIDYA *v.* GANESH CHANDRA BISWAS. 47 I.C. 829 (Cal.).

——S. 182—*Applicability—Homestead of raiyat.*

By virtue of the general provisions of the Act or of the special provisions under S. 182 of the Act, the Act applies to the homestead of a raiyat, whether it is or is not a part of an agricultural holding. (*Teunon and Richardson*, JJ.) RAICHARAN *v.* SIB RAM. 46 I.C. 489 (Cal.).

——S. 182—*Applicability—Ryot building house—Transfer.*

The widow of a ryot in possession of an agricultural *jote* who paid rent to the Zamindar for two years and built herself a homestead which she used as her dwelling, must be taken to have been a ryot as regards the homestead, so that S. 182 applied. She cannot transfer except with the consent of the landlord in the absence of a custom permitting a transfer. (*Woodroffe and Beachcroft*, JJ.) ISWAR CHANDRA ROY *v.* MURARI LAL DUTT. 41 I C. 472=26 C.L J. 88.

——S. 182—*Land taken for building a shop used also for agricultural purposes governed by S. 182.*

A raiyat acquiring lands under a lease for building a shop, in which he has resided and from where he carries on agricultural operations in another village in respect of holdings under the same landlord is entitled to protection under S. 182. 10 C.W.N. 941; 10 I.C. 139, Fol. (*Chatterjee and Chapman*, JJ.) BHIKARI RAM *v.* MAHARAJ BAHADUR SINGH. 43 Cal. 193=34 I.C. 152=25 C.L.J. 357.

——S. 182—'*Homestead' meaning of—Land used for agricultural purposes.*

'Homestead' is land used by *raiyat* for residential purposes. S. 182 does not apply where the land is not used by the raiyat as his homestead. But it is not necessary for its applicability that the homestead should be in the same village or be held under the same landlord as the holding of the raiyat. The Act applies to all lands for agricultural purposes and not to such lands alone as are actually under cultivation. (*Mookerjee and Newbould*, JJ.) DINA NATH NAG *v* SASHI MOHAN. 22 C.L.J. 219=31 I.C. 16=20 C.W.N. 550.

——S 182, Sch. III, Art. 3—*Suit by purchaser of Homestead land, for possession is not within the article.*

Where the plaintiff bought only the house and the homestead land of a person and he was dispossessed by the landlord, who claimed the house through some other tenant and the plaintiff sued to recover the possession of the homestead land. *Held*, that as the plaintiff did not claim to nearer possession either as a settled *raiyat* or as an occupancy *raiyat* and did not occupy the disputed plot for 12 years, and the land was not alleged to be the subject of an occupancy right transferable by custom, the two years' rule of limitation laid down in Art. 3, Sch. III, of the Bengal Tenancy Act was not applicable. (*Rampini*, J.) CHUNDRA *v.* KUTBAN. 29 I.C 839=21 C.L.J. 473.

——S. 182—*Raiyat—Under-raiyat—Holding under different landlords.*

Plaintiff was a raiyat, whose holding consisted partly of agricultural and partly of homestead lands, the latter of which he let to defendants who held certain other lands as *raiyats* under a different landlord, in a different village. *Held*, that S. 182 would apply though the defendants had only the interest of an *under-raiyat* and the provisions applicable to a *raiyat* would regulate the incidents of the tenancy of defendants of the homestead. (*Chatterjee and Greaves*, JJ.) KRISHNA KUER GHOSH *v.* JADU KASYA. 21 C.L.J. 475=28 I C 839=19 C.W N. 914.

——S. 182—*Homestead lands.*

Homestead lands forming part of the raiyat's holding fall within the scope of the Act and notice to quit before ejectment is necessary. (*Holmwood and Chapman*, JJ.) SARBESWAR *v.* RAI CHARAN. 19 I.C. 78 (Cal.).

——S. 182—*Raiyat purchasing homestead of another tenant and cultivating—Applicability of the Act.*

The Bengal Tenancy Act applies where a *raiyat* purchases parcels of land belonging to the homestead of other tenants and cultivates them, as, by so doing they become agricultural lands. (*Carnduff*, J.) JAJINDRA MOHAN *v.* KEDAR NATH. 13 I.C. 289 (Cal.).

——Ss. 184 and 185—*Periods of limitation—Deduction.*

The B.T. Act is a self-contained Act on the subject of limitation even as regards periods of limitation prescribed by it to which Ss. 184 and 185 are inapplicable. (*Richardson and Walmsley*, JJ.) THE SECRETARY OF STATE *v.* SHIB NARAIN HAZRA. 46 Cal. 199=47 I.C. 502=22 C.W N. 802.

——S. 184, Sch. III, Art. 6—*Decree—Limitation—Decree, if capable of execution.*

A decree for which limitation is prescribed by Art. 69 of the B.T. Act, is one capable of execution. If the decree is amended, time runs from the date of amendment. (*N. R. Chatterjee and Walmsley*, JJ.) MAHAMAYA PRASAD SINGH *v.* HAMID. 21 I C 61[illegible]=18 C W.N. 266.

BENGAL TENANCY ACT (VIII of 1885), S. 185.

——Ss. 185 and 104-H—*Suit under S. 104-H—Lim. Act, S. 15 (2), if applicable.*

S. 15 (2) of the Lim. Act, does not apply to extend the period of 6 months prescribed for suits under S. 104-H of the B.T. Act. (*Mookerjee and Walmsley, JJ.*) SECRETARY OF STATE *v.* GANGADHAR NANDA. **45 Cal. 934 = 45 I.C. 228 = 27 C.L.J. 374.**

——S. 185—*Invalidity of sub-lease.*

The question of invalidity of a sub-lease is to be raised only by the landlord of the raiyat. The defts. a trespasser cannot question the validity of the permanent lease given by the raiyat. (*Mookerjee and Coxe, JJ.*) MANIK *v.* BANICHERAN. **10 I.C. 469 = 13 C.L.J. 649.**

——S. 185 (2) and Sch. III, Art. 3.—*Dispossession of landlord by tenant—Constructive dispossession—Limitation.*

The term 'dispossession' implies coming of a person and the driving out of another from possession. The plffs. took a lease of 12 cottahs of land from the defts. and obtained delivery of possession of seven cottas only. Defts. agreed to vacate the remaining portion after three months but failed to carry out the terms of the agreement and continued in occupation. *Held*, that there was no dispossession such as would attract Art. 3, Sch. III of the B.T. Act. S. 185 (2) of the said Act makes Art. 144 of the Lim. Act applicable. Suits instituted within 12 years from the date when the possession of the defts. became adverse after the lapse of the three months would be within time. The Court discourages recourse to the fiction of constructive dispossession in cases under Art. 3, Sch. III of the B.T. Act. (*Mookerjee, C.J. and Fletcher, J.*) PANCHOOKAPALI *v.* JANEWAR MAJHI. **38 I.C. 844 = 32 C.L.J. 9.**

——S. 186-A—*Scope and Denial of title—Ejectment.*

S. 186-A, B.T. Act, does not apply to a suit by landlord in a Civil Court for possession when the tenants thereof have successfully denied his title in a rent suit. (*Fletcher and Teunon, JJ.*) PROSONNO KUMAR *v.* KULADA PROSAD. **29 I.C. 472 (Cal.).**

——S 186-A—*Forfeiture—Denial of relationship by tenant—Decree of the Court.*

In cases to which the B.T. Act applies, the mere denial of the relationship of landlord and tenant does not work forfeiture unless the denial was incorporated in a decree of the Court. A suit for arrears of rent was dismissed as the deft. denied the relationship of landlord and tenant. The plaintiff appealed but was allowed to withdraw the suit. He then brought a suit to eject the deft. on the ground that he had denied the relationship of landlord and tenant. *Held*, that owing to withdrawal, the decree ceased to exist and the landlord could not eject the tenant. (*Carnduff and Chatterjee, JJ.*) PYARI LAL *v.* HEM CHANDRA. **14 I.C. 719 = 16 C.W.N. 730.**

BENGAL TENANCY ACT (VIII of 1885), S. 188.

——S. 186-A—*Applicability.*

Before awarding damages under S. 186-A the Court should decide whether there was reasonable or probable cause and state its ground for coming to that conlusion. (*Woodroffe and Carnduff, JJ.*) SIBU SANT *v.* NETAI CHARAN. **9 I.C. 806 = 15 C.L.J. 114.**

——S. 188—*Applicability—Suit for arrears of rent is not governed by section—Rent suit by manager of joint Hindu family—Other members are not necessary parties.*

Provisions of S. 188 have no application to the institution of a suit for arrears of rent. The tendency of modern decisions is in favour of the representative character of the manager, though no doubt, the question must be decided in each individual case or special class of cases subject to the operation of relevant statutory provisions, if any, such as the one embodied in S. 188 of the B.T. Act. A suit for rent instituted by the managing member of a Joint Mitakshara family cannot fail merely because the infant co-parceners have not been placed on the record as joint plaintiff or as *pro forma* defendants. (*Mookerjee and Chotzner, JJ.*) KALIPADA DAS *v.* RAJA SATI PRASAD GANGA BAHADUR. **72 I.C. 722 = 27 C.W.N. 372 = 36 C.L.J. 234 = 1922 Cal. 468.**

——S. 188—*Suit in ejectment of trespassers—Section does not apply.*

S. 188, B.T. Act applies only to cases of landlords and can have no application to a suit in ejectment against trespassers. (*Sanderson, C.J. and Ghose, J.*) REAJUDDIN PATWARI *v.* SYED ABDUL JOBBAR. **69 I.C. 804 (Cal.).**

——Ss. 188 and 158—*Applicability of S. 158 to application under S. 188.*

S. 188 of the Act applies to an application under S. 158 just as it does to a suit under S. 7 or 30. (*Richardson and Beachcroft, JJ.*) DHANANJOY MANJHI *v.* UPENDRA NATH DEB. **46 I.C. 428 = 22 C.W.N. 685.**

——S 188—*Co-sharer landlord—Application for fair and equitable rent.*

The section does not bar a co-sharer landlord having a *kabuliat* from his tenant, respecting his share of the lands in his holding, from applying to Settlement Officer to fix fair and equitable rent, under S. 105. (*Jenkins, C.J. and Chatterjee, J.*) SAFARUDDI *v.* FAZAL HUQI. **30 I.C. 414 = 21 C.L.J. 592.**

——S. 188—*'Joint landlords'—Meaning of.*

Where the constituent members of an entire body of landlords do not all occupy the same status, they cannot be held to constitute a body of joint landlords. (*Mookerjee and Beachcroft, JJ.*) ASKORAN SATIA *v.* SATISCHANDRA. **24 I.C. 281 (Cal.).**

——S. 188—*Suit for additional rent—All co-sharers must be parties.*

A suit for additional rent against tenants who had executed a *kabuliyat* agreeing to pay

BENGAL TENANCY ACT (VIII of 1885), S. 188.

additional rent for additional land must be brought by the whole body of landlords under S. 188 of the Act, and it is not sufficient that co-sharers who are unwilling to join as plffs. are joined as defts. The existence in a separate *kabuliyat*, of a stipulation to pay additional rent for additional land does not take the case out of the scope of the Act. 17 Cal. 695; 25 Cal. 917; 38 Cal. 270, foll.; 7 C.W.N. 670; 3 C.W.N. 225 dist. (*Coxe and Roy*, JJ.) DERIK DHAKAI *v.* ASWINI KUMAR NAG.
20 I.C. 669=18 C.W.N. 942.

——— S. 188—*Applicability.*

S. 188 is no bar to a suit brought by a co-sharer landlord alone to compel a tenant to fill up a tank wrongfully excavated by him in his part of the holding or in the alternative for damages. (*Ghosh and Pratt*, JJ.) GOBINDA CHANDRA BASU *v.* KAMIJUDDI SOYAL.
17 I.C. 115=16 C.L.J. 127.

———S. 188—*Co-sharer landlords—Suit for rent by one, when lies.*

Where a tenant makes a contract by which he is liable to pay rent to several co-sharers jointly, one co-sharer cannot maintain a suit for the whole rent. S. 188 of the B.T. Act demands that landlords shall do jointly anything which they are under the Acts required or authorised to do, but there is nothing to prevent one co-sharer from bringing a suit for the whole rent after making the co-sharers who refuse to join as plaintiffs, defendants in the suit. 35 Cal. 331, Ref. Again if a co-sharer can prove that there is a contract express or implied by which a tenant is liable to pay him his share of the rent separately, then he may bring a suit for that part of the rent without joining his co-sharers as defendants, but the decree obtained by him is to be executed as money and not a rent decree. On the other hand, notwithstanding such arrangement for separate collection all the co-sharers may sue jointly for the whole rent. To further facilitate the recovery of arrears of rent due to a co-sharer who is in dispute with his tenants or with his fellow landlords, the legislature enacted S. 148-A of the Bengal Tenancy Act. The section requires firstly, that the co-sharer shall sue to recover the rent due to all the co-sharer landlords in respect of the entire holding, secondly that he must make all the remaining co-sharers parties to the suit, and thirdly that he must state that he is able to ascertain what rent is due for the whole tenure or holding or whether the rent due to other co-sharer landlords has been paid, owing to the refusal or neglect of the tenant or of the co-sharer landlords, defendants in the suit, to furnish him with direct information on these points or on either of them. In such a case the plaintiff co-sharer will be entitled to proceed with the suit for his share only of the rent and a decree obtained in a suit so framed shall be as effectual as a decree obtained by the sole landlord in a suit brought for the rent due to all the landlords. If in the suit it is found that the co-sharer landlords have realised rent in excess of their shares, then they will be liable to reimburse the plaintiff to the extent of the excess realised by them. 4 Pat. L.J. 500, Ref. (*Miller*, C.J. *and Mullick*, J.) RAJGIRI SINGH *v.* JADUNATH SINGH.
(1922) Pat. 355=4 Pat. L.T. 39=1923 P. 41.

BENGAL TENANCY ACT (VIII of 1885), S. 193.

———Ss. 191, 192—*Fair and equitable rent—Ganti lease.*

A portion of a permanent *Ganti* lease at a fixed rent was resumed by the Govt. and re-settled with the proprietor. The rent suit of the transferee from the settlement holder was dismissed by the Privy Council on the ground that the permanent rights of the tenant were not abrogated by the resumption and fresh settlement. After the expiry of the settlement the farming lease granted by the Govt. to the plff. was fixed at a certain rent which was never impugned. *Held*, that plffs. were entitled to the fair and equitable rent and that the Privy Council decision was not *res judicata* as the plffs. were not representatives of the proprietor. (*Holmwood and Imam*, JJ.) KHIRADA KANTA ROY *v.* AKHOY KUMAR.
33 I.C. 420 (Cal.).

———S. 192—*Contract in force—Meaning of—Tenant's right to land settled with Zemindar—Contract before the passing of the B. T. Act.*

Where the intention of the parties to the contract was that the lease should comprise all the lands within it and the rent was settled at a lump sum for all the lands leased out, the tenant has a right to the lands settled with the zemindar after resumption by Government. The words "lease or contract in force" in S. 192 of the Bengal Tenancy Act have reference to the words "lease" or "contract" in the opening lines of the section and do not affect contracts entered into before the passing of the Act. S. 192 does not either expressly or impliedly, give power to a Revenue Officer to fix a rent so as to affect contracts entered into, before the passing of the Act. (*Chatterjee and Pearson*, JJ.) PRAFULLA NATH TAGORE *v.* T. C. TWEEDIE. 35 C.L.J. 14=65 I.C. 234=1922 Cal. 248.

———S. 193—*Rent—Suit for* garh *in S. 55 of the Bengal Court of Wards Act.*

The expression "rent" has a more extensive meaning than that in the B.T. Act, and includes the price of forest produce. (*Chaudhuri and Newbould*, JJ.) JOY CHURN *v.* SARAJUBALA. 55 I.C. 261=23 C.W.N. 876.

———S. 193—*Banker—Grant of forest right—T.P. Act.*

Plff. granted deft. the right to fell or remove and sell trees from a forest for a period of five years, on payment of Rs. 20,000 in advance and the balance in 5 yearly instalments; plff. also undertook to provide convenient sites for roads, *etc.*, *held*, that the lease did not fall within the T.P. Act but that the grant was one of forest

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rights. (*Teunon and Richardson*, JJ.) SERA JUBALA DENI *v.* SARAD NATH.
50 I.C. 862=23 C.W.N. 336.

———**S. 193 and Sch. III, Art. 2**—*Lease—Construction of—Fishery—Money payable for Rent.*

The provision in a lease of a right to fish in Jalkar that the lessee is not to claim reduction of the *jama* on the goound of drought or inundation does not necessarily show that any right to the soil is conferred. A suit to recover money due under such a lease comes under S. 193 of the Bengal Tenancy Act and is barred, if not brought within the period provided by Sch. III, Art. 2 of the Act. The money payable in respect of fishery is not rent within the B.T. Act and interest at the rate stipulated in the lease is therefore recoverable. (*N.R. Chatterjee and Greaves*, JJ.) KRISHNA LAL *v* SALIM MOHAMED. **27 I.C. 614=19 C.W.N, 514.**

———**S. 193**—*Money payable in respect of forest rights — Suit, for recovery of—Civil Courts—Jurisdiction—Provincial Small Cause Court Act, Sch. II, Art.* 8.

The provisions of the Act applicable to suits for recovery of arrears of rent apply also to a suit for the recovery of money payable in respect of forest rights, and this money being rent the suit is triable by Civil Courts and not by Small Cause Court. (*Mookerjee and Beachcroft*, JJ.) BANDI ALI *v.* AMUD.
20 C L.J. 227=26 I C, 880=19 C.W.N. 415.

———**S. 196**—*Enactment of the Act of* 1907 *—Effect.*

S. 196 applies only where both this Act and the later amending Act X of 1907 affect the proceedings, *e g.*, in a suit filed after 1907. (*Woodroffe and Carnduff*, JJ) KALANAND *v.* BHEKHDHARI SINGH, **9 I.C. 803 (Cal.).**

———**Sch. III**—*Real purchaser in possession for two years—Effect of.*

Where a *benami* purchaser at an execution sale is kept out of possession for a period of two years by the real purchaser, the former's title becomes extinguished under Sch. III to the Bengal Tenancy Act. (*Teunon and Newbould*, JJ.) HARISH CHANDRA GUHA *v.* NRIPENDRA COOMAR CHAKRAVARTI
59 I.C. 719=24 C.W.N. 1024.

———**Sch. III, Art. 1**—*Ejectment of tenant—Limitation Act, Art.* 142.

A suit to eject a tenant, in Bengal on the ground that the tenant broke his covenant not to transfer his interest by mortgaging the leasehold is governed by Art. 142 of the Limitation Act and not by Art. 1 of Sch. III, (*Sanderson* C.J., *and Mookerjee*, J.) DWARAKANATH *v.* MATHURA NATH. **24 C.L.J. 40=34 I.C. 833=21 C.W.N. 117.**

———**Sch. III, Art. 1, Ss. 3, 4**—*Zerait land Acquisition of non-occupancy right—Ejectment—Limitation.*

BENGAL TENANCY ACT (VIII of 1885), Sch. III, Art. 1.

The B.T. Act applies to a proprietor's private land and a suit by a landlord to eject a non-occupancy raiyat of his private land on the ground of the expiration of his lease is governed by art. 1 (*a*) of Sch. III The operation of the article is not excluded by S. 119 of the Act in the case of *serait* lands. (*Chamier, C.J. Chapman. Mullick Ree and Jwala Prasad*, JJ.) JANKI SINGH *v.* JAGANNATH DAS. **44 I.C, 94=3 Pat. L.J. 1 (F.B.).**

———**Sch. III, Art. 1 (a)**—*Ejectment of lessee of serait land is not governed by the Schedule—Non-occupancy right—Limitation.*

Schedule III, art. 1 (*a*) of the B.T. Act (as amended)does not apply to suits to eject persons who were not non-occupancy raiyats of the land under Ch. VI of the Act. To fall within the article, the non-occupancy raiyat must be a person who, before the expiry of his term, had acquired the status and rights of a non-occupancy raiyat under Ch. VI of the Act. A lessee of a proprietor's private or Zerait land is not such a non-occupancy raiyat. (*Sir John Edge*) MAHANTH JAGARNATH DAS *v.* JANKI SINGH.
43 M.L.J. 55=66 I.C. 837=26 C W N. 833=35 C L.J. 506=(1922) M.W.N. 410=1 Pat. 340=3 Pat L.T. 197=31 M.L.T P.C. 231=49 I.A. 31=1922 P.C. 142 (P.C.).

———**Sch. III, Art. 1 (a)**—*Limitation—Suit for ejectment of khas khaman lands.*

A suit by a landlord for ejectment of the tenants in possession of his *khas khaman* lands on the expiry of the term of the lease is governed by the general law of limitation prescribed by Sch. III, Art. 1 (*a*) of this Act. For interpretation of Art. 1 (*a*), the help of the heading of Chap. XI of the Act should be sought. (*Woodroffe and Choudhuri*, JJ.) DWARKANATH *v.* TAFAZAR RAHAMAN.
39 I.C. 64=44 Cal. 267=20 C.W N. 1097.

———**Sch. III Art. 1 (a), S. 116**—*Ejectment—Suit for—Zerait land—Limitation.*

A suit for ejectment of a non-occupancy raiyat of a Zerait land must be brought within six months of the expiry of the lease. The provisions of Art. 1 (*a*) of Sch. III of the Act are not controlled by S. 116 of the Act. (*Mookerjee and Beachcroft*, JJ.) GANPAT MAHTON *v.* RISHAL SINGH. **33 I.C. 978=20 C.W.N 14.**

———**Sch. III, Art. 1 (a)**—*Limitation—Suit to eject non-occupancy raiyats—Expiration of term—Effect of custom to the contrary—Limitation.*

A suit to eject a non-occupancy raiyat on the ground of the expiration of the term of lease must be brought within six months after the expiration of the term under clause (*a*), Art. 1, Sch. III, notwithstanding a custom to the contrary. (*Jenkins*, C. J. *and Mookerjee*, J). DURBIJOY *v.* DAMAN BHAGAT. **22 I.C. 67=18 C.L.J. 597.**

BENGAL TENANCY ACT (VIII of 1885), Sch. III, Art. 1.

———Sch. III, Art. 1 (a)—*Ejectment of sub-lessee is governed by this General Law of Limitation.*

A sub-lessee from a non-occupancy tenant is not a non-occupancy tenant but only a tenant of a non-occupancy tenant and there is no relation of landlord and tenant as there the sub-lessee does not hold directly from the landlord and therefore a suit to eject him, is governed by general law of limitation and not by Sch. III, Art. 1 (*a*). (*Ross*, J.) JAWAHIR OJHA *v.* MORGAN. 62 I.C. 392 (Pat).

———Sch. III, Art. 1 (a)—*Lease, expiry of —Ejectment—Limitation.*

Where a firm continued in possession after the expiry of a lease in 1905 and on 1-4-1915 they were served with a notice to quit and a suit for ejectment was brought in January 1916 *held*, that the suit was barred by limitation under Art. 1 (*a*) of Sch. III. (*Atkinson and* DAS, JJ.) PARMAD BANABIHARI *v.* ATKINS. 53 I.C. 106 = 4 Pat. L.J. 533.

———Sch. III, Art. 1 (a)—*Tenant inducted by mortgagee of Zemindari—Ejectment.*

Where after redemption of a usufructuary mortgage, the mortgagors sued to eject the tenants inducted by the mortgagee Art. I, Cl. (*a*) governs the suit. (*Atkinson*, J.) SHEOBARTA SINGH *v.* PAGARATH. 52 I.C. 473 (Pat.).

———Sch. III, Art. 2—*Suit for money due under forest lease—Lim. Act, Art.* 116.

A suit for recovery of money, under a registered contract in respect of forest rights is governed by Sch. III, Part I, Art. 2 and not by Art. 116 of the Lim. Act. (*Teunon and Richardson*, JJ.) SARAJUBALA DEBI *v.* SARD NATH. 50 I.C. 862 = 23 C.W.N. 336.

———Sch. III, Art. 2—*Agricultural land—Lease—Suit for rent—Limitation.*

Per *Fletcher*, *J*:—The Bengal Tenancy Act does not apply to leases of agricultural land which are not for agricultural purposes. Per *Richardson*, J:—Whether a lease of agricultural land is or is not for agricultural purposes, the period of limitation for a suit for rent is that provided by the B. T. Act. (*Fletcher and Richardson*, JJ.) RASH BEHARI LAL *v.* TILAK DHARI LAL. 20 C.W.N. 485 = 29 I.C. 797 = 23 C.L.J. 111.

———Sch. III, Art. 2 — *Ascertainment and assessment of excess land—Time taken in proceedings for, if may be deducted — Subsequent suit for rent.*

Where in a previous suit for rent which was withdrawn, it was open to the plff. to ask for ascertainment of the area in the actual occupation of the tenants and for recovery of rent in respect thereof, he is not entitled in a subsequent suit for such rent to a deduction of time up to the date of assessment. 27 Mad. 143 P. C.

BENGAL TENANCY ACT (VIII of 1885), Sch. III, Art. 2.

dist. (*Mookerjee and Beachcroft*, JJ.) UPENDRA NATH NAG *v.* SURYA KANTA ROY CHOUDHURY. 20 I.C. 205 Cal.

———Sch. III, Art. 2—"*Landlord*"—*meaning of.*

An assignee of arrears of rent from a landlord is not a landlord within the meaning of the Act. (*Roe and Jwala Prasad*, JJ.) GAJADHUR PRASAD *v.* THAKUR PRASAD SINGH. 3 P.L.W. 179 = 38 I.C. 102 = 1 P.L.J. 506.

———Sch. III, Art. 2 (a)—*Bengal Tenancy Act* (VIII *of* 1869), *S.* 46 — *Doposit of rent—Suit for rent.*

Art. 2 (*a*) of the Act, 1885 applies to a suit for rent wherever it has been deposited under S. 61 even though the allegation of the tenant that the full amount was deposited, was proved to be incorrect. The change in S. 61 of the later Act from S. 46 of the older Act does not really indicate a change in the law. 18 C.W.N 84, dist. (*Mookerjee and Beachcroft*, JJ.) SASI BHUSAN DEY *v.* UMAKANTO DEY. 19 C.W.N. 1143 = 25 I.C. 171 = 20 C.L.J. 153.

———Sch. III, Part 1, Art. 2, Cls. (a) (c)—*Purchase of tenure with arrears of rent — Suit for arrears, if one for rent—Limitation.*

Where a tenure is purchased with arrears of rent due, and a suit is filed for the arrears, the suit is one for rent and is governed for purposes of limitation by Art. 2, Cl (*c*) of Part. I of Sch. III to the Bengal Tenancy Act. (*D. Chatterjee and N. R. Chatterjee*, JJ.) BANGA CHANDRA PAL *v.* NABENDRA KISHORE ROY. 11 I.C. 496 (Cal.).

———Sch III, Art. 2 (b) — *Rent of fishery (Jalkar)—Limitation.*

A suit for rent of a Jalkar right of fishery is governed by the limitation in Sch. III, Art. 2, Cl. (*b*). (*Chatterjee and Richardson*, JJ.) SHEKHARESHWAR ROY *v.* NANDA LAL MANDAL. 33 I.C. 110 (Cal.).

———Sch. III, Art. 2, (b)—*Suit brought by a landlord.*

The question whether a suit for recovery of arrears of rent is a suit brought by a landlord, has to be determined with reference to the relations in which the parties stood when the arrears fell due. 26 Cal. 750; 31 Cal. 550; 35 Cal. 737, Foll. (*Mookerjee and Beachcroft*, JJ.) BALMUKAND SAHAI *v.* TARINI SINGH. 17 I.C. 343 = 16 C.L.J. 360.

———Sch. III, Art. 2 (b)—*Suit by an assignee for arrears of rent is not within the Schedule—Limitation.*

A suit by an assignee for arrears of rent does not fall under Art. 2 (b) of Sch. III to the Act for purposes of limitation but under Art 110 of the Limitation Act. (*Das and Adami*, JJ). HAYAT MAJID *v.* HAZARI LAL. 63 I.C. 424 (Pat.).

BENGAL TENANCY ACT (VIII of 1885), Sch. III, Art. 3.

——Sch. III, Art. 3—*Applicability.*

Art. 3 does not apply to a suit which is not a suit between the landlord and tenant. The time under the article begins to run from the decision of the first Court. (*Greaves and Ghose*, JJ.) GOPINATH JALUA *v.* BHAJAHARI DAS.
68 I.C. 472=1923 Cal. 327 (2).

——Sch. III, Art. 3—*Suit between two tenants—Article does not apply.*

Art. 3 of Sch. III to the B T. Act does not apply to a suit between two tenants unless the dispossession of the plaintiff tenant is attributable to the agency of the landlord. 25 C.W.N. 102, Rel. (*Richardson and Suhrawardy*, JJ.) JANAKI NATH SHAH v. BAIKUNTHA NATH GHATTACK. 86 C L J. 140=70 I.C. 602=27 C.W.N. 259=1922 Cal. 176.

——Sch. III, Art. 3—*Dispossession by tenants settled by co-sharer landlords—Article applies.*

Art. 3, Sch. III of the Act is applicable where the dispossession is effected by the tenants settled upon the land by co-sharer landlords with the help of their naib. 25 C.W.N. 168, foll. (*Chatterjee and Pearson*, JJ.) PROFULLA CHANDRA GHOSE *v.* BABURAM MANDAL.
65 I.C. 1=34 C.L.J. 462.

——Sch. III, Art. 3—*Applicability of—Dispossession of tenant—Limitation.*

Art. 3 of Sch. III applies only where it is shown that the landlord was taking part in the *dispossession* which is therein referred to. The landlord or somebody acting in concert with him must have caused the dispossession. 24 C. 40 Rel. (*Sanderson*, C J. *and Chotzner*, J.) GOBINDA CHANDRA GOPE *v.* AKHIL CHANDRA DAS. 64 I.C. 858 (Cal.).

——Sch III, Art. 3—*Special period of limitation applies when the relationship of landlord and tenant exist.*

Where there is a relationship of landlord and tenant between the parties and the landlord after obtaining a decree for rent attaches the crops and dispossesses the tenant, a suit by the latter for the recovery of possession is governed by Art. 3 of Sch. III of the B.T. Act. *Semble:*—The special limitation does not apply where the landlord dispossesses the tenant as auction purchaser. 24 C.W N. 38=25 C.W N. 102, Rel. (*N.R. Chatterjee and Panton*, JJ.) BAIKUNTHA NATH GHATAK *v.* SHEIKH FAZIL.
64 I C. 192 (Cal.).

——Sch. III. Art 3—*Dispossession by third person—Article does not apply.*

Unless the landlord is shown to have a hand in the ouster, the fact that a tenant was dispossessed by a third person, under the landlord's authority, does not bring the case under Sch. III, Art. 3. *N. R. Chatterjee and Panton*, JJ.) ALOM SHEIKH GAZI *v.* HARINATH MITRA. 62 I.C. 763 (Cal.).

BENGAL TENANCY ACT (VIII of 1885), Sch. III, Art. 3.

——Sch. III, Art. 3—*Dispossession of tenant by landlord and by a third person is within the article.*

Where a *raiyati* tenant is dispossessed by a third person, who subsequently obtains a settlement from the land lord, the landlord having no hand in the tenant's ouster, the dispossession is not one by the landlord and the tenant's suit for possession is not governed by Art. 3. Where the landlord granted a settlement of the holding to his peons, and the *raiyati* tenant was dispossessed by them with the help of landlord's *burkundazes* and at the landlord's instigation a suit by the tenant for possession is governed by Art. 3. (*N. R. Chatterjee and Suhrawardi*, JJ.) ARMAN PEEDA *v.* MANIK SARKAR. 62 I.C. 690 (Cal.).

——Sch. III, Art. 3—*Dispossession—Grant of a new lease is not.*

Art. 3 applies only where the dispossession has been effected either by the landlord or by his agent acting within the scope of his authority. The grant of a lease to a new tenant by the landlord is not equivalent to a dispossession by the landlord. (*Mookerjee*, A.C J. *and Fletcher*, J.) HARAN CHANDRA BARAI *v.* HARI CHARAN BARAI.
61 I.C. 899=25 C.W.N. 102.

——Sch. III, Art. 3—*Landlord taking possession of tenant's holding under agreement and holding over after termination of right to hold—Suit by tenant to recover holding is not within article.*

A suit by a tenant against a landlord taking over the tenancy of his tenant under a usufructuary mortgage and holding over after the termination of the right to hold under the mortgage, for recovery of the holding is not governed, as to limitation, by Art. 3 of the Act. (*Mookerjee*, A.C.J. *and Fletcher*, J.) KHETRA NATH MONDAL *v.* LAKHAN SARDAR.
59 I.C. 442 (Cal.)

——Sch. III, Art. 3—*Suit for joint possession—Co-heir of the tenant against co-sharer landlords—Limitation.*

Plff. an heir of the original tenant brought a suit for joint possession in respect of his share of the land against the defts. who were co-sharer landlords having a *kobala* of the entire land from another heir of the original tenant and dispossessed the plff. *Held*, that the suit was governed by Sch. III, Art. 3 of the Act. When the landlord purchases at a sale held in execution of a decree, possession is delivered to him by the Court as auction purchaser, *i.e.*, on the footing that there is no longer any relation of landlord and tenant and that the possession of the landlord as purchaser cannot be challenged so long as the sale is not set aside or declared ineffective against the tenants. In the case of a private purchase there is a relation of landlord and tenant and the mere fact that a *Kobala* obtained from one of the heirs of the original tenants cannot take the case out of the

purview of Art. 3. (*Chatterjee and Panton*, JJ.) NABIN CHANDRA *v.* SHEIKH WAJID.
24 C.W.N. 382=58 I.C. 598=31 C.L.J. 199.

——Sch. III, Art. 3—*Suit to recover possession by a tenant.*

A tenant dispossessed by a landlord through inducted tenants, must necessarily make the landlord a party in a suit for possession within the time of limitation prescribed by Article 3. A plaintiff after joining several defendants and proceeding against one only, describing others as *pro forma* defendants cannot amend in the second appeal so as to leave those proceeded against and to claim relief against the *pro forma* defendants. (*Chatterjee and Panton*, JJ.) PEARY MOHAN *v.* AREINODY.
58 I.C. 581=25 C.W.N. 168.

——Sch. III, Art. 3—*Licensee—Refusal to vacate on expiry—Suit for possession—Limitation.*

Where the licensees of a tenant refuse to vacate on the expiry of the period of their license, such refusal amounts to a dispossession of a licensor within Art. 3 and a suit to recover possession must be brought within the period prescribed by that article. (*Newbould*, J.) PANCHU *v.* JAJNESWAR.
53 I.C. 959 (Cal.).

——Sch. III, Art. 3—*Raiyat's suit for possession against auction purchaser.*

The limitation in art. 3, Sch. III does not apply to a suit by a raiyat to recover possession of his holding from an auction purchaser in execution of a rent decree. (*Fletcher and Huda*, JJ.) GANESH CHANDRA *v.* BERAJA SUNDARI. 46 I.C. 975 (Cal.).

——Sch. III, Art. 3—*Dispossession by landlord in execution.*

Where a landlord puts a holding to sale in execution of a decree for rent, and purchases it himself and gets delivery through Court, the dispossession of the tenant is not dispossession within Art. 3, Sch. III of the B.T. Act. (*Mookerjee and Walmsley*, JJ.) RAM KINKER TEWARI *v.* STHITI RAM.
46 I.C. 221=27 C.L.J. 528.

——Sch. III, Art. 3—*Suit for possession—Co-sharers.*

In a suit by some co-sharers after a ryot was dispossessed by other co-sharers, the Civil Court recognized the ryot's right to recover it. The ryot cannot sue for recovery of possession after two years, (the period prescribed by Art. 3, Sch. III) though his right has been recognized. (*Fletcher and Huda*, JJ.) GIRISH CHANDRA MITTRA *v.* GIRIBALA DEB.
45 I.C. 937=28 C.L.J. 219.

——Sch. III, Art. 3—*Dispossession.*

In order that special limitation under Art. 3, Sch. III may apply, dispossession need not be

by the landlord as such. (*Fletcher and Newbould*, JJ.) SATISH CHANDRA BASU *v.* NITTYA GOPAL HALDAR. 40 I.C. 419=21 C.W.N. 918.

——Sch. III, Art. 3—*Dispossession by execution purchaser whether governed by Sch. III, Art. 3.*

Dispossession of a tenant by an execution purchaser at a sale held at the instance of the landlord, is not a dispossession by landlord and hence a suit by a tenant to recover possession is not governed by two years' rule of limitation. (*Teunon and Sheepshanks*, JJ.) DURGAPADA PANJA *v.* BHUSHAR CHANDRA GHOSE.
39 I.C. 383=21 C.W.N. 373.

——Sch. III, Art. 3—*Dispossession of raiyat holding at fixed rates.*

Where a ryot holding at fixed rates was dispossessed by the landlord shortly before the passing of the Bengal Tenancy Amendment Act, the limitation applicable to his suit for recovery of possession was twelve years under the law as it stood before the passing of the Amendment Act and not two years under Art. 3, Sch. III of the Act. (*Fletcher and Richardson*, JJ.) KHALIL RAHMAN *v.* KAFILUDDIN DALAL. 38 I.C. 643 (Cal.).

——Sch. III, Art. 3—*Scope of—Limitation.*

The special rule of limitation in Art. 3 is not restricted to suits against landlord himself. (*Fletcher and Richardson*, JJ.) SEKANDAR SHEIKH *v.* ANU SARKAR. 38 I.C. 69 (Cal.).

——Sch. III, Art. 3—*Dispossession by landlord who was also auction purchaser of holding.*

The dispossession referred to in Art. 3 need not be a dispossession by the landlord as such. The dispossession of a tenant by a person having dual capacity of the landlord and auction purchaser of the holding when he dispossesses is governed by Art. 3. 41 Cal. 52; 13 C.W.N. 108 and 24 I.C. 860, foll.; 17 C.W.N. 817, not foll. (*Fletcher and Teunon*, JJ.) FANI BHUSAN SARKAR *v.* PULIN CHANDRA MANDAL.
35 I.C. 838=21 C.W.N. 976.

——Sch. III, Art. 3—*Limitation—Dispossession necessary to deprive tenant of right of suit.*

In determining the scope of the Act, the purpose of the Act which governs the relations of landlord and tenant only, must not be lost sight of. To deprive a tenant of his right of suit, there must be a plain dispossession within Art. 3. (*Jenkins*, C.J. *and N. R. Chatterjee*, J.) KRISHNA CHANDRA *v.* SATISH CHANDRA. 35 I.C. 365=20 C.W.N. 872.

——Sch. III, Art. 3—*Landlord ousting tenant—Forcible possession of the land by landlord.*

If a landlord purchased a holding at a rent sale in the name of a former tenant and forcibly took possession thereof without delivery

BENGAL TENANCY ACT (VIII of 1885), Sch. III, Art. 3.

of possession by Court *held* that Art. 3 applied and that it was immaterial whether the land is purchased in his own name or in the name of a new tenant. (*Fletcher and Richardson*, JJ.) PITAMBAR MAHAPATRA *v.* BHAGABAT LAL. **24 I.C. 860 (Cal.).**

——Sch. III, Art. 3—*Suit for possession.*

Art. 3, Sch. III of Act, as amended, in 1908 does not apply where the dispossession was in 1898 and the suit for recovery of possession was instituted on 25-8-08. The decision in 19 I.C. 793 has not been affected by the decision of the Privy Council. (*Jenkins*, C.J. *Stephen*, *Woodroffe*, *Holmwood*, *and Chatterjee*, JJ.) GOPESHWAR PAL *v.* JIBAN CHANDRA. **41 Cal. 1125=18 C.W.N. 804=24 I.C. 37=19 C.L.J. 349.**

——Sch. III, Art. 3—*Dispossession by landlord—Limitation.*

Before Art 3 of Sch. III of the B.T. Act is applied in bar of a plff.'s suit within the ordinary period allowed by law, the terms of the Article must be strictly complied with and the question whether there has in fact been a dispossession must be found. (*Jenkins*, C.J. *and Mookerjee*, J.) RUDRA NARAIN MAITY *v.* NATABAR JANA. **41 Cal. 52=18 C.L.J. 89=21 I.C. 431=18 C.W.N. 353.**

——Sch. III, Art. 3—*Landlord and tenant—Landlord assisting in dispossessing tenant—Limitation.*

Where a landlord assisted the defendant in dispossessing a tenant, the special limitation of 2 years provided by Sch. III, Art. 3 of the Bengal Tenancy Act was applicable to a suit by the tenant for possession. (*Sharfuddin and Richardson*, JJ.) DENO NATH DAS *v.* KOTISWAR BHATTACHARYA. **21 I C. 367 (Cal.).**

——Sch. III, Art. 3—*Amending Act (I of 1907 (B.C.)—Not retrospective.*

Art. 3 of Sch. III of the Act as amended by (Act I of 1907) does not apply to cases where dispossession takes place before the Amending Act came into operation. 17 C.L.J. 316, foll. (*Mookerjee and Beachcroft*, JJ.) BUDHU KUMAR *v.* HAFIX HUSSAIN. **20 I.C. 821=18 C.L.J. 274.**

——Sch. III, Art. 3—*Limitation—Dispossession by landlord—What is.*

It cannot be said that because a landlord has favoured the dispossession of the tenant by others, there has been a dispossession by the landlord so as to make Art. 3 of Sch. III of the Act applicable. (*Jenkins*, C.J. *and Mookerjee*, J.) BASANT KUMARI *v.* NUNDA RAM. **18 C.L.J. 86=20 I.C. 350=17 C.W.N. 1149.**

——Sch. III, Art. 3—*Suit for possession of raiyati holding after setting aside* ex parte *decree as fraudulent.*

A suit for a declaration of plff. raiyat's right and for possession, after setting aside an *ex parte* decree is governed by Art. 95. Sch. I of the Limitation Act and not by Sch. III, Art. 3, B.T. Act, as the setting aside of the *ex parte* decree is the essential feature of the case. (*Stephen and Mullick*, JJ.) MEHER ABZAL *v.* RAHAMAN ALI. **19 I.C. 980 (Cal.).**

——Sch. III, Art. 3—*Eastern Bengal and Assam Tenancy Amendment Act.*

Per *Mookerjee and Chatterjee*, JJ. The special rule of limitation which was extended to under-raiyats in Eastern Bengal by the amendment in 1909 of the third schedule of the Bengal Tenancy Act does not apply to suits instituted after the commencement of the Amending Act in respect of causes of action which arose before the Act came into force. S. 61 of the Eastern Bengal Amendment Act has no retrospective operation. (*Mookerjee, Carnduff and Chatterjee*, JJ.) MAHJURI BIBI *v.* AKKEL MAHMUD. **17 C.L J 316=19 I.C. 793=17 C.W.N. 889.**

——Sch. III, Art. 3—*Dispossession by landlord as auction-purchaser not in the course of law—Special limitation.*

The dispossession by delivery of possession by the Court is not dispossession by the landlord. Whether he be fractional landlord owing to auction-sale or full landlord, the article contemplates dispossession by the landlord otherwise than in due course of law. (*D. Chatterjee and N.R. Chatterjee*, JJ.) KHAMAL DHARI THAKUR *v.* RAMESHWAR SINGH BAHADUR. **19 I.C. 545=17 C.W.N. 817.**

——Sch. III, Art. 3—*Possession of landlord as auction purchaser in—Suit by tenant for recovery.*

When the whole body of landlords obtain a proper rent decree and purchase the holding in execution and dispossess the tenant, the special law of limitation contained in Art. 3 of Sch. III applies. (*Coxe*, J.) SATIS CHANDRA GHOSE *v.* PATU MALLIK. **10 I.C. 54 (Cal.).**

——Sch. III, Art. 3—*Suit for possession.*

The Schedule applies to a suit for possession by a tenant dispossessed by another tenant at the instance of the landlord. It also applies where a landlord sells a holding in execution of a rent decree and it is purchased by another ryot. (*Coxe*, J.) NATABAR, JANA *v.* RUDRA NARAIN. **9 I.C. 625 (Cal.).**

——Sch. III, Art. 3—*Essentials for—Applicability.*

The essential conditions which must be satisfied in order to attract the operation of Sch. III Art. 6 of the B. T. Act are these: First, the decree must be obtained in a suit between landlord and tenant, and secondly, the provisions of the Bengal Tenancy Act must be applicable to them. (*Coutts and Das*, JJ.) RAGHUNATH SAHAY *v.* CHOWA MAHTON, **3 Pat. L.T. 525=67 I.C. 882=1922 P. 602.**

BENGAL TENANCY ACT (VIII of 1885), Sch. III Art. 3.

——**Sch. III, Art. 3**—*Applicability of—Suit for possession of portion of holding is within the article.*

Art. 3 of Sch. III to the Act applies to suits to recover possession of land claimed by an occupancy tenant and not to suits to recover possession of an occupancy 'holding' and a suit for lands forming a portion of an occupancy holding falls within the article. (*Coutts and Ross, JJ.*) JOWHAR ALI *v.* ALARAKHU. **63 I.C. 481=2 Pat. L.T. 615.**

——**Sch. III, Art. 3**—*Suit for possession by tenant.*

A suit by tenant for possession is governed by Art. 3 if the landlord is in any way responsible for his dispossession by a third person; if the landlord has no hand in the dispossession, the suit will be governed by the Limitation Act though landlord is joined as a party. (*Jwala Prasad*, J.) DWARKA *v.* ISHWARI.
58 I.C. 46=2 U.P.L.R. (Pat.) 233.

——**Sch. III, Art. 3**—*Application of.*

Per *Chamier*, C.J. Art, 3 applies to a suit by a raiyat or under-raiyat against his landlord, who dispossessed him, irrespective of any reason or excuse. Per *Mullick*, J. Art. 3 applies to cases where the relation of landlord and tenant is found to exist whether the plff. and defts. admit their mutual relation as tenant and landlord or not. (*Chamier*, C.J. *and Mullick*, J.) KUNTI DAI *v.* JHARU LAL DAS. **2 P.L.W. 16=40 I.C. 907=2 P L.J. 567=1917 Pat. 247.**

——**Sch. III, Art. 3**—*Scope.*

Art. 3 applies to a suit by a tenant for possession of the holding against the landlord whether dispossession was by him as landlord or as an auction-purchaser of the jote. (*Chamier* C.J. *and Mullick*, J.) GOWHAR ALI *v.* ENAYAT ALI. **40 I.C. 774=2 P.L.W. 45.**

——**Sch. III, Art. 3**—*Possession and dispossession.*

A suit by a tenant to recover possession of his holding when he has been dispossessed by a co-sharer landlord and not as landlord but claiming to have acquired an independent jote interest in the holding comes under Art. 142 of the Lim. Act. and not under Art. 3 of Sch. III of the B.T. Act. (*Atkinson*, J.) GAWHAR ALI *v* ENAYAT ALI.
38 I.C. 777 (Pat.).

——**Sch. III, Art. 3 (1)**—*Dispossession by landlord.*

Obiter.—Where the landlord purchases the holding in execution of a rent-decree it merges in the landlord's interest and when he or a lessee from him, proceeds to take possession from the original tenant, the dispossession is one by the landlord, within Art. 3 (1). (*Teunon and Abdul Majid, JJ.*) ERIDAJ ALI BISWAS *v.* ARJUN CHANDRA BISWAS. **62 I.C. 704 (Cal.).**

——**Sch. III. Art. 6**—*Execution application—Fresh application after dismissal—Limitation.*

BENGAL TENANCY ACT (VIII of 1885), Sch. III. Art. 6.

In execution of a rent decree, the property of the judgment-debtor was sold, but the sale was afterwards set aside on the latter application. A second application for execution was made by the decree-holder beyond the three years period. *Held*, that the second application could not be regarded as one in continuation of the previous application for execution which ended with the order of the Court dismissing that execution case for default of the decree-holder. (*Richardson and Walmsley*, JJ.) MIDNAPORE ZEMINDARY COMPANY, LIMITED *v.* DINA NATH SAHU. **43 I.C. 712=22 C.W.N. 766.**

——**Sch. III, Art. 6**—*Amending Act—Execution of decree by co-sharer landlord—Limitation.*

The three years' rule of limitation in Sch. III, Art. 6 of the B.T. Act is applicable to the execution of a decree obtained by a co-sharer landlord for a sum not exceeding Rs. 500 after the amendment. 10 C.L.J. 463; 18 C.L J. 81, ref. (*Teunon and Newbould*, JJ.) BYOMKESH CHUKERBURTY *v.* UDAY CHAND. **43 I.C. 737 (Cal.).**

——**Sch. III, Art. 6**—*Decrees for arrears of rent after cessation of landlord's interest.*

The special law of limitation prescribed by the Act for the execution of rent decrees, has no application to a decree in a suit for arrears of rent brought by a landlord after parting with his interest as landlord. In such a case he can execute his decree, under the general law of limitation. 41 Cal. 926 (P.C.), foll. (*D. Chatterjee and Beachcroft*, JJ.) SATIS RANJAN DAS *v.* NASARADDI PATWARI. **34 I.C 145 (Cal.).**

——**Sch. III, Art. 6**—*Co-sharer landlord obtaining decree for rent without joining another co-sharer—Art. 6, Sch. III applies—Execution.*

Art. 6 of Sch. III is applicable to an application presented by one co-sharer landlord in execution of a rent decree obtained by him for his share without making the other co-sharers parties. (*Chatterjee and Chapman*, JJ.) BYOMKESH CHAKARVARTI *v.* HALADHAR MANDAL. **31 I.C 700=19 C.W.N. 1271.**

——**Sch III, Art. 6**—*Amendment by Act (I of 1908)—Suit by co-sharer for rent—Limitation.*

Art. 6 of Sch. III of the B.T. Act (as amended by Act I of 1908) governs an application for execution of a decree obtained by a co-sharer landlord for his share of the rent of less than Rs. 500 in a suit to which the other co-sharer were not parties. 18 C.L.J. 81, foll. (*N.R. Chatterjee and Greaves*, JJ.) NARENDRA CHANDRA LAHIRI *v.* AFIFANNESSA BIBI.
27 I.C, 729=19 C.W.N. 751

——**Sch. III, Art. 6**—*As amended by Act (I of 1907), S. 61—Application for execution—Limitation.*

An application for execution after the Act of governed by Art. 6 of Sch. III of the Bengal

BENGAL TENANCY ACT (VIII of 1885), Sch. III, Art. 6.

Tenancy Act as amended by S. 61 of the Act of 1907 though the decree and the last but one application were made before the Act was amended. (*Richardson and Newbould*, JJ.) NARENDRA LAL KHAN *v.* UPENDRA NATH. **21 I.C. 113 (Cal.).**

——— **Sch. III, Art. 6**—*Amendment—Suit instituted after amendment.*

In case of a suit instituted after an amendment of Art. 6 of B.T. Act, the amended article is applicable even when the cause of action arose before the amendment. 35 All. 227 (P.C.) foll; 17 C.W.N. 889, not foll. (*Coxe and Roy*, JJ.) BARHANUDDI CHOWDHAY *v.* LAL KHAN. **21 I.C. 43 (Cal.).**

——— **Sch. III, Art. 6**—*Limitation—Execution of a decree for rent obtained by landlord.*

A decree in a suit by one of several joint landlords for his share of the rent in respect of several holdings in the occupation of the tenant is a decree for rent within Art. 6, Sch. III of the Act. 10 C.L.J. 463, foll. 16 C.L.J. 379 diss. (*Mookerjee and Beachcroft*, JJ.) MRTIYANJOY *v.* BHOLA NATH DATTA. **20 I.C. 833 = 18 C.L J. 81.**

——— **Sch. III. Art. 6**—*Decree by one co-sharer landlord.*

A decree obtained by a co-sharer landlord for his share of the rent not brought under S. 148-A or S. 158-A and in which the other co-sharers are not joined as parties, is a simple money decree to which Sch. III, Art. 6 does not apply. (*Brett and Sharfuddin*, JJ.) K. B. DUTT *v.* BEHARY BHUIYA. **16 C.W N. 1006 = 17 I.C. 207 = 16 C.L.J. 379.**

——— **Sch. III, Art. 6**—*Execution of order for restitution.*

An order of the Appellate Court ordering the respondent to pay a portion of the appellant's cost as awarded against the latter in the Court below, made in a suit for rent between the landlord and tenant to whom the provisions of Bengal Tenancy Act are applicable is governed by Art. 6. (*Chitty and Coxe*. JJ.) RAJ KUMAR SEN *v.* ANNODA CHARAN SEN. **9 I.C. 246 (Cal.).**

——— **Sch. III. Art. 6**—*Rent decree unnecessary—Prayer for declaration does not change character of decree.*

The insertion of an unnecessary prayer for declaration as to the plff.'s share in the Bhaoli produce, does not prevent the decree in a suit between landlord and tenant from being a rent decree and consequently the limitation for execution of that decree is that provided by Sch. III, Art. 6 of the B.T. Act. (*Coutts and Das*, JJ.) DARGAHI MIAN *v.* MT. MANGO KUER. **(1923) Pat. 5 = 3 Pat. L T. 563 = 67 I.C. 869 = 1922 P. 566.**

BENGAL TENANCY AMENDMENT ACT (II of 1918), S. 49.

——— **Sch. III, Art. 6**—*Applicability—Essentials for.*

The essential conditions which must be satisfied in order to attract the operation of Art. 6, Sch. III of the Bengal Tenancy Act are these:—First the decree cannot be obtained in a suit between the landlord and tenant and secondly the provisions of the Bengal Tenancy Act, cannot be applicable to them. A decree-holder not being the landlord of the holding, can, against the will of the judgment-debtor and without the express consent of the landlord, cause a portion of the judgment-debtor's occupancy holding to be sold in execution of a money decree though there is no local custom of transferability. 3 P.L.T. 205 F.B. foll. (*Coutts and Das*, JJ.) RAGHUNATH SAHAY *v.* CHOWA MAHTON. **3 P.L.T. 525 = 67 I.C. 882 = 1922 P. 602.**

——— **Sch. III, Art. 6**—*Co-sharer tenant—Decree—Execution.*

Art. 6 applies to the decree in a rent suit between landlord and co-sharer tenant, as the latter is a tenant. (*Atkinson and Doss*, JJ.) BINDA BIBI *v.* MUNI SINGH. **50 I.C. (;**

——— **(AMENDMENT) ACT, (I of 1907).**

———*Not retrospective.*

The Act does not retrospectively affect the tenant's rights (whether occupancy or non-occupancy) held by him within the limits of Calcutta as defined in Schedule I of the Calcutta Municipal Act, 1899. S. 3 cannot be construed, so as to operate retrospectively as the Act is not a declaratory one but has totally altered the law on the subject. (*Mookerjee and Beachcroft*, JJ.) JOTIRAM KHAN *v* JONAKI NATH GHOSE. **33 I.C. 584 = 20 C.W.N. 258.**

———*Not retrospective.*

The Bengal Tenancy (Amending) Act (I of 1907) has no retrospective effect. (*Suhrawardy and Cuming*, JJ.) ABDUL RAKIB KHAN *v.* JALAL AHMED. **65 I.C. 584 (Cal.).**

——— **(AMENDMENT) ACT, (II of 1918).**

——— **Ss. 49 (e) and (f).**—*Aboriginal—Power to mortgage—Sanction of Collector.*

The power of an aboriginal to effect a mortgage of his land is restricted by the provisions of section 49-E, sub-section (2) of the Act under which such a tenant is empowered only to make a complete usufructuary mortgage of his land and the permission of the Collector cannot enlarge the power of an aboriginal to effect a mortgage of his holding in any other way, than by a complete usufructuary mortgage. (*Walmsley and Ghose*, JJ.) GANGARAM MAJHI *v.* BAMAPADA MAHAPATRA. **68 I.C. 301 = 1923 Cal. 313 (2).**

BENGAL VALIDATION ACT (I of 1903).

——*Suit for rent—Persons purchasing interest pendente lite in execution of money decree against lessees, must be made parties.*

The plff. purchased the interest of grantor of permanent tenure in all the lands leased out to certain kundus and brought a suit for rent against them. The plff. purchased the tenure in the execution sale. In the meantime, the defts. purchased at an execution-sale of a money decree, the interest of the kundus in them. *Held*, that if the plff. desired to affect or override the interest acquired by defts. in the tenure in compliance with the terms of the Validation Act, if he becomes aware of such interest subsequent to the institution of his suit, must on general legal principles join them as a party to his suit before he can affect or override such interest. (*Fletcher and Richardson*, JJ.) KALI CHARAN SHAHA *v.* GOBIND SUNDER SANYAL. **41 I.C. 733 (Cal.).**

BENGAL WILLS AND INTESTACY REGULATION (V of 1799.)

——S. 7—*Jurisdiction.*

The section gives jurisdiction to a Dist. Judge only when the person dies intestate and has no claimant to his personal property. A person claiming under a gift from the intestate is also a claimant. (*Mookerjee and Chapman*, JJ.) JOGENDRA NATH SAHA *v.* COLLECTOR OF FARIDPUR. **30 I.C. 36=21 C.L.J. 612.**

BEQUEST.

See (1) HINDU LAW—RELIGIOUS ENDOWMENT AND WILLS.

(2) MAHOMEDAN LAW—WAKF AND WILLS.

(3) WILLS.

BERAR.

——*Is not British India but not foreign territory.*

Berar is not British India and the Limitation Act as such, does not apply to those territories though it has been separately applied to that Province. A Berar Court can hardly be said to be a foreign Court but it is not a Court contemplated by S. 14 of the Limitation Act, namely a Court in British India. (*Batten*, J.C. *and Prideaux*, A.J.C.) RAJANNA *v*, NARAYAN. **76 I.C. 305=1923 Nag. 321.**

——*Custom—Duty of* Mahas *to remove carcass.*

In Berar, if the owner does not dispose of the carcass of a dead animal in a sanitary way and if he requires the services of village working *mahars*, their duty is to remove the carcass if left undisposed and to appropriate ordinarily by custom, the hides and flesh as their remuneration for services, otherwise he cannot demand the hides and flesh as of right. Custom gains validity if it is reasonable ; and nothing is more unreasonable than the invasion of other's right without any benefit to common weal. (*Batten*, A.J.C.) NIWA *v.* RAGHO. **15 I.C. 867=8 N.L.R. 35.**

BERAR INAM RULES, (1879).

BERAR ATTENDED VILLAGES TENANCY LAW.

——S. 40 *Ante-alienation tenant—Rights of.*

The rights of an izara tenant are transferable notwithstanding any contract to the contrary and the tenant could not be ejected from his holding by his landlord as such, for any case. (*Prideaux*, A.J.C.) SHAIKH IMAM *v.* RAMCHANDRA. **71 I C. 28=1923 Nag 69 (2).**

BERAR ELECTORAL RULES.—R. 29 (1).

——*Regulation II, Cl. (ii)—Governor can dismiss petition, when security is not deposited.*

The Governor can dismiss the election petition where the security for costs is not deposited according to R. 28. In R. 29 (1), the figure 27 is a misprint for 28. Under the Rules, whatever is proposed to be done by the elector, proposer or secondor, cannot be done by agent unless with express authority. Where under the Rules, the nomination paper must be sent to the Returning Officer by the proposer or secondor, its transmission by the candidate, renders the nomination invalid. The certification of facts as required by cl. (ii) by means of two or more certificates given by different officers would not make the nomination paper invalid. But the nomination is invalid if the certificate is obtained and appended by the candidate himself. The declaration of an Election Agent made by a candidate need not be stamped. But to write it on a stamp-paper would not render it invalid. The nomination is not invalid if the paper is posted by a peon at the directions of the secondor instead of by the secondor himself. A member of the Legislative Council constituted under the Govt. of India Act, 1912, may seek election under the Govt. of India Act, 1919. (*Messrs. W. R. Dhoble, M. R. Pathak, and H. P. Bhargava, Commissioners.*) SADASHIV VAMAN KELKAR *v.* R.V. MAHAJANI. **60. I.C. 870.**

BERAR INAM RULES (1879).

——*Conversion into ordinary estates—Question of fact—Burden of proof—Succession—Nature of inam.*

An inam estate in Berar is governed by the Inam Rules of 1879. It is mainly a restricted tenure, but may be converted in certain cases, into an estate of free-hold, governed by the personal law of the grantee. Whether an estate has been so converted, is a question of fact in each case, the burden of proving which rests on the patry who asserts it. Unless the inam estate has been converted into an estate of full ownership, its devolution is governed by the Inam Rules, with the help of the personal law of the Inamdar. A Jagir or other inam estate may be a mere grant for life in the royal share of the revenue, or an absolute estate in the soil and only correct method for the judicial decision of claims upon it, is to ascertain the meaning of grant in each case from the circumstances and objects with which

BERAR INAM RULES (1879), R. 1.

and the rules under which, the sanad was granted. 5 M. I. A. 169; 3 Bom. 186; 21 Bom. 458; 15 Bom. L. R. 983, ref. (*Stanyon*, A.J.C.) KRISHNAJI *v.* NILKANTH.
36 I.C. 518=12 N.L.R 150.

——Rr. 1 and 5 (2)—*Grant of unenfranchised inam.*

Grant of an unenfranchised inam under R. V (2) becomes void after the death of the alienor. Lands do not cease to be inam simply because there exists a nominal quit rent. (*Mittra*, A.J.C.) AMAN ALI *v.* IMAM BI.
22 I.C. 89=9 N.L.R. 188.

——R. 5, *Scope of.*

The Berar Inam rules are merely instructions to Revenue officers for the original settlement of claims to Jagirs and they lay down the conditions that shall ordinarily govern each grant. (*Hallifax and Prideaux*, A. J. C.) SUBHAN ALI *v.* IMAMI BEGAM.
65 I.C. 194=1922 Nag-129.

——Rr. 5, 9—*Impartibility is not a condition under the section.*

The condition of impartibility is not one of the restrictions imposed by rule 5, though rule 9, provides that service grants cannot be divided. (*Dhobley* A, J. C.) KRISHNAJI *v.* NILAKANTH. **18 N.L.R. 163=69 I.C, 800=5 N.L.J. 25=1922 Nag. 62.**

——R. 7 (2)—*Deshmukhi cash inam not within the rule.*

A Deshmukhi cash inam does not fall under rule VII (2) so as to be governed by rule V (2). The grant is a perpetual hereditary grant for the maintenance of the dignity of the members of the family and each person entitled for the time being to a share must be held to be holding that share for his life only. (*Kotval*, A. J. C.) SHANKER RAO *v.* KHUSHAL RAO.
75 I.C. 999=1923 Nag 329.

——R. 14 (2)—*Scope of—Lease of service grants.*

Rule 14 (2) of the Berar Inam Rules relates to a permanent alienation such as a gift or exchange and does not apply to a temporary alienation or lease. Therefore such a temporary alienation does not require the sanction of the Deputy Commissioner. (*Mittra*, A.J.C.) NARASINGHDAS *v.* ALADADKHAN.
43 I.C. 384=14 N.L.R. 12.

——*Classes* II *and* IV—*Scope of.*

Where the Inam certificate itself does not mention the class and in the certificate the purpose of the grant is stated to be the service of the Kazi and maintenance, and the tenure to be in perpetuity conditional on service. *Held*, the grant is both a maintenance and a service grant. As a service grant the inam does fall under class II. The main purpose of the inam was the maintenance of the family and the service stipulated for is not necessarily personal service

BERAR LAND REVENUE CODE (1896), S. 4.

by the particular person in whose name the certificate for the time being stands but is service by any member or members of the family of the first grantee from the British Government. (*Kotval*, A. J. C.) SYED WAZ-RUDDIN *v.* SHAHBUDDIN.
71 I.C. 150=1922 Nag. 254.

——Cl. III. R. V—*Inam estates in Berar—Succession—Descendants through females—Rights of.*

Subject to the special terms, if any, of the grant the devolution and incident of an inam estate in Berar are governed by the Berar Inam Rules 1879. The recognition of a jagir or inam by the Government operates as a fresh starting point to provide conditions for its future enjoyment and devolution. 11 N.L.R. 150, foll. It is the recognition by the Govt. of an inam under the Berar Inam Rules that operates as the real root of title of the grantee as against the Government. The expression "*farzandan*" means offspring or lineal decendants and includes daughters but not the childern of daughters. (*Dhobley*, A. J. C.) CHOTU *v.* AKBAR ALI.
65 I.C. 72=1922 Nag. 170.

BERAR LAND REVENUE CODE (1896).

—— *Pre-emption — Price fixed — Fair market value.*

Under Ch. XVIII of the Hyderabad Assigned Districts Land Revenue code, 1896. the price fixed in the sale—deed is *prima facie* the price for pre-emption, unless it is shown that the price has not been fixed in good faith. In the latter case, the Court has to determine the fair market value of the interest proposed to be sold, or sold, and to fix the price of pre-emption accordingly. In neither case can an apportionment of the purchase money be made. (*Mittra*, A. J. C.) SHAMRAO *v.* SHEIK-IMAM. **51 I.C. 731=15 N.L.R. 130.**

——*Scope — Creation of occupancy rights under Govt.—Registration, if necessary.*

The Code is exhaustive and does not contemplate the registration of any document for the creation of occupancy rights under the Govt. (*Mittra, Off.*, A.J.C.) ZINGU *v.* GOSANI.
24 I.C. 868=10 N.L.R. 78.

——Ss. 4 and 56—*Amount payable by ante-jagir tenant to Jagirdar is revenue and is a charge on the holding.*

The sum payable on account of a holding by the inferior holder, who is not a tenant is land revenue and is as such a charge on the holding whether the amount is payable to Govt. or not. (*Kotval*, A.J C.) SHAMRAO *v.* SHRI SITARAM MAHARAJ. **18 N.L.R. 206=68 I.C. 289=1923 N. 5.**

——Ss. 4, 15, 72, 73 and 76—*Registered occupant—Decree.*

It is not a condition precedent for a decree for possession of an unalienated land in Berar, that the plff. should already be a registered

BERAR LAND REVENUE CODE (1896), S. 4.

occupant or it should be declared along with the decree that he is entitled to be registered accordingly. (*Batten*, A J.C.) LAXMAN *v.* SHEORAM. **15 I.C. 899=8 N.L R. 73.**

——Ss. 4 (5) (8) (10) (14), 86 (1) (2), and 205—*Pre-emption*—Paiki—*Number*—*Co occupant.*

The holder of a *paiki number* has no right of pre emption over another *paiki* number in the same survey number. (*Batten*, A.J.C.) MUSAMMAT GANGU *v.* CHANDU.
18 I.C. 862=9 N.L.R. 16.

——S. 4 (5)—*Survey number.*

An officer in charge of the Record of Rights cannot recognise the sub-division of a survey number and therefore a *pot* number does not constitute a separate survey number. (*Findlay*, A.J.C.) VITHOBA *v.* NARAIN.
57 I C. 260 (N.)

——Ss. 4 (5), 86, 87 and 205—*Pre-emption—Sub division of survey number.*

An occupant of a recognised division of a survey number within S. 4 (5) of the Code, has no right of pre-emption with reference to another recognised division of the same survey number. A Sub-division by agreement of parties but which has not been recognised within the meaning of S. 4 (5) of the code is not "Recognised sub-division of a survey number." The officer in charge of the Record of Rights is not an officer authorised under S. 4 (5) to recognise the division of a survey number. (*Mittra*, A.J.C.) SURYA BHAN *v.* RENAJ. **42 I.C. 447=14 N.L R. 61.**

——S. 4 (14)—*Co-occupant.*

A person not a co-occupant, has no right of pre-emption in respect of alienation of a survey number. (*Prideaux*, A.J.C.) ARJAN *v.* SITARAM. **57 I.C. 265 (Nag.).**

——Ss. 4 (14) and (15), 60, 72 and 105—*Presumption.*

Under the practice, and Berar Revenue Law, a registered and an actual occupant may be different persons. No presumption can be made that until a person is shown to be a registered occupant, the occupancy rights in unalienated land are not held by him or that a person newly recognised as the registered occupant must necessarily be the owner of such rights. "Registered occupant" and "actual occupant" are often different persons. (*Batten*, A.J.C.) KISAN *v.* HIRALAL. **15 I.C. 899=8 N.L.R. 76.**

——Ss. 4 (17) (9) 78 (2) and 223, "*Alienation*"—Jagir—*Confirmation by Br. Govt.—Effect of—Tenancy—Commencement known—Presumption under* S. 78 (2).

Where a jagir was conferred in the seventh century, by the then Sovereign Power on the plff.'s ancestor and when the province was taken under Br. Govt. in 1854, the *Jagir* was confirmed in plff.'s name in 1891 and the tenancy

BERAR LAND REVENUE CODE (1896) S. 69.

of the deft. commenced in 1872, about 40 years prior to the present suit by the *Jagirdar*. *Held*, that, S. 223 does not apply. The confirmation of 1891 does not amount to an alienation within Ss. 223 and 4 (17) of the Code, and that the presumption under S. 78 (2) did not arise as the tenancy was known to have commenced about 40 years ago and there was no uncertainty as to its commencement. 16 Bom. 646; 18 Bom. 221, foll. (*Batten*, A J.C.) PANDU *v.* UDHOJI RAO. **11 I.C. 693=7 N.L.R.100.**

——S. 56—*Forfeiture of rights on non-payment of revenue—Re-grant—Improvement.*

If, under the Code, a co-sharer in a holding has caused by his own default a forfeiture of the rights of himself and his co-sharers, and subsequently obtained a re-grant of the holding whether by a timely payment which averted sale or by buying it in an auction-sale, he must hold the estate thus acquired in trust for his co-sharers as well as himself, and cannot use his own neglect to defeat their claim. (*Skinner*, A. J. C.) SHANKAR LAL *v.* MULCHAND. **10 I.C. 694=7 N.L.R. 11.**

——S. 56—*Forfeiture sale.*

In a forfeiture sale, the purchaser is absolutely protected against incumbrances created by the ex-occupant but if no such sale is made, the effect of the forfeiture and acquisition are to be determined according to ordinary law and are subject to the control of equities. (*Stanyon*, A.J.C.) DEORAO *v.* BANAI. **10 I.C. 689=7 N.L.R. 2.**

——Ss. 60, 72 and 105—*Unalienated land—Occupancy right.*

Occupancy rights in unalienated land are not presumed to be held by registered occupant till some other person is recognised as registered occupant nor is it presumed that a newly recognised registered occupant must own rights of occupancy. (*Batten* A.J.C.) KISAN *v.* HIRA LAL. **15 I.C 899=8 N.L R. 76.**

——S. 69—*Transfer of occupancy rights.*

Under S. 69 of the Code a registered occupant may, by notice in writing to the Tahsildar give up the occupancy either absolutely or in favour of a specified person. Where the holding had already been mortgaged, such relinquishment would take effect subject to the mortgage. S. 69 of the Berar Land Revenue Code which prescribes the mode of transfer of occupancy rights is not abrogated by the T.P. Act. (*Mittra, Offg.* A.J.C.) ZINGU *v.* GOSAVI.
24 I.C. 868=10 N.L.R. 78.

——S. 69—*Registered occupant—Relinquishment—Effect on co-occupant.*

S. 69 of the Berar Land Revenue Code does not enable a registered occupant to destroy by relinquishment the rights of his co-occupants. 6 Nag. 78, Diss. (*Batten*, A.J.C.) KISAN *v.* RAMCHANDRA. **21 I.C. 851=9 N.L.R. 168.**

BERAR LAND REVENUE CODE (1896), S. 76.

——Ss. 76, 4 (15), 72, 73 and 74—*Suit for possession of unalienated land.*

In Berar, in a suit for possession of unalienated land, it is not necessary for a decree that plff. should be a registered occupant or that the decree should be accompanied by declaration that plff. is eligible to be registered occupant. (*Batten*, A.J.C.) LAXMAN *v.* SHEORAM.
15 I.C. 895=8 N.L.R. 73.

——S. 78—*Anti-alienation tenancy—What must be proved.*

To prove an ante alienation tenancy, a tenant must establish that his ancestors or predecessors-in-title possessed the land prior to the period when the grantee got the village, on payment of a fixed proportion of the revenue. The fact of the tenant having held out at survey rates for a period of forty years is not presumptive of an anti-alienation tenancy. Where there is no proof of an express agreement as to the permananoy of the lease on a fixed rental or to the duration of the lease, it must be presumed that unless the tenant can establish protection against arbitrary eviction, and a right to hold on a just and reasonable rent, the normal incident of the law of the landlord and tenant holds good, and that the landlord is entitled both to enhance rent and eviot after proper notice. (*Batten and Prideaux*, A.J.Cs.) GANPAT *v.* SAMBHSHIV. **4 N L.J. 235.**

——Ss. 78 and 79—*Notice—Lapse of more than one year—Ejectment.*

If a notice has been duly served under S. 78, then in the absence of waiver, the person so served can be ejected under S. 79 even more than a year after the service of the notice without a fresh notice. The enhancement contemplated in S. 78 can be decreed only if it appears to the Court to be just and reasonable. A notice to quit under S. 79 unconditionally determines the tenancy but a notice under S. 78, cl. (8) does not have that effect as the tenant has a right to appeal so as to test its reasonability. (*Mitra*, A.J.C.) NARAYAN *v.* SYAD BAHADUR. **44 I.C. 723 (Nag.)**

——S. 78 (2)—*Origin—Unknown.*

If it can be proved with certainty that the tenancy did not commence till after a certain point of time then it cannot be said of such a tenancy that evidence of its commencement has been lost by reason of its antiquity. A tenant of such holding is not protected by S. 78 (2). 14. N.L.R. 111 foll. In the absence of any proof that the tenancy was perpetual or that the defendant was an *antejagir* tenant, it must be assumed that he was an annual tenant. (*Dhobley*, A J.C.) YESHWANT *v.* SHIWAPPA. **68 I.C. 178=1923 Nag. 129 (2).**

——S. 78 (2)—*Agricultural holding—Transfer—Position of transferee.*

An agricultural holding is a persoual right, not transferable unless expressly declared to be so by contract or by statute. In Berar there is no law which permits an annual tenant of an agricultural holding to transfer his rights.

BERAR LAND REVENUE CODE (1896), S. 79.

Under the Berar Land Revenue Code a tenant right is heritable and transferable as "property". But a transferee of a tenant right by contract who does not make any fresh contract with the landlord obtains only the right, title and interest of the transferor, and if the transfer is from a woman with a limited interest his right to occupy the land would come to an end after her death or re-marriage. (*Stanyon*, A.J.C.) HAJI BEGUM *v.* SHANKAR RAO
53 I.C. 553 (Nag.)

——S. 78 (2)—*Applicability and effect—"Antiquity—Meaning—Proof of—Commencement of tenancy.*

Under S. 78, clause 2, it must be proved that by reason of the antiquity of the tenancy, no satisfactory evidence is forthcoming as to its commencement. The word antiquity in clause (2) must be construed with reference to the nature of the history of the country where the land is situated and to the possibility of getting evidence and not in its commonly accepted meaning of absolute antiquity. S. 78, clause (2) does not contemplate proof of the commencement of the tenancy in a particular year, much less on a particular date. If it can be proved with certainty that the tenancy did not commence till after a certain definite point of time, then it cannot be said that evidence of its commencement has been lost by reason of its antiquity. A tenant of such a holding is therefore not protected by S. 78 (2). S. 78 (2) practically becomes inapplicable to *ijara* villages as a result of this decision. 18 B. 221; 7 N.L.R. 100, foll. (*Mitra, Offg.*, A.J.C.) PARSHARAM *v.* BAPU. **42 I.C. 631=14 N.L.R. 111**

——S. 79—*Notice to quit—Service of—Refusal of post card.*

Section 79 of the Code does not lay down any specific mode for the service upon a tenant of a notice to quit. A notice therefore sent to a tenant by means of a registered post card the acceptance of which, upon being tendered by the postal authorities is refused by him, constitutes a proper service. 46 Cal. 458, dist. (*Mitra*, A.J.C.) RAMCHANDRA KANIRAM *v.* LAXMAN. **53 I.C. 62 (Nag.)**

——S. 79—*Scope.*

S. 79 applies to all classes of agricultural tenants in Berar and is not limited to cases of alienated land. (*Mitra, Offg.* A.J.C.) JANU *v.* FAKIRA. **42 I.C. 694=13 N.L.R. 181.**

——S. 79—*Annual tenant—Transfer of rights.*

In Berar an annual tenant can transfer his rights and neither he nor his transferee can be ejected without notice under S. 79, by landlord. (*Mitra, Offg.* A.J.C.) BHIWAJI *v.* THUKARAM.
39 I.C. 15=13 N.L.R. 11.

——S. 79 (2)—"*Annual Tenancy*"—*Tenancy for a year—Notice to quit.*

The expression "annual tenancy" in S. 79 of the Berar Land Revenue Code covers tenancy

BERAR LAND REVENUE CODE (1896), S. 87.

from year to year and not a tenancy lasting for a year only. No notice by either party to a contract tenancy for one year is therefore, necessary to determine the tenancy. (*Kotwal*, A.J.C.) KESHAO *v.* MANSHA. 44 I C. 212 = 14 N.L.R. 129.

——S. 87—*Survey number.*

'Survey number' in S. 87 includes recognised division of a survey number. (*Mittra*, A.J.C.) SURYA BHAN *v.* RENAI. 42 I.C 447 = 14 N.L.R. 51.

——S. 96 (1)—*Record of Rights—Presumption—Suit for setting aside.*

S. 96 (1) of the Berar Land Revenue Code lays down that an entry in the Record of Rights shall be presumed to be true until the contrary is proved. This presumption arises even in a suit brought to have the entry set aside and extends to trees standing on land. (*Mittra*, A.J.C.) MUSSAMMAT BULKI *v.* DAGDIA. 54 I.C. 331 (Nag.).

——S. 96 (j)—*Pre-emption—Recognised sub-division of a survey number—Sale of—Entry in Record of Rights.*

The recognised sub-division of a survey number is a holding which has separate assessment fixed for it. The officer in charge of the Record of Rights is not such an officer as is authorised either to recognise a sub-division of a survey number or to form two recognised sub-divisions into one survey number, 14 N.L R 51 Foll. The plff. cannot institute a suit for pre-emption where there has been a revision of such recognised sub-division only. (*Mittra*, A.J.C.) GADADHAR *v.* CHUNNILAL. 44 I.C. 541 = 14 N.L.R. 55.

——S 96.B (c)—*Record of Rights.*

An entry in the Record of Rights regarding maintenance which contains the conditions or liabilities attaching to the interest of holders is admissible in evidence and raises a presumption in favour of the person claiming maintenance. (*Macnair*, A.J.C.) FAKIRYA *v.* TULSI. 57 I.C. 271 (Nag.).

——S. 158—*Patwari is a public servant.*

As a patwari is entrusted with the work of collecting Land revenue and under S. 158 of the L. R. Code cesses can be collected as if they are land revenue, a Patwari is a public servant within the definition in the Penal Code. (*Batten*, J.) LOCAL GOVT. C.P. *v.* MADO PATWARI, 68 I C. 157 = 23 Cr. L J. 557.

——S. 160 (iii)—*Cess is a payable by—Superior holder.*

Under S. 160 the cesses in an alienated village are recoverable from the superior holder, and it lies on him to show, if he throws the liability on another person how the case is taken out of the application of that section. (*Kotwal*, A.J.C.) RAMCHANDRA *v.* ISHRABHO. 64 I.C. 202 = 1922 Nag. 168.

BERAR LAND REVENUE CODE (1896), S. 205.

——S. 178 (2)—*Ante ijara tenancy—Presumption—Onus.*

It is the tenant who wants to remain on the land in spite of the landlord's wishes to the contrary that has to prove the circumstances which entitle him to do so. He has, therefore, to prove, in the case of an *ante ijara* tenancy in Berar, that no satisfactory evidence of the commencement of his tenancy and of the period agreed upon between the landlord and tenant for its duration is forthcoming. If he fails to do so, no presumption under S. 178 (2) of the Berar Land Revenue Code can be made in his favour. (*Kotwal*, O. A.J.C.) ABDULLA KHAN *v.* ABHIMAN. 44 I.C. 831 (Nag.).

——Ss. 201 and 205—*Co-occupant may be a temple.*

There is nothing in the Berar Land Revenue Code to indicate that the co-occupant who is entitled to pre-empt must be a human being. A temple acting through its trustees can also pre-empt. (*Kotwal*, A.J.C.) BAKARAM *v.* RAMCHANDRA MAHARAJ. 71 I.C. 39 = 1923 Nag. 95.

——S. 205—*Mehernama for no fixed amount is not within the section.*

A Mehernama without indicating the amount of mehr is not a sale or a relinquishment. It is the giving of the land as a family settlement. (*Prideaux*, A.J.C.) MAHATAP KHAN *v.* MT. ASHABI. 76 I.C. 668 = 1923 Nag. 330.

——S. 205—*Right to pre-emption—Agreement to resell—Effect of.*

A preemptor's right under S. 205 of the Berar Land Revenue Code cannot be defeated by the vendee reselling to the vendor after a pre-emption decree has been passed. 2 N.L.R. 150 Foll. (*Prideaux*, A.J.C.) BAPU *v.* BHOMI. 18 N.L.R. 202 = 68 I.C. 493 = 1923 Nag. 26.

——S. 205—*Co-occupant—Pre-emption.*

Co-occupant means a holder of unalienated land. The holder or occupier of a survey number therefore cannot exercise the right of pre-emption. (*Prideaux*, A.J.C.) ARJAN *v.* SITARAM. 57 I.C. 265 (Nag.).

——S. 205—*Ante-nuptial settlement by a Co-sharer—Pre-emption—Gift.*

An ante-nuptial settlement of the interest of a co-sharer in a survey number does not amount to a sale or relinquishment for valuable consideration within S. 205 but is in the nature of a gift and not subject to pre-emption by other co-sharers. (*Mittra*, A.J.C.) NARAYAN *v.* VITHOBA. 28 I C. 355 = 11 N.L.R. 34.

——Ss. 205 to 209 and 211 (d)—*Right of pre-emption.*

The right of pre-emption in respect of mortgage is quite independent of any obligation to redeem the mortgage. Right of redemption

BERAR LAND REVENUE CODE (1896), S. 205.

may fall on the pre-emptor as a representative of the mortgagor. (*Stanyon*, A. J. C.) AGYA RAM *v* DEO RAO. **17 I.C. 616=8 N.L.R.161.**

——— **Ss. 205 and 211**—*Right to pre-empt—Co-occupants.*

The words co-occupant having a right to pre-empt in S. 211 include only either the persons who are co-occupant on the date of the transfer — the basis of pre-emption suit or their transferees by inheritance and not those entirely strangers, to whom a transfer is made voluntarily by sale or gift subsequent to the sale sought to be pre-empted. Hence a stranger transferee subsequent to the sale cannot get a right of pre-emption, as it is untransferable if once accrued. (*Batten*, A. J. C.) RAMJI *v.* MUKTAI. **15 I.C. 570=8 N.L.R. 62.**

——— **Ss. 206 and 211**—*Foreclosure suit—Occupant's right of pre-emption—Notice, when sufficient.*

Section 206 of the Berar Land Revenue Code provides the manner of giving notice and no other kind of notice is sufficient under S. 211 to deprive the co-occupant of his right of redemption. (*Batten*, A.J.C.) BAPU *v.* ANAND. **21 I.C. 287=9 N.L.R. 143.**

——— **Ss. 206 (1), 209 (2)** — *Pre-emption — Notice to Manager, if sufficient—Co-parceners, independent rights of pre-emption—Presumption — Several coparceners having equal rights of pre-emption—Procedure.*

Notice to the Manager of a joint Hindu family is sufficient under S. 206 (1) of the Code. But where the vendor relies upon a consent of the members of the family, he and his vendees must see that the substituted precaution is such as will bind all concerned. There is no presumption that where a manager does an act he does it as manager. The Code does not militate against the view that every co-parcener has an independent right of pre-emption which he can exercise by himself. All co-parceners should be considered as having equal rights of pre-emption until the contrary is shown. Where two or more co-parceners are equally entitled to pre-empt, the person to exercise it should be determined by lot. (*Drake Brockman*, J.C.) MOTIRAM *v.* BHIKAM RAO. **59 I.C. 601 (Nag.).**

——— **S. 211**—*Co-occupant having a right of pre-emption.*

The expression refers to a co-occupant at the date of transfer which is the basis of pre-emption or a transferee by inheritance from such co-occupant and does not refer to an entire stranger who gets the occupancy right by voluntary transfer after the sale sought to be pre-empted and hence such a transferee cannot pre-empt. (*Batten*, A.J.C.) RAMJI *v.* MUKATAI **15 I.C. 570=8 N.L.R. 62.**

——— **S. 223**—*Applicability — Tenant must have held prior to alienation.*

BERAR MUNICIPAL LAW (1886), S. 51.

S. 223 of the Berar Land Revenue Code applies only when the tenant has held from a period anterior to the alienation. The fact of the tenant having held out at survey rates for a period of forty years does not necessitate any presumption of an anti-alienation tenancy. Where there is no proof of an express agreement as to the permanency of the lease, on a fixed rental or to the duration of the lease, there is a presumption that unless the tenant can establish protection against the arbitrary eviction, and title to hold on a just and reasonable rent, the normal incident of the law of landlord and tenant is applicable and that the landlord is entitled both to enhance rent and evict after proper notice. (*Batten and Prideaux*, A. J. Cs.) GAMPAT *v.* SAMBASHIV, **4 N.L.J. 235.**

——— **Ch. VII**—*Superior and inferior holder*

The term superior and inferior holders in Ch. VII should be read in ordinary sense as defined in the Bombay Land Revenue Code and not as defined in the Berar Code. (*Mittra, Offg.*, A.J.C.) JANU *v.* FAKIRA. **42 I.C. 694 = 13 N.L.R. 181.**

BERAR MUNICIPAL LAW (1886).

——— **Ss. 32 and 33**—*Balcony—Encroachment—Daily fine.*

A balcony eleven feet high above the street level is not an encroachment within S. 132 of the Act. S. 133 does not justify a daily fine but only one fine extending up to Rs. 50. The policy of the Municipal Law is not to authorise a daily fine except in cases of contumacy *i.e.*, disobedience of a lawful order. (*Mittra*, A.J.C.) RADHA KISAN *v.* MUNICIPAL COMMITTEE AMRAOTI. **19 Cr. L J. 392=44 I.C 745= 14 N.L.R. 167.**

——— **Ss. 42 and 44**—*Notification of tax—Jurisdiction of Civil Court to declare tax illegal.*

S. 44 (*a*) precludes a Court from questioning the legality of a tax duly notified. S. 42 shows that the condition of taxation for scavenging purposes is a provision by the committee for scavenging service and not the actual rendering of it. (*Kotwal*, A.J.C.) TEHER ALI *v.* MUNICIPAL COMMITTEE, KHAMGAON. **46 I.C. 682=15 N.L.R. 42.**

——— **Ss. 51 and 53**—*Municipal tax, legality of, can be raised in Civil Courts—Professional tax—Levy of—Subject of the tax.*

The jurisdiction of the Civil Courts is not ousted when the question is, whether a particular tax purporting to have been imposed under the Berar Municipal Law has any legal existence. When the levy and assessment of any tax by the committee, purporting to be done under the authority of the Berar Municipal Law is alleged to be *ultra vires*, the Civil Courts have jurisdiction to entertain the suit. 8 N. L. R. 107; 24 M. 124; 35 C. 859, Rel. Where the committee acted *ultra vires* and charged income not liable to tax the Civil Court has jurisdiction to entertain the suit and to

BERAR MUNICIPAL LAW (1886), S. 51.

direct the refund of the amount realised in excess. It is not competent to a Municipality in Berar to assess to tax professional income derived by the assessee outside the Municipal limits, when such income is not brought into or mixed up with the income arising within the Municipality. 48 C. 443, Ref. (*Dhobley*, A.J.C.) MUNICIPAL COMMITTEE MALKAPORE *v.* AMRIT WAMAN DAYAL. **8 N L.J. 214 = 18 N.L.R. 121 = 66 I.C. 832 = 1922 Nag. 10.**

———Ss. 51, 53—*Imposition of tax—Legality of—Civil Court has power to determine the question of.*

Notwithstanding anything contained in the Berar Municipal Law, a Civil Court has power to determine the validity of an imposition of a tax by a Municipality. If a Municipality acts *ultra vires* while levying taxes in accordance with the power conferred by a special law or local authority such special law cannot limit the power of a Civil Court to grant relief against the illegality committed. (*Stanyan*, A.J.C.) G.I.P. RY. COMPANY *v.* AMRAOTI MUNICIPALITY. **16 I.C. 449 = 8 N L.R. 107.**

———Ss. 79 and 116—*Bye-law depriving public of a right*—Ultra vires—*Approval by Local Government.*

S. 116 (*l*) (*j*) of the Berar Municipal Law does not even by implication, authorise a committee to make a bye-law depriving the public of a right of way for a particular class of traffic long enjoyed by it; such bye-law is illegal and *ultra vires* and a conviction for the breach of the terms could not be maintained. The mere fact of the Local Government having signified its approval to a bye-law would not render the bye-law valid. (*Mittra*, A.J.C.) MAHOMED SARWAR *v.* SECRETARY CAMP MUNICIPALITY, AMROATI. **20 Cr. L J. 458 = 61 I.C. 341 = 15 N L.R. 105.**

——— Ss. 85, 86, 116 and 130—*Application for permission—Absence of orders on—Erection on balcony—Encroachment—Notice to show cause—Fine—Propriety of.*

S 86, cl. (2) of the Act contemplates a notice issued personally to an individual and a notice to show cause why a balcony should not be removed as an obstruction is not a notice to remove the obstruction as required by S. 86, cl. (2) of the Act. The mere fact that a Municipal Committee did not pass any orders, on the application of a person to build, does not place the applicant in the same position as if written permission was accorded to him by the committee as required by S. 86. So far as encroachments dealt with by S. 86 are concerned, they are *per se* not punishable by that section but it is disobedience to the order of the committee for their removal that is punishable. (*Mittra*, A.J.C.) RADHAKISAN *v.* MUNICIPAL COMMITTEE, AMROATI. **44 I.C. 744 = 19 Cr. L.J. 392 = 14 N.L.R. 157.**

——— S. 116—*Rules under—Validity of.*

BIDDER AND PURCHASER.

Rules framed under S. 116 of the Municipal Law must be consistent with the Act. The effect of rule 10 framed under S. 10 and S. 116 is to do away with the notice required by Section 138 and the rule is therefore *ultra vires*. (*Mittra A.J.C.*) RADHAKISAN *v.* MUNICIPAL COMMITTEE, AMRAOTI. **44 I C. 744 = 19 Cr. L.J. 392 = 14 N.L R. 157.**

BERAR PATELS AND PATWARIS LAW, 1900.

———S. 9—*Endowments of patwari office—Partition.*

Under S. 9 of the Berar Patels and Patwaris Law, 1900, emoluments of a patwari are to be enjoyed solely by the person for the time holding the office. There cannot be a partition or assignment of the emoluments. (*Mittra*, A.J.C.) SHIVARAM AMBADAS *v.* SRIDAR SHIVRAM. **43 I.C. 137 (Nag.).**

——— Ss. 9, 11, 20 and 21—*Patwari and his substitute—Contract to distribute remuneration of office void.*

A private contract between a patwari and his substitute to distribute emoluments of his office is void under the Berar Patel and Patwari law. (*Mittra, Offg.* A.J.C.) TATIA *v.* GANGA RAM. **21 I C. 855 = 9 N.L.R. 175.**

—— —— S. 20—*Suit for division of patel allowance does not lie in Civil Court.*

A suit as to the division of balance of emoluments by the patel in proportion to share under S. 6-A. (4) is not triable by Civil Courts. Under S. 20 of the Berar Patels and Patwaris Law a Civil Court has no jurisdiction to try a claim for a share of the arrears of allowance due to a Patel in virtue of his office. *Kotwal*, A.J.C.) CHAMPAT *v.* GANPAT RAO. **68 I.C. 506 = 1923 Nag. 16.**

BETROTHAL.

See (1) DAMAGE.
(2) HINDU LAW-MARRIAGE.
(3) TORT.

BETTING.

See CONTRACT ACT, S. 30.

BHAGDARI TENURE.

See LAND TENURE.

BIAS.

See PRACTICE-JUDGE.

BID.

See (1) CIV. PRO. CODE, O. 21, RR. 69, 82,
(2) CONTRACT ACT, S. 2 (*a*) and (*b*).

BIDDER AND PURCHASER.

See (1) CIV. PRO. CODE, O. 21, RR. 69, 82.
(2) CONTRACT ACT, S. 2 (*a*) and (*b*).

HIHAR AND ORISSA COURT FEE AMENDMENT ACT (II of 1922).

———*Appeal filed after the Act should bear new Court Fees.*

An appeal memorandum filed after the amending Act came into force and the vakalat should be stamped under the new Court Fees Act; and the copies of judgment and decree if obtained before the Amending Act came into force, need only bear the Court-fee required by the old Court Fees Act as it stood before the amendment. (*Jwala Prasad*, J.) ANAND RAM PRAMHANS *v.* KRAMGULAM SAHU.
3 Pat. L T. 820=71 I.C. 426=1922 Pat. 365=1 Pat. L.R. 12=2 Pat. 264=1923 P. 150.

BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT (IV OF 1904).

———**Ss. 10 and 45**—*Non-service of notice—Burden of proof—Sale held more than a year before the Act—Limitation.*

The burden of proving non-service of notice under S. 10 of the Behar and Orissa Public Demands Recovery Act is upon the person applying to set aside the sale on that ground. (45 C. 496 Foll.) S. 45 of the Act does not apply to a suit to set aside a sale held more than a year before the coming into force of the Act. (*Ross*, J.) GOKARAN PRASAD SINGH *v.* WARIS ALI. **71 I.C. 957=1 Pat. L.R. 285.**

———**S. 26**—*Arrears certificate in respect of part of holding—Priority over purchaser under money decree.*

Where a decree holder in execution of a decree for rent chooses to sell part of a holding though the decree is against the whole, the decree ceases to be a rent decree. 11 C.W.N. 350, Ref. If all tenants of a holding are not made parties to a rent suit the decree obtained will not be a rent decree but will be a money decree. 1 Pat. L.J. 190; 22 C.W.N. 289; 1920 Pat. 9, foll. A holding stood in the name of several tenants, but a certificate under the Bihar and Orissa Public Demands Recovery Act was issued only in the name of one of them and only a portion of the holding was sold in execution of the certificate *Held*, if the decree-holder in execution of the decree chooses to sell part of a holding though the decree was against the whole, the decree loses the character of a rent decree and the purchase of the defendants was in effect in execution of a money decree. (*Sultan Ahmad*, J.) RAMNARAIN *v.* HARNANDAN PRASAD.
56 I.C. 463 (Pat.)

———**S. 32**—*Proceedings before certificate officer—Termination of—Proceedings if judicial.*

Proceedings before the Certificate Officer under the Bihar and Orissa Public Demands Recovery Act, 1914, terminate when the sale has been held and the proceeds realised. The only proceedings of a judicial nature contemplated by the Act after realization of the sale proceeds is an inquiry under S. 32 (2) in cases in which the certificate-debtor disputes a claim made by the certificate-holder to receive any amount which might be due to him under S. 32 (1) (c). (*Mullick and Bucknill*, JJ.) HARU LAL *v.* MAHANTH MADAN DAS.
2 Pat. 257=24 Cr.L.J. 809=1923 P. 410.

BIHAR MUNICIPAL ELECTION RULES.

———**R. 40**—*Disqualification of candidate can be raised in Civil Court.*

Though the decision of the Dt. Magistrate as to the validity of the nomination of a candidate is final, the question whether a member is disqualified from election is a separate one and can be tried by a Civil Court. If the name of a person qualified as voter is entered in the original vote-register but is subsequently removed by fraud or gross negligence it should still be supposed to be on the electoral roll and the Dist. Magistrate may restore it to the roll at any time before election. (*Ross*, J.) AUDH BIHARI LAL *v.* KESRI PROSAD SINGH.
63 I C. 6 (Pat.).

BILL OF EXCHANGE.

See NEGOTIABLE INSTRUMENTS ACT.

BILL OF LADING.

See SHIPPING.

———*Evidentiary value.*

A Bill of lading is prima facie evidence that the condition of goods is according to the description shown therein. (*Robinson*, C.J. *and May Oung*, J.) BIBBY BROTHERS *v.* CHARLES COWIES AND CO. **1 R. 146=74 I.C. 916=1924 Rang. 25.**

BIRT.

See (1) C.P. CODE, S. 60.
(2) HINDU LAW RELIGIOUS OFFICE.
(3) T.P. ACT, S. 6.

BIRT JAJMANI.

Birt Jajmani—Pragwals—Using the same kind of flag.

Where a Pragwal used the same kind of flag to attract the notice of customers as was used by another Pragwal already *held* that the act was unlawful and the Pragwal who used to hoist that kind of flag first had a cause of action against the other. (*Piggott and Kanhaiya Lal*, JJ.) BENI MADHO *v.* HIRA LAL. **18 A.L.J. 679=43 A. 20=58 I.C. 873=2 U.P.L.R. (A.) 227.**

BLINDNESS.

See HINDU LAW—SUCCESSION.

BOARD.

See DEED—CONSTRUCTION.

BOMBAY ACT (XI OF 1852).

———**Sch. B. r. 8**—*Powers of Govt.—Rules for resuming grants.*

The Govt. has power for regulating by rules the question of emoluments relating to service

BOMBAY BHAGDARI ACT (V of 1862), S. 8.

performed to state under Sch. B, r. 8 (5). But it has no power to frame any rules with reference to the resumption of land given as emoluments of any hereditary office. The Govt. have no inherent power to authorise the Collector to resume lands summarily when they appertain to the office of a village servant mentioned in r. 8. It cannot be taken as granted apart from any specific provision, that the Collector has the power to disturb the possession of third parties who may have acquired rights in respect of such lands under the operation of law. (*Shah*, A J.C *and Kemp*, J.) PATDAYA MUPPAYA *v.* SECRETARY OF STATE FOR INDIA. **28 Bom.L.R. 1160=48 Bom. 61= 1924 Bom. 273.**

BOMBAY BHAGDARI ACT (V OF 1862).

———*—Will—Validity of.*

If a will of Bhagdari lands offends against the provisions of the Act, it will be inoperative, though it is valid according to the personal law of the testator. (*Scott*, C J. *and Heaton*, J.) AHMAD ASMAL MUSE *v.* BAI BIBI.
41 Bom. 377=39 I C. 83=19 Bom L.R. 141.

———**S. 3** — *Unrecognised sub-division—Lease of, is void—Possession of alienee is adverse.*

The property in dispute formed an unrecognised sub-division of a Narva. On 29-4-1892 it was conveyed by its owners, the plaintiff's predecessors, to defts. for a long term of 500 years in consideration of a sum of money. In a suit for redemption by the plaintiffs in 1918 treating the transaction of 1892 as a mortgage, the defendants pleaded that the alienation was void in view of the Bombay Bhagdari Act and that their possession had been adverse for over 12 years. *Held*, that the transaction of 1892 was not an out and out sale but a lease for a long term and that as the alienation was void, the defendants had acquired by prescription a leasehold interest. (*Shaw*, A.C.J. *and Crump*, J.) CHATURBHAI LALLUBHAI PATEL *v.* MOTIBHAI BAPUJI.
24 Bom. L R. 1315=1923 Bom. 147.

———**S. 3**—*Unrecognised sub-division of a* bhag—*Sale so as to piece together a recognised sub-division.*

There is no alienation such as prohibited by S. 3 of the Bhagdari Act, where the effect of a transaction had not been to effect dismemberment of bhags or shares, but to bring together the various severed portions of a recognised sub-division into the hands of one owner. (*Scott*, C.J. *and Shah*, J.) GULAB *v.* BAI TEJ BAI.
15 I.C. 917=21 Bom. L R. 707.

———**S. 3**—*Award—Division of recognised sub-division of bhag.*

An award, the result of which will be to effect further partition in a certain recognised sub-division of a Bhag is void under S. 3 of the Act. The substance and effect of the transaction is what must be looked to, for the purpose of

BOMBAY CITY IMPROVEMENT ACT (IV of 1898), S. 41.

determining whether it is within the mischief of the Act. If the transaction clearly amounts to an alienation of an unrecognised sub-division of a share in a *narva*, its real nature cannot be disguised by calling it a compromise. (*Batchelor*, A.J.C. *and Kemp*, J.) NAGAR KASAI *v.* BAI DHULI. **43 I C. 577=20 Bom. L.R. 342.**

———**S 3**—*'Alienation'.*

'Alienation' in S. 3 not only covers transfers *'inter vivos'* but extends to testamentary dispositions also. (*Scott*, C.J. *and Shah*, J.) JAVER JIJI BHAI *v.* HARI BHAI. **40 Bom. 207= 33 I.C. 426=17 Bom. L R. 1131.**

———**S. 3**—*Mortgage of unrecognised sub-division of bhag—Right of mortgagee to compensation.*

An unrecognised sub-division of a *bhag* namely a house was mortgaged and the mortgagors were in possession as tenants. In a suit for possession the defendant admitted the mortgage deed and rent notes. *Held*, the mortgage and the rent notes were void under S. 3 of the Act; the consideration for the mortgage failed *ab initio* and a suit for its recovery is barred if brought more than 3 years after. (*Scott*, *C.J. and Batchelor*, J.) JAVERBHAI *v.* GORDHAN.
39 Bom. 338=28 I C. 442= 17 Bom. L.R, 259.

———**S 3**—*Alienation of lands in Bhag—Permanent tenant.*

The section does not prohibit alienation by a permanent tenant of lands in a *bhagdari* and *narwadari* village, whose rights existed before the Act. The Collector's interference with the sale is wrong. (*Beaman and Hayward*, JJ.) VENIDAS *v.* BAI HARI **38 Bom. 679= 28 I.C. 127=16 Bom. L.R. 571.**

BOMBAY CITY IMPROVEMENT ACT, (IV of 1898).

———**Ss 41 and 45**—*Regular line—Building—Set forward—Right to the space.*

Where the trustees for the improvement of the city of Bombay acting under S. 41 of Bom. Act IV of 1898, notify that an existing street is required by them under a new street scheme and constructed the new street with a building line set forward from the old building line, the strip of land between the two building lines belongs to the owner of the premises as set forward and does not vest in the trustees. The vesting in the trustees, under the notice is co-extensive with the revesting under S. 45 (2) in the Corporation. (*Lord Shaw.*) RATANLAL CHOONILAL PANALAL *v.* MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY. **43 Bom. 181=17 A L J. 1= 36 M L.J. 1=29 C.L J. 138=9 L W. 171= 25 M.L.T. 103=21 Bom. L.R. 114= 23 C.W.N. 441=1 U P.L R. 31= 48 I C. 404=(1918) M.W.N. 321 (P.C.).**

BOMBAY CITY IMPROVEMENT ACT (IV of 1898), S. 48.

———S. 48 and Validating Act (XV of 1904)—*Appellate Tribunal—Powers of, to determine compensation and questions of title.*

The Appellate Tribunal created by the Bombay City Improvement Act has power to decide questions relating to the apportionment of compensation money and also questions of title of the claimants *inter se* if that is necessary for determining the amount of compensation (*Russell and Chandavarkar*, JJ.) PANDURANG *v.* GANGARAM. **36 Bom. 203=13 I.C. 855=14 Bom. L.R. 22.**

BOMBAY CITY LAND REVENUE ACT (II of 1876).

———*Scope and object of.*

The object of Bombay Act II of 1876 is to provide for the administration and collection of the land revenue of the Govt. in the City of Bombay and not to establish a system of registration of title. Mere incidental statements in the records as to title are not decisive of the rights of the Govt. or of the individual as to anything except the liability to contribute to the revenue. (*Viscount Haldane.*) MARWANJI KAMA *v.* SECRETARY OF STATE.
2 L.W. 701=39 Bom. 664=19 C.W.N. 1056=(1915) M W.N. 536=29 M.L.J. 299=13 A.L.J. 1026=30 I.C. 539=42 I.A. 185 (P.C.).

———Ss. 39 and 40—*Acts of Collector.*

The controlling authority of the Government as to general form or rules by which the Collector shall keep Registers under Ss. 39 and 40 or give inspection copies, does not make the Collector's act that of Government so as to estop them. The granting of certified extract by the Collector under S. 40 is not representation to the applicant, that no other entry is to be found in the rent roll as regards the same land. (*Scott*, C.J. *and Russell*, J.) MARVANJI *v.* SECRETARY OF STATE.
16 I.C. 714=14 Bom. L.R. 654.

———S. 40—"*Extract*"—*Meaning of.*

"Extract" is different from "copy" and the latter does not mean the copy of the whole rent roll in the case of ordinary applications. Therefore the granting of extracts of selected entries though they might not be all the entries about the property in question is contemplated by the Legislature. (*Scott*, C.J. *and Russell*, J.) MARVANJI *v.* SECRETARY OF STATE. **16 I.C. 714=14 Bom. L.R. 654.**

BOMBAY CITY MUNICIPAL ACT (III of 1888).

———Ss. 3 and 305—*Public street—Private Street—Sewer—Meaning of.*

"Sewer" in S. 3 signifies a drain or passage to convey water and filth underground and refers to the carrying of other water besides liquid filth. A street where-under runs a corporation pipe for carrying off sullage water from certain houses but which have connection with surface of the street, cannot be said to be "sewered" by the corporation and is not a public street and notice can validly be issued under S. 305. (*Batchelor and Rao*, JJ.) EMPEROR *v.* EDALJI. **13 Cr. L.J. 43=18 I.C. 297=14 Bom. L.R. 116.**

BOMBAY CITY MUNICIPAL ACT (III of 1888), S. 36.

———Ss 3 (x) (y) and 305—*Street—Public and private—House abutting on the street.*

A street does not merely mean the actual roadway but includes the houses on either side of it. Therefore the laying down in a street of a sewage pipe which carries the sullage water of the houses abutting on it constitutes sewering of the street by Municipality though the surface water of the street is not taken away. (*Shah and Marten*, JJ.) EMPEROR *v.* RAM RAO. **19 Cr. L.J. 743=43 Bom. 122=46 I.C. 519=20 Bom. L.R. 620.**

———S. 14—*Protection afforded under—Agreement to contrary should be strictly proved.*

As regards the protection afforded by S. 147 to the landlord, strong documentary evidence is required to show that the parties intended that however much the rateable value might be increased in the feature over and above the rent payable under the lease still the landlord would have to pay the whole of the tax, (*Macleod*, C.J. *and Shah*, J.) DARASHAH BOMONJI DUBASH *v.* LIPTON LTD.
24 Bom. L.R. 479=67 I.C. 430=1923 Bom. 70.

———S. 33—Election petition for Municipal Council dismiss by the decision of Chief Judge of the Small Cause Court is not open to revision by the High Court. (*Macleod*, C.J. *and Crump*, J.) NAVALKAR *v.* SARAJONI NAIDU. **25 Bom L R. 463=73 I.C. 133=1923 Bom. 421.**

———S. 36—*Municipal Corporation—Meeting—Right to vote—Disqualification by reason of interest—What constitutes—Validity of votes—Decision by Civil Court—Suit by Councillor.*

The interest contemplated by S. 36 (p) and S. 16 sub. S. (1) (f) of Bombay Act III of 1888 must not be too speculative and remote. Again it must not be a mere sentimental interest. It must be a pecuniary or at least a material interest. Where there is a pecuniary advantage or a reasonable expectation of a pecuniary advantage, it must be regarded as an interest within S. 36. If the interest in a contract is pecuniary it is immaterial that the amount involved is trifling. The object to the provision imposing the disqualification is to prevent the conflict between interest and duty that might otherwise inevitably arise. It is clear on the language of S. 36, cl. (p), that a Councillor, whose name stands as a shareholder on the register of the said company, and who has a beneficial interest in the shares, is disqualified from voting or taking part in the discussion of any matter

BOMBAY CITY MUNICIPAL ACT (III of 1888), S. 90.

pertaining to the said company. It is also clear that if the shares stand, not in his name but in the name of a nominee of his, the beneficial interest being in him, he is similarly disqualified. The shares again may stand in the name of a Councillor who holds them not in his own right but as a trustee for another. Where the shares stand in the name of a person who has no beneficial interest in them but is a mere trustee, he cannot, it seems vote at meetings of the company in which he holds the shares in a manner inconsistent with the interest of the beneficiaries. The reason is that he derives the position which he holds as a member of the Company from the legal ownership of the shares. But if such person is also a member of the Corporation, he is not, disqualified from voting or taking part in the discussions of any matter relating to the Company at meetings of the Corporation. He is under no obligation to vote at such meetings in a manner beneficial to the interests of the *cestui que trust*, for he does not owe the membership of the Corporation to the fact that he is a share-holder of that Company. He commits no breach of the trust, if he votes at meetings of the Corporation in contravention of the interests of his beneficiary. It is no part of his duty as a trustee to vote at meetings of the Corporation in matters affecting the company as the beneficiary would have him to do. If no such duty is imposed upon him by law, it cannot be a case of conflict between two duties. Nor can it be a case of conflict between interest and duty, the interest which he has in the beneficiary being no higher than what a father has in the prosperity of his son. The question of the validity of the vote is a question of law and a Court of law has jurisdiction to entertain it. Questions relating to the validity of votes are not questions relating to the internal management of a Corporation. They are questions that can be disposed of only by a Court of law. If councillors disqualified from voting at a meeting of the Corporation vote at the meeting and by so voting create a majority, has a remedy in a Court of law. The question of the validity or invalidity of the votes could only be disposed of by a Court of law. When the question is one of the validity of the votes, it is open to the members of the Corporation to bring an action in their own names. It is open to one or more councillors to bring a suit in their own name without filing a representative suit under O. 1, R. 8, C. P. Code. (*Mulla*, J.) NARIMAN *v.* MUNICIPAL CORPORATION OF BOMBAY. **47 Bom. 809 = 25 Bom. L.R. 689 = 1923 Bom. 305.**

———**Ss. 90, 91, 92, 296** — *Acquisition of additional land—Corporation must act bona fide.*

The Corporation can, under the Act, acquire more land than is necessary for the actual construction of the new road in order that, by the resale of the surplus land, they may recoup themselves for the expenses of construction and

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widening. *Per Macleod*, C. J.:—The Corporation can acquire additional land for frontages whenever it seemed expedient for them to do so, the only restriction of such powers being that the decision regarding expediency must be arrived at honestly and on reasonable grounds. *Macleod*, C. J. *and Fawcett*, J.) KANDARAO VITHOBA KORE *v.* THE MUNICIPAL CORPORATION OF BOMBAY. **63 I. C. 581 = 23 Bom. L. R. 361.**

———**S. 91**—*Acquisition of land by Govt. for the Municipal Corporation—No transfer by Govt. is necessary.*

The section modifies the provisions of the Land Acquisition Act and vests the property in the Corporation on payment of the compensation and therefore no transfer in favour of the Corporation by the Govt. is needed. S. 31 of the Land Acqn. Act does not apply to acquisitions made under S. 91 of the City of Bom. Mun. Act. The vesting contemplated by S. 91 is such as would result from the Land Acqn. Act. The interest of a monthly tenant in property which is being acquired under the Land Acqn. Act comes to an end when the property vests in the Collector under S. 16 of the Land Acqn. Act. (*Setalvad*, J.) BOMBAY MUNICIPALITY *v.* M. DAMODAR BROS. **45 Bom. 725 = 60 I. C. 571 = 23 Bom. L.R. 35.**

———**Ss 140 (C.) and 43 (1) (a) and (2) (d)**—"*Charitable Purposes*" — *Hostel of a college—Fee paid by a student residing in a hostel, if rent—Universities Act* (VIII *of* 1904), *Ss.* 21 (1) (*Cl.*) (*f*) 25 (1) *and* (2) (*m*)—*Special case—Re-opened by consent.*

The part of a hostel of a college occupied by the students and the Superintendent is occupied for charitable purposes, within S. 143 (1) (*a*) of the Municipal Act, and is, therefore, exempt from general taxation leviable under S. 140 (*c*) of the Act. That part of the hostel occupied by the Professors was liable to be taxed under S. 140 (*c*) of the Act unless it was shown that the duties of the Professors for purposes of supervision, physical welfare and education of students, were such as to make their presence on the premises absolutely necessary. The extra fee paid by a student residing in a hostel of a college is not 'rent' within the meaning of S. 143 (2) (*d*) of the City of Bombay Municipal Act, (*Kajiji, J.*) MONIE *v.* SCOTT. **43 Bom. 281 = 47 I. C. 642 = 20 Bom. L.R. 839.**

———**S. 147**—*Landlord—Taxes and rates—Liability to pay—Increase of assessment on the basis of rents obtained by sub-letting of members.*

S. 147 means this, that the lessor from whom taxes are leviable under S. 146 has a claim against a tenant if the rateable value of the premises exceeds the amount of rent payable by the tenant. Ordinarily when the lease is granted, it would be intended that the lessor should be liable to pay the taxes which would

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be based on the rent payable under the lease and it is difficult to think that the parties contemplated that in case of an increase in the assessment, the responsibility for paying the tax in accordance with that increased assessment should fall on the landlord and not on the tenant. (*Macleod*, C.J. *and Shah*, J.) DARASHAH BOMONJI DUBASH *v.* LIPTON, LTD. **24 Bom. L.R. 479=67 I. C. 430=1923 Bom. 70.**

——S. 154 (2)—*Valuation of building—Cost of bath-tubs, lavatories and Electric Fittings—Machinery.*

In respect of buildings newly built in Bombay City, deductions in their rateable value should not be allowed to the owner, for the cost of bath tubs, lavatories and electric lights and fans. Baths and lavatories must necessarily be put in before tenants can be expected to take the premises. Electric fittings installed by a landlord become part of the premises and are necessary for the user of the premises by the tenant. "They do not constitute machinery" within S. 154 (2) of the Bombay City Mun. Act. (*Macleod*, C.J. *and Shah*, J.) HAJI DAWOOD HAJI ELIAS *v.* THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY. **24 Bom. L.R. 476=67 I.C. 426=1922 Bom. 386.**

——Ss. 289 and 290—*Highway--Trespass--Right to sue—Railway line.*

A public street in Bombay is vested in the Municipal Corporation of Bombay and the effect of such vesting is that they have the surface and a portion of the sub-soil vested in them in such a fashion as to enable them to bring an action for trespass. But where a Railway company constructs a line across the street under S. 7 of the Railways Act, there is no right of action. (*Viscount Haldane.*) MUNICIPAL CORPORATION v. G.I.P. RY. CO. **40 Bom. 291=21 M.L.T. 1=38 I C 923=19 Bom. L.R. 48=15 A.L.J. 63=(1917) M W N. 83=21 C W.N. 447=25 C.L.J. 209=43 I.A. 310 (P.C.)**

[Affirming 8 Bom. 565=23 I.C. 765=16 Bom. L.R. 104.]

——S. 289—*Effect of.*

S. 289 only vests in the Corporation such property as is necessary for the control, protection and maintenance of the street as a highway for public use. (*Scott*, C.J. *and Batchelor*, J.) G.I.P. RY. v. MUNICIPAL CORPORATION OF BOMBAY. **38 Bom. 565=23 I.C. 765=16 Bom. L.R. 104.**

——Ss. 296, 297 and 301—*Preservation of regular line—Acquisition of land adjoining public street—Collateral object—Compensation—Land Acquisition Act* (I *of* 1894).

The powers given by Ss. 297 and 299 of Bom. Act III of 1888 could be exercised notwithstanding that the purpose for which the land is

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taken is not mainly the preservation of the line of the street but the building of a bridge over a Railway level crossing; consequently the compensation payable to the owner of the land acquired is to be calculated under S. 301 of the Act. (*Lord Sumner.*) ABDUL RAHIM v. MUNICIPAL COMMISSIONER OF BOMBAY. **42 Bom. 462=(1918) M.W.N. 840=48 I.C. 63=23 C.W.N. 110=24 M.L.T. 297=20 Bom L R. 937=8 L.W. 648. (P.C.)**

——S. 297—*Power to prescribe regular line—Fresh line.*

Under S 297 as amended, the Municipal Commissioner has the power to prescribe a regular line on each side of the street and a fresh line in substitution for any line so prescribed or for any part thereof, though it may be to widen the street. An ambiguity in a clause of the Act should not be created or imagined for bringing in the aid of the preamble of the Act or the heading of the clause. (*Scott*, C.J. *and Batchelor*, J.) THE MUNICIPAL COMMISSIONER v. MANCHERJI **36 Bom. 405=12 I.C. 906=13 Bom. L.R. 1130.**

——Ss. 300 and 301—*Building line—Set forward—Compensation, right to.*

Where premises are compulsorily ordered to be set forward to the building line, the Corporation is not entitled to compensation from the owner of the premises for land which prior to the order vested in the corporation but which will be covered by the premises as ordered to be set forward. The fact that the Corporation has to pay compensation for the compulsory expropriation of an owner does not confer a right to a payment by the owner for compulsory impropriation. (*Lord Shaw.*) RATANLAL *v.* MUNICIPAL COMMISSIONER, BOMBAY. **43 Bom. 181=17 A.L J. 1=36 M L.J. 1=29 C.L.J. 138=9 L.W. 171=25 M.L.T. 108=21 Bom. L.R. 114=23 C.W.N. 441=48 I.C. 401=1 U P L R. (P C.) 31=(1919) M.W.N. 321 (P.C.)**

——S. 349-A—*Building—Commissioner can allow to be erected to any height.*

The words "except with the written permission of the Commissioner" in S. 349-A of the Act form a general exception to the regulations in Ss. 349-A and 349-B and the Commissioner if he thinks it proper, can allow building to be erected to any height. (*Scott*, C.J. *and Batchelor*, J.) ADVOCATE-GENERAL OF BOMBAY v. ISMAIL HASHAM. **61 I.C. 143=23 Bom. L.R. 188.**

——S. 349-B — *Building — Maximum height of.*

The words "maximum prescribed by S. 349-A" in S 349-B of the Act cover an alternative maximum, 70 feet or such other height as the Commissioner may authorize by written permit. (*Scott* C.J. *and Batchelor*, J.) ADVOCATE-GENERAL OF BOMBAY *v.* ISMAIL HASHAM. **61 I.C. 143=23 Bom. L.R. 188.**

BOMBAY CITY MUNICIPAL ACT (III of 1888), S. 349-B.

——S. 349-B—*Building—Meaning of.*

A small portion of a residential room such as an outlying bath room cannot be construed to be a building with in S. 349-B of the Act. Adding of such rooms is not building. (*Batchelor and Shah*, JJ.) KALIANJEE *v.* EMPEROR. 41 Bom. 741= 42 I.C. 134=18 Cr. L.J. 902= 19 Bom. L.R. 681.

——S. 379-A (1)—*Notice to abate to whom given—Overcrowding.*

A notice under S. 379-A (1) to abate the overcrowding must be given to the owner and not to the tenants to whom the building is let separately by the owner. (*Chandavarkar and Hayward*, JJ.) MUNICIPAL COMMISSIONER *v.* MATHURADAS. 36 Bom. 81= 11 I.C. 995=12 Cr. L.J. 459= 13 Bom. L.R. 640.

——Ss. 394 and 471—*Storing oil without license—Wrongful refusal of Commissioner to grant license.*

A wrongful refusal by Commissioner to grant license is no defence to a charge of storing oil without license. (*Shah and Crump*, JJ.) NARANDAS KARSANDAS *v.* EMPEROR. 45 Bom. 1076=61 I.C. 49=22 Cr. L.J. 321= 23 Bom. L.R. 353.

——S. 394—*Lessor and lessee—Liability of.*

The lessees and sub-lessees of certain premises used them for keeping bullocks which were meant for hire contrary to the provisions of S. 394. The use was known to the owner and the lease expressly provided against it. *Held*, the lessor, *i.e.*, the owner of the premises was guilty under S. 394. (*Batchelor and Rao*, JJ.) EMPEROR *v.* DADABHAI. 17 I.C. 532= 13 Cr. L.J. 788=14 Bom. L.R. 882.

——S. 394—*Bullocks kept by tenants—Liability of owner.*

Where A was joint owner of a place, part of which was let out to several tenants and the tenants kept bullocks on the place, some in huts and some in the open and they were plied for hire; but the place was not licensed by the Municipal Commissioner under S. 394 and A knowing that the bullocks were kept on the land allowed their keeping. *Held*, that A was guilty of an offence under S. 394 whether the bullocks were kept upon leased land or not (*Scott*, C.J. *and Russell*, J.) IMPERATOR *v.* TAYEBALI. 17 I.C. 529= 13 Cr. L.J. 785=14 Bom. L.R. 885 (n).

——Ss. 461 and 418—*Power to frame bye-laws—Bom. Mun. Bye-laws, Chap. III, Bye-law 4.*

The fourth bye-law prohibiting the use of unverified measure, whether correct or false, is *ultra vires* under S. 461 (*o*); the Corporation can prevent the use of false measures. If they are suspected to be false they should be verified. (*Batchelor and Shah*, JJ.) *In re* JIVRAJ DHANJI. 19 Bom. L.R. 358= 18 Cr. L.J. 701=40 I.C. 701=41 Bom. 580.

BOMBAY CIVIL COURTS ACT (XIV of 1869), S. 32.

——S. 515—*Nuisance — Magistrate can direct Commissioner not to issue license.*

A Magistrate acting under S. 515 of Bombay City Municipal Act can direct the Municipal Commissioner not to issue a license, if the effect of the grant would be to cause nuisance to residents in the locality. S. 515 gives the power in case of such nuisance to any resident to complain to the Court about such nuisance. In such proceedings, the owner of the premises should necessarily be made a party. (*Shah* A.J.C. *and Crump*, J.) THE MUNICIPAL CORPORATION, BOMBAY *v.* MALLANDAINE, 48 Bom. 241=25 Bom. L.R. 1321= 1924 Bom. 241.

——Part II of Sch. M—"*Oil (other sorts)*," *includes sweet oil and cocoanut oil.*

The words "oil (other sorts)" in Part II of Sch. M to the City of Bombay Municipal Act, include sweet oil and cocoanut oil. (*Shah and Crump*, JJ.) NARANDAS KARSANDAS *v.* EMPEROR. 45 Bom. 1076= 23 Bom. L.R. 353=61 I.C. 49= 22 Cr L.J. 321.

BOMBAY CIVIL COURTS ACT (XIV of 1869).

——S. 16—*Divorce Act—Dissolution of marriage, suit for—District Judge, power of to refer to Assistant Judge—Valuation of such suits.*

A District Judge has no power under S. 16 of the Act to refer to the Assistant Judge for decision, a suit under the Divorce Act for dissolution of marriage. Such suits are not capable of valuation. (*Scott*, C.J., *Davar and Beaman*, JJ.) THOMAS *v.* JULIA. 39 Bom. 136=26 I.C. 599=16 Bom. L.R. 754.

——S. 17—*Notification under.*

A notification under S. 17 confers power upon Assistant Judges personally and not upon their Courts so that even on transfer they have the same powers. Under S. 17, an empowered Asst. Judge can hear an appeal from a decree of an Asst. Judge. (*Scott*, C.J. *and Beaman*, J.) SHANTAPPA *v.* RAMCHANDRA, 19 Bom. L.R. 852=42 Cal. 825.

——S. 32—*Suit for injunction with regard to Municipal election—Secy. of State is a necessary party—Subordinate Judge cannot try the suit.*

In a suit being filed in the Court of a Subordinate Judge in Bombay for an injunction with regard to a Municipal election, the Secretary of State is both a necessary and a proper party, and hence the suit cannot be tried in that Court. (*Shah*, A.C.J. *and Coyajee*, J.) SECRETARY OF STATE FOR INDIA *v.* NARSIBAI DADABHAI PATEL. 25 Bom. L.R. 992=77 I.C. 241= 46 Bom. 43=1924 Bom. 65.

BOMBAY CIVIL COURTS ACT (XIV OF 1869), S. 32.

——S. 32—*Bombay Court of Wards Act* (1908), *S.* 3 (*e*).

A suit against Collector as Court of Wards under S. 3 (e) is one against a Govt. Officer in his official capacity and is triable exclusively by District Court according to S. 32, Civil Courts Act. (*Scott*, C.J. *and Chandavarkar*, J.) MISS J. DESILVA *v.* MISS D. J. S. MINZIS.
37 Bom. 313=17 I. C. 972=14 Bom. L.R. 1207.

BOMBAY CO-OPERATIVE CREDIT SOCIETIES ACT.

——S. 43—*Rule* 34 *framed under—Award—Execution of—Transfer of award—Civil Procedure Code, S.* 39—*Jurisdiction.*

A Court which can execute an award under rule 34 passed under S. 43 of the Bombay Co-operative Credit Societies Act can transfer it under the provisions of S. 39 of the Civil Procedure Code. (*Macleod* C.J. *and Shah*, J.) KRISHNA BARDE *v.* MAHADEO PATIL.
64 I. C. 337 (1)=23 Bom. L. R. 909.

BOMBAY COURT OF WARDS ACT (I OF 1905).

——Ss. 4 and 5—*Lunatic—Appointment of.*

A Civil Court cannot appoint a manager to a lunatic's estate when the Court of Wards can superintend it. After Civil Court's order adjudging a person to be lunatic, an application for appointing a manager lies to the Court of Wards. (*Pratt*, J. C. *and Hayward*, A. J. C.) DAYARAM CHATUMAL *v.* KHEMIBAI.
16 I. C. 678=6 S.L.R. 65.

——S. 14—*Notices—Publication in newspapers—Notice calling creditors.*

Notices under Ss. 13 and 14 are sufficiently published if they are printed in the Government Gazette in English and in the local newspapers in the Vernacular. Some further publication is desirable. (*Macleod*, C.J. *and Heaton* J.) SHANKAR *v.* SHIVABHAI.
55 I.C. 939=22 Bom. L.R. 223.

——S. 16, Proviso.

The proviso to S. 16 does not prevent the claimant from using the letter as acknowledgment to start a fresh period of limitation as under S. 19, Limitation Act, though the offer made by Collector cannot be proved in a suit by the claimant if he does not accept the offer. (*Macleod*, C.J. *and Heaton*, J.) SHIVAJIRAO *v.* HARI. **22 Bom. L R. 943=58 I.C. 319=44 B. 871.**

——Ss. 31, 32—*Application—Gujrat Talukdars.*

The sections apply to a suit against a Gujrat Talukdar where estate is under Talukdari Settlement Officer constituting Court of Wards. (*Heaton*, J.) HARGOVIND *v.* BAI BAI HIRBAI,
22 Bom. L.R. 619=58 I.C. 205=44 B. 986.

BOMBAY DISTRICT MUNICIPAL ACT (III of 1901).

——Ss. 31 and 32—*C.P.C., S.* 92—*Notice and naming of guardian—Suits relating to charitable trust.*

Neither the omission to give the statutory notice required by S. 31 of the Act nor the omission to name, the Court of Wards as guardian from the commencement of the suit vitiates an otherwise properly instituted suit against a Govt. Ward under S. 92 of C.P.C. (*Scott*, C.J. *and Heaton*, J.) AMIN SAHEB *v.* MASLEUDIN. **40 Bom. 541=37 I.C. 186=18 Bom. L.R. 363.**

——S. 32—*Applicability to pending suits.*

S. 32 of the Act was not intended to be applicable to pending suits. (*Scott*, C.J. *and Batchelor*, J.) HARI GOVIND *v.* NARSINGH RAO. **38 Bom. 194=23 I.C. 123=16 Bom. L.R. 26.**

BOMBAY DISTRICT MUNICIPAL ACT (I OF 1901).

——*Octroi Schedule — Construction*—Ad valorem *duty.*

The Municipality claimed to charge on the plaintiff's goods, which were bales of cloth, an *ad valorem* rate on the value of the maunds according to their present value and not according to the value, appearing in the schedule of rates. The octroi schedule was divided into three columns ; in the 1st column were the names of various articles ; in the 2nd column was the rate per cent load ; in the 3rd column was the weight in maunds or price. For cloth the rate per cent load was 12 annas per every Rs. 100 or part of it. In the 3rd column the price was to be taken at Rs.500 per cent load of 16 maunds. *Held*, that Rs.500 was the limit value of a full cart load of cloth of all sorts and articles made of cotton, silk, etc., upon which the rate of 12 annas per cent was to be levied ; otherwise the amount of Rs. 500 in the third column has no meaning. If it is considered desirable in the interests of the Municipality that certain articles should be charged on their actual value *ad valorem*, it would certainly be necessary to add to the schedule, rules prescribing how the real value of these goods was to be ascertained. It would also be necessary to set up the proper machinery for arriving at such valuation. (*Macleod*, C.J. *and Crump*, J.) LAXMI CHAND JAVERMAL *v.* THE MUNICIPAL COMMITTEE OF NANDURBAR. **74 I.C. 205=1923 Bom. 413.**

——*Provisional order—Effect of.*

The applicant should not be restrained from proceeding with his work simply because a provisional order expressly limited to one month is issued months or years earlier. (*Scott* C.J. *and Batchelor*, J.) AHMEDABAD MUNICIPALITY *v.* RAMJI KUBER.
36 Bom. 61=12 I.C. 551=13 Bom. L.R. 914.

BOMBAY DISTRICT MUNICIPAL ACT (III of 1901).

——*T.P. Act, S. 54.*

A mere contract to sell immoveable property is incapable of creating any interest in or charge upon the property under T. P. Act, S. 54. (*Fawcett* J.C. *and Raymond*, A.J.C.) HEMUMAL *v.* COMMITTEE. 14 S.L.R. 22 = 58 I.C. 591.

——*Municipality—Compensation— Liability to pay, when arises.*

A Municipality is not liable to pay compensation to an householder ordered by it to leave vacant a strip of land between the front of his house and the street except when the vacant land is included in the street. (*Pratt*, J.C. *and Boyd*, A.J.C.) MUNICIPALITY *v.* MAHOMED. 33 I C 675 = 9 S.L.R. 126.

——S. 3 (7)—*Building includes a 'compound wall.*

(*Macleod*, C.J. *and Shah*, J.) EMPEROR *v.* RAMRAO ABAJI PRABHU. 45 Bom. 1151 = 23 Bom. L R. 831 = 22 Cr. L.J. 622 = 63 I.C. 158.

——S. 3 (7)—*Building—Meaning of—Wire fence.*

A wire fence is neither a "wall" nor an "enclosure" and is not a building under S. 3 (7) of the Act. The word "enclosure" used in the definition of "building" must be interpreted *ejusdem generis* with the preceding words "hut" and "shed" (*i.e.*) must be taken to refer to some fabric or structure or thing built in the more popular acceptation of the word. *Batchelor and Shah*, JJ). EMPEROR *v.* RANCHHODLAL. 41 Bom. 563 = 19 Bom. L.R. 521 = 41 I.C. 656 = 18 Cr. L.J. 832.

——S. 3 (12)—*Open space abutted by houses is a street.*

A vacant space with houses leaving upon it and used by the occupiers of the houses as a means of access is a street within S. 3 (12) of the Bombay District Municipal Act. (*Shah*, A. C.J. *and Crump*, J.) DAYABHAI LALLUBHAI *v.* AHMEDABAD MUNICIPALITY.
25 Bom. L.R. 1218 = 1924 Bom. 116.

——Ss. 3 17, 14 and 59—*Trollies on rails in municipal street.*

Trollies running on rails in the streets of a Municipality pushedor pulled by hand and used by contractors for the purpose of carrying material to fill up a tank are 'vehicles'. They are subject to the wheel tax under the District Municipal Act. (*Heaton and Shah*, JJ.) DAYA BAI *v.* PESTONJI.
27 I. C. 497 = 17 Bom. L.R. 63.

——Ss. 11 and 22 (4)—*Rules* 21 (3) *and* 22 (1)—*Error in list of voters—Corruption—Paying voters carriage hire.*

The scrutiny of votes are required by Rule 21 (3) is to be made at the special general meeting convened for that purpose. An error in a list of voters giving the name of a voter

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twice by mistake does not invalidate the election unless there is evidence that the error was corruptly caused. The hiring of carriages for the convenience of the voters does not amount to corrupt practice under r. 22. (*Pratt*, J.C.) RAHIM BASRIE *v.* WALI MAHOMED.
49 I. C. 394 = 12 S.L.R. 73.

——S. 40—*Water rate under S.* 71 (1) (*b*). —*Section does not apply.*

S. 40 does not apply to water rate under S. 71 (1) (*b*) though it is a contractual charge. (*Fawcett*, J. C. *and Kemp*, A. J. C.) COMMITTEE OF MANAGEMENT OF HYDERABAD *v.* SETH RAMCHAND. 16 S L.R. 98 = 1923 Sindh 1.

——S. 42—*Misapplication—Meaning of.*

S. 42 of the Act was not restricted to misapplication by councillor or councillors, but it applies to any misapplication made by whomsoever. (*Batchelor and Hayward*, JJ.) MANI LAL *v.* SECRETARY OF STATE.
40 Bom. 166 = 33 I. C. 428 = 17 Bom. L.R. 1115.

——S. 46—*Rules and bye-laws of Ahmedabad Municipality—Rule* 74 *is not* ultra vires.

R. 74 of the Rules of the Ahmedabad Municipality is not *ultra vires*. Under it the Municipality is entitled, for any particular year, to such amount as house and property tax as is determined at the beginning of the year and not any increase determined subsequently. In case of increase in contravention of R. 74, the assessee should pay only the amount fixed for the next preceding year. (*Shah and Crump*, JJ) AMBALAL SARABHAI *v.* AHMEDABAD MUNICIPALITY.
45 Bom. 611 = 60 I. C. 578 = 23 Bom. L.R. 48.

——Ss. 46 and 167—*Dismissal of a Secretary comes under the Act.*

As S. 46 confers power upon a Municipality to dismiss its officers and servants, dismissal of a Municipal Secretary comes under the Act according to S. 167 and hence a suit for damages by him is barred if instituted after more than 6 months from the date of dismissal. (*Scott, C. J. and Shah*, J) MUNICIPALITY OF RATNAGIRI *v.* VASUDEO BALKRISHNA.
39 Bom. 600 = 30 I. C. 390 = 17 Bom. L.R. 652.

——S. 48 (f)—*Bye-law as to Census of school going children is not* ultra vires—*Legality of*—*Bombay. Primary Education Act* (*I of* 1918).

The powers of a Municipality to frame bye-laws under S. 48 of the Bom. Dt. Mun. Act are not in any way curtailed by the powers conferred under S. 18 of Act I of 1918 upon the Local Government to frame rules for the purposes of the Act. Bye-laws 4 and 5 framed under S. 481 (*b*) or the Bom. Dt. Mun. Act are

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not *ulra vires*. Under that Act read with the rules framed by the Local Govt. under that Act it is incumbent upon the Municipality to keep a register of the children of school going age ; and with an object to fulfil that obligation it is open to the Municipality is free to frame a bye-law which would enable them to take a census of such children within the municipal area. In order to keep such a register certain information would be necessary and the Municipality are entitled under S. 48 (*b*) of the Act to take the power to demand such information from persons living within the municipal area. Where a notification of a Municipality never received the sanction of the Government nor was it published in the Gazette it is open to the Municipality to rescind or cancel it by a subsequent resolution without reference to the Local Government. (*Shah and Kajiji*, JJ.) EMPEROR v. PARSHOTTAM JAGJIVAN.

25 Bom. L.R. 767=77 I.C. 186=1924 Bom. 47.

——S. 50-A—*Claim—Adverse decision by Survey Officer—Suit against Municipality—Govt. if necessary party.*

The mere fact that Govt. has an interest in all public streets vested in Municipalities is not a ground for holding that Govt. is a necessary party to a suit by a private individual adversely affected by the decision of a Survey Officer under S. 50-A of the Bom. Dt. Mun. Act. (*Shah*, A.C.J. *and Crump*, J.) BAI PARVATI v. THE NADIAD MUNICIPALITY.

25 Bom. L.R. 63=47 Bom. 315=1923 Bom. 459.

——S. 50-A—*Suit under—Secretary of State is a necessary party.*

The suit contemplated by S. 50-A (2) of the Bombay Act III of 1901 is one as between a private party and the Municipality and the Secretary of State is not a necessary party thereto. In the course of a Govt. survey of a municipality under S. 50-A of the Bombay District Municipalities Act the Survey Officer decided that a certain disputed plot of land was a 'street land' within the meaning of S. 3 (2) of the Act and this decision was confirmed by the Collector. The alleged owner of the land sued the Municipality for declaration of his title without impleading the Secretary of State. *Held* that the suit was maintainable. (*Shah*, A.C.J. *and Crump*, J.) NATHALAL RAMDAS v. THE NADIAD MUNICIPALITY.

47 Bom. 306=25 Bom. L.R. 58=1923 Bom. 456.

——S. 59—*Assessment to tax—Different plots of land forming parts of the same survey number leased to different tenants.*

Where a person owned two survey numbers, which he divided into several small plots and let them to different tenants who built their own houses upon the sites, *held* (1) that the Municipality could not levy a rate which would include the rate on the building and land and

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a second rate on the land itself but the Municipality could only levy a tax on the land and building together or on the land and the building separately, (2) that even if the Municipality levied a rate on the land, they could do so only on each plot beneath each building and not on the whole survey numbers. (*Macleod*, C.J. *and Shah*, J.) SHOLAPUR MUNICIPALITY v. SHANKAR,

64 I. C. 177=23 Bom. L.R. 1018.

——S. 59 (2)—*Vehicle tax—Vehicle kept outside but plying for hire within municipal limits is not liable to tax.*

A vehicle kept outside the municipal limits but plying for hire inside the municipal area is not liable to pay wheel tax under S. 59, clause (2) of the Act. (*Macleod*, C.J, *and Heaton*, J.) SURAT MUNICIPALITY v. MANEKLAL ITCHARAM AND CO.

22 Bom. L.R. 1104=59 I.C. 389.

——S. 59 (b) (vi)—**Proviso**—*District Municipality—Special sanitary cess—Construction of main sewer by Municipality—Connection between house and sewer at plaintiff's expense.*

The Municipality constructed a main sewer along the road by the side of which the plffs., had private latrines which were previously cleansed by manual labour. Later on the plaintiffs connected them to the main sewer of the Municipality at their own expense. The Municipality thereupon levied special sanitary cess for the connection from the plffs, under the provisions of S. 59 (*b*) (vi) of the Bombay District Municipal Act, 1901. The plaintiffs, having sued to recover the amount of the cess levied from them. *Held*, dismissing the suit that the Municipality were entitled to levy a special sanitary cess from the plaintiff. (*Macleod*, C. J. *and Heaton*, J). AHMEDABAD MUNICIPALITY v. GUJERAT GINNING AND MANUFACTURING CO. **22 Bom. L.R. 747=57 I.C. 433=44 Bom. 527.**

——Ss. 60, 71 (1) (b) and 46 (1)—*Water rate—Rules—Publication.*

Plaintiff sued the committee of management of Hyderabad for the refund of charges paid for supply of water by the Municipality to a private connection to his house on the ground that the rules were not first published under S. 60. *Held* apart from the words subject to the provisions of Chapter VII rules under S. 46 (1) do not require preliminary publication for the purpose of inviting objections but merely require the sanction of the Governor in Council or the Commissioner under proviso (*a*) to S. 46. The words "subject to the provisions of Chapter VII" cannot in themselves make the provisions of S. 60 applicable to cases of water rate under S. 71 (1) (*b*) which is outside the particular one dealt with, namely, the case where the Municipality proposes to impose a tax. The main provision in the rules under S. 46 (1) and S. 71 (1) is that Municipality will supply water to private persons on certain

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terms and this clearly makes an offer to such private persons to supply them with water on the terms laid down and the water rate revised is a contractual charge. (*Fawcett*, J. C. *and Kemp*, A.J.C.) COMMITTEE OF MANAGEMENT OF HYDERABAD *v.* SETH RAMCHAND.
16 S.L.R. 98=1923 Sind 1.

——S. 76—*Ahmedabad Municipality Rule 84—Goods brought in by post man—Octroi duty—Inspection of books.*

Goods brought into the walled city of Ahmedabad through the agency of the Post Office are liable to octroi duty. The terms of Sec. 76 (1) (*b*) do not permit a Municipal Officer to claim inspection of the private account books of merchants. (*Scott*, C. J. *and Davar*, J.) AHMEDABAD MUNICIPALITY *v.* SAKAR CHAND.
28 I. C. 480=17 Bom. L R. 182.

——Ss. 82, 83 and 86—*Arrears—Bill not in proper order—Distress warrant terms—Legality of.*

A Bill to recover the arrears of house-tax served upon a person does not comply with S. 82 (2) (*b*) (ii) of the Dist. Mun. Act, 1901, if it does not specify the time within which an appeal may be preferred under S. 86 of the Act. In such a case the issue of a distress warrant on failure to pay the arrears is illegal, the right of distress depends upon the observance of the statutory formalities it being a right conferred by the statute only upon those conditions. (*Scott*, C. J. *and Davar*, J.) SURAT CITY MUNICIPALITY *v.* CHHABILDAS DHARAM CHUND. 27 I. C. 573=16 Bom. L R. 749.

——S. 90 (3)—*Notice to level road—Manner of execution not specified—Notice is not valid—Validity.*

Where the manner of executing is not mentioned as required by S. 90 (3) but notice requires the person to level the road, channel it and light it, the notice is vague and indefinite and is unenforceable. (*Shah*, A. C. J. *and Crump*, J.) DAYABHAI LALLUBHAI *v.* AHMEDABAD MUNICIPALITY.
25 Bom. L.R. 1218=1924 Bom. 116.

——S. 92—*Set back—When can be ordered.*

Where the conditions contemplated by S. 92 of the Act do not exist, no set back can be obtained by the Municipality and an owner can rebuild in spite of the condition to set back laid down by the Municipality and can restrain the latter by injunction from pulling down the house built in contravention of such condition. (*Scott*, C. J. *and Davar*, J.) BAI FATMA *v.* RANDER MUNICIPALITY. 38 Bom. 597=23 I. C. 411=16 Bom. L. R. 529.

——Ss. 92, 160—*Contract Act, S.* 50.

To make a contract binding price is of the essence; and where it is unascertainable S. 50 of the Contract Act is inapplicable and consequently invalidates a sale. (*Fawcett*, J. C. *and Raymond*, A. J. C.) HEMUMAL *v.* COMMITTEE. 14 S.L.R. 22=38 I. C. 591.

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——Ss. 92 and 96—*Reconstruction of old buildings—Omission to give notice.*

Notice or permission is required in the case of all buildings whether on a public road or in a private *mohala*. S. 96 of the Act does not empower the Municipality to deprive the owners of the legitimate use of their lands or to refuse permission to build at all, but confers a power of regulating the buildings with a view to secure their safety and sanitation. (*Pratt*, J.C. *Hayward*, A.J.C.) KHUSALDOSS MOOLCHANDA *v.* EMPEROR. 44 I.C. 346=19 Cr. L.J. 330=11 S.L R. 90.

——Ss. 96 and 3 (7)—*Erection of wall on old foundation—Permission necessary.*

Rebuilding of a wall from its foundation is equivalent to "Building" under the Act and Committee's permission is necessary. (*Macleod* C.J. *and Crump*, J.) THE BANDRA CITY MUNICIPALITY *v.* D' MONTE.
76 I C. 478=1923 Bom. 407.

——Ss 93 and 36 (2)—*New buildings—Permission by Public Works Committee—General Board can cancel permission.*

The plff. who wished to made additions to his existing building obtained permission to build under S. 96 of the Bombay District Municipal Act 1901, from the Public Works Committee of the delt. Municipality. On an application by the plff.'s neighbour, the permission was later on recalled by the General Board of the Municipality. The plff. having sued for a declaration that he was entitled to build in accordance with the permission once granted:—*Held* by *Macleod*, C.J. *and Fawcett*, J., that the General Body of the Municipality had power to cancel or revoke the permission to build granted by the Public Works Committee either of its own motion or on the application of a person injuriously affected thereby. *Held, by Shah*, J., concurring, that the power so exercised was subject to the qualification that the cancellation or revocation was otherwise consistent with the provisions of S. 96 of the Bombay District Municipal Act 1901. 19 Bom. L. R. 65; 20 Bom L.R. 756; 23 Bom. L.R. 244; Rel. (*Macleod*, C.J. *Shah and Fawcett*, JJ.) MULJI TRIBHOVAN SEVAK *v.* THE DAKOR MUNICIPALITY.
46 Bom. 663=24 Bom L.R 178=69 I.C. 18=1922 Bom. 247.

——Ss. 96 and 97—*Erection of huts—Permission of Municipality not obtained—Offence.*

The acoused was charged with an offence punishable under S. 96 (5) of the Bombay District Municipal Act for erecting huts on his land without permission of the Municipality. The trying Magistrate being of opinion that

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the accused had committed no offence under S. 93 altered the charge and convicted him under S. 97 read with S. 155 of the Act. The accused having applied in revision. *Held*, setting aside the conviction, that the Magistrate was not competent to alter the charge in the manner he did. (*Macleod*, C.J. *and Shah*, J.) EMPEROR *v.* MATUBHAI M. SHAH.

46 Bom. 657=24 Bom. L R. 108=66 I.C. 323=23 Cr. L.J. 259=1922 Bom. 97.

——Ss. 96, 113—*Projections—Biggar projection built than that sanctioned—Notice to demolish—Delay—Bom. Dist. Municipal Act*, (VI *of* 1873), *Ss.* 33 and 42.

The plff. obtained permission from the Municipality on 4—10—'97 to erect a projection of certain size. He erected a projection of a larger size and so on 13—6—'98 the Municipality gave him notice to remove the projection and on his failure to comply, prosecuted him under S. 33 of the Act (VI of 1873) but the prosecution failed. The plff. asked the Municipality for cancellation of the notice but the question was left to a Sub-Committee and it did nothing; on 23—7—'14 the Municipality again served him with a notice under Ss. 113 and 96 on which he sued the Municipality for injunction restraining them from cutting the projection. *Held*, that as the projection did not come within Ss. 11, 3 (3) and there was delay of 16 years, the injunctions should be granted, that the notice of 23—7—'14 was invalid and the Municipality had no right to remove the projection by executive action. Scope of Ss. 113 and 96 discussed. Old law on the point considered. (*Macleod*, C.J. *and Fawcett*, J.) AHMEDABAD MUNICIPALITY *v.* MANILEA CHAGANLEAL SHAH. **62 I C. 913=23 Bom. L R. 193.**

——S. 96—*Question of title is irrelevant-Permission to build.*

Permission to build once granted under S. 96, cannot be revoked. (Per *Crump, J.*) For the purposes of S. 96, Bombay District Municipal Act, the question of title is altogether irrelevant. Therefore a flaw in the applicant's title is no ground for refusing permission and once the permission is given it cannot be cancelled. (*Shah and Crump*, JJ.) MUNICIPALITY OF SHOLAPUR *v.* ABDUL WAHAB SHAIK CHAND. **23 Bom. L.R. 244=61 I.C. 428=45 B. 797.**

——S. 96—*New building—Addition of otla to existing building—No permission.*

Where a person builds an *otla* to his house without permission under S. 96 of the Act, he is liable to have the *otla* removed at the instance of the Municipality independently of the question whether the *otla* is built on his land or on a land forming part of the public street. (*Macleod*, C.J. *and Heaton*, J.) THE VIRAMGAM MUNICIPALITY *v.* BHAICHAND DAMODAR. **44 Bom. 198=55 I.C. 318. 22 Bom. L R. 61.**

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——S. 96—*Rebuilding of house—Permission granted—Time limit*—Ultra vires.

If the work of rebuilding is begun within six months allowed by the permission under S. 96, the owner commits no offence. Although the Municipality has power to say that a work to which it gave permission under S. 96 of the Dt. Municipalities Act should be begun within a certain time it is doubtful whether it has power to say that a work must be finished within a given time. Per *Hayward*, J.—The time of limitation contained in the permission for rebuilding was *ultra vires* and a limitation was not contemplated by the legislature in enacting S. 96 in its present form in Bombay Act II of 1904. (*Heaton and Hayward*, JJ.) GODHRA MUNICIPALITY *v.* HARILAL.

20 Cr. L.J. 438=51 I.C. 262=21 Bom. L.R. 255.

——S. 96—*'Conversion of any building'—Meaning of.*

The words 'conversion of any building' in Explanation to S. 96 necessarily imply some change in the building itself. The section will not apply if the building remains absolutely unchanged and the only thing that is changed is the use or occupation to which the building is put. Conversion of a shop into a dwelling house does not fall under the section. (*Heaton and Shah*, JJ.) ADURJI *v.* EMPEROR.

28 I.C. 517=17 Bom. L.R. 212=16 Cr. L.J. 293.

——S. 96—*Order prohibiting doors to project into street, legality of.*

A Municipality is under S. 96 competent to order the owner of a house to construct the doors of his house in such a way as not to project into the street. (*Pratt*, J.C. *and Boyd*, A.J.C.) MUNICIPALITY OF KARACHI *v.* MAHOMED ALI. **33 I.C. 675=9 S.L.R. 126.**

——Ss. 96, 113 and 122—*Departure from plans submitted.*

It is only those departures from the plans submitted that involve also disobedience to a legal order or the infringement of a bye-law or of some provision of the Act that justify an action on the part of the Municipality. No order as to the manner in which the doors and windows are to be opened can be legally issued under S. 96 of the Act. Ss. 113 and 122 do not apply where an obstruction is merely apprehended. (*Crouch*, A.J.C.) MAHOMED ALI ESSAJI *v.* KARACHI MUNICIPALITY.

20 I.C. 572=7 S.L.R. 31.

——S. 96 (2) (3)—*Permission—Revocation—Injunction.*

Held that the first order made by the Municipality granting permission to build the privy was a final order under S. 96 (2) of the Act and the subsequent order which purported to be provisional in its character, was therefore not legal. Consequently the plff. was entitled to the injunction claimed, he having commenced

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the work within a year under S. 96 (1) of the Act. (*Shah and Marten*, JJ.) VITHAL *v.* THE ALIBAG MUNICIPALITY.
42 Bom. 629=47 I. C. 146=
20 Bom. L.R. 766.

——Ss. 96 (2) (3) and (4) (a)—*Provisional order—Contravention of—Building.*

Where plff. applied to the Municipal Committee for permission to build a house and balconies and he was informed that the matter was referred to Managing Committee and that till then he should not build balconies. One year after, receiving no reply, plff. built the balconies, reported the matter to the Municipality who asked him to demolish the balconies. Plff. sued for injunction. *Held*, the order prohibiting the construction of balconies was valid for one month only and that plff. need not demolish the building. "Any provisional order" in S. 96 (4) (*a*) (II) refers only to a subsisting provisional order. (*Scott*, C.J. *and Batchelor*, J.) AHMEDABAD MUNICIPALITY *v.* RAMJEE KUBAR. 36 Bom. 61=12 I C. 551=
13 Bom. L R. 914.

——S. 96 (2)—*Scope of—Power of Municipalities to regulate buildings.*

The powers of Municipalities as under S. 96 (2) are very wide and are subject to two restrictions, *viz.*, (1) the orders should be reasonable and (2) that orders should not be inconsistent with the Act. (*Pratt*, J.C. *and Boyd*, A.J.C.) MUNICIPALITY OF KARACHI *v.* MAHOMED ALI ESSAJI. 33 I.C. 675=9 S.L.R. 125.

——S. 96 (5)—*Order under the section final and irrevocable.*

An order issued under the Act to build a house cannot be rescinded or varied from time to time. The whole tenor of the section is to consider the merits of the application and pass order once and for all. A conviction under a fresh order for non-compliance was held illegal. (*Batchelor and Shah*, JJ.) KARIM RANJAM KHOJI *v.* EMPEROR.
19 Bom. L.R. 65=39 I.C. 298=
18 Cr. L J. 488.

——S. 96 (6)—*Amended—Meaning.*

The word 'amended' in S. 96 (6) is wide enough to cover any demolition necessary to alter a building to make it comply with the Act or the bye-law contravened. (*Macleod*, C.J. *and Fawcett*, J.) AHMEDABAD MUNICIPALITY *v.* MANILAL CHAGANLAL SHAH.
62 I.C. 913=23 Bom. L.R. 193.

——S. 96 (7)—"*Erecting a building*"—*Meaning of—Re-construction—Constructing side wall on old foundation.*

The re-construction of a small wall upon its own foundation is not necessarily the "erection of a building" within S. 96. (Per *Heaton*, J.) (*contra Chandavarkar*, J.) "Building" as contemplated by S. 96 is the whole house and not a single wall of the house which is only a

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part of a building. It is a question of fact whether the re-construction of any particular wall or portions of a building is substantially a re-construction of the building. (*Scott*, C.J. *Chandavarker and Heaton*, JJ.) EMPEROR *v.* BRAZ H. DE'SOUZA. 35 Bom. 412=
11 I.C. 610=13 Bom. L.R. 494=
12 Cr. L.J. 426.

——S. 106 (c) (3)—*Land Acqn. Act*, S. 23, *cl.* (2)—*Award of compensation by Dt. Court—Procedure—Revision.*

The Dt. Court deciding the amount of compensation under S. 160, cl. (3) of the Bom. Dt. Munl. Act acts as a Civil Court and its proceedings are open to revision under S. 115 of the C.P. Code. The word "procedure" in S. 160, cl. (3) of the Act is used in a popular and not in a strictly legal sense and a Dt. Court in awarding compensation under that section can award 15 per cent. of the market value in addition to such value. (*Pratt*, J.C. *and Crouch*, A.J.C.) HYDERABAD MUNICIPALITY *v.* MOORIJMAL MUSHTAK RAM.
44 I.C. 363=11 S.L.R. 93.

——Ss. 113 and 122—*Bye-laws—Chapter* XIV—10 (3)—*Shop boards projecting over public street—Tax.*

Under S. 113 it is open to a Municipality to prescribe rules for projections on public streets and a bye-law to that effect is not *ultra vires*. (*Shah and Marten*, JJ.) NAGINDAS CHABILDAS *v.* EMPEROR. 42 Bom. 454=
20 Bom. L.R. 388=45 I C. 503=
19 Cr. L.J. 589.

——Ss. 113 and 122—*Encroachment for over* 12 *years—Statutory conditions—Strict compliance essential.*

Under Ss. 113 and 122 of the Bom. Dt. Munl. Act, it is immaterial if the encroachment existed for more than 12 years. The statutory conditions for exercising power under either section must be shown to exist. (*Scott*, C.J. *and Heaton*, J.) THE DAKORE TOWN MUNICIPALITY *v.* ANUPRAM HARIBHAI TRAVADE.
38 Bom. 15=21 I.C. 313=15 Bom L.R. 833.

——Ss. 122 and 155—*Projection—Notice to remove—Disobedience—Penalty.*

Where an accused was served with a notice under S. 122 of the Bom. Dt. Mun. Act to remove an *otla* and was convicted under S. 155, *held* that the accused cannot be convicted under S. 155 of the Act of having disobeyed a lawful order. S. 122 gives no power to a Municipality to issue a notice to a person alleged to have effected an encroachment to remove it. Although the Municipality may send such a notice, it is not a notice under the section, such a notice might be sent as a matter of courtesy, preliminary to the Municipality taking action under the powers given them by the section to remove the encroachment themselves. (*Macleod*, C.J. *and Coyajee*, J.) ATMARAM SHAMJI *v.* EMPEROR.
24 Bom. L.R. 384=66 I.C. 817=
23 Cr. L.J. 321=1923 Bom. 30 (1).

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———S. 122—*Public street—Encroachment—Adverse possession.*

The site of an encroachment on the public street existing for over thirty years, no longer forms part of the street but belongs to the party who has been in adverse possession thereof and the Municipality cannot take action under S. 122 of the Act. (*Macleod* C.J. *and Shah*, J., *Dubitante*,) ABAJI RAGHU *v.* JALGAON MUNICIPALITY. 22 Bom L.R. 1028.

———S. 122—*Verandah standing on part of public street.*

When a verandah is standing on part of a public street for more than thirty years the Municipality cannot issue notice under S. 122 for its removal as the owner of verandah gets title to the site under it by virtue of S. 28 and Art. 146-A, Limitation Act. (*Macleod*, C.J. *and Heaton*, J.) TAYABALI ABDULLAHBHAI *v.* DOHAD MUNICIPALITY. 58 I C. 326= 22 Bom. L.R. 951.

———S. 142 (1)

A person found selling at a beef-stall meat unfit for human consumption may be ordered by the Municipality to destroy the unwholesome meat but the Magistrate cannot convict the person under S. 142 (1). (*Shah and Kajiji*, JJ.) EMPEROR *v.* HAJI ABOO.
22 Bom. L.R. 889=58 I C. 157.
21 Cr.L.J. 733=46 Bom. 193.

———S. 145-A—*Permission to build on old wall—Pulling down a wall—Withholding of permission.*

Plaintiff wanted to build another storey on his western wall, and got permission. According to a compromise in a dispute with his neighbours he agreed to build further back to which the Municipal Committee did not give permission. The plaintiff therefore began to follow out his old plan to which the Municipality objected. *Held*, the objection was factious. The Municipality was not entitled to object to the rebuilding of the old wall where it stood with the addition to which it had given permission. (*Macleod*, C.J. *and Shah*, J.) THE BANDRA MUNICIPALITY *v.* JOHN C. DE. MELLO.
1922 Bom. 432=1922 Bom. 344 (1).

———S. 151—*Ingredients of offence.*

For a conviction under the section, it should be proved (i) that a notice has been given to accused under sub-section (1) and (ii) that he uses the place in question or permits it to be used in the manner specified; the mere fact that notice in due form was given regarding the user of the place on a particular date cannot be conclusive evidence that there has been user of the place in such a manner as to be a nuisance after that date. (*Fawcett*, J.C. *and Crouch*, A.J.C.) LUINDARAM *v.* KARACHI MUNICIPALITY. 8 S.L R. 238=28 I.C. 111= 16 Cr. L.J. 255.

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———S. 151—*Notice—Conditions.*

A notice under S. 151 can be issued by the Municipality if it is satisfied that the smell which issues in the ordinary course of working the factory with ordinary care is so offensive as to cause annoyance to the neighbourhood. If annoyance is caused only by reason of improper user it must be actually dangerous to life, health or property. (*Crouch* A.J.C.) PAHLAJRAI CHAPUMAL *v.* KARACHI MUNICIPALTY. 9 I.C. 886=5 S.L.R 11.

———S. 151 (1)—*Nuisance—Lime kiln—Order by Municipality—Interference by Civil Court.*

A District Municipality can under S. 151 require the owner of a lime-kiln within Municipal limits to desist from carrying out or allowing to be carried out the intention to use it as a lime-kiln if it thinks that it is or is likely to be a nuisance to the neighbourhood. The Civil Court will not interfere with that power unless the Municipality is shown to have exercised it in an improper manner. It is only for the purpose of seeing whether the Municipality has exercised its power in the proper way that the Court will consider the evidence to see what steps the Municipality took before it issued the notice. The Court will not however deal with the question whether what is complained of by the Municipality is likely to be a nuisance and consider whether that particular use of land within the Municipal limits is a nuisance or is likely to become a nuisance to the neighbourhood. (*Macleod*, C.J.) NUR MAHOMED GULAM RASUL *v.* THE SURAT CITY MUNICIPALITY.
57 I C. 988=22 Bom. L.R. 838=44 B. 738.

———S. 151 (1) (o)—*Applicability of—Factory, Meaning of.*

In order that S. 151 (1) (*o*) may apply, it is necessary that an objectionable smell must arise in the usual course of the working of the manufactory. It is not sufficient if such smell may arise from negligent user. A flour mill worked by a camel is not a manufactory within the meaning of S. 151 (*o*). (*Crouch*, A.J.C.) PAHLAJRAI CHAPUMAL *v.* KARACHI MUNICIPALITY. 9 I.C. 886= 5 S.L.R. 11.

———Ss. 160 and 92—*Power to act.*

Where a party is precluded from exercising power under S. 92 of the Act S. 160 is inapplicable. (*Fawcett*, J.C. *and Raymond*, A.J.C.) HEMUMAL HARPALMAL *v.* COMMITTEE OF MANAGEMENT, HYDERABAD. 58 I.C. 891= 14 S.L.R. 22.

———S. 160 (3)—*Order of District Court under—Can be executed as a decree.*

An order of the District Court under S. 160 (3) of the Bombay District Municipal Act, 1901, can be executed as a decree. It is not necessary to make an application to the Court

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to pass a decree in accordance with the award. (*Macleod*, C.J. *and Crump*, J.) THE BROACH CITY MUNICIPALITY *v.* GULAM RASUL.
25 Bom. L.R. 305=72 I.C. 636=47 Bom. 664=1923 Bom. 289.

——S. 160 (3)—*Decision of Dt. Court—Revision.*

An application for revision is not allowed from the decision of a District Court under cl. 3 of S. 160. (*Batchelor and Shah*, JJ.) MUNICIPALITY OF BELGAUM *v.* RUDRAPPA SUBBA RAO. 40 Bom. 509=34 I.C. 21=18 Bom. L.R. 340.

——S. 160 (3)—*Order under—Appeal.*

The remedy suggested by a statute for the enforcement of the new rights created by it must be followed. Right of appeal cannot be assumed in every matter brought for consideration before a Judge, unless such a right is given by a statute or its equivalent authority. Hence no appeal lies from an order passed by the District Court under S. 160 (3) of the Act as it is not a decree, because it is made under a special jurisdiction created by the Act which does not call it so and not under Civil jurisdiction. (*Chandavarkar and Hayward*, JJ.) CHUNILAL VIRICHAND *v.* AHMEDABAD MUNICIPALITY. 36 Bom. 47=12 I.C. 540=13 Bom. L.R. 958.

——S. 160 (3)—*Acquisition of land—Temporary boom—Fancy value.*

In awarding compensation for acquisition of land under S. 160 (3) of the Act a boom in prices of lands existing owing to certain extraordinary circumstances must be taken into account in estimating the market value of the land to be acquired. Where a portion of land acquires a fancy value as being necessary for widening a street, no compensation is allowed for the severance of the same. (*Crouch*, A.J.C.) THE KARACHI MUNICIPALITY *v.* KHATAN MAL HIRANAND.
27 I.C. 326=8 S.L.R. 126.

——S. 161 (2)—*Order of Magistrate—Revision—High Court.*

The Magistrate referred to in S. 161 (2) of the Bombay District Municipalities Act is an inferior Criminal Court, and his orders are liable to revision by the High Court. (*Heaton and Shah*, JJ.) *In re* DINBAI JIJIBHOY KHAMBATA. 43 Bom. 864=52 I.C. 670=20 Cr. L.J. 702=21 Bom. L.R. 775.

——S. 167—*Deposit by contractor—Deduction from, by Municipality—Suit to recover is governed by section.*

S. 167 governs a suit to recover the amount deducted by a District Municipality for the non-performance of a contract from the deposit made by the contractor for the due performance of his contract entered into with the Municipality. (*Macleod*, C.J. *and Shah*, J.) BABAN *v.* CITY MUNICIPALITY, POONA.
65 I.C. 357=23 Bom. L. R. 881.

BOMBAY GENERAL CLAUSES ACT (I of 1904).

——S. 167—"*Anything done or purporting to be done*"—*Suit for injunction against Municipality—Notice, if necessary.*

The expression anything done or purporting to be done in S. 167 applies only where something has been done and not where there is mere apprehension that something will be done; therefore a suit against a Municipality to restrain an apprehended injury is not bad merely because no notice as required by the section was given as in such a case no notice is necessary. (*Kemp*, A.J.C.) VIRJI *v.* THE KARACHI MUNICIPALITY. 56 I.C. 527=14 S.L.R. 46.

——S. 167—*Suit on contract—Section, if applicable.*

S. 167 of the Bombay District Municipalities Act does not apply to an action brought on a contract. (*Fawcett*, J.C.) MUNICIPALITY OF TATTA *v.* ASSANMAL CHANDOOMAL.
29 I.C. 597=8 S.L.R. 294.

——S. 167—*Suit for injunction—Notice.*

Under S. 167 of the Act no notice is necessary before a suit for injunction is brought. 4 I.C. 1156, foll. (*Crouch*, A.J.C.) MAHOMED ALI ESSAJI *v.* KARACHI MUNICIPALITY.
20 I.C. 872=7 S.L.R. 31.

——S. 188, sub-S. 1—*Permission to build cannot be refused for an indefinite time.*

The accused applied to the Notified Area Committee for permission to build on his plot of land, but the Committee, purporting to act under r. 27 (5) of the Rules framed by the Government of Bombay, under S. 188, sub-S. (1) of the Bombay District Municipal Act, 1901, gave a model reply, "Permission refused". After waiting for one month, the accused built up his house, for which he was convicted for building his house without permission. *Held*, reversing the conviction, that the model reply in question was not proper as it refused permission for an indefinite period and all that the Committee could do under the rules was to pass a provisional order directing that for a period, which should not be longer than one month from the date of such order, the intended work should not be proceeded with. (*Macleod*, C.J., *and Shah*, J.) ARDESHAR JIVANJI MISTRI *v.* EMPEROR.
24 Bom. L.R. 102=66 I.C. 331=23 Cr. L.J. 267=1922 Bom. 221.

BOMBAY GENERAL CLAUSES ACT (I of 1904).

——*Person—Meaning of.*

The word "person" in S. 87 includes the Board, any officer or servant of the Board and any person acting under the orders of the Board. Therefore a suit brought against the Port Trust for anything done or purporting to have been done in pursuance of the Act must be brought within 6 months from the accrual of the cause of action. (*Leggatt*, A.J.C.) PRAG NARAIN BARGAVA *v.* KARACHI PORT TRUST. 10 I.C. 972=4 S.L.R. 236.

BOMBAY HEREDITARY OFFICES ACT (III of 1874).

———*Application to set aside alienation Effect.*

An application under the Act to set aside an alienation does not prevent adverse possession from continuing. (*Scott*, C.J. *and Beaman*, J.) MAGANCHAND *v.* VITHALRAO.
37 Bom. 37=17 I.C. 148=14 Bom. L.R. 793.

———Ss. 4 and 18—*Civil Courts—Mahar vatan—Suit by villagers to restrain mahars from taking away skins from dead animals—Bombay Revenue Jurisdiction Act* (*X of* 1876), S. 4 (*A*).

Plffs. residing in a village, sought an injunction to prevent the skins of their dead animals being taken away by the defts. who were village Mahars and claimed the right of taking away the skins as vatandars. *Held*, that the question, whether it was or was not a Mahar Vatan, as contended for, was within the jurisdiction of the Civil Courts and that the plffs. would be entitled to an injunction unless the Mahars should succeed in showing that it was a hereditary office as alleged by them. (*Heaton and Hayward*, JJ.) SAVLA *v.* SANTYA. **43 Bom. 277=48 I.C. 224=20 Bom. L.R. 993.**

———S. 4—'Vatan *Family*'—*Succession.*

A *vatan* family means the descendants of a common progenitor who was a *vatandar* and the male descendants of the brother of the grantee of the *vatan* property do not succeed in preference to the female descendants of the grantee of the *vatan* under S. 2 of the Bom. Act V of 1886. (*Scott*, C. J. *and Beaman*, J.) BAI LAXMI *v.* MOHAN LAL JAMIET RAM.
41 Bom. 677=42 I.C. 460=19 Bom. L.R. 780.

———S. 5—*Decree—Execution.*

Provision for payment of mortgage amount by Vatandar mortgagor by payment of annual sum out of profits or mortgaged lands is ineffective against the Vatandar's heirs after the death of the Vatandar. (*Fawcett*, J.) GANESH EKNATH KAULGI *v.* BHAWSAHEB BHAWANRAO. **46 Bom. 345=64 I.C. 208=23 Bom. L.R. 1037=1922 Bom. 110.**

———S. 5—*Sale in execution of a money decree against vatandar will bind reversioner.*

Where in execution of a money decree against a vatandar, his vatan lands were sold after his death and purchased by another vatandar of the same vatan, who obtained possession from the widow, *held* the sale in execution would bind the reversioners, as the alienation was a valid one for legal necessity under S. 5 of the Bombay Hereditary Offices Act. (*Macleod*, C.J. *and Shah*, J.) GANESH RAMCHANDRA KULKARNI *v.* LAXMIBAI VENKATESH NARAYAN.
46 Bom. 726=24 Bom. L.R. 249=67 I.C. 209=1922 Bom. 96.

BOMBAY HEREDITARY OFFICES ACT (III of 1874), S. 9.

———S. 5—*Mortgage decree—Provision for payment out of profits—Application in execution for recovery of whole from other property does not lie.*

Where a mortgage decree, provides satisfaction of the mortgage debt by payment of an annual amount out of the profits of the mortgaged lands it is not open to the decree-holder to apply to execute the decree, to recover the full amount by sale of other property in the hands of the judgment-debtor. (*Fawcett*, J.) GANESH *v.* BHANS SAHEB. **64 I.C. 208=23 Bom. L.R. 1037.**

———S. 5—*Mortgagee—Rights.*

Under S. 5 a mortgage of Vatan lands is valid during the life-time of the mortgagor only and on his death, the mortgagee in possession, becomes a trespasser with his lien of mortgage. (*Shah and Crump*, JJ.) KRISHNAJI SAKHARAM *v.* KASIM MOHIDDIN SAHEB.
22 Bom. L.R. 385=75 I.C. 76=44 Bom. 800.

———S. 5—*Vatan—Collector levying full assessment—Sale in execution.*

Where in consequence of a sale of vatan lands in execution of a decree against vatandar the Collector levied the full assessment and assigned it for remuneration of service, the land does not by reason thereof lose its character as vatan property. The purchaser at Court sale of vatan land in execution of a decree against the vatandar acquires only the right title and interest of the judgment-debtor and on the death of the latter his right under the Court sale ceases. (*Chandavarkar and Batchelor*, JJ.) SHIVRAM *v.* MAHADEV NARAYAN.
37 Bom. 81=17 I.C. 170=14 Bom. L.R. 797.

———Ss. 9, 11 and 11-A—*Alienation of Vatan—Declared void—Assessment to Revenue—Default—Forfeiture—Limitation.*

The defendants, predecessor-in-title alienated his vatan land to plaintiff and died subsequently. The defendants applied to the Collector to take proceedings for the protection of the vatan. Acting under S. 11 of the Bombay Hereditary Offices Act the Collector made a declaration on 5-10-1904, that the alienation was null and void. The Collector resolved to assess the land at a full rent and on 6-7-1908, the Collector held further proceedings and assessed the land at a rental of Rs. 75 per annum. On 15-3-1915, the Collector ordered forfeiture of the land owing to the default of the plaintiff in payment of arrears of rent then due. The plaintiff sued for a declaration that the order of forfeiture was invalid on the ground that the rent was due from 6-7-1908 when the assessment was fixed and on that footing, no arrears of rent had become due. *Held* that the assessment of land was an alternative to the summary resumption of possession and the order that the land was liable to assessment, means assessment from the date of the order; that S. 9, cl. 1 of the Act provided that an order giving the vatandars profits of

BOMBAY HEREDITARY OFFICES ACT (III of 1874), S. 11-A.

the vatan should have effect from the date of the Collector's order, and there was nothing in S. 11-A of the Act to the contrary; and that the plaintiff's suit was barred by limitation under Art. 14 of the Limitation Act. (*Pratt and Fawcett*, JJ.) DHONDI SUBHANE *v.* SECRETARY OF STATE FOR INDIA.
25 Bom. L.R. 765=1923 Bom. 478.

——S. 11 A—*Order of Collector is an order under—Bombay Revenue Jurisdiction Act, S. 4 (a), para. 3—High Court cannot interfere.*

An order of a Collector under S. 11 (*a*) of the Act directing a levy of full rent is an order within S. 4 (*a*), para. 3 of Revenue Jurisdiction Act and therefore the High Court has no jurisdiction to interfere with the order. (*Macleod*, C.J. *and Shah*, J.) DATTATRAYA KESHAV *v.* LAXUMAN CHIMNAJI.
64 I.C. 7=23 Bom. L.R. 561.

——S. 11-A—*Duty of Collector.*

An order by the Collector declaring an alienation void and authorising recovery of possession by the applicant is opposed to the Act as the Collector can only resume possession or assess the land. (*Scott*, C.J., *and Beamon*, J.) MAGAN CHAND *v* VITHAL RAO.
37 Bom. 37=17 I.C. 148=14 Bom. L.R. 793.

——S 18—*Vatan property.*

In the case of Vatan property, the distinction between grants of the royal share of the revenue and the grants of the soil cannot be conveniently made without detriment to the statutory restriction on the Vatandar's power of alienation and should not be made unless it is clearly justified by the terms of the grant. (*Shah and Hayward*, JJ.) AMRIT VAMAN *v.* HARI GOVIND. 44 Bom. 237=56 I.C. 411=22 Bom. L.R. 275.

——S 18—*Hereditary office dispute—Maharki Vatan—Arbitration—Award.*

Under S. 18 of the Bombay Hereditary Offices Act, 1874, a dispute as regards a Maharki Vatan was referred to a Panchayat. The parties however failed to nominate the panchas and thereupon the Deputy Collector asked the Mamlatdar to appoint them but the latter in his turn issued orders to the Head Karkun to get two panchas appointed by each party and himself to act as sarpanch. The Mahars appointed their panchas but the villagers declined to do so. When this fact was brought to the notice of the Mamlatdar, he ordered the Head Karkun to appoint two panchas under S. 18. The panchas were so appointed and the panchayat thus constituted made the award which was submitted to the Mamlatdar and was in due course approved of by the Deputy Collector. In a suit questioning the validity of the award *Held*, that the Panch was not constituted according to the procedure prescribed by S. 18 of the Bombay Heriditary Offices Act and the award was invalid. Having regard to S. 18 of the Act, it is not competent to a Civil Court to entertain a

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suit by the Mahar Vatandars to restrain the villagers of their village from delivering the carcases of dead animals and paying baluta to the mangs. (*Shah*, A.C.J. *and Crump*, J.) MAHADU KASHIB *v* KRISHNA TATYA MAHAR.
24 Bom. L.R. 917=68 I.C. 746=1922 Bom. 410.

——S. 36—*Civil Court—Declaration.*

A Civil Court has jurisdiction to try a suit for declaration that the plff. is the nearest heir of the deceased vatandar. (*Scott*, C.J. *and Shah* J.) SHANKER BABAJI KULKARNI *v.* DATTATRAYA BHIWAJI. 40 Bom. 33=30 I.C. 925=17 Bom. L.R. 725.

——S. 67 (d)—*Suit for a declaration—Bar of suit.*

The section bars a suit for a declaration that plff. is the head of a vatandar family and is thus entitled to share in vatan and the suit is therefore not cognizable by Civil Court. (*Chandavarkar and Batchelor*, JJ.) JIWAJI SAMBHAJI KAMBLI *v.* FAKIR SABAJI KAMBLI. 38 Bom. 420=15 I.C. 840=14 Bom. L.R. 395.

BOMBAY HIGH COURT CIVIL CIRCULARS.

——Ch. I, R. 55—*Expenses of witnesses—Pleader, if entitled to special rate.*

It is open to a witness to show that there are peculiar circumstances which entitle him to demand subsistance money or travelling allowance at a higher rate. The law does not allow for any special fee for witnesses in the District Courts on account of their status. It is different if a witness is called as an expert. A pleader who is merely called to give evidence as to what had occurred in a previous suit in which he was a pleader is not entitled to any special rate of subsistance allowance. (*Mecleod*, C. J. *and Shah*, J.) VALI ASMAL *v.* MALJI.
46 Bom. 89=23 Bom. L.R. 898=64 I.C. 78=1922 B. 116.

——Ch. II, R. 91 (16) (c)—*Execution of decree by Collector—Leave to bid and set off decree amount—Application.*

Where a decree is transferred to a Collector for execution, he has power to grant permission to the holder of the decree to bid for the property but it is the Civil Court alone that can give permission to set off the decree amount. (*Macleod*, C J. *and Heaton*, J.) MARTAND TRIMBAK *v.* DAYA APAJI.
22 Bom. L.R. 106=55 I.C. 527=44 B. 346.

——Ch. VII, R. 69—*Execution sale—What passes—Son's interest.*

In order to pass valid interest of a minor of a joint Hindu family, to its purchaser, the rule requires the mention of such circumstances in the proclamation. Where through a mistake a certificate of sale in execution contained the property of the minor sons, of which a slip was added to the proclamation, the sons' shares did

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not pass to the purchaser. (*Macleod*, C.J. *and Heaton*, J.) SHANKAR GOVIND *v.* PARASHARAM JANARDHAN. 58 I.C. 391= 22 Bom. L.R. 970.

BOMBAY HIGH COURT RULES (APPELLATE SIDE).

——R. 1—*Single Judge—Power to stay suit pending in the mufassal.*

A single Judge on the Original Side of the High Court is not competent to stay the hearing of a suit pending for trial in a Subordinate Judge's Court in the mufassal unless authorised to do so by a rule. (*Scott*, C.J., *Batchelor*, *Macleod*, *Shah and Hayward*, JJ.) NARAYAN VITHAL *v.* JANIBHAI SITARAM. 39 Bom. 604= 30 I C. 560=17 Bom. L.R. 655 (F. B.).

——R. 65—*Pleader's fee—Assessment of.*

For assessing the Pleader's fees, an appeal to the High Court from a preliminary decree adjudicating the status of a party as an agriculturist, is regulated neither by S. 52 of Regulation (II of 1827) nor by S. 6 but by Rule 65 of the Appellate Side Rules of the Bombay High Court. (*Batchelor and Rao*, JJ.) MANOHAR RAMACHANDRA HINGE *v.* COLLECTOR OF NASIK. 37 Bom. 303=17 I.C. 964= 14 Bom. L.R. 1190.

——R. 107—*Scope of.*

Rule 107 of the Bombay High Court Rules falls under S. 27 of the General Clauses Act, (1897). If a summons sent by registered post is refused by deft. he does so at his own risk. (*Beaman*, J.) ROOPCHAND RANGILDAS *v.* HAJI HUSSEIN HAJI MAHOMED SUDAGAR. 16 Bom, L.R. 204=24 I.C. 437.

BOMBAY HIGH COURT RULES (ORIGINAL SIDE).

——R. 62—*Single Judge—Power to stay suit pending in the mufassal*

It is not competent to a single Judge of the High Court exercising the ordinary original civil jurisdiction of the High Court to stay the hearing of a suit pending trial in the mufassal in a Subordinate Court. (*Scott C.J.*, *Batchelor*, *Macleod*, *Shah and Hayward*, JJ.) NARAYAN VITHAL *v.* JANKIBHAI SITARAM. 39 Bom 604=30 I C. 560= 17 Bom. L.R. 655 (F.B.).

——Rr. 81 and 321—*Application for short notice.*

According to the Bombay practice applications for short notice should be made to and disposed by the Prothonotary. (*Heaton*, J.) MOORJI MANECK *v.* PASSU PARBHAT. 36 Bom. 418=16 I.C. 588=14 Bom. L.R. 629.

——Rr. 105 and 106—*Defendant not filing written statement—Defence.*

Rules 105 and 106 of the Bombay High Court Rules (Original Side) do not preclude a deft., who has not filed his written statement,

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from defending the suit extempore at the hearing. (*Beaman*, J.) JAYANTI LAL *v.* NAGNATH. 19 I.C. 95=15 Bom. L.R. 126.

——R. 118—*Counter-claim—Set-off—Bar of limitation—Effect on.*

A defendant can plead set off or counter-claim as a cross claim but the set off must have arisen out of the same transaction and be for an ascertained sum while counter-claim need not arises out of the same transaction. If the plff. pleads limitation in case of set-off he must prove that it was barred at the time of the institution of the suit. But in the case of counter-claim it will do if he proves that it was barred by limitation at the time of pleadings. (*Miller*, J.) NAJAN AHMED HAJI ALI *v.* SALE MAHOMED PEER MAHOMED. 24 Bom. L.R. 998= 1923 B. 113.

——R. 118—*Set off and Counter claim.*

Distinction between set off and counter-claim is of the greatest importance when a claim for unascertained damages is allowed as set off or counter-claim. (*Macleod*, C.J. *and Coyajee*, J.) VITHALDAS GULABDAS *v.* HYDERABAD SPINNING AND WEAVING CO , LTD. 24 Bom. L.R 328= 47 B. 182=67 I.C. 326=1923 B. 24.

——Rr. 127, 128 and 129—*Third party notice—Deft. outside the jurisdiction of the Court—Leave of Courts—Letters Patent (Bom.), Cl* 12.

The Court on summons for directions in a third party notice does not decide any question of jurisdiction and from the fact that the Court gave direction it could not be assumed that the Court decided the point of jurisdiction. The order of the summons for directions merely enables the third party to come into the suit as he was an added party deft. and then it was open to him at the trial to raise any issue which an added deft. was entitled to raise. Leave under Clause 12 of the Letters Patent could not be presumed to have been given because, before it could be assumed that leave has been granted under Clause 12, it must be proved that an application was made to the Judge under Cl. 12 and if the Judge made the order, it should appear clearly on the face of it that he was giving leave under Clause 12 of the Letters Patent. A successful deft. is entitled to his costs of the suit and the third party proceedings as well. Per *Macleod*, C.J. When a deft. asks the Courts to issue a third party notice in a case in which leave has to be obtained under Clause 12 an application should be made to the Judge for such leave to be endorsed on the notice in the same way as it is endorsed on a plaint. (*Macleod*, C.J. *and Heaton*, J.) KARIM ELAHI SHETI *v.* SHER AHMED HAJI MIR AHMED. 45 B. 24=59 I.C. 28=22 Bom. L.R. 863.

——Rr. 130 and 131—*Directions to third party—Order of refusal is not a judgment—Appeal.*

BOMBAY HIGH COURT RULES (ORIGINAL SIDE), R. 214.

An order refusing direction under Rr. 130 and 131 is not a judgment within cl. 15 of the Letters Patent and is not appealable. (*Mears*, C.J. and *Fawcett*, J.) CHARANDAS CHATURBHUJ *v.* PITAMBHAR DAS.
22 Bom. L.R. 1169=39 I.C. 833=46 Bom. 428.

——— R. 214—*Originating summons—Court can grant declaration that covenant for re-conveyance or pre-emption is void.*

It is open to the Court to pass a declaratory decree in an originating summons under R. 214 of the Bombay High Court Rules to the effect that a covenant for re-conveyance or pre-emption annexed to a sale-deed is void as infringing the rule against perpetuities. (*Macleod*, C.J. *and Kanga*, J.) DINKARRAO GANPATRAO *v.* NARAYAN. 24 Bom. L.R. 449=1922 Bom. 84.

——— R. 215—*Originating Summons—Question as to existence of partnership.*

The question as to the existence of a partnership (which is denied) is not one that can be disposed of on an originating summons. (*Muila*, J.) SUKHANAND GURUMUKHRAI *v.* BHIMRAJ R. POTDAR. 25 Bom. L.R. 390=73 I.C. 254=1923 Bom. 394.

——— R. 223—*Originating Summons—When proper.*

An originating summons is not the proper procedure to be adopted where the disputed facts are of such complexity as to involve a considerable amount of oral evidence. 30 Ch. D. 291, 296 and 43 Ch. D. 398, ref. (*Pratt*, J.) VITHALDAS *v.* DULSUKHBHAI. 53 I.C. 650=21 Bom. L.R. 972.

——— Rr. 253 and 266—*Receiver—Accounts—Court can go into question of amendment of decree.*

The Court can enter into questions regarding the Receiver's accounts even although the suit may not be pending, especially where the decree is preliminary with regard to the Receiver taking certain action and passing his accounts. In such cases R. 258 of the Bom. H. C. Rules applies, namely, in every decree and order that is not final, liberty to apply shall be implied. It is open to the party interested to apply in regard to any question that may arise as to the Receiver's accounts, so far as they are accounts in any liability subsequent to his appointment as Receiver to take effect; and to that extent R. 266 does not bar any alteration of or addition to the terms of the preliminary decree. (*Fawcett*, J.) KISHEN PRASAD AND CO., LTD. *v.* FULLUMAL HIRALAL. 25 Bom. L.R. 888=77 I.C. 171=1924 Bom. 166.

——— R. 321—*Practice.*

Applications to issue short notice are made to and disposed of, by the prothonotary, according to the established practice. It is based on the legal interpretation of the said rules. (*Heaton*, J.) MOORJI MANAK *v.* PASU PARBHAT. 36 Bom. 418=16 I.C. 588=14 Bom. L.R. 629.

BOMBAY IRRIGATION ACT (VII of 1879), S. 23.

——— R. 519—*Scope of.*

The words "as the taxing master shall in his discretion think proper to be settled by council" used in rule 519 only refer to special affidavits. (*Macleod*, J.) BAPUJI SORABJI PATEL *v.* BHIKUBHAI VIRCHAND.
31 I.C. 868=17 Bom. L.R. 924.

BOMBAY HIGH COURT RULES (CRIMINAL SIDE.

——— Rr. 397 and 399—*taking of accounts—Power of Commissioner to decide questions of law—Court's jurisdiction to decide the questions.*

The Commissioner on the Original Side of the High Court can decide questions of law which arise while taking accounts. Parties to the reference cannot ask the Judge to give his opinion on questions of law which arise in the taking of accounts. The parties can only file exceptions to his report. (*Macleod*, J.) LAXMIBAI *v.* HUSSAINBHAI. 41 Bom. 719=36 I.C. 618=18 Bom. L.R. 798.

BOMBAY IRRIGATION ACT (VII of 1879).

——— Ss. 22 and 23—*Water-supply—Control over.*

Ss. 22 and 23 give control over the supply of water from the water-course. The right, however, to regulate water from a Govt., or public channel or canal, is the right of the Govt. alone. (*Fawcett*, J. C. *and Kemp*, A.J.C.) NAWAZ ALI SHAH PIR ALI GOHAR SHAH *v.* RUSTOMALI SHAH MUHBATALI SHAH. 62 I.C. 225=14 S.L.R. 53.

——— S. 23—*Jurisdiction under—Service of summons and hearing of objections are conditions precedent.*

The service of summons and hearing of objections are conditions precedent to the exercise of jurisdiction conferred by the S. 23, and failure to comply with those conditions makes an order made under it a nullity, nor is such an order protected by the theory of inherent jurisdiction. (*Fawcett*, J.C. *and Kemp*, A.J.C.) NAWAZALI SHAH *v.* RUSTOMALI SHAH.
62 I.C. 225=14 S.L.R. 53.

——— S. 23—*Order of Collector—Suit to set aside order.*

An order made by a Collector under S. 23 of the Act falls within the purview of S. 203 of the Bombay Land Revenue Code and is the order of the Collector though it is a confirmation of an order of a Canal Officer. An appeal from such an order lies to the Commissioner and until presentation of the appeal, a suit to set aside the order is incompetent. (*Pratt*, J.C. *and Fawcett*, A.J.C.) SECRETARY OF STATE *v.* JERAM DAS KHATONMAL.
19 I.C. 726=6 S.L.R. 241.

BOMBAY IRRIGATION ACT (VII of 1879), S. 31.

——Ss. 31 and 38—*Scope of.*

Sections 31 and 38 of the Bombay Irrigation Act do not bar any suit for compensation for deficiency of water due to Govt Engineer's action against the Secretary of State. (*Fawcett*, J.C. *and Kemp*, A.J.C.) GANGARAM *v.* SECRETARY OF STATE FOR INDIA. **58 I.C. 769 (Sind.)**

——S. 33—*Compensation for interruption of water-supply—Decision of Collector—Civil Court has no jurisdiction.*

When Government fails to supply water for crops and the claim for compensation has been already decided by the Collector under S. 35 of the Bombay Irrigation Act, Civil Courts have no jurisdiction to entertain a suit for the same relief. Scope of the Act considered. (*Macleod*, C.J, *and Shah*, J.) VISHNU VINAYAK VAZE *v.* THE SECRETARY OF STATE FOR INDIA.
46 Bom. 738=24 Bom L.R. 264=67 I C. 43=1922 Bom. 8.

BOMBAY KHOTI SETTLEMENT ACT (I of 1880).

——*Khoti Lands—Transfer without Khot's consent.*

When a Khoti tenant transfers land without the Khot's consent it works as a forfeiture and the Khot can enter on the land as against the transferee. (*Scott*, C.J. *and Heaton*, J.) HARIGANU BHAGNADE *v.* GANGADHAR VITHAL GULAVNI. **37 I C. 299=18 Bom. L.R. 446.**

——Ss. 8, 10—*Occupancy tenant—Adverse possession against*—Khoti, *position of—Ejectment—Notice.*

An adverse possession of a *khoti* land of an occupancy tenant, extinguishes the right of the occupancy tenant to actual possession but not right to relinquish his occupancy right to the *khoti* who, after due notice under S. 84 of the Bombay Land Revenue Code, is entitled to eject the person in possession. (*Macleod*, C. J. *and Fawcett*, J.) VISHNU BHIKAJI *v.* BABLA.
45 Bom. 1001=61 I.C. 595=23 Bom. L.R. 411.

——Ss. 9 and 10—*Transfer of occupancy tenancy without consent is null and void.*

Deft. Nos. 2 to 4 occupancy tenants of Khot lands having transferred without the consent of the Khot their occupancy rights to deft. No. 1 the plff. Khot claimed that defts. had thereby forfeited their occupancy rights and sued for recovering the possession of Khoti land: *held*, that the transfer having taken place before the amendment of the Khoti Settlement Act in 1912 the occupancy rights had not been forfeited owing to the transfer but that the transfer was null and void as against the Khot and deft. Nos. 2 to 4 still remained his occupancy tenants. (*Macleod*, C.J. *and Shah*, J.) DAMODAR RAGHUNATH KARANDIKAR *v.* VASUDEO PARSHAR KETKAR.
44 Bom. 267=22 Bom. L.R. 102.

BOMBAY KHOTI SETTLEMENT ACT (I of 1880), S. 10.

——Ss. 9 and 10—*Khoti land—Tenant resigning occupancy rights for consideration—Effect of—Consent.*

Defendant purported to resign his occupancy rights in a *Khoti* for consideration to the Plaintiff who was one of the *Khots*. At the same time a lease for five years was executed by the defendant. Plaintiff sued defendant on the expiry of the lease and the latter impugned plaintiff's title. *Held* that, the alleged resignation, was in effect a transfer and there was no valid transfer under S. 9 as the consent of the other *Khots* was not obtained. Both the parties being in *part delicto* defendant was not estopped from showing the illegality of the title under S. 116, Evidence Act. There is no estoppel against an act of Parliament or in India against an Act of Legislature. (*Beaman and Hayward*, JJ.) SHRIDHAR BALKRISHNA WAIDYA *v.* BABAJEE MULA AGARYA.
38 Bom. 709=28 I.C. 134=16 Bom. L.R. 586.

——S. 9—*Occupancy right—Transferability—Purchase in execution—Objection.*

A purchaser acquires no valid right of occupancy in a tenure purchased at an execution sale after the creation of the occupancy rights in a Khoti village the Khot of which consents to the transfer of the right by the tenant as the prohibition against the sale of such right is applicable both to a private sale and one in an execution of a decree. Exceptions to these are (1) where the right of transfer is created by custom under S. 9.; (2) where Khot in granting a lease has conferred upon the lessee this right at the time of creating the tenancy. The objection as to the validity of the purchase of an occupancy right in a Khoti Village can be raised even for the first time by the Appellate Court, *suo motu*. (*Chandavarkar and Heaton*, JJ.) MAHADEO RAMCHANDRA *v.* MAHADAJI MONSHAWAR.
12 I.C. 956=13 Bom. L.R. 1157

——S. 10—*Transfer includes simple mortgage.*

A simple mortgage is a transfer of the interest of the tenant within the meaning of the section. Even payment by Khatedar of the mortgage amount prior to suit by Khot does not destroy the right of Khot. (*Shah and Crump*, JJ.) VASU KRISHNA YENKAVDA *v.* MAHADHAV RAO MORESHAR. **73 I.C. 880=24 Bom. L.R. 1160=1923 Bom. 33 (1).**

——S. 10—*Transfer of portion of Khoti land.*

If the permanent tenant of Khoti lands transfers a portion of it without the Khot's consent only the portion so transferred, and not the entire holding, is at the disposal of the khot, under S 10. (*Shah and Pratt*, JJ.) MADHAVRAO MOREHSWAR BHANDARKAR *v.* KRISHNAJI SETURAO RANE.
46 Bom. 470=24 Bom L.R. 131=68 I.C. 277=1922 Bom. 257.

BOMBAY KHOTI SETTLEMENT ACT (I of 1880), S. 20.

———S. 20—*Entry in settlement register—Value of.*

The rule of evidence laid down in S. 20 that the entry in the settlement register purporting to record the fact that the interest of any occupancy tenant is not transferable shall be conclusive evidence, cannot apply where according to a judgment *inter partes* the person relying on the section is not an occupancy tenant. The fact of the tenancy of the individual is not conclusively settled by the entry. (*Scott*, C.J. *and Shah*, J.) CHINTO *v.* MADHAV.
43 Bom. 565=51 I.C. 101=21 Bom. L.R. 361.

———S. 21—' *Decision,' meaning of—Entry in Botkhat.*

The Khoti Settlement Act nowhere provides that the mere entry in the settlement register of the name of a particular person as the occupant of the survey number is either final and conclusive or that it is binding upon all the parties concerned, unless and until it is reversed or modified by a decree of the Civil Court. What is made binding by the provision of S. 21 is the decision of the Recording Officer and not a mere entry of a person's name in the Settlement Register. Preceding sections make it clear that the mere entry of the name of some particular person as occupant was not intended to be included among those decisions of the Recording Officer. An entry in Botkhat is not a decision. S. A. No. 850 of 1914, Ref. (*Macleod*, C.J. *and Coyajee*, J.) POTPHODE *v.* YESHWANTRAO. 24 Bom. L.R. 323=67 I.C. 322=46 B. 966=1922 Bom. 329.

———S. 21—*Entry in revenue records—Not conclusive.*

The mere entry of the name of some particular person as occupant is not a decision of the recording officer which is final. Decisions as to the class of tenure and as to the complicated rights of the khots are conclusive. (*Heaton and Hayward*, JJ.) BHIVA *v.* BABU.
43 Bom. 559=51 I.C. 7=21 Bom. L.R. 350.

———S. 33 (c)—*Liability to payment—Occupancy tenant.*

The liability of occupancy tenant to pay rent to khot is as laid down by S. 33 (c) *i.e.*, a fixed proportion of gross annual produce of land and fruit trees, if any. (*Scott*, C.J. *and Chandavarkar*, J.) VINAYAK BALAKRISHNA *v.* SITARAM JANARDAN. 37 Bom 284=17 I.C. 943=14 Bom. L.R. 1173.

———S. 40 (a)—*Rules under R.* 8—*Legality of,*

Rule 8 is not *ulra vires*. The rules made under this section regulate the appraisement of crops which when not done according to rules must be only based on the admission of the tenant. (*Scott*, C.J, *and Chandavarkar*, J.) 37 Bom. 284=17 I.C. 943=14 Bom. L.R. 1173.

BOMBAY LAND REVENUE CODE (V of 1879), S. 12.

———S. 3 (2) and S. 217—*Holder of Varkas Land—Meaning of—Uses of waste by rice tenants.*

A person who wants to claim the benefit of S. 217 of the Land Revenue Code must show that he was a "holder" within the meaning of S. 3 of the Code at the date of the Settlement. Mere user by rice lands tenants of adjoining waste land with the leave and permission of the *Inamdar* does not make them holders of *Varkas* land. (*Scott*, C.J. *and Russell*, J.) WASUDEO LAXMAN *v.* GOVIND MAHADEO.
36 Bom. 315=14 I.C. 473=14 Bom. L.R. 124.

———S. 3 (19)—'*Alienated village*'.

Where a *kowl* granted certain lands to the grantee for 99 years on condition of paying assessment on land already under cultivation and within fifty years to bring under cultivation the remainder and some occupants in the village built houses on lands comprised in the *kowl* and Govt. imposed extra assessment and the grantee also claimed to impose extra assessment on the ground that it was an alienated village within S. 3 (19). *Held* that the land was not an "alienated village" for which it is not necessary that ownership of Govt. with respect to land Revenue must be transferred. In this particular case the *kowl* was only a lease and its object was only agriculture and as the grantee was to consider himself a farmer, the village came under the operation of the Code. (*Chandavarkar and Hayward*, JJ.) HAJI ABDULLA HAJI SUMAR *v.* SECY. OF STATE.
35 Bom. 462=12 I C. 369=13 Bom. L.R. 883.

———Ss. 3 (20) and 217—*Alienated village—Survey—Settlement—Holders of land.*

Though the grant to the plff. was of the entire property in the soil, the lands in question were still "alienated" within the meaning of S. 3(20) of the Bombay Land Revenue Code; if the other requirements of the section are satisfied and defendants (tenants) were entitled to the rights of occupants in unalienated villages by virtue of S. 217 of the Code. (*Batchelor*, A.C.J. *and Marten*, J.) DADOO *v.* DINKAR.
43 Bom. 77=47 I C. 745=20 Bom. L.R. 887.

———S. 10—'*Or any other law for the time being in force.*"

We must give its natural effect to the language of S. 10. The words 'by any other law at the time being in force' should not be restricted. They refer also to the Mamlatdar's Courts Act. It confers upon the collector powers of revision which within his limits to the Asst. Collector was empowered to exercise. (*Beaman and Hayward*, JJ.) KESHAV DHONDI SINDE *v.* JAIRAM. 36 Bom. 123=12 I.C. 709=13 Bom. L.R. 1031.

———S. 12—*Delegation of powers by Collector to Mamlatdar.*

A Collector can delegate certain powers to a Mamlatdar only for his own district and such powers can be exercised only in the *Talukas* of

BOMBAY LAND REVENUE CODE (V of 1879), S. 37.

that District. (*Scott*, C.J. *and Chandavarkar*, J.) GANGA RAM *v.* DINKAR GANESH PATVARDHAN. **37 Bom. 542=20 I.C. 526=15 Bom. L.R. 665.**

——S. 37—*Government ownership of roadways.*

Government is the owner of the land forming roadways through the village site of a bhagdari village. All the lands of the village site of a bhagdari is not the property of the bhagdars. The bhagdari tenure is a particular system of collecting the Government revenue. A bhagdar can have only those village fields and the portion of the village site as are assigned to him by the Government. He cannot claim the proprietorship of such lands as he is liable to pay rent or assessment to the Government for these lands. (*Batchelor and Rao*, JJ.) UMAR ANNAJI MIAJI *v.* SECRETARY OF STATE FOR INDIA. **37 Bom. 87=17 I.C. 659=14 Bom. L.R. 934.**

——S. 37—*Waste lands—Title of Government.*

S. 37 of the Land Revenue Code does not confer title on Government and even as to open village sites there is no presumption of title in favour of the Government. 25 Bom. 287 foll. (*Pratt*, J.C. *and Crouch*, A.J.C.) SULTAN MUHAMMAD *v.* SECRETARY OF STATE. **29 I.C. 51=8 S.L.R. 331.**

——S. 37—*Collector's powers—Private land.*

The Collector acts *ultra vires* if he interferes with private land; his powers extend only to ownerless land. (*Hayward*, J.C. *and Boyd*, A.J.C.) SECRETARY OF STATE *v.* MUSHTAK SINGH. **24 I.C. 813=7 S.L.R. 169.**

——S. 37—*Scope of.*

The Collector can only dispose of lands which are not the property of individuals. The section cannot be construed as conferring upon the Collector the power to determine whether the land is the property of Government or not. (*Pratt*, J.C. *and Fawcett*, A.J.C.) FAKIR SHAH BALDIN *v.* SECRETARY OF STATE. **19 I.C. 565=6 S.L.R. 210.**

——S. 40—*Future growth—Forest.*

The section does not imply that future growth in reserved forest would become Government property. (*Shah and Hayward*, JJ.) EMPEROR *v.* YELLAPPA RAMANGOWDA. **46 Bom. 110=38 I.C. 60=21 Cr. L.J. 716=22 Bom. L.R. 884.**

——S. 40—*Khote lands—Survey and Revised Settlement—Kabuliyats—Rights of Khots to trees on Virkas lands.*

In a dispute as regards the ownership of certain trees between the Khots and the Government *held*, that the matter in dispute was concluded by the Kabuliyat passed to the

BOMBAY LAND REVENUE CODE (V of 1879), S. 56.

Government and that the khots could not claim more than one-third of the sale proceeds of the trees. Per *Shah*, J.—The Khots in this case were not in permanent occupation of the lands in question nor did they have such interest in the lands as would enable them to obtain the benefit of Dunlop's proclamation. If the proclamation applied to the *Virkas* lands in question, the Khot's rights to the trees were not affected by the kabuliyat. (*Heaton and Shah*, JJ.) SADASHIV PARSHARAM *v.* SECRETARY OF STATE. **44 I.C. 872=20 Bom. L.R. 141.**

——S. 48—*Extra assessment—Bombay Act (I of 1885) S. 35—Conversion of land from agricultural to non-agricultural uses—Brick kiln—Levy of fine by Collector—Building of chappars—Building fines.*

Plff. converted his land from agricultural to non-agricultural uses by establishing a brick-kiln in 1872. He was called upon by the Collector to pay this time the assessment as fine for the conversion under S. 35 of Bombay Act (I of 1865.) Plff. thereupon erected some huts on the land. At the revision of survey which took place in 1889 the land was assessed as agricultural. Sometime between 1897 and 1901 plff. erected a substantial building on the land. In 1912, the Collector levied building fine from the plff. *Held*, that though the levy of additional assessment under S. 35 of the Bombay Act (I of 1865) might have protected the plff. against its enhancement before the Revision Survey of 1889, still S. 48 of the Revenue Code, (1879) rendered him liable to pay extra assessment for the conversion in use which took place, after the date of the Revision Survey of 1889. (*Beaman and Heaton*, JJ.) MUHAMMAD BHAI *v.* THE SECRETARY OF STATE FOR INDIA. **42 Bom. 126=43 I.C. 744=20 Bom. L.R. 22.**

——S. 53—*Rent equal to assessment—Presumption of—Occupancy Rights.*

The fact that the tenants pay the amount of assessment may not be conclusive evidence but it would afford strong presumption that the tenants have attained to occupancy rights by virtue of their long holding. The word 'Miras' should not be used in case of persons who by virtue of their long holding are presumed by reason of the provision of S. 53 to have acquired fixity of tenure. In cases where a rent is equivalent to assessment it cannot be enhanced unless a right to do so is established by custom or otherwise. (*Macleod*, C.J, *and Crump*, J.) SITARAM SADASHIV SASTRI *v.* PARSHURAM. **1923 Bom. 429.**

——Ss. 56 and 153—*Applicability of S. 56.*

S. 56 of the Code does not apply where their has been no forfeiture under S. 153 of the Code. (*Scott*, C.J. *and Heaton*, J.) CHITTA BHULLA *v.* BAI JANMANI. **40 Bom. 483=37 I.C. 295=18 Bom. L.R. 538.**

BOMBAY LAND REVENUE CODE (V of 1879), S. 56.

———S. 56—*Non-payment of revenue—Forfeiture—Re-grant, if free from encumbrances.*

Where a land vests in the original tenure-holder under a new tenure created by S. 56 of the Code as amended by Act VI of 1901, the land vested free from all encumbrances and from all previous equities. The fact that default in the payment of revenue was made is immaterial. (*Batchelor and Shah*, JJ.) VEDU SHIVLAL v. KALU UKHARDU, 37 Bom. 692=21 I.C. 310=15 Bom. L.R. 827.

——— S. 56—*Forfeiture of occupancy.*

When an occupancy forfeited under S. 56 has been disposed of by the Collector under Ss. 32 and 62 of the Rules under S. 214, to a person signing a *kabuliyat* in Form B. S. 63 does not empower the Collector to order the occupancy to be taken from that person and restore it to the occupant before forfeiture. (*Chandavarkar and Hayward*, JJ.) DHARMA BAL PATIL v. BOLAMIYA. 36 Bom. 91=12 I.C. 845=13 Bom. L.R. 968.

———S. 56—*Scope of—Not retrospective.*

S. 56 of the Code has a retrospective effect. The ordinary presumption against retrospectivity of any statute operates chiefly when it prejudicially affects vested rights. (*Fawcett*, J.C. *and Crump*, A.J.C.) GAGANDAS v. YUSUF. 28 I.C. 95=8 S.L.R. 233.

———Ss. 65 and 66—*Graveyard—Long possession and user without assessment—Eviction—Lim. Act, Art.* 14.

In 1907 the District Collector ordered the *mamlatdar* to cause the building and the wood to be removed forthwith from a graveyard of which plff. had been in possession for 50 years without assessment and the order was confirmed on appeal by the Commissioner in April 1909. On the 22nd February 1910, the plaintiffs sued the Secretary of State, for a declaration that they were the owners of the land, for a cancellation of the order and for a permanent injunction. *Held*, that in view of the long and undisturbed possession of the plaintiffs, the order of eviction was *ultra vires* and that the suit was not barred by Art. 14 of the Lim. Act. (*Heaton and Shah*, JJ.) RASUL KHAN v. SECRETARY of STATE. 39 Bom. 494=29 I.C. 490=17 Bom. L.R. 513.

———Ss. 68 and 79-A—*Occupancy, grant of, subject to prohibition of alienation—Application for transfer of part of occupancy—Summary eviction.*

Where a grant of occupancy was made to the plff. subject to restrictions prohibiting alienation and a few years afterwards he made an application for transfer of the occupancy to the 2nd defendant, *held*, that the application amounted at most to an attempt to transfer which was never carried into effect, that there was no alienation and no breach of the conditions of the grant, that the order of the District Deputy Collector for summarily evicting the plff. was a nullity and that the Officer cannot be said to have acted in his official capacity. (*Shah and Crump*, JJ.) DHANJI JAIRAM v. SECRETARY OF STATE FOR INDIA. 45 Bom. 920=61 I.C. 857=23 Bom. L.R. 279.

BOMBAY LAND REVENUE CODE (V of 1879), S. 74.

———Ss. 74 and 88—*Notice of Relinquishment—Registration Act, S.* 90 — *Holder of alienated lands, if can receive notices of relinquishment—Rajinama in respect of such lands if requires registration.*

An *inamdar* can receive notice of relinquishment under S. 74 only where the Survey Settlement has been introduced or when the powers under S. 88, have been given to him. These notices are exempt from registration under S. 90 of the Registration Act. (*Macleod*, C.J. *and Fawcett*, J.) SHIDRAJ BHOJRAJ DESAI v. DARI SANTARAM MALI. 45 Bom. 898=61 I.C. 884=23 Bom. L.R. 272.

———S. 74—*Transfer—Rajinama and Kabuliyat, do not constitute transfer.*

A Rajinama and Kabuliat do not by any means take the place of a sale deed. Before they really do evidence a transfer of ownership, there must be either evidence or indications furnished by lapse of time and possession and so forth, and that there was in fact an intention to transfer ownership. They only serve as documentary evidence of transfer if that transfer can properly be inferred from the totality of the facts proved. (*Macleod*, C.J. *and Heaton*, J.) CHANDANMAL HAMBIRMAL v. BHASKAR WAMAN. 39 I.C. 114=22 Bom. L.R. 1079.

———S. 74—*Rajinama—Kabuliyat—Transfer of Property.*

The execution of a rajinama and kabuliyat does not by itself amount to a transfer of property. The transfer can be rebutted by evidence regarding the manner in which the parties concerned dealt with the property. Each case however must necessarily depend upon its own facts. (*Macleod*, C.J. *and Heaton*, J.) CHANDANMAL HAMBARMUL v. BHASKAR VAMAN. 55 I.C. 619=22 Bom. L.R. 140.

———Ss. 74 and 76 — *Rajinamahs and Kabuliyats—Registration, if necessary.*

Rajinamahs and Kabuliyats though not in themselves documents of transfer are fairly conclusive evidence that a transfer has in fact been made and as between the mortgagor and mortgagee extinguish the equity of redemption without the necessity of registration. (*Beaman and Heaton*, JJ.) NARSO RAMJI KULKARNI v. NAGAVA ISHVARAPPA. 42 Bom. 359=45 I.C. 492=20 Bom. L.R. 358.

———S. 74—*Registration.*

A *Rajinama* by a *Khatedar* of unalienated lands, subject to Section 74, Bombay Land Revenue Code abandoning his rights to another,

BOMBAY LAND REVENUE CODE (V of 1879), S. 74.

subject to the payment of revenue need not be registered under S. 90, Registration Act. (*Scott*, C. J. *and Heaton*, J.) MOTIBHAI JIJI BHAI *v.* DESAI BHAI GOKAL BHAI. **41 Bom. 170 = 38 I.C. 838 = 18 Bom. L R. 976.**

——S. 74—*Transfer of equity of redemption—Registration.*

A mortgagor agreed to abandon his equity of redemption and also executed a *Rajinama* in favour of the *Mamlatdar* under S. 74 and the mortgagee executed a *Kabuliyat*. *Held*, that the *Rajinama* combined with the *Kabuliyat* did not transfer the title of the mortgagor to the mortgagee as a transfer of the equity of a redemption must be registered according to S. 54 of the T.P. Act. (*Scott*, C.J. *and Shah*, J.). SAKHARAM KESHAV *v.* RAM CHANDRA GANESHI.

38 I.C. 819 = 18 Bom. L.R. 980 (Note).

——S. 79-A—*Scope of.*

The section refers to unauthorised occupation or wrongful possession of land. The question is whether the person was in wrongful occupation of land at the date of notice. (*Macleod*, C.J. *and Heaton*, J.) BHAIJI ISHAVARDAS SHAH *v.* TALUKDHARI SETTLEMENT OFFICER.

22 Bom. L.R. 906 = 38 I.C. 88 = 44 B. 832.

——S. 79-A—*C.P.C., S. 80—Notice.*

Where a Collector issued a notice under S. 79-A, on A asking him to vacate certain land within a certain time, which notice by implication declared that the sale and mortgage under which A held the land were void, a suit against Collector by A, must be instituted after a notice under S. 80. C.P.C. Mere letter by A, to the Collector that he cannot be evicted except by a suit and that if he were evicted he would sue in his turn, is not a sufficient notice. (*Chandavarkar and Batchelor*, JJ.) TALUKDHARI SETTLEMENT OFFICER *v.* BHAIJI BHAI ISHAWARDAS.

16 I.C. 445 = 14 Bom. L.R. 577.

——S 81—*Action under, results only in forfeiture of interest.*

Where the Collector takes action under S. 81 of the Act and instead of selling or otherwise disposing of the occupancy right, removes the registered occupants' name from the *Khata* and substitutes the name of his co-sharer instead, the transaction results only in forfeiture of the registered occupants' interest, while his occupancy rights remain unaffected and he could recover possession on his title. (*Macleod*, C.J. *and Shah* J.) VINAYAK *v.* GANESH.

23 Bom. L.R. 1024 = 64 I.C. 201 = 46 Bom. 221 = 1922 Bom. 1918.

——S. 83—*Presumption from antiquity of tenancy—Kabuliat, how far rebuts.*

When it has been proved that a tenant has been in occupation of certain land for so long that one cannot ascertain the commencement of the tenancy, the mere fact that during the currency of his holding he has signed a Kabuliyat which purports to be in terms an agreement for an annual tenancy, may not be sufficient to displace the advantage he has obtained from his long holding, if he continues in possession for many years after he had signed the kabuliyat on the same rent. But each case of this class must stand entirely on its own facts. At first, the tenant claiming to hold as a permanent tenant must establish the facts which would entitle him to the presumption of S. 83. But that can be rebutted by the landlord by the production of a kabuliyat. Again the effect of the kabuliyat can be destroyed by further evidence on the part of the tenant. The fact of the signing of the kabuliyat as merely an isolated instance in the midst of a long holding at the same rent, will not necessarily prevent the tenant from succeeding. (*Macleod*, C.J. *and Crump*, J.) VIJBHUKHUNDAS *v.* ISHVARDAS.

25 Bom. L.R. 431 = 74 I C. 292 = 1923 Bom. 137.

——S. 83—*Duration of tenancy—Presumption as to—Commencement of the tenancy.*

The phrase "commencement of the tenancy" in S. 83 of the Bom. Land Rev. Code refers to the time and not to the terms of the tenancy. The presumption in S. 83 applies only when the time (*i. e.*) rather the date or the period of the commencement of the tenancy is not proved by satisfactory evidence. Directly it is shown that the tenancy commenced from a particular period say between 1830 and 1850 the ordinary presumption that is now contained in S. 106 of the T. P. Act will have to be drawn. 18 Bom. 433; 23 Bom. L.R. 533; 24 Bom. L.R. 226, Rel. (*Pratt and Fawcett*, JJ.) NARAYAN RAM CHANDRA *v.* PANDURANG BALAKRISHNA.

24 Bom. L.R. 831 = 47 B. 4 = 76 I.C. 71 = 1922 Bom. 402.

——S. 83—*Presumption does not apply where Origin is known.*

S. 83 of the Bombay Land Revenue Code, 1879, does not apply to a tenancy which, though very old, can be shown to have originated in a specified year. (*Shah and Pratt*, JJ.) CHIKKO BHAGWANT NADGIR *v.* SHIDNATH MARTAND.

46 Bom. 687 = 24 Bom. L.R. 226 = 1922 Bom. 25 = 66 I.C. 315 = 1922 Bom. 337.

——S. 83—*Presumption of annual tenancy—Landlord and tenant—Permanent tenancy—Burden of Proof.*

The presumption is that a tenant is an annual tenant and the onus is on him to prove that he is something more. If he sets up permanent tenancy, in the absence of any document, he must prove antiquity of his tenure. If he succeeds, the burden is shifted to the landlord to prove the intended duration by agreement or usage. In the absence of any proof, it is presumed that the tenancy is co-extensive with the tenure of the landlord. (*Macleod*, C.J. *and Fawcett*, J.) MANEKLAL *v.* BAI AMBA.

45 Bom. 850 = 59 I.C. 751 = 22 Bom. L.R. 1224.

BOMBAY LAND REVENUE CODE (V of 1879), S 83.

———S. 83—*Presumption from antiquity of tenancy—Rebuttal—Burden of proof.*

It lies on the parties, who wish to rebut the presumption arising from the antiquity of a tenancy to establish, first, that there is no evidence of the period of its intended duration and secondly, that there is no usage of the locality as to the duration of such tenancy. Where a tenant and his ancestors had cultivated the land as far as memory could go and paid the same amount of rent to his landlord and were in possession all along, the mere fact that he executed a rent note for one year in 1882 does not rebut the presumption of the permanency of the tenancy which arose from its antiquity. (*Macleod*, C.J. *and Fawcett*, J.) RAM RANCHHOD *v.* SAYED ABDUL RAHIM.
45 B. 303=
59 I.C. 278=22 Bom. L. R. 1214.

———S. 83—*Enhancement of rent—Landlord and tenant—Permanent tenancy.*

When there is no satisfactory evidence of the commencement of a tenancy, it is presumed to be permanent under S. 83 but the tenant is not a Mirasi tenant. The landlord has the right by usage, agreement or otherwise to enhance the rent in the case of a permanent tenant. (*Macleod*, C.J. *and Heaton*, J.) VYASACHARYA *v.* VISHNU. 44 Bom. 866=
38 I.C. 289=22 Bom. L.R. 717.

———S. 83 (2)—*Presumption—Applies only when date of origin of tenancy is unknown.*

The presumption in S. 83 (2) of the Act does not apply when the tenancy is proved to have commenced in a particular year. It is only where the date of its origin is not known that the Court must hold that the tenancy is co-extensive with the duration of the lessor's tenure. (*Macleod*, C. J.) SIDHANATH MARTAND NADGIR *v.* CHIKU BHAGVANT RAO.
63 I.C. 933= 23 Bom. L. R. 833.

———Ss. 85, 86 and 87—*Civil and Revenue Courts—Suit by superior holders to recover dues from inferior holders.*

S. 85 restricts the liberty of the superior holders to receive payments directly from the inferior holders in an alienated village where a hereditary patel and a village accountant exist. But Ss. 86 and 87 do not prevent parties from having recourse to the Civil Court. (*Shah*, J.) VISVANATH *v.* KONDAJI.
42 Bom. 49=43 I.C. 995=
19 Bom. L.R. 820.

———Ss. 86, 141 and 142—*Penal Code, Ss. 378 and 424.*

The honest removal of moveable property from the physical possession of another does not amount to an offence either under S. 378 or 424 of the Penal Code. But the removal of a crop by a lessee from the guard of a watchman appointed under Ss. 86 and 141 Bombay Land Revenue Code gives rise to an offence punishable

BOMBAY LAND REVENUE CODE (V of 1879), S. 135-H.

under S. 142. (*Pratt*, J.C. *and Fawcett*, A.J.C.) LEKHRAJ *v.* IMAMBUX.
12 Cr. L J. 611=12 I.C. 987=5 S.L.R. 130.

———S. 109—*Revenue Register—Rectification—"Oversight."*

A wrong entry in the Revenue Register made on account of the misunderstanding of an order can be corrected, such a cause of error amounting to an "oversight" within S. 109 of the Code. (*Scott*, C.J. *and Russell*, J.) VASUDEO LAXMAN *v.* GOVIND MAHADEO. 36 Bom. 316=
14 I.C. 473=14 Bom. L.R. 124.

———S. 121—*Settlement of boundary does not affect easement rights.*

Under S. 121 of the Code the enquiry officer must settle the boundary between the lands of adjoining house owners which ordinarily is done by means of a line drawn on a plan and that line determines the rights of the landholders on either side of the boundary. But it does not determine the right which the holder of one number can claim to exercise over the land belonging to the holder of the adjoining number. The section applies also to the survey of land at a time as it applies to agricultural land. The enquiry officer cannot decide that a broad strip of land lying between two numbers is common to both the adjoining owners. (*Macleod*, C.J. *and Shah*, J.) GANESH *v* RAMCHANDRA.
46 Bom. 390=23 Bom. L.R. 1209=
64 I.C. 864=1922 Bom. 293.

———S. 121—*Boundary fixed by Collector—Suit in Civil Court for recovery of portion on title by adverse possession is not barred.*

The settlement of a boundary by the Collector under S. 121 of the Code is no bar to a suit in a Civil Court for recovery of a portion of the Survey Number on the ground that the plaintiff has acquired such portion by adverse possession. 59 I.C. 437, Ref. (*Macleod*, C J. *and Heaton*, J.) BHAGA MOTIJI *v.* DORABJI SORABJI.
45 Bom. 67=59 I.C. 440=
22 Bom. L.R. 1111.

———S. 121—*Boundaries, fixing of—Right to sue in Civil Court to recover possession on ground of adverse possession is not barred.*

The fixing of boundaries, by the Collector, of Survey numbers under S. 121 of the Code merely shows what land belongs to the persons in whose names the Survey numbers are registered. But it does not affect the right of any one of those persons to show in a Civil Court that he has acquired a title by adverse possession against a registered occupant. (*Macleod*, C.J. *and Heaton*, J.) MANAK *v.* NARAYAN.
59 I C. 437=22 Bom. L.R. 1114 foot-note.

———S. 135-H—*Omission to file copy of record with plaint, noticed in appeal—Appellate Court should give time to produce it.*

Where, in a suit relating to land, the plaintiff omits to annex to his plaint a certified copy

BOMBAY LAND REVENUE CODE (V of 1879), S. 135-H.

of the entry in the Record of Rights as provided in S. 135-H but the Court passes a decree, the Appellate Court cannot reject the plaint in appeal merely on the ground of the omission but it should give an opportunity to the plaintiff to produce the entry within a fixed time. (*Sir Norman Macleod and Shaw*, JJ.) GIRIJA BAI NAGAPPA CHANDAWAR *v.* HEMRAJ VRINDAWANDAS. **45 Bom. 1339=64 I.C. 681=23 Bom. L.R. 895.**

——S. 135-H—*Extracts not produced in lower Court.*

From Para 2 of the section, it appears that the High Court has power, as the trial Court has, to allow a reasonable time for the production of extracts, if not produced in the lower Court. What is or is not a reasonable time is a matter within the discretion of the High Court. (*Shah and Crump*, JJ.) GANESH BALKRISHNA *v.* VITHAL TRIMBAK.
46 Bom. 79=23 Bom. L.R. 745=64 I.C. 166=1922 B. 114.

——S. 135-J—*Entries in record of rights—Presumption.*

Under S. 135 (*j*) of the Bom. Land Rev. Code, entries in the record of rights shall be presumed to be correct and in the absence of any other evidence, a Court is obliged to be guided by any facts so entered in the record of rights. (*Beaman and Hayward*, JJ.) ANANDI BAI BHASKAR NILKANTH *v.* NARAIN DHOND DEV TATTOO. **27 I.C. 478=17 Bom. L.R. 49.**

——S. 140 — *Detention of crops alone authorised.*

Section 140 and other sections in the same group of the Code do not authorise the detention of anything but the crop of the land, or the seizure of the crop or any other goods after removal from the land. (*Scott*, C.J. *and Chandavarkar*, J.) GANGARAM *v.* DINKAR.
37 Bom. 542=20 I.C. 526=15 Bom. L. R. 665.

——Ss. 144 and 160—*Lands rent free—Mohad Jama—Attachment for non-payment of assessment — Proportional assessment from holders of rent free lands—Recovery of.*

Plff. held rent free land from the talukdar of a village, who paid the Government assessment for the village in a fixed lump sum. The village was attached by the Government, for non-payment of the Jama by the Talugdar under S. 144 of the Code (1879). *Held*, that the Government had the right to levy the assessment on the lands of the plff. in the village; for, the grant of lands rent-free by the Talukdar did not affect the right of the Government to assess the lands. (*Beaman and Heaton*, JJ.) TULLA *v.* THE COLLECTOR OF KAIRA.
43 Bom. 6=47 I.C. 117=20 Bom. L. R. 758.

——Ss. 150 and 154—*Seizure of account books—Illegal.*

An attachment of account books by an officer acting under Ss. 150 and 154 of the Bombay

BOMBAY LAND REVENUE CODE (V of 1879), S. 203.

Land Revenue Code is illegal and the officer is liable to damages for doing so. (*Scott*, C.J. *and Heaton*, J.) DALUCHAND *v.* GULA BHAI.
34 I.C. 198=18 Bom. L. R. 823.

——S. 153-J—*Record of rights—Entry in—Presumption—Retrospective effect.*

S. 153-J of the Bombay Land Revenue Code is not retrospective with respect to the entries for the purpose of determining the rights of the parties which were till after 1913 innocuous. (*Scott*, C.J. *and Beaman*, J.) HATHISINGH JEEBHAI *v.* KUBER JETHA.
34 I.C. 667=22 Bom. L.R. 33.

——S. 154—*Distraint of chattels—How effected.*

A seizure for distraint of chattels may be either actual or constructive. The goods need not necessarily be touched or handled. (*Heaton and Pratt*, JJ.) EMPEROR *v.* LAL LUWAGHAL. **43 Bom. 550=21 Bom. L.R. 251=30 I.C. 999=20 Cr. L.J. 391.**

——S. 154—*Defaulter's property—Onus of proof.*

Section 154 will apply only if the distrained property is the moveable property of the defaulter and the onus is on the officer who effects a seizure to prove it. (*Scott* C. J. *and Chandavarkar*, J.) GANGARAM *v.* DINKAR.
37 Bom. 542=20 I.C. 526=15 Bom. L.R. 665.

——S. 197—*Absence of judicial inquiry—Rectification.*

A Revenue Officer, in correcting an entry so as to bring it in accordance with an order passed after hearing both the parties, can dispense with any judicial or quasi-judicial enquiry. (*Scott*, C.J. *and Russell*, J.) VASUDEO LAXMAN *v.* GOVIND MAHADEO. **36 Bom. 315=14 I.C. 473=14 Bom. L.R. 125.**

——S. 202—*Pasaita land settled as Pateli—Removed from Office—Order under S. 202, if can be made.*

The right to hold *Pasaita* land *rent free* was allowed so long as the services of Patelship were rendered by the same person but the only effect of the removal from the office of patelship was to take away exemption to pay rent and not to put an end to the right of possession. So long as he paid the assessment to the Government, he cannot be deemed to be in wrongful possession, and the Government have no right to eviot him. (*Macleod*, C.J. *and Shah*, J.) BHAVAN MORAR *v.* SECRETARY OF STATE. **45 Bom. 894=61 I.C. 287=23 Bom. L.R. 259.**

——Ss. 203 and 204—*Notice of demand of assessment is not a decision or order.*

A notice of demand to pay assessment by a mamlatdar cannot be treated as a decision or order within the meaning of Ss. 203 and 204 of

BOMBAY LAND REVENUE CODE (V of 1879), S. 203.

the Bombay Land Revenue Code. (*Macleod, C.J. and Shah, J.*) NATHURAM HIRARAM *v.* SECRETARY OF STATE FOR INDIA.
1922 Bom. 274=24 Bom. L.R. 402=67 I.C. 842=46 Bom. 811.

——S. 203—*Revenue Officer—Executive order—Appeal.*

Under S. 203 of the Bombay Land Revenue Code, the right of appeal against an executive order of a Revenue Officer is vested in every person aggrieved by the order, irrespective of his being a party to the enquiry wherein the order was passed. (*Pratt, J.C. and Hayward, A. J.C.*) MULCHAND TILOKCHAND *v.* MURADALI SHERAMAHOMED. 45 I.C. 335=11 S.L.R. 124.

——S. 214—Rule 63.

The rule means that existing reserved trees belong to Government, and future growth belongs to the occupier. (*Shah and Hayward, JJ.*) EMPEROR *v.* YELLAPPA RAMANGOWDA.
45 Bom. 110=38 I.C. 60=22 Bom. L.R. 884=21 Cr. L.J. 716.

——S. 214—*Power of Collector.*

R. 63 empowers a Collector to restore forfeited occupancy to the original occupant, before it has been disposed of by grant to a new occupant. (*Chandavarkar and Hayward, JJ.*) DHARMA BAL PATIL *v.* BOLAMIYA.
35 Bom. 91=12 I.C. 555=13 Bom. L.R. 968.

——Ss. 216 and 217—*Prior suit to recover the* mamool *rates—Later Survey Settlement—Effect of.*

Where the plaintiff inamdar got a decree for the *mamool* rates for the years 1888-1890 in the year 1892 against the defendant's Khots and where Survey Settlement was introduced in the village in 1885-86 and where he filed a suit in 1917 for those dues for the years 1915 and 1916. *Held*, that though the proper construction to be placed on S. 216 was not strictly speaking *res judicata*, still on the principle of *stare decisis* the previous construction should be adhered to. 18 Bom. 525, doubted. (*Macleod, Shah and Fawcett, JJ.*) SITHARAM *v.* LAXMAN.
45 Bom. 1260=65 I.C. 152=23 Bom. L.R. 718.

——S. 216—*Unalienated village lands are not within the section.*

Lands in an unalienated village, granted by Government, for rent wholly or partially free, do not fall within S. 216 of the Code. (*Macleod, C.J. and Fawcett, J.*) SITARAM SADASHIV *v.* TUKARAM DAJI. 45 Bom. 994=61 I.C. 577=23 Bom. L.R. 895.

——S. 217—Kadim *inam village—Survey Settlement with consent of inamdar — Mirasidar cannot get rent enhanced.*

Where with the consent of the *kadim inamdar* who is the grantee of the soil of a village, survey settlement is introduced, in the village, the *mirasidar* (or permanent tenant) can by virtue of S. 217 of the Code hold the lands on payment only of the assessment and the *kadimdar* cannot get that rent enhanced. (*Shah and Hayward, JJ.*) PANDU BALA JAGTAP *v.* RAMACHANDRA GANESH DESHPANDE. 45 Bom. 61=63 I.C. 671=22 Bom. L.R. 668.

BOMBAY MAMLATDAR'S COURTS ACT (II of 1906), S. 5.

——S. 217 — *Alienated village — Survey settlement—Expiration of period of settlement—Right of inamdar to enhanced assessment — Summary Settlement Act* (I *of* 1865).

Survey Settlement was extended to an alienated village on the application of the inamdar under Bombay Act, (I of 1865). The period of the settlement expired in 1888, and the inamdar recovered from 1895 higher assessment than that allowed under the Survey Settlement. The Commissioner objected in 1910 and the inamdar sued to establish his right to charge higher assessment. *Held*, that the inamdar had no such right since S. 217 applied, when a Survey Settlement had been introduced into an alienated village with the consent of the alienee under Bombay Act (I of 1865) and when the period of the Settlement had expired after the Code came into force. (*Shah and Hayward, JJ.*) DHONDO VASUDEO *v.* THE SECRETARY OF STATE. 44 Bom. 110=38 I.C. 198=22 Bom. L.R. 247.

——S. 217 — Kadim inamdar — *Alinee—Right to enhance rent.*

An inamdar, to whom the Government has granted all its rights in the soil in a village as well as its other pecuniary interests is entitled even after a Survey Settlement had been introduced to raise the rents of the permanent tenants even when such permanent tenancies had commenced before the alienation. (*Beaman, J.*) PANDU *v.* RAMCHANDRA.
42 Bom. 112=43 I.C. 785=20 Bom. L.R. 16.

BOMBAY MAMLATDAR'S COURTS ACT (II OF 1906).

——S. 5—*Dismissal of suit by mamlatdar—Trial ordered by Collector—Mamlatdar cannot after recording evidence send the papers for orders of Collector.*

A Mamlatdar in whose Court a possessory suit was brought dismissed it on the ground that the matter could be more properly tried by the Civil Court. On revision, the Collector directed the mamlatdar to proceed with the case and returned it for necessary action. The mamlatdar after recording some evidence sent the papers for orders to the Collector who heard the parties and declined to vary the original order of the mamlatdar. On an application for revision to the High Court, *Held* that immediately the case was sent back by the Collector, the mamlatdar's duty was to try the suit under the

BOMBAY MAMLATDAR'S COURTS ACT (II of 1906), S. 5.

Mamlatdar's Courts Acts and to give his own decision thereon ; and that the High Court in revision should direct the mamlatdar to restore the suit to his file and dispose of it according to law. (*Shah*, A. C. J. *and Crump*, J.) RASUL MUSA MAFAT *v.* ASMAN MUSA DADI.
24 B.L.R. 1311=76 I.C. 442=(1923) Bom. 60.

——S. 5—*Explanation—Possessory suit—Joint possession cannot be given by mamlatdar.*

A mamlatdar has no jurisdiction to award joint possession in proceedings under the Act. Any action of one co-owner who has rights over the whole property, although it may interfere with the joint ownership of the co-owner, does not amount to dispossession under S. 5. It is not intended that the ouster by one co-owner of the other can amount to dispossession within the meaning of the Act so as to entitle the mamlatdar to award joint possession, (*Macleod*, C.J. *and Shah*, J.) JINA *v.* MATHUR.
23 Bom. L.R. 1016=46 Bom. 289=68 I.C. 225=(1922) Bom. 126.

——S. 23 — *Collector, District Deputy Collector—Revision by High Court,*

A District Deputy Collector has no authority to pass an order under S. 23 of the Mamlatdar's Courts Act, of 1906. Where a District Deputy Collector has assumed to act judicially, he will be treated as a Court under the superintendence of the High Court and his proceedings can be revised under the extraordinary jurisdiction. (*Scott*, C.J. *and Batchelor*, J.) SONU JANARDAN KULKARNI *v.* ARJUN BARKU KUNBI.
39 Bom. 552=29 I.C. 954=17 Bom. L R. 579.

——S. 23—*Revision—No grounds for—Reversal of decision by Collector—Jurisdiction.*

Where in a decision of a Mamlatdar, there is no question of revision under S. 23 of the Act for illegality or impropriety, a Collector has no jurisdiction to reverse the decision on a different appreciation of evidence. (*Scott*, C.J. *and Beaman*, J.) HASAN MALIK *v.* RASUL MALIK.
37 Bom 595=20 I.C. 535=15 Bom. L.R. 680.

——S. 23—*Bombay Land Revenue Code, (Act V of 1879), S. 10.*

An Assistant Collector in charge of the Revenue of a portion of the district under S. 10 of the Land Revenue Code, is empowered to exercise all the powers of a Collector of the District under S. 23 of the Mamlatdar's Courts Act. (*Beaman and Hayward*, JJ.) KESHAV DHONDI SINDE *v.* JAIRAM.
36 Bom. 123=12 I.C. 709=13 Bom. L.R. 1031.

——S. 23—*Finding of mamlatdar on misappreciation of evidence—Collector can set aside.*

When the finding of the Mamlatdar is based on nothing but the unsupported allegations of the plaintiff, it must be called a finding based on a total misappreciation of what the evidence was. It is not based on evidence such as is necessary to establish a disputed claim and the error in the Mamlatdar's finding amounts therefore not only to an error of fact but also an error of law. In such a case therefore the Collector is perfectly justified in setting aside the finding of the Mamlatdar. (*Kennedy*, J.C. *and Madgaonker*, A.J.C.) MOTUMAL PARUMAL *v.* LEKHUMAL.
1922 Sind 18=16 S.L.R. 106.

BOMBAY NATIVE PASSENGER SHIPS ACT (X of 1887), S. 9.

——S. 24—*Revision—Judicial Commissioner's Court.*

Under S. 24 of the Act, the Judicial Commissioner's Court has the same powers as the High Court and exercises such revisional powers over the order of the Collector in its capacity as successors to the Sadar Diwani Adalat which exercised these powers under Regulation II of 1817 and which powers were vested in the High Court by the Statute 24 and 25 Vic. Chap. 104. (*Kennedy*, J. C. *and Madgaonker*, A. J. C.) MOTUMAL PARUMAL *v.* LAKHUMAL.
1922 Sind 18=16 S.L.R. 106.

——S. 24—*Judicial Commissioner—Provisions of C. P. Code*—Ex parte *order—Setting aside.*

S. 24 of the Mamlatdar's Courts Act read with Bombay Regulation II of 1827, bestows revisional powers on the Court of the Judicial Commissioner in Sind. That Court has therefore the power to call for the proceedings of the Mamlatdar's Courts and to issue such orders thereon as the case may require. The Mamlatdar's Courts Act itself lays down its own simple and summary procedure. The provisions of the C. P. Code do not apply to the proceedings under this Act. A Mamlatdar has no power to pass an *ex parte* decision unless he is satisfied that the defendants had notice sufficient to enable them to appear on the date fixed for appearance at the place where the proceedings are held. (*Pratt*, J.C. *and Hayward*, A.J.C.) KHAMISO *v.* RASA.
16 I.C. 675=5 S.L.R. 67.

BOMBAY MATADARS ACT (VI of 1887.)

——S. 9—*Death of Matadar—Heirship—Right to.*

On the death of a representative Matadar, the heir next in succession is ascertained in the first instance by reference to the personal law of the parties. (*Batchelor*, J.) DAHYA KHUSAL *v.* BAI BHIKHI.
39 Bom. 478=29 I.C. 500=17 Bom. L.R. 504.

BOMBAY NATIVE PASSENGER SHIPS ACT (X of 1887).

——Ss. 9, 10 and 31—*Voyage includes both outward and return journey.*

The accused's steamer, left Bombay for Goa with passengers and returned back again to Bombay. He had a certificate 'A' as required by Ss. 9 and 10 of the Act but it has expired by the time of the return journey and he was charge-

BOMBAY PLEADERS ACT (XVII of 1920), S. 10.

for an offence under S. 31 of the Act. *Held*, he could not be convicted, as 'voyage' includes both the outward and the return journey and the certificate he had was enough. (*Macleod*, C.J. *and Shah*, J.) EMPEROR *v.* MACHAD.
23 Bom. L.R. 1200=69 I.C. 91=46 B. 438=1922 Bom. 167=23 Cr. L.J. 951.

BOMBAY PLEADERS ACT (XVII of 1920).

——S. 10—Ex parte *decree—Application to set aside—Pleader appearing in the suit, appearing for the application—Fresh vakalat unnecessary.*

Where a pleader files a Vakalatnama at the original hearing of a proceeding, it is not necessary for him to bring a fresh Vakalatnama for the purpose of an application to set aside an *ex parte* decree. (*Macleod*, C.J. *and Kanga*, J.) BACHUBAI JHIRAD *v.* IBRAHIM ISUK.
24 Bom. L.R. 744=47 B. 11=69 I.C 169=1922 B. 207.

——S. 10 (1)— *Execution proceeding — No fresh* Vakalatnama *is necessary.*

An application for execution does not require a separate *Vakalatnama* under S. 10 (1), although the Vakil is entitled to a separate fee on account of execution proceedings. (*Macleod*, C. J. *and Shah*, J.) ISOOB SAIBA ABDUL RAHIMAN *v.* HAIDER SAIBA.
23 Bom. L.R. 883=64 I C. 55=46 Bom. 123=1922 Bom. 113.

BOMBAY PUBLIC CONVEYANCE ACT (VI of 1863).

——S. 2—*Using a licensed pony in a licensed* tonga *though numbered differently.*

Using a licensed pony for a licensed tonga, though the pony does not bear the number of the *tonga*, is not an offence under S. 2 (*Batchelor and Shah*, JJ.) EMPEROR *v.* SANJIVA SHIVAPPA. 17 Cr. L.J. 144=33 I.C. 320=18 Bom. L.R 65.

——S. 2—*Yoking of unlincesed pony to* tonga.

The yoking of an unlicensed pony to a *tonga* is an offence within S. 2 of the Act. (*Scott*, C.J. *and Show*, J.) EMPEROR *v.* HARI TANAJI.
14 Cr. L.J. 488=20 I.C. 618=15 Bom. L.R. 700.

——(VII of 1920), S. 22—*Carriages let for hire to approved customers are not within section.*

Under Bombay Act VII of 1920 a public conveyance is a vehicle which is used for the purpose of plying for hire for the conveyance of passengers and goods. A person who owns carriages which are let for hire to approved customers cannot be said to let them for hire within the meaning of S. 22 of the Bombay

BOMBAY REGULATION (V of 1827), S. 14.

Public Conveyances Act, 1920. (*Macleod*, C. J. *and Crump*, J.) EMPEROR *v.* NASARVANJI BOMANJI. 23 Bom. L.R. 95=72 I.C. 70=24 Cr. L.J. 310=1923 Bom. 258.

BOMBAY REGULATION.

——(II OF 1827), S. 5—*Powers of interference—High Court.*

Decision in a Municipal election case, on the issues whether the Govt. is a party and whether the Court could hear the suit is a decision in a case under S. 5 of the Regulation. (*Shah*, A.C.J. and *Coyajee*, J.) SECRETARY OF STATE *v.* NARSEBAI DADUBAI PATEL.
25 Bom. L R. 992=77 I.C. 241=48 Bom. 43=1924 Bom. 68.

——S. 52—*Pleader's fee—Assessment of.*

For assessing the Pleader's fees, an appeal to the High Court from a preliminary decree adjudicating the status of a party as an agriculturist is regulated by the Pleaders' Act neither by S. 52 of Regulation II of 1827 nor by S. 6 but by Rule 65 of the Appellate Side rules of the Bombay High Court. (*Batchelor and Rao*, JJ.) MANOHAR RAMCHANDRA HINGE *v.* COLLECTOR OF NASIK.
37 Bom. 303=17 I.C. 964=14 Bom. L.R. 1190.

——S. 56—*Misbehaviour of pleader.*

The word "misbehaviour" in juxta-position with the case of a pleader merely accused of a criminal offence need not necessarily be restricted to professional misbehaviour. (*Batchelor and Rao*, JJ.) GOVERNMENT PLEADER *v.* ANNAJI NARAYAN DESHPANDE.
37 Bom. 354=14 I. C. 529=14 Cr. L.J. 257=15 Bom. L.R. 231.

——(IV of 1827), S. 26—*Scope of.*

There is no presumption in favour of a custom deviating from general or personal law being applicable to a case. Custom is made applicable only if it is proved as required by law. (*Lord Buckmaster*). ABDUL HUSSEIN KHAN *v.* BIBI SONA DERO. 45 Cal. 450=16 A.L.J. 17=4 Pat. L.W. 27=34 M.L.J. 48=22 C.W.N. 353=43 I.C. 306=23 M.L T. 117=27 C.L.J. 240=1 Pat.L.R. 1918=20 Bom. L.R. 528=12 S.L.R. 104=45 I.A. 10 (P.C.).
[Affirming 16 I.C. 941=6 S.L.R. 1.
See also 8 I.C. 897=4 S.L.R. 88.

——(V of 1827) S. 14—*Effect and scope of—Tender—Mortgage debt if included—Partial tender—Validity of.*

In S. 14 of Bombay Regulation V of 1827 it is provided that, if a debtor can prove that he has tendered to a creditor the whole or any portion of the amount due, all further interest shall cease on the amount tendered. The word "debtor" in S. 14 is certainly wide

BOMBAY REGULATION (XII of 1827), S. 27.

enough to cover a debtor who has given security by way of mortgage, and this is in fact shown by S. 15 of the same Regulation, which deals with the case of a usufructuary mortgage, or pledge and speaks of a creditor of the debt. Similarly in Act No. XXVIII of 1855, which provides for the Repeal of the Usury Laws, S. 6 speaks of the lender and borrower of money upon any mortgage, so that there is no reason to suppose that S. 14 (if literally construed) would not cover the case of a mortgagor and mortgagee. S. 14 of Bombay Regulation of 1827 is still in force in the Presidency Town of Bombay, as well as the rest of the Bombay Presidency. In the case of a mortgagor who seeks to redeem the entire mortgage and tendering only a part of the mortgage-debt really due. S. 14, so far as it relates to a tender of a part of a debt can be held to apply to a case of that kind. (*Fawcett*, J.) NADERSHAW *v.* SHIRINBAI.
25 Bom. L.R. 839=1924 Bom. 264.

——(XII of 1827) S. 27—*District Magistrate—No delegation—Restriction in bond—Interference with means of livelihood.*

The District Magistrate is to impose restrictions in the bond. Delegation of this duty to the Superintendent of Police is *ultra vires*. The restrictions in a bond taken under S. 27 of the Regulation should be imposed by the District Magistrate himself so as not to affect personal liberty or impair the means of procuring livelihood of the suspect. Conditions in bond should not unreasonably interfere with suspect's personal liberty or means of livelihood. (*Pratt*, J.C. *and Hayward*, A.J.C.) EMPEROR *v.* UMAR.
15 Cr. L.J. 255=19 I.C. 511=6 S.L.R. 177.

——S. 37—*Exemption of particular hamlets—Imposing separate fines—Hindus and Muhammadans—Jurisdiction of Magistrate.*

Imposing separate fines on the Muhammadan and Hindu residents is without jurisdiction. The responsibility is on the whole community residing within the village and a Magistrate cannot exempt particular hamlets or villages from his order. Nor should he impose separate fines on Muhammadans and Hindus. The exemption from responsibility of particular hamlets or individuals within the bounds of the village is without jurisdiction. Neglect must consist of acts or omissions leading to the inference that villagers were in sympathy with the robbers and obstructed the police investigation. Mere cowardice is irrelevant. (*Pratt*, J. C. *and Hayward*, A. J. C.) EMPEROR *v.* THE ENTIRE DESH OF CHAKAR KOTE.
15 Cr. L.J. 249=19 I.C. 505=6 S.L.R. 124.

——S. 37 and 9—*Scope—Attendance of villagers at trial, if compulsory—Conviction of individual members, whether valid.*

Section 37 of the Bombay Regulation XII of 1827 empowers a Magistrate to take proceedings against the inhabitants of a village (which includes also a hamlet), but he cannot make an order affecting individual members alone as the responsibility attaches under Section 37 to the whole village; the attendance of the villagers at such proceedings is unnecessary. (*Pratt*, J.C. *and Hayward*, A. J. C.) IMPERATOR *v.* ABDULA SHAH.
12 Cr. L.J. 391=11 I.C. 255=4 S.L.R. 269.

BOMBAY RENT (WAR RESTRICTIONS) ACT (II of 1918), S. 2.

BOMBAY RENT (WAR RESTRICTIONS) ACT (II of 1918).

——*Sub-tenant of judgment-debtor cannot obstruct landlord.*

The sub-lessee of the sub-tenant is not entitled to obstruct the original landlord who has got a decree against the lessor of the sub-tenant as there is no privity of contract between the landlord and the sub-tenant, though the sub-tenant may be entitled to protection against the immediate lessor. (*Macleod*, C. J.) JAFFERJI *v.* MIYADIN.
23 Bom. L.R. 1251=64 I.C. 692=46 Bom. 526=1922 Bom. 273.

——S. 2—*Standard rent cannot vary as between different persons.*

By including in 'landlord' a tenant who sub-lets and in 'tenant' a sub-tenant, the benefits of the Act are extended to sub-tenants. The standard rent was not intended to be determined by different standards between landlord and tenant and tenant and sub-tenant. Standard rent must mean the rent at which the premises were originally let. It is to be fixed in relation to premises and not in relation to persons and can only be one and not varying as between different persons. (*Setalwad*, J.) CHAPSI UMERSI *v.* KESHAVJI DAMJI.
45 Bom. 765=60 I. C. 950=23 Bom. L. R. 133.

——S. 2 (1) (b)—*Act does not apply to relationship of licensor and licensee.*

The distinction between a lease and license is that in the former case there is an exclusive right to possession on the part of the tenant while in the case of a license, the licensee has not got such a right. Plaintiffs owned a stable in which there were open spaces for keeping carriages as they came in and stalls for horses. There were open spaces for motor cars as well as cubicles large and small. Deft. hired stabling accommodation for the horses, carriage and three motor cars. The carriage was kept in the open space, and the horse in the stalls. One of the motor cars was kept in the open space, another in the large cubicle along with other cars and the third in a small cubicle separately. The owner of the stables wanted an enhanced rent. *Held*, that the relation between the parties was not that of landlord and tenant but merely of licensor and licensee and that the provisions of the Bombay Rent (War Restrictions) Act were no bar to enhancement of the rent. (*Fawcett*, J.) THE INDIAN HOTELS CO, LTD. *v.* PHIROZ SORABJI.
25 Bom. L.R. 35=1923 Bom. 228.

BOMBAY RENT (WAR RESTRICTIONS) ACT (II of 1918), S. 2.

——Ss. 2 (c) and 9—*Landlord—Meaning—Lessee entitled to recover rent, if a landlord—Right to exercise rights under S. 9 (2).*

Plaintiffs who were lessees for a period of 20 years from 6-2-1918 gave notice of ejectment to the tenant of the premises on 31-3-1918 and sued for possession on the day when the Rent Act came into force. *Held*, that plaintiffs fell within the terms of the definition of 'landlord' in S. 2 (c) of the Bombay Rent Act, for they were the persons entitled to recover rent for the premises when the Act came into force. Plaintiffs were entitled to the possession of the premises as reasonably and *bona fide* required for their own occupation. (*Scott*, C. J. *and Hayward*, J.) MORARJI GOKUL DAS & CO. LTD. *v.* THE ASIAN COMMERCIAL ASSURANCE COY., LTD. 43 Bom. 795=51 I. C. 293=21 Bom. L. R. 397.

——S. 3—*Failure to pay stipulated rent.*

The tenant failed to pay the rent stipulated for in the agreement of lease between landlord and tenant, but simply paid the standard rent. On the landlord asserting his right of re-entry for breach of covenant, *held*, the tenant is liable to pay only the standard rent for failure to pay which the landlord can re-enter but not for failure to pay the stipulated rent. (*Setalwad*, J.) KASTURBHAI MANIBHAI *v.* HIRALAL DAYABHAI. 46 Bom. 535=58 I. C. 69=22 Bom. L.R. 926.

——S. 7 (1)— *Standard rent—Additional charges for supplying electric light—No offence.*

The supplying of electric light on the passages of the building was a matter of arrangement or contract between the tenant and the landlord and does not necessarily form a part of the rent and a landlord who charges a fair rent for electric supply to the tenant is not guilty of having charged excess rent under S. 7 (1). (*Shah and Kajiji*, JJ.) EMPEROR *v.* RAM GOPAL RUPJI. 45 Bom. 188=53 I.C. 149=21 Cr. L.J. 725=22 Bom. L.R. 900.

——S. 8—*Act—Premium for arranging lease—If allowed.*

Where a sub-lessee of premises granted a lease for the unexpired portion of his period and agreed to get a renewal for a further period, in consideration of which he stipulated for a premium in addition to the standard rent, the agreement is contrary to S. 8 of the Bombay Rent Act, and specific performance is unenforceable. (*Shah*, A.C.J. *and Crump*, J.) SHAVAKSHAV DINSHAW DASAR *v.* MOTOR UNION INSURANCE CO. 25 Bom. L.R. 1313=1924 Bom. 295.

——S. 9—*Scope and object of.*

The first part of S. 9 of Act II of 1918 points to the act of a tenant whose lease has terminated and therefore the subletting must have occurred after the termination of the lease; so also in the second part of the sub-section the term of the lease must be lease fixed before the sub-letting. The object of the sub-section is to put a stop to a statutory tenancy being used as a source of profit by a tenant who does not require the premises for his own occupation. The first part refers to a tenant who holds over under S. 9 (1) and the second part to a tenant who sublets beyond his term in expectation of statutory tenancy. (*Pratt*, C.J.) MADHAVJI VIRJI *v.* LAKSHMIDAS MULJI & CO. 25 Bom. L.R. 1178=48 Bom. 257=1924 Bom. 99.

——S. 9—*Requirement by landlord—Reasonable and bona fide demand—Test of.*

The plaintiff, who carried on business in hardware in a rented shop in the Fort in the City of Bombay, was ejected by the owner of the shop-premises. The plaintiff owned a house, in another locality of the city, known as Tardeo, which had seven compartments on the ground floor. Five of these compartments were already in plaintiff's possession. He sued to recover possession of the remaining two compartments in order to carry on his business in hardware on the ground floor of the house. The area of the whole of the ground floor was less than the area of the rented shop in the Fort. The trial Judge dismissed the suit on the ground that the area already in plaintiff's possession was quite enough for developing a new business in the Tardeo locality:—*Held*, decreeing the claim for possession that to prevent the plaintiff from occupying a space in his own premises equal to the space previously rented by him on the ground stated by the trial Judge would be going entirely beyond the jurisdiction of the Court in cases falling under the Bombay Rent Act, 1918. (*Macleod*, C.J, *and Shah*, J.) NOWROJI HORMASJI PATHAK *v.* V. SRINIVAS PRABHU. 46 Bom. 632=24 Bom. L.R. 95=66 I.C. 929=1922 Bom. 222.

——S. 9—*'Tenant' does not include sub-tenant.*

The term 'tenant' in S. 9 does not include a sub-tenant. Unlike trespassers they come in by right but like trespassers they hold over without right and are in the same position as trespassers. (*Pratt*, J.) SUGANCHAND SAVAICHAND *v.* MOTILAL DURGAPRASAD. 24 Bom. L.R. 155=67 I.C. 130=1922 Bom. 197.

——S. 9—*Requirement of fraction of premiss is not requirement of whole.*

A *bona fide* requirement of a small fraction of the premises leased, does not amount to a reasonable requirement of the whole of the premises, and so a landlord cannot sue to evict a tenant in such cases under S. 9 of the Act. (*Pratt*, J.) VITHALDAS BHAGWANDAS *v.* NAGUBAI M. JOSHI. 68 I.C. 333=23 Bom. L.R. 856.

——S. 9—*Reasonable and* bona fide *purpose.*

When the intention of the community who own the premises was to put in one of the

BOMBAY RENT (WAR RESTRICTIONS) ACT (II of 1918), S. 9.

members of the community in possession of the premises it cannot be said that the community required the premises for their own purposes reasonably and *bona fide*. (*Macleod*, C.J. *and Shah*, J.) ATMARAM *v.* NARAYAN.
23 Bom. L.R. 972=64 I.C. 555=46 Bom. 132=1922 Bom. 109.

——S. 9—*Portion of premises required by landlord—Decree—Severance of tenancy.*

Where in a suit for ejectment of a tenant from a house on the ground that the landlord requires the premises for his own use, it is found that he reasonably requires a portion of the premises and the tenant is willing to occupy the remainder of the premises the decree should direct the surrender only of the portion required by the landlord. There is, under the circumstances no valid objection to the severance of a tenancy. (*Macleod*, C. J. *and Shah*, J.) KUNDANMAL DAULATRAM *v.* LAKHMICHAND.
45 Bom. 1294=63 I.C. 1007=23 Bom. L.R. 559.

——S. 9—*Object of the Act — Landlord choosing to occupy the house himself.*

The Act provides for the case of a landlord, who ejects an existing tenant in order to let the premises to another at a higher rent or exact more rent from the same tenant with the threat of eviction. Where the owner desires to occupy the premises himself, he can do so and can occupy any portion of the house he likes provided he does not occupy more space than necessary. (*Macleod*, C. J. *and Shah*, J.) RUSTOMJI DINSHAW BILLIMORIA *v.* DOSIBAI RUSTOMJI. **45 Bom. 1236=63 I.C. 41=23 Bom. L.R. 850.**

——Ss. 9 and 10—*Ejectment, suit for — Court, duty of—Court can postpone execution of decree.*

It is the duty of the Court under S. 9 (2) of the Act, to decide whether the landlord reasonably and *bona fide*, requires the premises for his own use. A Court has power under S. 10 of the Act to postpone execution of a decree for ejectment for a certain period with liberty to apply after the expiry of the period fixed. (*Macleod*, C. J. *and Fawcett*, J.) BHAGWANDAS MAGANLAL *v.* KAIKHUSARU ADIJI.
45 Bom. 928=61 I.C. 273=23 Bom. L.R. 287.

——S. 9—*Applicability—Act does not apply to premises acquired under the Land Acquisition Act.*

The Act was not intended to apply to premises acquired under the Land Acquisition Act for public purposes. The object is to effect acquisition immediately for public purposes. The general provisions of the Act do not override or repeal the special enactments, like the Land Acquisition Act or the Municipal Act. (*Setalvad*, J.) BOMBAY MUNICIPALITY *v.* M. DAMODAR BROS. **45 Bom. 725=60 I.C. 571=23 Bom. L.R. 35.**

BOMBAY RENT (WAR RESTRICTIONS) ACT (II of 1918), S. 9.

——S. 9—*Object of pulling down of old house and building new ones—Reasonable requirement*—Bona fide.

The Act does not mean that the improvement of old, ill-erected, badly ventilated premises should be entirely stopped until the Act is repealed. All that the Courts have to do in construing S. 9 is to see that the landlord is acting reasonably, to determine which, the Courts should consider the condition of the premises and should not consider the existence of other buildings owned by the same landlord. (*Macleod*, C.J. *and Heaton*, J.) PUDUMJI *v.* SIR DINSHAW MANEKJI PETIT. **58 I.C. 27=22 Bom. L.R. 880.**

——S. 9—*Landlord, rights of.*

Where the limitations upon the rights of landlord created by S. 9 are removed his previous rights revive. (*Kincaid*, J.C. *and Kennedy*, A.J.C.) HUSSAN LAL MUHAMMAD *v.* BACHAL HAJI NATHU. **62 I.C. 860=15 S.L.R. 79.**

——S. 9 (1)—*Ejectment for non-payment of rent cannot be resisted by deposit after suit.*

The conditions in S. 9 (1) of the Bombay Rent Act are conditions precedent which must be fulfilled at the date of the cause of action. Consequently where a landlord brings a suit to eject a tenant whose rent is in arrears for a long time, the tenant cannot, by paying the arrears of rent into Court, resist the suit in ejectment. Where the tenancy is determined not by forfeiture but by a notice to quit, the Court has no power to grant relief against eviction by the landlord. (*Pratt*, J.) MATHURADAS MAGAN LAL *v.* NATHUBAI.
26 Bom. L.R. 345=47 Bom. 756=70 I.C. 920=1923 Bom. 387.

——S. 9 (2)—*Accommodation of employees of landlord is a satisfactory cause for ejectment.*

The accommodation of a staff of employees of the landlord is a satisfactory cause within the meaning of S. 9 (2) of the Bombay Rent (War Restrictions) Act 1918, for the ejectment of a tenant, though it does not amount to a reasonable and *bona fide* requirement by the landlord for his own occupation within the meaning of the section. (*Pratt*, J.) NIPPON MENKWA KAIMSHIKI *v.* F. PORTLOOK.
24 Bom. L.R. 55=65 I.C. 677=1922 Bom. 70.

——S. 9 (2)—*Building by landlord—Eviction of tenant.*

S. 9, Cl. (2) does not require expressly or by implication that the building must be erected by the landlord, and it does not mean that if a building is erected by some person other than a landlord under some arrangement with the landlord, the landlord cannot require the tenant to leave the premises. (*Macleod*, C.J. *and Heaton*, J.) RUSTAN SORABJI POWWALA *v.* RAMCHANDRA BALAJI GAIKWAR.
57 I.C. 993=22 Bom. L.R. 860.

BOMBAY RENT (WAR RESTRICTIONS) ACT (II of 1918) S. 10-A.

———S. 10-A—*Notice of motion—Limitation—Copy of notice filed with protonotary—Motion in Court after expiry of prescribed period—Effect of.*

The period of limitation for applications by way of motion to the High Court is calculated from the date on which the motion is brought on in Court and not from the date on which the copy of the notice of motion is lodged with the protonotary. In cases when the motion is brought on such that an application can be said to be made to the Court, the copy of the notice of motion being lodged with the protonotary does not amount to an application; it is only an intimation to the Court that an application is intended to be made. 31 C. 150, foll; 17 M.L.J. 215, dist. The law will be different so far as the Madras High Court is concerned for there it is the Court that issues notice of motion. (*Pratt*, J.) NAZARALLY *v.* KANEMAR.

25 Bom. L.R. 13=1924 Bom. 289.

———S. 10-A—*Limitation for application—Starting point—Copy of notice of motion filed with protonotary within the period of limitation—Motion in Court after the expiry of the period—Limitation.*

Though it is open to a defendant for applying direct to the Court for a rule *nisi* in order to call upon the plaintiff to show cause why the relief prayed for should not be given under S. 10-A of the Rent Act, the usual procedure in a case where a party wishes to obtain a relief of an interlocutory nature, is by motion, and necessarily the first step which has to be taken is to file a notice of motion in Court. To file the notice of motion in such a case is deemed to be the application which the applicant wishes to make and though the application is moved in Court after the expiry of the prescribed period, it is not barred by limitation if it is filed in the proper office of the Court within time. (*Macleod*, C.J. *and Crump*, J.) KANEMAR VENKAPAIYA *v.* NAZERALLY TYABALLY.

47 Bom. 765=25 Bom. L.R. 484=1924 Bom. 36.

BOMBAY REVENUE JURISDICTION ACT (X of 1876).

———Ss. 4 and 5—*Claim as Jangam—Claim to restrain levy of rent in excess of assessment.*

A suit to declare that plaintiff was *Jangam* is based under S. 4 (*a*) (2) of the Bombay Revenue Jurisdiction Act. But he can ask under S. 5 for a declaration that the Collector could not levy rent on his lands in excess of the full assessment by Government and can stop the Government from collecting the excess. (*Shah*, A.C.J, *and Kemp*, J.) PATDAYA MUPPAYA *v.* SECRETARY OF STATE FOR INDIA.

25 Bom.L.R. 1160=1924 Bom. 273=48 Bom. 61.

———S. 4—*Suit for declaration that plffs. are hereditary vatandar Kulkarnis.*

A suit against the Secretary of State for a declaration that plffs. are hereditary vatandar kulkarnis and entitled to the *vahivat* of the Vatan hereditarily is barred by S. 4 (*a*) of the Bombay Revenue Jurisdiction Act (1876). (*Macleod*, C.J. *and Heaton*, J.) DAMODAR KRISHA KULKARNI *v.* THE COLLECTOR OF NASIK.

44 Bom. 261=65 I.C. 388=22 Bom. L.R. 99.

BOMBAY REVENUE JURISDICTION ACT (X of 1876) S. 4.

———S. 4—*Whether* ultra vires—*Government of India Act* (1858), *S.* 65.

S. 4 is not *ultra vires* of the Government virtue of S. 65, Govt. of India Act (1858), much as a similar suit could not have been brought against the East India Company. (*Macleod*, C.J. *and Heaton*, J.) RICHANGAUDA IRANGAUDA *v.* SECRETARY OF STATE.

44 I.C. 129=21 Bom. L.R. 1155.

———S. 4—*Scope of.*

Where a person in possession of vatan lands under a miras lease or mortgage from the owner continues in adverse possession of the land after the death of the owner for the statutory period, he is still liable to be ousted under the Hereditary Offices Act and so he is at most entitled only to an injunction restraining the owners from taking proceedings other than under the Hereditary Offices Act to recover possession. An order which though purporting to be passed under the Hereditary Offices Act is not authorized by the Act, does not come under the purview of the Revenue Jurisdiction Act. (*Scott*, C.J. *and Beaman*, J.) MAGNACHAND *v.* VITHALRAO.

37 Bom. 37=17 I.C. 148=14 Bom. L.R. 793.

———S. 4 (a), Para 3—*Order of Collector under S. 11-A of Bombay Hereditary Offices Act—Revision by High Court.*

An order of a Collector under S. 11-A of the Bom. Hereditary Offices Act directing a levy of full rent is an order within S. 4 (*a*), para. 3 of the Act and therefore the High Court has no jurisdiction to interfere with the order. (*Macleod*, C. J. *and Shah*, J.) DATTATREYA *v.* LAXUMAN CHIMNAJI.

64 I.C. 7=23 Bom. L.R. 561.

———S. 4 (a)—*Construction.*

S. 4 (*a*) of the Act should be strictly construed and a refusal by the Collector to declare an alienation null and void does not prevent the Civil Court from discussing the question of binding nature of the alienation. (*Macleod*, C. J., *Shah and Hayward*, JJ.) DATTATREYA KESHAV *v.* TUKARAM RAGHU.

48 Bom. 1141=61 I.C. 372=23 Bom. L.R. 876.

———Ss. 4 (b) and 5—*Inamdar — Miraspatra—Effect—Survey settlement—Introduction of—Right to levy building fines.*

Defendants were inamdars of the village and they were grantees of the soil as well as assignees of the revenue. The plaintiffs were mirasi class of peramanent tenants holding under the inamdars under comparatively recent Miraspatra

of 1859 and 1864. Survey settlement was introduced into the village at the request of the inamdars and a revised assessment of agricultural land came into effect. Under S. 217 of the Bombay Land Revenue Code, all holders of land in the village became liable in respect of such lands to the provisions of the Land Revenue Code. The Collector under rules framed by the Government and at the request of the inamdar purported to levy building fines for the benefit of the Inamdar assignees of the land revenue. The plffs. sued for a a declaration of their rights to hold the land free from building fines and for an injunction restraining the Inamdars from levying such fines. The Inamdars pleaded that the suit was barred under S. 4 (*b*) of the Bom. Rev. Jurisdiction Act. *Held* that the suit was not barred by S. 4 of the Bom. Rev. Jurisdiction Act. If without questioning the legality or propriety of the amount or incidence *per se* the plff., asserts a right independent of and having no relation to it, such as a right to pay a certain fixed amount annually under a contract between him and the Inamdar, he cannot be said to object to the amount of incidence of the assessment within the meaning of S. 4 (*b*). An objection to come within either of the two heads of cl. (*b*) of S. 4 must be an objection which reaches them directly (*i. e.*,) an objection to them *per se* which admits the liability to pay land revenue on the part of the objector but quarrels with its amount or incidence of the validity and effect of the notification of survey settlement as by themselves objectionable, not because some other right affects them or makes them inapplicable to this particular case. 28 B. 74, Ref. (*Shah*, A. C.J. *and Pratt*, J.) DAMODHAR MAHADEV BHONDE *v.* KASHINATH SADASHIV. 1923 Bom. 79=76 I.C. 897=24 Bom. L.R. 1040.

———S. 4 (c) and 6—*Scope of—Seizure of property.*

A suit on a claim arising out of an alleged illegality of the proceedings taken for the realisation of land revenue would not be barred by S. 4 (*c*) of the Act, as the proceedings mentioned in that Section must, in their inception, be legal. S. 6 of the Act does not protect an officer who did not believe the property seized by him to be the property of the defaulter. (*Scott*, C. J. *and Chandavarkar*, J.) GANGA RAM *v.* DINKAR. 37 Bom. 542=20 I.C. 526=15 Bom. L.R. 665.

———S. 4—Proviso (k)—*Khatib inam—Resumption—Suit to set aside—Civil Court—Jurisdiction.*

Lands assigned to a Khatib inam were enjoyed rent free by the grantee and continued to him on the same terms by the Inam Commissioner in 1856 under Act (XI of 1852). Plff. an alienee from a Khatib enjoyed them similarly from 1864 to 1910 and claimed to have performed the Khatib service. In 1911 the Commissioner resumed the lands by levying full

assessment on them. Plff. sued for a declaration that he was the full owner of the lands of the Khatibgari right appertaining to them. *Held*, that the plff.'s claim to hold the land wholly or partially free from payment of land revenue under an adjudication order passed by a competent officer under Act (XI of 1852) was cognizable in the Civil Courts under proviso (k) to S. 4 of the Bombay Revenue Jurisdiction Act. (*Shah and Hayward*, JJ.) FAKRODIN SAB *v.* SECRETARY OF STATE. 21 Bom. L.R. 1166=54 I.C. 105=44 B. 130.

———S. 4—Proviso (k)—*Land exempted from land revenue—Suit claiming exemption—Jurisdiction—Civil Court.*

Lands appurtenant to Kaji Vatan were continued by the Inam Commissioner in 1852 as sarva inam to a predecessor-in-title of the plff. Plff., an alienee from a Kaji, held the lands free of assessment, though the service of the Kaji continued to be performed by the descendants of the Kaji. The Collector ordered in 1914 full assessment to be levied for the lands in question and in case of non-payment lands to be forfeited. Plff. sued for a declaration that the Collector's order was illegal and *ultra vires*. *Held*, that cognizance of the suit by the Civil Court was not barred under S. 4 (*a*) (1) of the Bombay Revenue Jurisdiction Act, 1876 for, the suit fell within proviso (k.) (*Shah and Hayward*, JJ.) MAHMADSAHEB *v.* SECRETARY OF STATE. 21 Bom. L.R. 1159=54 I.C. 98=44 B. 120.

———S. 11—*Collector's refusal to grant sanad—Suit.*

S. 11 clearly prevents the High Court from entertaining any suit on account of the Collector's refusal to grant the plaintiff a sanad, as the plaintiff has to prove, previously to filing the suit, that he had presented all such appeals allowed by the law for the time being in force, as within the period of limitation allowed for bringing such suit it was possible to present. (*Macleod*, C.J. *and Crump*, J.) AMBARAM KUBERDAS *v.* SECRETARY OF STATE FOR INDIA. 74 I.C. 196=1923 Bom. 416.

———S. 11—*Rent free land—Demand of assessment—Notice by mamlatdar—Suit to set aside is maintainable.*

Plffs. who had been holding their lands rent free were suddenly served by the mamlatdar with a notice of demand to pay assessment. There was no order by the Collector to that effect. Plffs. filed a suit for declaration that they were entitled to hold their lands rent free.

Held that this was a case to which S. 11 of the Bombay Revenue Jurisdiction Act would not apply and that the suit as laid was maintainable. (*Macleod*, C.J. *and Shah*, J.) NATHURAM HIRARAM *v.* SECRETARY OF STATE FOR INDIA. 25 Bom. L.R. 402=1923 Bom. 275=67 I.C. 852=46 Bom. 811.

BOMBAY REVENUE JURISDICTION ACT (X of 1876), S. 11.

———S. 11—*Order by Collector to remove encroachment—No appeal preferred—Suit to set aside is not maintainable.*

A person against whom an order was passed by the Collector to remove an alleged encroachment and who preferred no appeal against the order within 2 months thereof is barred under S. 11 of the Act from afterwards suing in the Civil Court, to get the order set aside. (*Macleod*, C.J. *and Heaton*, J). DAYAL KUSHAL *v.* SECRETARY OF STATE.
39 I.C. 122 = 22 Bom. L.R. 1089.

———Ss. 12 and 4—*Reference under S. 12 excluded where a claim is excluded under S. 4.*

J sued B for declaration that he, and not B was the adopted son of X and as such was entitled to his properties. B pleaded that J's adoption was not consented to by the Maharajah of Kolhapur and was void as such. The case went up to the Privy Council which finally decided in J's favour. The Maharajah of Kolhapur who was not a party to the suit took exception and made representation to the Govt. of Bombay that J's adoption was invalid owing to want of consent on his part. The Bombay Govt. then referred the matter to the High Court under S. 12 of the Act, *held* that the Maharajah had himself a claim against Govt., jurisdiction as to which was excluded under S. 4 and that the matter was therefore referable to the High Court. (*Viscount Haldane*), MAHARAJA OF KOLHAPUR *v.* SHRI BALA MAHARAJ. **33 M.L.T. 378 = 50 I.A. 308 = (1923) M.W.N. 688 = 77 I.C. 100 = 48 B. 1 = 26 Bom. L.R. 252 = 1923 P.C. 194 (P.C).**

———S. 12—*Reference can make order as to High Court—Costs.*

On a reference to the High Court under S. 12 of the Bombay Revenue Jurisdiction Act, the High Court has powers to deal with costs, as to who should pay them and as to how they are to be ascertained. (*Macleod*, C.J., *Pratt and Fawcett*, JJ.) *In re* JAGANNATH VASUDEO PANDIT. **45 Bom. 1177 = 61 I.C. 271 = 23 Bom. L.R. 189.**

———S. 12—*Claim not cognisable by Civil Court can be referred to High Court.*

S. 12 of the Act gives the Government the right to refer to the High Court all the claims and objections not cognisable by a Civil Court and this right is not excluded in respect of claims not cognisable by a Civil Court even before the passing of the Act. (*Macleod*, C.J., *Pratt and Fawcett*, JJ.) *In re*, VASUDEV HARIHAR PANDIT. **45 Bom. 463 = 61 I.C. 146 = 23 Bom. L.R. 161.**

BOMBAY SALT ACT (II OF 1890).

———Ss. 11 and 47—*Contract to sub-lease saltpan against conditions of license is unenforceable.*

The defendants leased a salt-pan from Government under a license; one of the conditions of which was that the lessee was not at liberty to sub-lease the salt-pan without the permission of the Collector. In spite of this the defendants agreed to sub-let the salt-pan to the plaintiff. The plaintiff having sued for specific performance of the agreement of sub-letting:—*Held*, dismissing the suit, that the agreement of sub-letting, which was against the condition of the license, was unenforceable at law, 33 Bom. 636 Foll. (*Macleod*, C.J. *and Shah*, J). RABIA BIBI *v.* GANGADHAR VISHNU PURANIK. **24 Bom. L.R. 111 = 46 Bom. 661 = 66 I.C. 393 = 1922 Bom. 78.**

BOMBAY SEA CUSTOMS ACT (VIII of 1871), S. 30.

———S. 11—*Sub-lease of license—Admission of partners, whether sub-lease.*

Licensee, prohibited from sub-letting his license, may admit his family members and others as partners in the business; such admission of partners does not mean sub-lease. (*Macleod*, J.) CHAMPSEY DOSSA. *v.* GORDHANDAS KESSOWJI. **50 I.C. 805 = 19 Bom. L.R. 381.**

BOMBAY SCHEDULED DISTRICT ACT (XI OF 1856).

———S. 3—*R. 44 of the rules made under section 3, whether* ultra vires—*High Court's jurisdiction—Mewas Agent's Court.*

The rule is not *ultra vires*. The High Court has power to take cognizance of any case in the petition of a convicted party and if it thinks fit send for the proceedings and make a fresh order. The jurisdiction may be called appellate or revisional. The High Court has jurisdiction to entertain an appeal from a convicted person who has been sentenced by a Court of the Mewas Agent to a term not exceeding five years imprisonment. (*Scott*, C.J. *Beaman*, *Heaton and Macleod*, JJ.) NAZIR MAHOMED *v.* EMPEROR. **41 Bom. 687 = 19 Bom. L.R. 537 = 41 I.C. 641 = 18 Cr. L.J. 817 (F.B.).**

BOMBAY SEA CUSTOMS ACT (VIII OF 1871).

———S. 30 (a) and (b)—*Customs duty—Assessment — Wholesale price, meaning of—Costs of the goods to importer.*

The term "wholesale cash price" in S. 30 cl. (*a*) of the Sea Customs Act, 1878 means the whole cash price for which the goods of like kind and quality are sold or are capable of being sold at the time and place of importation. The expression indicates that it must be the price which the importers in India are able to realise on a wholesale disposal of the goods to some one after importation. It does not mean the cost of the goods to the importers on the basis that the goods should be taken as being sold to the importer at the price which it cost him to lay them down in Bombay. Clause (*b*) of S. 30 of the Sea Customs Act applies when the wholesale price is not ascertainable. This clause is added in order that the real value might be ascer-

BOMBAY SUMMARY SETTLEMENT ACT (VII of 1863).

tained where there is no whole saleprice. (*Macleod*, O.J. *and Shah*, J.) THE VACUUM OIL CO., *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

24 Bom. L.R. 198=47 Bom. 174=67 I.C. 267=1922 Bom. 12.

BOMBAY SUMMARY SETTLEMENT ACT V of 1863).

———*Land granted to a mosque— Summary settlement—Alienation of land to strangers—Assessment on land in the hands of strangers—Construction of sanad.*

Certain land which was granted to a mosque was continued at the time of the Survey Settlement in 1879 on payment to Government of an annual quit rent under a sanad. Sixty years before suit, the land was alienated unlawfully by the manager of a mosque to a stranger from whom it was purchased by the piff. in 1900, when the Government levied the full assessment on the land. It was held, by *Shah and Hayward*, JJ.—(*Heaton*, J. *dissenting*) that the provisions of the Act and the terms of the Sanad pointed to the conclusion that the condition that the land must continue to be the property of the mosque in order that the holder for the time being might have the benefit of the exemption from assessment allowed by the Sanad could not be implied; and that the Government did not get any right under the Sanad to levy the full assessment even when the property ceased to be the endowed property otherwise than by lawful alienation. (*Shah, Hayward and Heaton*, JJ.) SHANKAR LAL *v.* THE SECRETARY OF STATE.

43 Bom. 583=51 I.C. 910=21 Bom. L.R. 668.

———*Inam lands settled under, whether subject to Vatan Act of* 1874.

Settlements effected under Act II of 1863 prevent inam lands from being subject to the provisions of the Vatan Act of 1874 because holders of those settlements are no longer hereditary officers holding for service. (*Scott*, C. J. *and Heaton*, J.) BRENDON *v.* SHRIMANT SUNDERABAI. **38 Bom. 272=23 I.C. 221=16 Bom. L.R. 164.**

———S. 7— *Summary Sanad — Temple lands—Description as Jat inam — Suit by Gaukar of temple for possession—Limitation Act, Arts.* 120 *and* 144.

A suit was filed by the plaintiff as representing gaukars of a village entitled to the management of a temple, against defendants who were the Devlis and Bhavnis connected with the temple and certain alienees from them for possession of lands alleged to be Devasthan lands. The lands were described as the *Jat-inam* of the temple servants in a sanad issued by the Government in 1865 under the provisions of the Summary Settlement Act, 1863. One of the defendants sold a portion of the lands in 1903 but the vendees took possession

BOMBAY TALUKDARI ACT (VI of 1888).

in 1916. The plaintiff's suit was filed in 1916. The defendants raised the plea that the suit was barred by limitation. *Held*, the issue of the sanad to the defendants did not negative the rights of the temple and the plaintiff, could prove that the lands were really *devasthan* lands. The grant of a sanad to defts. did not furnish a cause of action to the plff. Consequently the suit was not barred, Art. 120 of the Lim. Act having no application to a suit for possession. (*Shah*, A.C.J. *and Crump*, J.) VITHAL DHONDYI DEVLI *v.* SURYAJI RAMCHANDRA NAIK. **24 Bom. L.R. 902=73 I.C. 617=1922 Bom. 438.**

———S. 12—*Desai Inam— Summary settlement—Imposition of quite-rent—Will.*

Where a desai dying without co-parceners disposed by will of his lands which had been the subject of a summary settlement and payment of quit-rent, the alienation is valid. (*Sir John Edge*) SUNDERBAI *v.* COLLECTOR OF BELGAUM.

43 Bom. 376=(1919) M.W.N. 254=23 C.W.N. 753=21 Bom. L.R. 1148=52 I.C 897=45 I.A. 15 (P.C.) Affirming 38 Bom. 272=23 I.C. 221=16 Bom. L.R, 164.

BOMBAY SURVEY AND SETTLEMENT ACT (I OF 1865).

———Ss. 25, 28, 37 and 38—*Bombay Land Revenue Code* (V *of* 1879), *Ss.* 102 *and* 106—*Fixing and sanctioning—Difference between—* Khot's *position—Rates sanctioned—Expiry of period—Position of parties.*

There is a distinction between "Fixing" a period within which a sanctioned settlement is to be continued and "sanctioning" a settlement which simply accepts the rates proposed by the Settlement Officer. So where a settlement has been sanctioned and a period fixed, the *Khot* is to levy rents at the sanctioned rate till the period comes to an end and even after it; if no new settlement is introduced, the settlement must be deemed to continue. (*Beaman and Hayward*, JJ.) SECRETARY OF STATE *v.* SADASHIV ABAJI BHAT. **36 Bom. 290=14 I.C. 434=14 Bom. L.R. 77.**

BOMBAY TALUKDARI ACT (VI of 1888).

———*Applicability of*—Kasbatis *of Village Chharodi.*

Bombay Acts VI of 1888 and V of 1879 apply to of the *Kasbatis* village of Chharodi as they are included among Taluqdars. The right to manage the village carries with it definite obligations, failure to fulfil which, involves resumption by Government. The obligation cannot be sub-divided or surrendered by the recognised Manager to others without the consent of Government. The Government are not bound to recognise as Manager any one except a male or female *Kasbati* of Viramgam or the widow of such a *Kasbati*. It is not bound to recognise as Manager any person whatever who

BOMBAY TALUKDARI ACT (VI of 1888), S. 68.

claims the right to manage in virtue of a transfer whether brought about privately or by process of Civil Court. (*Chandavarkar and Heaton, JJ.*) SECRETERY OF STATE *v.* BAI RAJBAI. 11 I.C. 948=13 Bom. L.R. 609.

———Ss. 68 and 73—*Applicability of—Kasbati holding under patta.*

Bombay Act 6 of 1888 does not confer on a Kasbati holding under a patta in the nature of a lease any greater rights than those conferred by the terms of the patta. (*Lord Atkinson*) SECRETARY OF STATE *v.* BAI RAJ BAI.
39 Bom. 626=42 I.A. 229=19 C W.N. 1087=
18 A.L J. 953=(1915) M.W.N.568=
29 M.L J. 242=
18 M.L.T. 179=2 L.W. 781=
17 Bom. L.R. 730=30 I C. 808=
28 C.L.J. 1 (P.C.).
[Reversing=11 I.C. 918=13 Bom. L.R. 609.

BOMBAY TRAMWAYS ACT (I OF 1874).

———Ss. 24 and 25—*Bye-law not sanctioned—Breach—No offence.*

Where notices were issued by the Tramway Company in 1917 allowing three persons to travel on the rear platform and in 1919 forbidding the travelling on the rear platform, both without the sanction of the Governor in Council *held* the notices so far as they modified the Bye-law No. 6 had no effect in law and a breach thereof was held to be no offence. (*Shah and Hayward, JJ.*) EMPEROR *v.* SORAB MERWANJI. 54 I.C. 488=
21 Bom. L.R. 1103.

BOMBAY VATAN ACT (V OF 1886).

———S. 2—*Succession—Daughters—Cannot claim priority over male members.*

Under the Bombay Vatan Act, neither the daughters nor a brother's widow of the last male holder can claim priority over the male members. (*Macleod, C.J. and Crump, J.*) GAVARAWA KOM *v.* MALLANGOWDA.
76 I.C. 559=1923 Bom. 382.

———S. 2—*Panchmahals — Jivak badal grant—Daughter of vatandar.*

In a settlement by the Government of a dispute regarding the tenure of hereditary office in Panch Mahals, the Government decided it was *jivak badal*, i.e., without condition of the service. This announcement was made before the extension to the Panch Mahals of the Vatan Amendment Act V of 1886. On the death of the last male holder his daughter claimed a fourth share of her father's property. *Held*, that the property in suit was not service inam to which alone the Vatan Act applied, and that therefore, the plaintiff's suit had been rightly decreed. (*Scott, C J. and Shah, J.*) DWARAK DAS MOTILAL *v.* BAI JEKORE.
43 Bom. 323=51 I.C. 179=
20 Bom. L.R. 983.

———S. 2—*Vatan property—Suit by reversionary heir—Adoption by widow.*

BOUNDARY MARKS ACT (XXVIII of 1860), S. 25.

Where a Hindu widow first adopted a boy who died unmarried and on his death, adopted a second, *held*, that on the death of the 1st adopted boy vatan property vested in the reversioner and therefore the second adoption was declared invalid. (*Batchelor and Shah, JJ.*) BHIMA BAI KRISHNAPPA DESAI *v.* TAYAPPA MURARRAS NADGANDA. 37 Bom. 598=
21 I.C. 107=15 Bom. L.R. 783.

BONA FIDE PURCHASER.

See (1) SPECIFIC RELIEF ACT, S. 27.
(2) T. P. ACT, Ss. 41 and 53 etc.

BOOKS OF ACCOUNT.

See EVIDENCE ACT, S. 34.

BOUNDARIES AND AREA.

See DEED, CONSTRUCTION.

———*Miscalculation in Revenue Returns cannot defeat title.*

If in fact the boundaries include an area greater than that referred to in the Revenue Returns, such a miscalculation or misrepresentation cannot defeat the title to the estate. (*Mookerjee and Buckland, JJ.*) SECRETARY OF STATE FOR INDIA *v.* WAYED ALI.
65 I.C. 866=34 C.L.J. 141.

BOUNDARIES.

———*Dispute as to.*

The principle of proving the affirmative applicable where the boundary line which is the subject of dispute runs through waste lands which have been the subject of definite possession. (*Chatterjee and Panton, JJ.*) RADHA KRISHNA DAS *v.* MATIAR RAHAMAN.
65 I.C. 743 (Cal.).

———*Determination of identity of land.*

In determining the question of identity of land, attention must not be limited to one or other of the boundaries alone, but, as far as practicable, an attempt must be made to identify all the four boundaries in the document. (*Mookerjee and Beachcroft, JJ.*) SHIB CHARAN DEY *v.* NIL KANTHA MAHATO.
17 C.L.J. 642=16 I.C. 747.

———*Fence—Ownership.*

Adjoining owners of land, own the boundary fence up to its centre on each side, together with trees growing thereon. (*Atkinson and Jwala Prasad, JJ.*) RAGHUBIR MISSER *v.* BHAJAN SINGH. 2 Pat. L.W. 27=
40 I.C. 987.

BOUNDARY MARKS ACT (XXVIII of 1860).
Ss. 24 and 25—Order under—Res judicata.

A decision as well as its grounds if not contested, passed under S. 25 that the lands never formed part of the mitta are *res judicata*

BOUNDARIES RECITALS IN DEED.

between the parties. (*Wallis*, C.J., *Ayling and Seshagiri Aiyar*, JJ.) MUTHAMMAL v. THE SECRETARY OF STATE. 39 Mad. 1102 = 27 M.L.J. 529 = 26 I.C. 817 = 16 M.L.T. 432.

BOUNDARIES RECITALS IN DEED.

———*Recitals in a deed—Boundary, fixing of.*

In fixing the boundary, the description found in the deeds of the property is to be followed. (*Lord Moulton*). JOHN KING v. CHAIRMAN OF MUNICIPAL COMMISSIONERS OF HOWRAH, 18 C.W.N. 898 = 27 M.L.J. 20 = 26 I.C. 959 = 20 C.L.J. 407 (P.C.).

BRAHMOTTAR—*See* GRANT.

BREACH OF CONTRACT.

See (1) CONTRACT ACT, S. 73.
(2) DAMAGES.
(3) WORKMAN'S BREACH OF CONTRACT ACT.

BREACH OF TRUST.

See (1) C. P. CODE, S. 92.
(2) HINDU LAW, RELIGIOUS ENDOWMENT.
(3) TRUST.
(4) TRUSTS ACT, S. 23.

BRITISH INDIA, ABSENCE FROM.

See LIMITATION ACT, S. 13.

BROKER.

See Also CONTRACT ACT, S. 182 *Et. Seq.*

———*Commission—When payable.*

Where the remuneration of a broker is payable on the performance by him of a definite undertaking he is entitled to be paid that, as soon as he has substantially done all that he undertook to do even if the principal acquires no beneficial interest from his services, and except where there is an express agreement or special custom to the contrary, even if the transaction in respect of which the remuneration is claimed falls through, provided it does not fall through in consequence of any act or default of the broker. The contract itself will indicate the terms. (*Mookerjee and Rankin*, JJ.) SATCHIDANANDA DUTT v. NRITYA NATH MITTER. 50 Cal. 878 = 27 C.W.N. 1007 = 1924 Cal. 517.

———*Commission—Right to—Contract not completed.*

Those who bargain to receive commission for introduction of a contractor have a right to their commission as soon as they have completed their portion of the bargain irrespective of what may take place subsequently between the parties introduced and whether or not the contract is completed. Where there was a letter giving the nature of an authority to negotiate a lease and it contained a certain term that brokerage was to be nett Rs. 2,530, and it also contained a promise on the part of the defendant to pay that amount on a future date if he succeeded in getting a lessee to agree to the terms of the lease, and the lease could not be put through as the defendant had failed to make out a title to the premises. *Held* that the brokerage was payable. (*Chaudhuri*, J.) PUNDIT RAGHUNANDAN LAL SARMA v. MADAN MOHAN DASS. 76 I.C. 333 = 38 C.L.J. 139.

BUDDHIST LAW, BURMESE.

ADOPTION.
APPLICABILITY.
CONVERSION.
DIVORCE.
ECCLESIASTICAL JURISDICTION.
ECCLESIASTICAL LAW.
GIFT.
HUSBAND AND WIFE.
JOINT PROPERTY.
MARRIAGE.
MINOR.
PARTITION.
PRE-EMPTION.
PROPERTY.
RELIGIOUS OFFERING.
SEDUCTION.
SOURCE OF.
SUCCESSION.
WIDOW.

Adoption.

———*Adoption — Kittima daughter—Ceremonies.*

There is no special ceremony in Burmese adoption, but the adoption must be a matter of publicity and notoriety. It is strong evidence of such publicity and notoriety that the adoptee lived continuously in the house of adopter from her babyhood for twelve or thirteen years, and that he was entered on the register of the school as her parent, and paid the school fees. (*Lord Parmoor*). MA THAN THAN v. MA PWA THIT. 33 M.L.T. 361 = 2 Bur. L.J. 260 = 1923 P.C. 156 = 46 M.L.J. 334 = 1 Rang. 451.

———*Adoption—Proof of—Rights of adopted son—Separation from parents—Forfeiture of inheritance—Intention—Adoption by widow—Competition between sons.*

Under the Burmese Bhuddhist Law there is no ceremony for an adoption, but the adoption must be a matter of publicity and notoriety. The fact of the adoption can either be proved as having taken place on a distinct and specified occasion or may be inferred from a course of conduct which is inconsistent with any other supposition. But the amount of proof of publicity required will be greater in case of the latter category when no distinct occasion can be appealed to. 32 I.A. 72; 36 I.A. 197, Ref. A *Kittima* child may forfeit his right of inheritance by separating from his adoptive parents, this being considered an act of ingratitude. It is, however a matter of intention.

BUDDHIST LAW—BURMESE—ADOPTION.

But where there are no other children with whom the *Kitima* child seeks to compete or share, the law allows him to inherit in whole or part notwithstanding his separation. Separation working a forfeiture is a matter of intention. If the separation of residence be with the consent of the adoptive parents, and if the child is ready and willing to discharge filial duties after it, the bond is not broken. A child adopted according to the fullest form of adoption and retaining its status as an adopted child, till the death of his adoptive parents is entitled to inherit their estate, as if he were a natural and lawful child either in the absence of other lawful children or in competition with them. Such a child is called a Kittimatha. (*Lord Phillimore*). MAUNG THWE *v.* MAUNG TUN PE. 45 Cal. 1= 49 I.C. 863=44 I.A. 251=22 M.L.T. 411= 22 C.W.N. 97=27 C.L.J. 68= (1918) M.W.N. 9=20 Bom. L.R. 69= 11 Bur. L.T. 28 (P.C.).

——*Adoption—Ceremonies—Act of Shinbuying—Presumption—Manukye Dhamathat.*

Though the act of Shinbuying is, in some cases, *prima facie* evidence that the donor of the feast regarded the novice as his son, it is by no means a clear indication in every instance that any thing more than a charitable intent sometimes coupled with a love of display, was in the donor's mind. Where several boys are Shinbuyed at the same time, and none of them is a carural-born son, no presumption in favour of adoption can properly arise in the absence of a direct and public declaration of relationship or about the time of the ceremony. The Manukye Dhamathat requires that a Kittima son or daughter should have been adopted with the intention, publicly signified, of taking the adoptee as a son or daughter, who will inherit. His intention may have been expressed at the time of the taking or later; or may be inferred from a long course or conduct making such intention public. (*Robinson*, C.J. *and May Oung*, J.) MAUNG PO KAN *v.* DAW AT AND OTHERS. 1 R. 102=1923 Rang. 189.

——*Adoption—Adopted son becoming a monk—Subsequent abandonment of monkhood—Effect of—Inheritance to adoptive parents.*

Where a person adopted by Burmese parents enters the priesthood he must be held to have severed himself from all family ties. Where after remaining as a monk for some years, he resumed civil life, was received back in his old home on the old status as adopted son and heir, he must be deemed to have resumed his position of *Kittima* son and the years spent in the monastery do not affect his right to inherit the property of his adoptive father. (*Robinson*, C.J. *and Buckworth*, J.) MA NYUN-SEIN *v.* MAUNG CHAN MYA. 66 I.C. 573= 11 L.B.R. 124.

——*Adoption—Kitima form—Evidence of—Notoriety and publicity.*

Under Burmese Buddhist Law in order to prove adoption direct evidence of giving and taking is not necessary. Nor any documentary evidence or ceremony is required. But if there is no evidence of giving and taking, it is necessary to give clear and unambiguous evidence as to the publicity and notoriety of status as a Kitima child. (*Twomey*, C.J. *and Robinson*, J.) MAUNG SEIN *v.* U PO KO. 56. I.C. 954=12 Bur. L.T. 286.

——*Adoption—Appotitha child.*

An *appotitha* child takes half the estate in the absence of any natural or *Kittima* children equally with the co-heirs of the adoptive parents. (*Ormond and Pratt*, JJ.) MA NGWE *v.* MAUNG THAN. 30 I.C. 524= 11 Bur. L.T. 221.

——*Adoption—Married woman.*

Under the Buddhist Law, a woman who is divorced from her husband and has divided the joint property with him is in the same position as a single woman. An adoption is a matter of intention and may be proved even in the absence of any formal declaration. (*Twomey* C.J. *and Ormond*, J.) AUNG MA KHA ING *v.* MA AH BAN. 11 Bur. L.T. 65= 43 I.C. 737=9 L.B.R. 168.

——*Adoption, two kinds of.*

Kitima and *Appotitha* are two distinct forms of adoption, to which totally different considerations apply. (*Maung Kin*, J.) MAUNG THA SO *v.* MAUNG LA PE. 41 I.C. 749= 11 Bur. L.T. 246.

——*Adoption—Evidence of.*

It is only when adoption is proved by circumstantial evidence that notoriety and publicity must be proved. (*Maung Kin*, J.) MAUNG SEIK *v.* MA THET PU. 33 I.C. 927=9 Bur. L.T. 154.

——*Adoption—Validity of.*

Under the Buddhist Law, adoption just previous to the death of the adoptor is valid. (*Mc Coll*, J.C.) MI MAN *v.* MAUNG EYI. 32 I.C. 539=U.B.R. (1915) II, 87.

——*Adoption—Is a contract.*

Adoption under Buddhist Law, is not a mere contract and is not a grant or other dispositions of property. It need not be in writing and may be proved by any means other than by deed of adoption. *Kitima* adoption is intended to provide an heir to the adoptive parent. There must be a distinct occasion on which it takes place and there is very often a ceremony. (*Mc Coll*, A.J.C.) MI CHAN MYA *v.* MI NGWE YON. 31 I.C. 94=(1915) 2 U B.R. 74.

——*Adoption—Proof—Second adoption.*

Plff. who claimed to be the adopted daughter of a Buddhist couple, was proved to have lived with the couple from the age of three years. It was further proved that the plff's. mother as well as others had stated that the old couple had told them that they had adopted the plff. and that she was generally regarded as their

BUDDHIST LAW—BURMESE—APPLICABILITY.

daughter. *Held*, that the adoption was amply proved. No inference against adoption can be drawn from the fact that an adopted daughter worked in the fields for her adoptive parents as even children of well-to-do parents often assist in cultivating the family acres. A second adoption during the life-time of the first adopted child is not prohibited by the Buddhist Law though such adoptions are unusual. (*Parlett*, J.) MA SHWE YIN *v.* MA SHWE NYUN. **11 I C. 776=4 Bur. L.T. 158.**

Applicability.

———*Applicability — Shan buddhists in Burma—Marriage — Presumption from habit and repute—Strict proof required.*

The personal law of Shan buddhist resident in Burma does not appear to be in any way different from that of Burman Buddhist and the ordinary Buddhist Law applies. Shan notions concerning sexual relationship are extremely lax and the term Ma Ya (wife) is indiscriminately applied to women kept as mere concubines as well as those properly married. The presumption of marriage arising from co-habitation must rest on habit and repute and when proof of marriage depends wholly on habit and repute, the conduct of the parties concerned is of a great importance; the alleged husband must be shown to have clearly and unmistakably revealed his intention to confer on her the required status and the alleged wife must be shown to have acted all along in such a manner that it would be patent that she asserted that status. (*Head and May Oung*, JJ.) MA SHWE YIN *v.* MAUNG BA TIN.
1 R. 343=2 Bur. L.J. 114=1923 Rang. 218.

———*Applicability—Rajbansis—Custom.*

Burmese Buddhist Law is not applicable to the Rajbansis, even if they are Buddhists and the law applicable to them is the customary law prevailing amongst them in their habitat which is Chittagong. 1 Chan. Toon's L.C. 370, diss. from. 2 L.B.R. 95, ref. to. (*Fox*, C.J.) FOESON *v.* ADICHANDRO BOROA.
9 Bur. L.T. 248=35 I C. 431=8 L.B.R. 301.

Conversion.

———*Conversion—Change of religion by one of the parents — Subsequently born child, status of.*

Conversion of father to Christianity after marriage according to the Burmese Buddhist custom of marriage, the mother remaining a Buddhist does not dissolve the marriage and the legitimacy of the child born after the fathers's change of religion is not thereby affected. (*Fox*, C.J.) MAUNG YIN *v.* MA SAW MYAING. **26 I C. 700 (L B.)**

Divorce.

———*Divorce—Adultery—Cause of action—Partition.*

BUDDHIST LAW—BURMESE—DIVORCE.

**The Dhammathats clearly give the husband of an adulterous wife, the right to require her to leave the house with only the cloths on her back. The husband has also a right to ask for partition or possession of all the joint property. (*Carr*, J.) MAUNG PO HAN *v.* MA SO YI.
2 Bur. L.J. 65=75 I.C. 6=1923 Rang. 160.**

———*Divorce—Ex parte divorce — Conditions.*

A husband or wife is entitled to a divorce on payment of the costs of the suit and foregoing all claim to the joint property of the marriage. 2 U. B. R. (1904—1906), foll; 7 L. B. R. 79; 7 Bur. L.T. 83, appr. (*Pratt*, J.) MAUNG THEIN MYA *v.* MAUNG TUN HLA.
11 L B.R. 385=69 I C 980=1 Bur. L.J. 127=1923 Rang. 86.

———*Divorce—Desertion for over 12 years.*

Per *Robinson and Maung Kin* JJ.:—But even if the evidence had not been sufficient to establish a divorce by deed, there is the admitted fact that appellant's husband had deserted his wife for twelve years before her death, and that he had failed to maintain her during that period. This fact alone would be sufficient to constitute a divorce under the Burmese Buddhist Law, 3 L.B.R. 175, ref. (*Robinson*, C.J. *and Mung Kin*, J.) MAUNG SHWE SA *v.* MA MO.
1 Bur L.J. 24=1922 L.B. 28.

———*Divorce—Payin Property—Partition.*

In connection with a partition on a divorce by mutual consent, *payin* property is to go to the party who brought it to the marriage and this rule is still to apply even though the property may have been changed in form provided it has not been merged entirely in the jointly acquired property and so changed its character. Change of form does not affect the rule so long as the *payin* can be identified. (*Robinson and Mac Gregor*, JJ.) MAUNG SHWE THA *v.* MA WAING. **70 I.C. 862=11 L.B.R. 48.**

———*Divorce—Mutual consent—Misconduct—Right of husband to chastise wife—Extent of—Joint property—Onus.*

A Buddhist wife in Burma is entitled to a divorce by mutual consent if the husband is guilty of a single act of misconduct. Under the law as administered in Burma by British Courts, a husband has no right to chastise his wife, though it is open to the wife to submit to ill-treatment or condone it. Where in a suit for divorce by the wife, the husband claims certain property to be joint property, the onus is on him to prove it. (*Saunders*, A J.C.) MA SAT *v.* MAUNG NYI BU. **64 I C. 957=(1921) 4 U.B.R. 68.**

———*Divorce—Payin Property — Right of wife.*

Where the wife is a spinster but the husband had been previously married, where the husband brings *payin* to the marriage and the wife

UDDHIST LAW—BURMESE—DIVORCE.

nothing, the rule to be applied is the rule laid down for the case where neither party had been married before and separate by mutual consent without fault and where the relation of *nissaya* and *nissita* exists. Authorites reviewed. (*Robinson*, C.J., *and Heald*, J.) MA NGWE HNIT *v.* MAUNG PO HMU. 64 I.C. 806= 11 L.B.R. 52.

———*Divorce—Frame of suit.*

Under the Burmese Buddhist Law, suits for divorce should be framed and tried in one or other of the three kinds of divorce, or in the others in the alternative, and the question of status or existence of the properties to be partitioned, should be left to a later suit. (*Heald*, A.J.C.) MAUNG NGA *v.* MA PYU. 59 I.C. 1005=(1920) 3 U.B.R. 251.

———*Divorce—Cruelty—Single act, if sufficient.*

Under the Burmese Buddhist law a divorce may be allowed to a wife on proof of a single act of cruelty on the husband's part. 20 I.C. 674, rel. on. (*Pratt*, J.) MA SEIN PHAW *v.* MG. BA ON. 46 I.C. 144 (L.B.).

Ecclesiastical Jurisdiction.

———*Ecclesiastical jurisdiction — Power—Authority to decide disputes of laymen—Effect of.*

Ecclesiastical authorities in Burma cannot settle a dispute between a pongyi and a layman relating to private land and any decision arrived at must be of the nature of an arbitration. Parties who have had nothing to do with the reference to arbitration, will not be bound by such arbitration. (*Mac Gregor*, J.) U MEDA *v.* U SANDIMA. 1 Rang. 495=76 I.C. 807= 1924 Rang. 141.

———*Ecclesiastical jurisdiction — Revenue decision—Ecclesiastical Court has jurisdiction even over a lay plff.*

A claim of the plff. for restoration of property dedicated to the monastery was recognized by *Thathanabaing* against the decision of the Revenue authorities. *Held*, that the plff. could invoke religious rules in his favour and the decision of the Revenue Officer was no bar to the decision in question. (*Shaw*, J.C.) U. TEIKKA *v.* NGA TIN BYU. 10 I.C. 996=U.B.R. (1910) I, 78.

Ecclesiastical Law.

———*Ecclesiastical Law—Effect of becoming Monk — Renunciation of monkhood—Effect.*

By becoming a monk, a person divests himself of all earthly ties of relationship and property and dies a civil death. If he afterwards renounces the monastic life he does not *ipso facto* relapse to the same position which he occupied before, with regard to his property and his relationship. Overt acts recognised by law will alone instal him in the old status. (*Duckworth*, J.) MA SHWE THE *v.* MAUNG KAN. 1 Rang. 430=76 I.C. 672=1924 Rang. 101.

BUDDHIST LAW—BURMESE—ECCLESIASTICAL LAW.

———*Ecclesiastical Law — Property of — Buddhist Priesthood.*

A Member of the Buddhist Priesthood dies a civil death when he enters the priesthood and does not possess any property except such as is necessary for his religious life and which is held under conditions which do not make it available for any other purpose such as maintenance of a child. (*Sanders*, J.C.) MA E SHI *v.* U. ADITSA. 72 I C. 974= 24 Cr. L.J. 510=1922 U.B. 151.

———*Ecclesiastical Law — Saduthanthaka property—Incidents.*

Saduthanthaka property is property belonging jointly to four *pongyis* among whom the title passes by survivorship until the last survivor gets the whole property. On the death of one member, however, the survivors can admit a new member in his place in the joint ownership group. (*Twomey*, C.J. *and Robinson*, J.) U. NANDIYA *v.* U KAW WIDA. 13 Bur. L.T. 147=61 I.C. 778= 10 L.B.R. 288.

———*Ecclesiastical Law—Ayanzoungs.*

Persons in charge of Kyaung and its precincts are called Ayanzoungs and such persons have a right to sue for possession of land forming part of Kyaung. (*Maung Kin*, J.) U. PYUNIYA THIHA *v.* PO THIN 56 I C. 939= 12 Bur. L.T. 264.

———*Ecclesiastical Law— Civil Court—Pongyi's property—Devolution.*

Civil Courts in Lower Burma have jurisdiction to decide suits of a civil nature in which points of ecclesiastical law arise. Questions of ecclesiastical law are to be decided according to the *Vinaya* and the various commentaries thereon. The authority of the Dhammathats is not recognised by the ecclesiastical tribunals but they cannot be entirely excluded from consideration. A Pongyi cannot, after ordination inherit from him lay relatives and on the death of pongyi his lay relatives cannot inherit from his land which had been given to him as an outright gift. 8 L.B.R. 145 foll. (*Twomey*, C.J., *Maung Kin*, *Rigg and Parlett*, JJ.) MAUNG SHWE TON *v.* MAUNG TUN LIN. 9 L B.R. 220= 49 I C. 317=11 Bur. L.T. 161 (F. B).

———*Ecclesiastical Law—Decision of questions on.*

Buddhist Ecclesiastical Law must be interpreted with reference not only to the Canonical text book of *Vinaya* but also with the aid of the Attagatha and other commentaries. (*Twomey*, C.J., *and Maung Kin*, J.) UAWBATHA *v.* U THU DATTANA. 45 I.C. 923 (L B).

———*Ecclesiastical Law—Monk—Absence of property.*

Under the Buddhist Law, a man's interest in his property ceases when he is ordained as a monk though some texts permit his receiving

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gifts after ordination. There is, however, a strong presumption that he has no property over which he has rights of disposal. (*Twomey and Ormond*, JJ.) WILATHA *v.* THIRI.
8 Bur. L.T. 287=30 I.C. 112=8 L.B.R. 342.

——*Ecclesiastical Law—Monk—Contract by—Validity.*

A Buddhist Monk is incapable of entering into a valid contract for his own personal benefit. He is prohibited by his personal law from buying, selling or mortgaging land and is debarred from suing for redemption. (*Mc Coll*, A.J.C.) U. TILAWKA *v.* NAG SHWE KAN.
29 I.C. 613=U.B.R. 1916, II. 61.

——*Ecclesiastical Law—Building on monastery ground—Nature.*

A building erected on monastery ground becomes ecclesiastical. (*Fox*, C.J. *and Parlett*, J.) YEO KYEW SUM *v.* U KE TU.
24 I.C. 465=7 Bur. L.T. 63.

——*Ecclesiastical Law—Monk can appropriate fellow monk's property if certain conditions are satisfied.*

If a monk takes and appropriates the property of another monk, his act is valid and is called a *withathagaha* gift, if, (according to the *vinaya*) five conditions are present, *viz.*, (1) the monks should be intimate; (2) they must have associated together; (3) the property must have been spoken about by them; (4) the owner must be living when the property is taken; (5) the taker must be aware that the owner would be pleased at the taking. A monk can act as owner of a monastery, whether dedicated to him personally or allotted to him by other monks for 12 years at the most, but he cannot give away to another monk or layman monastery dedicated to him personally, such monastery being *sanghika* property and not *poggalika* which alone can be disposed of at pleasure. Buddhist monks may and do possess property. P. L. J. B. 614 diss. (*Mc Coll*, A.J.C.) NGA PO THIN *v.* U. THI HLA.
7 Bur. L.T. 27=23 I.C. 157=U.B.R. 1913, 183.

Gift.

——*Gift by monk—Validity.*

A monk cannot make a valid gift whether to a layman or another monk, of a monastery or of a site for a monastery whether it has been dedicated to him personally or not. (*Mac Gregor*, J.) U MEDA *v.* U SANDIMA.
1 R. 494=78 I.C. 807=1924 Rang. 141.

——*Gift to children—Effect only after death—Validity—T. P. Act, S. 123.*

Where the question at issue was regarding the validity of a deed of gift by a mother to her children to take effect after her death, the matter being one of inheritance. Buddhist Law applied to the case and being a testamentary disposition in the guise of a gift, the deed is invalid. Though possession is necessary under Buddhist Law to constitute a gift, the matter is now governed by S. 123, T. P. Act, which also gets the rule of Buddhist Law on the point. (*Robinson*, C.J. *and Beasley*, J.) MA THIN MYAING *v.* MAUNG GYI.
1 R. 351=75 I.C. 166=1924 Rang. 13.

——*Gift—Monk—Power of disposal.*

Buddhist Ecclesiastical Law permits a monk to make a gift by delivering possession without declaration. He has power to make a death-bed gift. (*Po Han*, J.) MA SE *v.* U LUN.
2 Bur. L.J. 266.

——*Gift by grand-parent to grandchild—Nature of.*

Under Buddhist Law, an actual delivery of possession is necessary to validate a gift. But a gift by a grand-parent to a grandchild is an exception to the rule and is valid without delivery of possession. Such a gift is merely contingent and the property remains absolutely under the disposal of the donor till his death, the intention of such a gift being that grandchildern, being younger, might fare badly in competition with their elder uncles and aunts and that they shall receive such share of the inheritance as the grandparents consider fair. (*Heald*, A.C.J.) MA ME I *v.* MAUNG LANK HUYA.
59 I.C. 999=(1920) 3 U.B.R. 228.

——*Gift—Death-bed gift—Validity of.*

Under Burmese Buddhist Law a death-bed-gift without delivery of possession is totally invalid even though it is made through trustees; for to recognise it would be a recognition of the power to make a will, which is unknown to that Law. (*Twomey*, C. J. *and Maung Kin*, J.) MA YU *v.* PO THAUNG.
50 I.C 522=11 Bur. L.T. 234.

——*Gift—Registration.*

A Burmese Buddhist religious gift of a Kyaung is invalid unless registered. (*Ormond*, J.) U. ZAYANTA *v.* NAGA.
45 I.C. 926 U=11 Bur. L.T. 259=9 L.B.R. 258.

——*Gift—Delivery of possession.*

The actual parting with possession is the only true test of the completion of a gift. 34 Cal. 207; 4 B. R. (1897—01) II 390, rel. (*Rigg*, J. C.) MATAK *v.* MA CHIT.
42 I.C. 68=3 U.B.R. (1917) 23=11 Bur. L.T. 229.

——*Gift—Shinbyu Gifts—Monu Kye Book.*

Per *Twomey*, J:—Questions as to the validity of *shinbyu* gifts concern religious usage and have therefore to be decided according to Buddhist Law under S. 13 of the Burma Laws Act of 1898. A gift of property made publicly by both parents (or by the surviving parent if one is dead) at the time of the *shinbyu* ceremony is, as between the donee and his co-heirs, a valid gift although possession of the property was not given but such property remains absolutely at the disposal of the parents or the survivor of them for their life-time or his or her life-time. If the donee dies leaving either of the donors

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surviving, the gift has no effect and the donee's heirs cannot take benefit of the exception regarding possession obtaining in *shinbyu* gifts. (*Twomey and Ormond*, JJ.) MA PAN NYUN *v.* MA HLA SEIN.

8 L.B.R. 190=30 I.C. 665=8 Bur. L.T. 149.

——*Gift—Contemplation of death — Non-delivery of possession—Effect.*

A gift made in contemplation of death and intended to operate only after the donor's death is inoperative and void. (*Ormond*, J.) MAUNG-PO YIN *v.* MG NI.

29 I.C. 888=8 Bur. L.T. 72.

——*Gift—Unfit state of mind—Possession.*

A gift while in an unfit state of mind is null and void. A gift not followed by possession is invalid and where the donee was collecting rents from the gifted property before the gift, continuing to do so after the gift does not establish possession. (*Fox*, C.J., *Robinson and Hartnoll*, JJ.) MA SU *v.* MA JIN.

6 L.B.R. 77=18 I.C. 466=
3 Bur. L.T. 291 (F.B.).

——*Gift—Kanwin—Essentials — Inheritance.*

It is not necessary to constitute a gift of *Kanwin* that the property should be given by the bridegroom's parents; such a gift at the time of the marriage delivered to the bride, reverts by inheritance to the husband as against the parents-in-law, even if the bride dies childless in her parent's house. (*Hartnoll*, C.J.) LU GALE *v.* MAUNG SEIN.

6 L.B.R. 16=11 I.C. 929=
4 Bur. L.T. 278.

——*Gift—Koyin becoming priest—Delivery of possession.*

A gift by parents to their son on his entering priesthood, is, when possession is delivered over to the donee, irrevocable. (*Hartnoll*, C.J.) MA HLA U *v.* ME AUNG DUN.

4 Bur. L.T. 193=11 I.C. 862=
6 L.B.R. 32.

Husband and Wife.

——*Husband and wife—Divorce—Decree of Court—Wife withdrawing defence—Subsequent suit for partition by husband—Maintainability—C. P. Code, O. 2, R. 2 (Ss. 42 and 43) no bar.*

A Buddhist husband first sued his wife for divorce on the ground of misconduct. The wife denied the misconduct but subsequently abandoned her defence and a decree was passed for divorce. Subsequently, the husband sued for recovery of properties alleged to be in the wrongful possession of his divorced wife and for partition of their joint property. The shares of the respective parties under the Buddhist Law depended on the grounds of divorce. The wife set up a divorce by consent and also a bar under O. 2, R. 2 of the C.P. Code. *Held*, that as the wife had abandoned her denial of matrimonial offence and had

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submitted to the decree as claimed, she could not be placed in the position of an innocent wife contracting for divorce on an equal footing with her husband. Ss. 42 and 43 of the C.P. Code of 1882 did not bar the second suit as the cause of action was different. (*Lord Robson.*) MAUNG PE *v.* MA LON MA GALE.

38 Cal. 629=15 C.W.N. 766=
11 I.C. 497=8 A.L.J. 739=
13 Bom. L.R. 464=14 C.L.J. 18=
(1911) 2 M.W.N. 397=4 Bur. L.T. 153=
6 L.B.R. 18=10 M.L.T. 479 (P.C.).

——*Husband and wife—Children of first and second marriage—Rights of.*

So long as a Burman Buddhist husband and wife are alive, their property from whatever source derived, forms one estate in which all members of the family have an interest but which is under the control of husband and wife. (*Brown*, A.J.C.) MAUNG LU GALE and THREE OTHERS *v.* MAUNG LU PO and TEN OTHERS.

1 Bur. L.J. 267=4 U.B.R. 140=
1923 Rang. 110.

——*Husband and Wife—Mortgage by husband—Consent of wife—Acquiescence.*

The question of acquiescence by the wife in a mortgage of joint property executed by her husband, depends upon the circumstances of the case. The wife's consent may be presumed, where the circumstances are such as to show that the husband is acting as the wife's agent and the husband ostensibly with the wife's assent manages the family business. (*Twomey*, C.J. *and Robinson*, J.) MA HLAING *v.* P.R.A.R. CHETTY. 13 Bur. L.T 129=
61 I. C. 701=10 L.B.R. 267.

——*Husband and wife*—Payin *property—House built during coverture.*

A house built during coverture on the *Payin* property of the husband or wife is their joint property and neither can oust the other from possession. (*Maung Kin*, J.) MA SHIN MI *v.* M. THAUNG.

38 I C. 225=12 Bur. L.T. 202.

——*Husband and wife—Interest of husband or wife—Nissayo and nissito—Letttepwa and Hnapazone.*

Property acquired by the husband or wife by inheritance during coverture is *Letttepwa* property and not *Hnapazone* and both husband and wife have a vested interest in such property when they are living together. The rule of *Nissayo and Nissito* applies to such cases. (*Maung Kin*, J.) PALANIAPPA CHETTY *v.* MA TU. 57 I.C. 950=13 Bur. L T. 35.

——*Husband and wife—Joint and separate property, coverture—Obligation undertaken—Gift of separate property—Profits of property acquired during coverture—Nissayo and Nissito.*

Under Burmese Buddhist Law in deciding what is joint property all payments of money, the obligation for which was undertaken during

coverture must be debited to the joint account though the actual payment was made by the survivor after the death of one of the parties to marriage. Property inherited by either of the parties to a marriage during coverture, is to be divided equally between the parties and the same rule applies to the profits of separate property brought by either party to the marriage. The rule of Nissayo and Nissito does not apply to the profits during coverture of the separate property of either of the parties. A gift of separate property of one of the parties to a marriage must be held to be made out of the separate property of the party to whom the property belonged, though the other's name also is joined as donor. (*Twomey*, C.J. *and Ormond*, J.) MA DWE *v.* MA TIN LUN. **36 I.C. 972= 12 Bur. L.T. 228.**

———*Husband and wife—Divorce—Re-union.*

Under the Buddhist Law mere physical re-union with a divorced wife is not sufficient to revive the status of marriage. The re-union must be of such a nature that if there had been no divorce, it would have amounted to a valid marriage. (*Pratt*, J.C.) MAUNG PO LAT *v.* MA NGWE MA. **54 I.C. 575= 3 U.B.R. (1919) 182.**

———*Husband and wife—Jointly borrowing money.*

There is no presumption that whenever a husband and wife borrow money there is a partnership between the two and that the money is borrowed for the purposes of that partnership. (*Saunders*, J.C.) MAUNG TAW *v.* MOOSAJI AHMED & CO. **54 I.C. 513= 3 U.B.R. (1919) 189.**

———*Husband and wife—Mortgage by husband—Decree against husband—Wife's interest, if affected.*

A mortgage of joint property effected by the husband with the wife's knowledge and consent, binds the wife's interest in the property as well as the husband's interest. (*Per Twomey*, C.J. *Pratt, and Maung Kin*, JJ.)—(*Ormond*, J. contra). A husband who mortgaged the joint property of himself and his wife, with her knowledge and consent is not acting as benamidar for his wife, and a decree against him alone will not affect the wife's interest in the property. (*Twomey*, C.J. *Ormond*, *Pratt and Maung Kin*, JJ.) MA NYUN *v.* TEXEIRA. **12 Bur. L.T. 31=51 I C. 563= 10 L.B.R. 36 (F.B.).**

———*Husband and wife—Divorce—Adultery—Illegitimate issue—Onus—Cr. P.C., S. 488—Evidence Act, S. 112.*

There is no such thing as judicial separation in Buddhist Law, but an order under S. 488, Cr. P.C. is practically a judicial separation, and if a child is born while the order is in force, the onus is on the wife to prove access. S. 112, Evidence Act is inapplicable to the case. (*Rigg*, J.C.) MA MYA *v.* MG. SHWE BAN. **46 I.C. 620 (L.B.)**

———*Husband and wife—Divorce—Second marriage with chief wife's consent.*

The chief wife has a right to object to second marriage of her husband and may claim divorce if he marries without her consent. But she cannot claim divorce on that ground if she is barren or has borne female children or is suffering from disease. (*Twomey*, C.J., *Ormond*, *Maung Kin and Rig*, JJ.) MAUNG HWE *v.* MA SEIN. **11 Bur. L.T. 236=45 I.C. 953= 9 L.B.R. 191.**

———*Husband and wife—Maintenance.*

After a husband's suit for restitution of conjugal rights has been dismissed, he is bound to maintain his wife especially where the wife lives apart on account of the husband's cruelty. (*Ormond*, J.) MA THEIN ME *v.* PO GYWE, **10 Bur. L.T. 212=18 Cr. L.J. 767= 41 I.C. 143=9 L.B.R. 442.**

———*Husband and wife—Divorce—Discretion—What constitutes.*

A single instance of ill-treatment would not entitle the wife to stay away from her husband and staying away for more than one year amounts to desertion on her part. The husband's not providing her with maintenance during that period is not equivalent to desertion by him. The wife being the offending party is not entitled to a share of the joint property. (*Parlett*, J.) MAUNG PO HAN *v.* MA WA THA. **39 I.C. 115 (L.B.)**

———*Husband and wife—Divorce—Re-union after separation.*

When the parties to a divorce re-unite after separation, they stand in the same position as if there had been no divorce. In a case of divorce between a man who had been married before and a woman who had not, the woman must be looked upon as in the same position as if her husband had not been previously married and the partition of property should be regulated accordingly. The status of the parties at the time of the first marriage is to be taken as the starting point in determining their rights on the second divorce. If at the time of the first marriage they were *nga lin ngwe-maya* (*i.e.*, Bachelor and Maiden) they are to be regarded as such on their re-union. On a divorce by mutual consent between *eindaungyis* the rules of partition are as follows:—"Each takes his or her *payin* property. If they were equally matched as regards property at marriage, the property acquired after marriage otherwise than by inheritance is equally divided between them. If one of the parties brought the bulk of the property to the marriage and the other comparatively little, then on the principle of *nissayo and nissito*, the supporter gets two-thirds of the jointly acquired property

and the other one-third. If one of the parties inherits property during the marriage, he or she, gets two-thirds of the property on the same principle. (*Mc Coll*, A.J.C.). MI SAING *v.* NGA YAN GIN. 38 I C. 408=11 Bur. L.T. 89=(1916) II U.B.R. 127.

———*Husband and wife*—Kanwin *and* payin *property.*

Kanwin property, *i.e.*, property given by the bridegroom to the bride at the time of marriage for the joint purpose of the married pair is a gift and must be in writing and registered as required by S. 123 of the T.P. Act, otherwise if there is mutual divorce, the property will revert to the husband as being only *payin* property. (*Maung Kin*, J.) MAUNG SHWE KHO *v.* MA MYA. 33 I C. 129=9 Bur. L.T. 87.

———*Husband and wife—Divorce—Effect on husband's property—Adultery—Presumption.*

What is joint property of husband and wife, under the Buddhist Law, becomes the sole property of the husband as soon as he validly divorces his wife. A Court may safely presume adultery if a guilty attachment is found to subsist between the parties and opportunities had occurred when a guilty intercourse might with facility have taken place. Under the Burmese Buddhist Law, the husband can discard an adulterous wife and send her away with only the clothes on her body; if the wife agrees to the proposal to abandon her and leaves the conjugal house, there is a divorce from the time of abandonment. (*Maung Kin*, J.) MAUNG PYA GYI *v* MAUNG PO KA. 33 I C. 118=9 Bur. L.T. 74.

———*Husband and wife—Widow—Right of disposal of joint property of herself and her husband.*

Subject to any claim by the eldest son to a certain specified property, *e. g.*, the father's elephant. pony, etc., and to a quarter share of the joint properties as *Orasa* son, a Burmese Buddhist widow has an absolute right of disposal over the whole of the joint property of herself and her husband as against their children. (*Fox*, C.J., *Parlett and Twomey*, JJ.) MA SEIN TON *v.* MA SON. 8 Bur. L.T. 203=30 I.C 888=8 L.B.R. 501.

———*Husband and wife—Separate living—Custody of child.*

In a suit by the mother of a Burmese Buddhist girl of 7 years to recover her from the custody of the father who was living separate, *held*, that as guardianship was not one of the matters mentioned in S. 13 of the Burma Laws Act, the personal law of Buddhists was not applicable. According to S. 19 (*c*) of the Guardians and Wards Act, the father was the natural guardian of the minor child under the circumstances of the case. (*Parlett*, J.) MA THEIN ME *v.* MAUNG PO GYWE. 29 I.C. 899=8 Bur. L.T. 73.

———*Husband and wife—Wife's interest in joint property.*

A Buddhist husband and, wife jointly owned properties. The business was however carried on by the husband in his own name. He alone mortgaged the joint properties but the wife knew of the mortgage created by him and acquiesced in the mortgages from the beginning. *Held*, that the husband had power to bind and did bind the wife's interest in the mortgaged properties. A wife will be estopped in pleading that a mortgage of a certain household property which stood in the name of her husband and in which he conducted a mill-business as his own, is not binding on her half share especially where she herself negotiated the mortgage. She is not a necessary party to the suit on the mortgage. (*Fox and Hartnoll*, JJ.) MATIN ME *v.* MAUNG MAUNG. 29 I.C. 881=8 Bur. L.T. 66.

———*Husband and wife—Divorce.*

According to the Buddhist Law of divorce a suit for bare divorce does not lie. The decision of the Privy Council in Nga Pe *v.* Mi La Pon Gale, 9 L.B.R. 18 does not affect the ruling in (1910) U.B.R 30. (*Shaw*, J.C.) MI SAW BWIN *v.* NGA SAN NYAN. 28 I C. 801=(1914) II U.B.R. 32.

———*Husband and wife—Mortgage by husband—Wife's liability.*

If a Burmese Buddhist wife acquiesces in a mortgage of property executed by her husband, it binds the wife's interest also though she does not join in the registration of the deed. (*Ormond*, J.) MA SHWE ME *v.* P. A. R. M. CHETTY. 27 I.C. 788=8 Bur. L T. 97.

———*Husband and wife—Residence for more than one year—Effect.*

Where a wife left her husband for 6 years and in the meantime there were suits for divorce both by the husband and wife and 17 months after separation the husband took another wife *Held*, that it effected a dissolution of marriage. (*Hartnoll, C.J. and Ormond*, J.) MAUNG THA KADO *v.* MA THIR MYALING. 25 I C. 93=7 Bur. L.T. 197.

———*Husband and wife—Divorce—Re-marriage—Affairs settled definitely at the time—Presumption.*

In the absence of special circumstances, it is presumed that the affairs of people, divorcing and re-marrying are settled definitely at the divorce or re-marriage and the presumption is very strong where a long period has expired since the divorce and the wife has never laid claim to the property taken by her divorced husband to the second marriage. (*Twomey*, J.) MI AH PUMA *v.* MI HUIN LIU. 23 I.C. 948=7 Bur L.T. 83.

———*Husband and wife—Imprisonment—Whether amounts to desertion—Dissolution of marriage tie—Whether mere desertion is enough*

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—Wife of a convict taking another husband—Effect of.

Under Buddhist Law, a man sentenced to imprisonment, is not regarded as having deserthis wife, nor does mere desertion *ipso facto*, without further express act of volition dissolve the marriage tie, so that the wife of a convict with sufficient property to maintain herself and her children, cannot take another husband and if she does so, she commits desertion and adultery and the husband on return can treat the marriage at an end and demand all the property. (*Hartnoll, Offg.* C.J. *and Twomey*, J.) MA AUNG BYA *v.* MAUNG THET HNIN. **23 I.C. 940=7 Bur. L.T. 240.**

———*Husband and wife—Divorce suit—Desertion and cruelty if dissolve marriage.*

Under Burmese Buddhist Law, mere desertion for the statutory periods, does not of itself dissolve a marriage tie without a further and expressed act of volition on the part of either party to the marriage, such as beating one's wife and charging her with adultery. An innocent party is entitled to obtain a legal divorce by a suit on the ground of desertion for the statutory period alone. *Obiter dictum* of Robinson, J. in 22 I. C. 945. ref. (*Robinson*, J.) MG. YIN KYE *v.* MA SEIM.

22 I.C. 945 (L.B.)

———*Husband and wife*—Payin *property changing its character—Presumption.*

Where *payin* property changes its character during a marriage, the presumption is that it has become *utetpava* of that marriage —a presumption which may however be rebutted. (*Parlett*, J.) MA TAH *v.* MA KA YIN.

21 I.C. 227=6 Bur. L.T. 174.

———*Husband and wife—Divorce—Cruelty*

Under the Buddhist Law even when the husband has been guilty of cruelty only once, the wife can insist on a divorce and is entitled to get it, subject to the penalty that assets and liabilities of the couple are to be divided equally between them, (*Twomey*, J) MAUNG PO HAN *v.* MA TA LOK. **20 I.C. 674= 6 Bur. L T. 134=7 L B.R. 79.**

———*Husband and wife—Divorce—Dissolution of marriage tie—Rights of children.*

When there was mutual abandonment o each other by a husband and a wife for more than the prescribed periods and both re-married starting a new home, the marriage tie between them is dissolved. Children lose the right to inherit the property of the parent who has abandoned them, unless filial relations are resumed. (*Hartnoll and Young*, JJ.) MAYI *v.* MA CALE. **6 L.B.R. 167=19 I.C. 85= 6 Bur. L.T. 73.**

———*Husband and wife—Husband's right over wife's* payin *property—Distinction between maiden wife and* eindaungyi *as regards husband's control over wife's* payin*—Estoppel.*

BUDDHIST LAW—BURMESE—JOINT PROPERTY.

A Buddhist wife, and *eindaungyi* may alienate her *payin* property in any way without even consulting her husband provided she does not give it to a paramour. (*Mc Coll*, A.J.C.) NGA TUN BAW *v.* NGA KAN. **12 I.C. 200= 4 Bur. L.T. 244.**

———*Husband and wife—Divorce—Cruelty, what is.*

The cruelty alleged in a suit for divorce was that the husband visited the petitioner, who was living apart from him on several occasions drunk; he had abused her once in the public street and once about 4 years ago he took her by the throat, threw her down and caused bruises on her body by pushing her against a chair; *Held*, no legal cruelty has been proved. (*Fox*, C. J. *and Hartnoll*, J.) JOSEPHINE HENRIETTA ALEXANDER *v.* EDWARD PHILLIP ALEXANDER. **11 I.C. 784= 4 Bur. L.T. 168.**

———*Husband and wife—Divorce—Connivance—Presumption—*" volunti non fit injuria".

Connivance amounts to a willing consent to conjugal offence or a culpable acquiescence in a course of conduct likely to lead to the offence being committed. It is covered by the principle "*volunti non fit injuria*." The Court will not, on presumption, impute connivance nor will it do so unless there is strong evidence to support it. (*Fox*, C J. *and Hartnoll*, J.) BENNETT *v.* BENNETT, **11 I.C. 779=4 Bur. L. T. 161.**

Joint Property.

———*Joint property—Ancestral property—Presumption.*

Buddhist law does not say that ancestral land must be presumed to remain undivided until the contrary is proved. There is no such presumption in Buddhist Law. No general rule can be laid down as to the burden of proving jointness or separation without regard to the facts and circumstances of each particular case. (*Maung Kin*, J.) MAUNG SHWE LAL *v.* MA KYWE AND OTHERS. **1 Bur. L.J. 174= 74 I.C. 9=1923 Rang. 92.**

———*Joint property—Delay in setting up claim.*

A claim to a share in a deceased parents' estate should be promptly made after the parent's death. Unreasonable and unexplained delay would defeat the claim. (*Parlett*, J.) MA E. *v.* MA THIN. **38 I.C. 147 (L.B.).**

———*Joint property—Ancestral property—Presumption.*

There is no such presumption that ancestral land must be presumed to remain undivided until the contrary is proved in the Buddhist Law. The ruling in such case is to the effect that the burden of proving the division of ancestral property lies upon the party asserting division. (*Maung Kin*, J.). MAUNG PO U *v.* MAUNG PO THIN. **38 I.C. 985= 9 Bur. L.T. 164.**

Marriage.

———*Marriage—Ceremonies requisite for—Mutual consent — Evidence of recognition—Reputation.*

In Burma no ceremony is essential for a marriage. Mutual consent is all that is required, which in the absence of direct proof, may be inferred from the conduct of the parties or established by reputation. In Burma where polygamy is lawful, it is not illegal to marry a wife's sister, though it is not quite a respectable thing to do during lifetime of the wife. Eating of the same pot is a sign of social equality rather than a proof of matrimony. (*Lord Macnaghten,*) MI ME *v.* MI SHIVE MA.

39 Cal. 492=39 I.A. 57=
11 M.L.T. 169=14 I.C. 475=
(1912) M.W.N. 201=16 C.L.J. 276=
9 A.L.J. 276=14 Bom. L.R. 204=
22 M.L.J. 360=16 C.W.N. 539=
5 Bur L.T. 65=(1912) 1 U.B.R. 111 (P.C.).

———*Marriage — Polygamy — Rights of junior wives—Presumption—Proof.*

Polygamy is undoubtedly lawful under the Burmese Buddhist Law and a man may have at the same time two or more wives who are on equal footing. When a claim to inheritance is made by a junior wife Courts must examine closely the relations that subsisted between her and her spouse, in order to determine her true status. Wives may under the law occupy identical positions or the junior wife may not be endowed with proprietary as well as personal rights. The junior wife has to prove that she was endowed with such rights before she can succeed to her claim. No ceremony of any kind is essential for the purpose of lawful wedlock. Although there may not be sufficient evidence of actual giving and taking the conduct of the parties subsequent to their coming together may raise a strong presumption of marriage, especially when the union has lasted for a long period. (*Heald and May Oung*, JJ.) MAUNG THA DUN *v.* MA THEIN YIN. 1 Rang. 1=73 I.C. 1044=
1924 Rang. 37.

———*Marriage — Dissolution — Burden of proof.*

Marriage even in Burma is ordinarily a permanent bond, which subsists until it is actually broken and the burden of proving that it has been broken is on the person alleging it. (*Heald, and Lentaigne,* JJ.) MA LUN ME *v.* MAKIN.
2 Bur. L.J. 67=74 I.C. 1037=
1923 Rang. 155.

———*Marriage — Re-marriage — Provision for children of first marriage.*

Among Burmese Buddhists when the mother dies and the father marries again, it is usual to make a family partition and settle on the children of the first marriage. It is most unusual for a father merely to make gifts on such an occasion but still more unusual to include in these gifts the bulk of his property. (*Duckworth and Pratt*, JJ.) MAUNG PO LUN *v.* MA E MAI. 1923 Rang. 57=
75 I.C. 47=1 Bur. L.J. 111.

———*Marriage—Consent obtained by pressure, is not free consent.*

There must be free consent of the parties for a valid marriage under the Buddhist Law, and a consent reluctantly given under pressure is not such free consent as is required by that Law. (*Robinson*, J.) MA TWE *v.* LWE HAIN.
59 I.C. 585=22 Cr. L.J. 123=
13 Bur. L.T. 105.

———*Marriage—Consent of guardian.*

Under Burmese Buddhist Law consent of the guardian is necessary to the marriage of a minor girl except perhaps when the girl is steadfastly determined to marry against the wishes of the guardian. (*Ormond*, J.) MA SA *v.* SAN TUN U. 12 Bur. L.T. 186=
34 I.C. 81=10 L.B.R. 50.

———*Marriage—Minor—Contract of marriage—Suit for damages.*

The Burmese Buddhist Law must determine the competency of a Burmese Buddhist youth under 18 years of age, to make a contract of marriage, and under that law a promise of marriage by a minor is voidable and the marriage of the minor youth or of a girl under 20 years of age requires the consent of the parents, unless the parties are steadfastly determined to marry. If a young man and a young woman have clandestine intercourse, the parents of the former cannot withhold their consent to the marriage and if the young man divorces the young woman, he must pay her his kobo. (*Ormond*, J.) TUNKYIN *v.* MA MAI TIN. 10 L.B.R. 28=32 I.C. 653=
12 Bur. L.T. 219.

———*Marriage — Non-Buddhist non-Burmans.*

Burmese Buddhisht Law of marriage is not applicable to the marriages of non-Burmese non-Buddhists celebrated in the time of the Buddhist Kings of Burma. (*Saunders*, J.C.) SOPHIA BHIN *v.* MARIA DAVID.
12 Bur. L.T. 48=3 U.B.R. (1919) 128=
51 I.C. 542=10 L.B.R. 77.

———*Marriage — Consent of parties — Promise by parents—Breach—Damages.*

A Burmese Buddhist whether male or female, adult or minor, cannot be legally married without his or her consent or against his or her will. Where the parents promise to give a boy in marriage, no damages for the breach of such promise can be recovered either against the son or against the parents. (*Saunders*, J.C.) MAUNG POTHAW *v.* MAUNG THA HLAING.
49 I.C. 59=(1918) 3 U.B.R. 106.

———*Marriage—Minor's marriage without parent's consent.*

There is nothing in Burmese Buddhist Law to prevent a minor from contracting a valid

marriage without his parent's consent at any time after he is physically competent for marriage. (*Heald*, A.J.C.) MAUNG NYEIN *v.* MA MYIN. **46 I.C. 421=(1918) 3 U B.R. 75.**

———*Marriage—Minor—Validity—Father's consent.*

Under Buddhist Law the marriage of a minor is not valid without the consent of her father. (*Twomey*, C.J. *and Ormond*, J.) MAUNG BA HAN *v.* MA TIN. **46 I.C. 831 (L.B.).**

———*Marriage—Dissolution of—Wife living away for over a year on account of cruelty.*

The rule of Burmese Buddhist Law that a marriage is dissolved by the wife voluntarily deserting the husband for one year does not apply where the wife has been compelled to leave her husband because of his cruelty. (*Ormand*, J.) MA THEIN ME *v.* PO GYWE.
10 Bur. L.T. 212=41 I C. 148=18 Cr. L.J. 767=29 L.B.R 44.

———*Marriage—Validity.*

Where there is divergence between the personal laws applicable to the parties to a marriage, the proper principles to act on, are that the *Lex Loci contractus quoad solemnitates* determines the validity of a marriage, and the *lex domicillii* the question of the capacity of the parties to marry. 62 L. T. 911=37 L. T. 415. A Marriage between a Chinese Buddhist male and a Burmese Buddhist female in which some of the preliminaries of Chinese Customary Law has been observed is invalid. (*Fox*, C. J. *and Parlett*, J.) MAUNG SEN KYI *v.* MA E.
9 Bur. L.T. 179=34 I.C. 139=8 L.B.R. 399.

———*Marriage — Dissolution — Imprisonment of husband, if desertion of wife by him —Desertion—Right to property.*

Under the Buddhist Law, a man sentenced to imprisonment is not thereby to be deemed to have deserted his wife. During the imprisonment of the husband, his wife has no right to take a second husband; if she does so, her conduct amounts to desertion and adultery and she cannot claim a divorce by pleading desertion. The marriage is not dissolved by the desertion but from the day, when the first husband on his release from jail, demands the joint property from her. Where the husband treats the marriage as at an end, on the ground of his wife's desertion and adultery he is entitled to all the joint property of the parties. (*Hartnoll*, A. C. J. *and Twomey*, J.) AUNG BYU *v.* THET HNIU. **29 I.C. 863=8 L.B.R. 30.**

———*Marriage—Karens—Custom — Marriage.*

The marriage customs of *Karens* are very peculiar, but if they profess Buddhism they may marry according to Buddhist Law. (*Hartnoll*, J.) MG SAW TU *v.* MA SA MA.
25 I.C. 342=15 Cr.L.J. 590 (Rang.).

———*Marriage—Chinese man and Burmese woman—Law applicable.*

In questions of marriage between a Chinese Buddhist man and a Burmese Buddhist woman, the law applicable to the man is his own personal law. The law as to marriage among Chinese is very much more restricted than among the Burmese Buddhists. (*Saunders*, J. C.) WA FOON *v.* MA THEIN TIN.
24 I.C. 872=15 Cr. L.J. 484=7 Bur. L.T. 71.

———*Marriage—Form of.*

The forms of first class Chinese marriage are not insisted on in the case of Chinese marriages in Burma and relaxation is permitted in the case of the poor. (*Twomey and Parlett*, JJ.) MA THEIN SHEIN *v.* U. AH. SHEIN.
7 Bur. L.T. 246=24 I.C. 367=8 L.B.R. 222

———*Marriage.*

Suit by man for damages for breach of contract of marriage will lie in the absence of proof of a contrary rule of Burmese Buddhist Law. (*Parlett*, J.) MA NGWE YIN *v.* MAUNG PO TAW. **23 I.C. 876=7 Bur. L.T. 14.**

———*Marriage—Chinese and Burmese.*

Marriages between Chinese and Burmese in Burma, performed according to Burmese customs, would not be binding unless supplemented by ceremonies peculiar to Chinese customs. The number and character of the ceremonies depend upon the wealth and position in life of the parties. A Burmese Buddhist woman, whether a minor or not cannot legally be married without her consent or against her will. Co-habitation with a Burmese woman for three or four months is quite insufficient to raise the presumption of a valid marriage. 4 L.B.R. 155; 1 Bur. L.T. 125, Foll. (*Parlett*, J.) WAINSHAIN *v.* MA HUIN-LAING.
12 I.C. 801=4 Bur. L.T. 124.

———*Marriage—Second marriage.*

No formal demand in marriage and no ceremony by a person married once before are necessary or usual; nor the consent of the chief wife for second contemporaneous marriage to enable the co-wife to inherit. The woman marrying a married man, with knowledge, connot be presumed to be the mistress and not a wife under the Burmese Buddhist Law. A man under Burmese Buddhist Law can marry two sisters. Where the acceptance of the relation of the husband and the lesser wife by the head wife is satisfactorily proved, the former is entitled to inherit on an equal footing with the latter. (*Shaw*, J.C.) MI SHWE MA *v.* MI MIN.
12 I.C. 191=4 Bur. L.T. 235.

Minor.

———*Minor—Guardians of—Who are.*

No near relative of a Buddhist minor is entitled to the guardianship of the person or property of the minor except his father, mother and their appointees. (*Twomey*, J.) MG. PO. THWE *v.* MA BAW. **13 I.C. 273=4 Bur. L.T. 272.**

BUDDHIST LAW—BURMESE—PARTITION.

Partition.

———*Partition—Ancestral estate—Jointness—Burden of proof.*

Buddhist law does not say that ancestral land must be presumed to remain undivided until the contrary is proved. There is no such presumption in Buddhist law. No general rule can be laid down as to the burden of proving jointness or separation without regard to the facts and circumstances of each particular case. (*Maung Kin*, J.) MAUNG SHWE LA *v.* MA KYWE.
74 I.C. 9=1923 Rang. 92.

———*Partition—Partial partition*—Hnapason *property and separate property.*

There can be separate suits for a claim of a share in *hnapason* property and separate property as the claims are distinct. (*Maung Kin*, J.) MAUNG SAN TIN *v.* MA NWE SA.
1 Bur. L.J. 206.

———*Partition—Auratha son—Joint acquisition of parents—Remarriage of father.*

On the death of the mother and the remarriage of the father, the auratha son is entitled to get from the father one-fourth of the estate jointly acquired by him and his mother. At the same time the auratha son cannot make that claim against his father merely by reason of his mother's death and its is only the remarriage of his father that gives him a right to the one-fourth. (*Heald*, J.) MAUNG SHWE JWET *v.* MAUNG TUN SHEIN.
66 I.C. 538=11 L.B.R. 199.

———*Partition—Children of two marriages and step-mother—Mode of division.*

Whether between children of two marriages, or between children of the first marriage and their step mother, the division is always *per stirpes*, not *per capita*, during the life-time of their mother. Children are not entitled to a share but only succeed as representing her. 4 L. B.R. 110, followed. (*Parlett*, J.) MI CHIT LU MAW *v.* WI WIN MA U. 35 I.C. 423=
10 Bur. L.T. 41.

———*Partition.*

A partition can be claimed during the step-father's lifetime. (*Parlett*. J.) MA MIN KYIN *v.* MAUNG WA. 31 I.C. 875=
9 Bur. L.T. 53.

———*Partition—Rights*—Auratha *son.*

Courts cannot recognise a preferential treatment in partition on the ground of service to the deceased. A first born child is not the *auratha* son until he attains majority. The children of a predeceased *auratha* child are entitled one-fourth of the share that their parent would have got and cannot be allowed to receive more than what their father would have obtained himself. The children of an *auratha* son take the same share as the younger brother of their father. When the

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position of an *auratha* child is filled up once, no one else can claim it. (*Fox*, O.J. *Robinson and Hartnoll*, JJ.) MA SU *v.* MA TIN.
6 L.B.R. 77=18 I C. 466=
3 Bur. L.T. 291 (F.B.).

———*Partition— Father and daughter—Daughter given a larger share—Validity of partition.*

A partition between a father and daughter is not invalid merely because the father assigns to the daughter a larger share than she could ordinarily claim under the Law of Inheritance, even if the whole of the joint property is given over to her. (*Twomey*, J.) MAUNG HMVE *v.* MA LUN AUNG.
11 I.C. 855=4 Bur. L.T. 186.

Pre-emption.

———*Pre-emption—Co-heir—Executant—Of right.*

A Burmese Buddhist co-heir has a right of pre-emption in respect of the unseparated interest of any particular co-heir in undivided inherited property, and the whole body of co-heirs, excepting those in respect of whose interest the exercise of the right is claimed, are entitled to settle among themselves which of them shall exercise it in any particular case. In case there are conflicting claims among the co-heirs and they fail to come to any agreement, any of them may institute a suit to establish his claim as against the others and also against any purchaser who may have bought or be proposing to buy the property in disregard of their rights. (*Heald*, A. J. C.) MAUNG PU ZA *v.* MA NGE MA.
33 I.C. 468=3 U. B. R. (1919) 154.

———*Pre-emption—Sale of ancestral undivided property—Right of purchaser—Pre-emption.*

Under Burmese Buddhist law the sale of an undivided ancestral estate by one co-heir without the consent of other heir is good only to the extent of his share in the estate. The other co-heirs have a right to pre-empt his share when sold, but they must exercise the right promptly. The proper remedy open to a purchaser or mortgagee of such share is a suit for partition of the property and possession of that share. (*U. Kin*, J.) SOMASUNDARAM CHETTY *v.* MA SHWE NYUN. 10 Bur. L.T. 1=
39 I.C. 257=8 L.B.R. 497.

———*Pre-emption—For whom and against whom it exists.*

The right of pre-emption can be enforced only against the person inheriting jointly with him, and is not available against his heirs after the co-inheritor's death ; surviving joint inheritors and the heirs of any who have died are entitled to pre-emption. There is no right of pre-emption among co-sharers who took part in the partition of ancestral immoveable property, after the partition of such property. The right of a co-heir to demand from another co-heir

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that he should sell his share to him in preference to a stranger is a part of his inherited right. Authorities reviewed. (*Fox*, C.J., *Hartnoll Twomey and Ormond*, JJ.) MAUNG YE NANO *v.* AUNG MYAT SARI. 8 Bur. L.T. 167=31 I.C. 512=8 L.B.R. 466.

———*Pre-emption— Delay in assertion of right—Effect.*

The right of pre-emption, must under the Buddhist Law be asserted promptly and it would be inequitable to allow a claim after a long period. The law makes no allowance for the fact that the claimant did not know of the sale at or about the time it took place. S.L.J.B. 39, fol. (*Fox*, C.J. *and Hartnoll*, J.) MA NYUN YE *v.* MG. THAT TUN. 20 I.C. 343=6 Bur. L.T. 115.

Property.

———*Property acquired during marriage—Interest of wife.*

Property acquired by the husband during the marriage becomes the joint property of the husband and wife unless their earnings are kept separate and distinct and their respective interest in such property are attachable in execution of a decree against one of them (*Ormond*, C.J. *and Maung Kin*, J.) MAUNG PAN HLA *v.* MAUNG TUN NYEIN. 41 I.C. 410 (L.B.).

Religious Offering.

———*Religious offering—Essentials.*

A verbal declaration or delivery of possession is enough to render a Buddhist religious offering irrevocable even without a formal dedication ceremony. (*Fox*, C.J. *and Parlett*, J.) YEW KYEW SUM *v.* U. KE. TU. 24 I.C. 465=7 Bur. L.T. 63.

Seduction.

———*Seduction—Burma Laws Act*, S. 13.

In an action for damages for breach of promise of marriage the fact that there was seduction must be taken into account in measuring damages. Under Burmese Buddhist Law an action lies for damages for seduction. The ancient law on this point is approved by public opinion and is in accordance with present customs and practice but as seduction is not a question ralating to marriage, suits ralating to seduction cannot under S. 13 of the Burma Laws Act be decided according to the Buddhist Law. (*Pratt*, O.J.C.) MA NGWE GAING *v.* TUN YA. 57 I.C. 815=13 Bur. L.T. 6.

———*Seduction—Cause of action.*

In the absence of promise of marriage seduction does not give any cause of action. (*Maung Kin*, J.) MA NGWE YI *v.* MAUNG HLA MAUNG. 42 I.C. 539 (L.B.).

Source of.

———*Source of*—Dhammadats.

Of the various *dhammadats* usually reckoned as 36 in number and considered more

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or less authoritative sources of law amongst the Burmese, that of the Mangya or Manu Kyay Dhammadhat (Alomprai Code of 1756) is and has been accepted by the British Courts as the most authoritative. (*Lord Shaw*). MA NHEN BWIN *v.* SHWE GONE. 41 Cal. 887=41 I.A. 121=1 L.W. 914=7 Bur. L.T. 105=16 Bom. L.R. 377=27 M.L.J. 41=18 C.W.N. 1121=16 M.L.T. 142=20 C.L.J. 265=8 L.B.R. 1=23 I.C. 433=(1914) M.W.N. 449 (P.C.). Reversing 4 Bur. L.T. 1=9 I.C. 442=5 L.B.R. 231.

Succession.

———*Succession — Eldest surviving son—Right to fourth share—Lim. Act. Art.* 123.

Under the Burmese Buddhist Law, an eldest son on the death of his father leaving the mother behind, has a definite right to a quarter share of the estate and not merely a right to elect within a reasonable time if he will take that share. He can assert his right at any time within the period prescribed by Art. 123. (*Lord Buckmaster*). MAUNG TUN THA *v.* MATHIT. 44 Cal. 379=19 Bom. L.R. 294=15 A.L.J. 96=32 M.L.J. 71=21 M.L.T. 97=21 C.W.N. 527=26 C.L.J. 169=9 L.B.R. 56=10 Bur. L.T. 138=38 I.C. 809=44 I.A. 42 (P.C.)

———*Succession — Daughter — Heir to — Sister or parent living a part—Texts.*

Under the Burmese Buddhist Law, where the daughters are living apart from their father and one of the daughters dies, the surviving sister inherits her estate in preference to her father. The succession of brothers and sisters in preference to the parents of a deceased childless person being established by the Manu Kyag, no reference to the other Dhammathats was necessary to clear up an ambiguity. *Held* also upon a review of the other Dhammathats that the balance of authority was in favour of the sisters and brothers being preferred to the parent. (*Lord Shaw.*) MA NHIN BWIN *v.* U. SHWE GONE. 41 Cal. 887=1 L.W. 914=41 I.A. 121=7 Bur. L.T. 105=16 Bom. L.R. 377=27 M.L.J. 41=18 C.W.N. 1121=16 M.L.T. 142=20 C.L.J. 264=8 L.B.R. 1=23 I.C. 433=(1914) M.W.N. 449 (P.C.).

———*Succession—Grand children.*

Grandchildren whose parents are dead inherit the property of their grandparents of their own right and not as representing their parents. The division is *per stirpes* but not *per capita*. (*Robinson*, C.J., *May Oung and Beasly*, JJ.) MAUNG PO THU DAW *v.* MAUNG PO THAN. 1 Rang. 316=1924 Rang. 78.

———*Succession — Partition — Letlelpwa property—Right of sons of first marriage.*

Where a partition is entered into between a father and the children by his first marriage

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just prior to his second marriage, the latter, cannot claim inheritance in the *letletpwa* property of the father's marriage with his second wife. (*Duckworth and Po Han*, JJ.) MA TOKE *v.* MA ULE. 1 Rang. 487=76 I.C. 838=1924 Rang. 71.

———*Succession—Orasa child—Joint residence not necessary.*

The appellant, the eldest daughter at the time of her mother's death, had been married for 17 years. During the first two years of her married life she continued to live with her parents; she then moved to a house near by and lived there for 20 years; finally she went to reside at another village, and a year later her mother died. *Held*, that the appellant was not disentitled to her share as Orasa by reason only of the facts that she lived separately from her father and that she never assumed the duties of her deceased mother in the family. (*May Oung*, J.) MA HLA U *v.* MAUNG SHWE YIN. 2 Bur. L.J. 138=1923 Rang. 271=1 Rang. 370.

———*Succession—Son's right in parent's estate after remarriage not a vested one.*

The right of the eldest son (orasa child) to claim a quarter share from his father on the latter's re-marriage after the mother's death is not a vested one. The same view would apply to the claim, if any, of the Canittha children. There is nothing in the Dhammathats to justify the assumption that the children in such a case are bound to be content with a portion only of their parent's joint estate, as would be the case if their right were a vested, one. They may elect to throw in their lot with the new benefit of any possible increase in the family fortune. Should they do so they would in any case be entitled to three-fourths of their own parent's *payin* as against the step parent and would also share in the after acquired property. Assuming that the Kanittha children are entitled to claim partition from their surviving parent on the latter's re-marriage, their right is not a vested one and, that, if they fail to exercise it before the death of that parent the right lapses. The same rule applies to the right of the eldest son. (*May Oung*, J.) MAUNG HO *v.* MAUNG PO THEIN. 1 Rang. 363=2 Bur. L.J. 109=1923 Rang. 239.

———*Succession—Child of divorced wife living some time with mother and some time with father—No rupture of filial affection—Child entitled to inherit.*

There is no provision in the Dhammathats enabling a father to disinherit his child except by giving him away in adoption to another, though a child who behaves as an enemy towards his parents is debarred from inheriting. A child who merely at his father's request lives separately from him is not included amongst the six classes of children who are not entitled to inherit. The Buddhist Code does not give any meritorious value to mere living together or

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make the opposite state of things a reason for exclusion, and there must be filial neglect to exclude. But if a child on the divorce of his mother accompanied by partition of property goes to live with her and ceases to be a member of his father's household he is debarred from inheriting from his father. The plaintiff after her mother's divorce lived for a short time with her father and then went and lived with his sister. Later she returned and lived with her father and was doing so when he married his last wife. She continued to live with her father and her stepmother for some time and then was sent by her father to live with her mother and she continued to live with her mother until her father's death but during that time she paid two or three visits to her father. *Held*, she was entitled to inherit. (*Maccoll*, J.) MA NGWE KIN *v.* MA HME. 1 Rang. 42=74 I.C. 100=1923 Rang. 206.

———*Succession—Relationship, evidence of share of grandchild as against grandmother.*

Plaintiff claimed to be the grand-daughter of the deceased. Her father had predeceased her grandfather and there were no other blood relations competent to give evidence as to her relation with the deceased. *Held*, this is a case in which evidence of general repute is of considerable importance provided it is cogent. In the estate of her deceased grandfather grandchild gets, as against the step grand-mother, in the absence of issue of the second marriage, one half of the "*payin* and 1/8 of the "letletpwa." (*Robinson*, C.J. *and May Oung*, J.) MA HMUN *v.* MA NGWE THIN. 1 Rang. 24=71 I.C. 104=1923 Rang. 171.

———*Succession — Wife living apart from husband for 8 years does not affect her right to succeed to husband.*

The mere fact that a wife has lived apart from her husband by mutual consent on account of incompatibility of temperament does not constitute misconduct or undutifulness entitling the husband to a divorce. Consequently the wife is not deprived of her right to inherit her husband's estate and is entitled to grant of administration in preference to the grandson. (*Robinson*, C.J. *and Pratt*, J.) MAUNG MAUNG TIN *v.* MA HLA U. 2 Bur. L J. 58=75 I.C. 200=1923 Rang. 150.

———*Succession—Short interval between death of wife and husband—Relations of both to succeed—"Short," measure of.*

Two months and fourteen days is too long a period to constitute a short interval so as to make the exceptional rule apply namely that relatives of both should succeed if it is uncertain whether the husband or wife died first or the interval between the deaths of both is short. (*Maung Kin and Mac Gregor*, JJ.) MA PWA OH AND OTHERS *v.* MA LAY AND OTHERS. 11 L.B.R. 376=1 Bur. L.J. 253=1923 Rang. 136.

———*Succession—Half brothers and sisters —Grand parents.*

Inheritance shall not ascend and half brothers and sisters succeed in preference to grand parents. 12 B.L T. 103; 8 L.B.R. 1; 10 L B. R. 107; 4 U.B.R. 20. Ref. (*Pratt and Heald*, JJ.) MA GYI *v.* MA KHIN SAW.
1 Bur. L.J. 263=11 L.B.R. 460= 72 I.C. 4=1923 Rang. 124.

———*Succession—Step grand children and collaterals—Separate residence of child—Effect —Difference in Nationality.*

Step grand children in the absence of real ones or heirs in the direct line exclude collaterals, except in regard to a share in undivided ancestral property which they share equally with collaterals. Step grand children cannot be held to have forfeited their right to inherit their step grand mother's estate because they have already received their grandfather's estate. The real point of view of Buddhist law is undoubtedly based on community of interest between husband and wife. So strong is the bond between them, that in the absence of natural children husband's or wife's children as the case may be, rank as children of the step parent in the matter of inheritance to the exclusion of collateral blood relations. 11 U.B.R 1892—61; *Ref.* 10 L.B.R. 396, *foll.* Mere seperate residence does not by itself now-a-days prove or even set up an inference of a breach of filial relations such as would deprive a child of his rights of inheritance. Burmese Buddhist law applies even though the parties on one side are not Burmese Bhuddist, and the mere fact that an heir or heirs is not of exactly the same religion or nationality is therefore immaterial. There is no provision, which excludes the descendants or others who would ordinarily be entitled to rank as heirs of a Burmese Buddhist from inheritance on the ground of difference in nationality or religion. (*Pratt and Duckworth*, JJ.) KHOO NAING SEIN *v* KHOO PEING HEO. **70 I.C. 855=(1922) L.B. 29.**

———*Succession—Disobedience, single act of —Thuanokta son.*

The plaintiff entered into second marriage with a servant of her mother's household. On her mother's death she sued for her mother's estate and was opposed by her own children. It was contended that, her second marriage being in defiance of her mother's wishes, in consequence of which there had been a complete breach which had never been healed, between her and her mother, she was debarred from inheritance. *Held*, The texts which debar an incorrigibly disobedient child from inheriting refer to a child living with his parents and still subject to their authorities and not to an adult child like the plaintiff respondent who had been married and had children of her own. Though by marrying plaintiff defied her mother's wishes her marriage cannot be regarded as an act of disobedience, as she was under no obligation to obey. A single act of disobedience, however gross, does not disqualify from inheritance, unless the act is an act of perfect enmity. Both the child who behaves like an enemy by abusing and assaulting his parents or otherwise, and the child who without behaving like an enemy is incorrigibly disobedient are debarred from inheriting. (*Mc Coll*, A.J.C.) MAUNG NYI MAUNG *v.* MA NU. **4 U.B.R. 104= 70 I.C. 904=1922 U.B. 12.**

———*Succession*—Orasa—*Rights of sons and daughters and their children.*

Held by the Full Bench (*Pratt*, J. not fully concurring). (1) In a family consisting of both sons and daughters a child can attain the full status of *orasa* prior to the death of its parents. (2) In such a family where the eldest child is a daughter no son can become *orasa*. (3) In such a family the question as to which is the *orasa* can be decided before the death of either parent. (4) There cannot be two *orasa* children. (5) Sons are not always preferred to daughters as *orasa*, unless the son is eldest born. (6) The eldest born son is the *orasa*. If he predeceased his parents, his children will have a right to preferential treatment. If the eldest son died before he became competent to take his father's place, a younger son, being fully qualified may become *orasa*, and if that son had predeceased his parents, his children will have a right to the same preferential treatment. (7) The eldest child being a daughter can claim on the death of her mother a quarter share as *orasa* and if she then died before her father without having got the share, her children will have a preferential treatment. And if she then died after her father but before she had claimed her distributive share in the estate, her right of maintenance will devolve upon her children. (*Robinson*, C.J. *and Maung Kin*, J.) MAUNG KIN *v.* MRS. KIRKWOOD.
68 I.C. 49=11 L.B.R. 220.

———*Succession*—Orasa *son—Mesne profits.*

The *orasa* son becomes entitled on the death of his father to a definite one-fourth part of the estate and he can recover it with mesne profits at any subsequent date. (*Robinson*, C.J. *and Heald*, J.) MAUNG PANON *v.* MAUNG TUN THA. **67 I.C. 769=11 L.B.R. 292.**

———*Succession — Step-mother, step-son entitles to succeed—Excludes parents of the step-mother and other collaterals.*

A step-son governed by the Burmese Buddhist law can succeed as an heir to the separate property of his step-mother and excludes the parents of his step-mother as well as other collaterals. (*Robinson*, A.C.J. and *Macgregor*, J.) MAUNG SEIN THWE *v.* MA SHWE YI. **10 L.B.R. 396=64 I.C. 415= 13 Bur. L.T. 216.**

———*Succession—Eldest son.*

There is no authority for the view that under the Burmese Buddhist law an eldest son can

claim the usual ½ share of the joint property of his parents where his father survives and does not remarry. (*Robinson*, J.) U NI TA *v.* KO MAUNG. 64 I C. 28=13 Bur. L.T. 207.

———*Succession—Step-brothers, if heirs.*

Where a woman marries twice the sons of her second husband from a previous wife are the heirs of her son from her first husband and should be preferred to the deceased's mother's sister. (*Crown*, A.J.C.) MAUNG KYAW SEIN *v.* MA MIN YIN. 63 I.C. 841= (1921) 4 U.B.R. 20.

———*Succession — Property inherited by one wife during marriage—Succession to.*

Under Burmese Buddhist Law, where a person had more than one wife, the property inherited by one wife during marriage and existing after her and her husband's death, descends only to her children, and the children of the other wife or wives have no claim to it. (*Brown*, A.J.C.) MAKHIN *v.* KINKIN. 63 I.C. 814=(1921) 4 U.B.R. 11.

———*Succession—Husband and wife dying within short interval "Short interval", what is.*

Under the Burmese Buddhist Law, where a husband and wife die within a short interval, the surviving parents of both, share the joint acquired property of the former. 'Short interval' for this purpose is a period not exceeding one month. (*Robinson*. J.) MA KYIN *v.* MA TOKE. 10 L.B.R. 288=63 I.C. 715= 13 Bur. L.T. 194.

———*Succession—Son of second marriage*

A son from second marriage is entitled to ⅛ (one-eighth) share in the *hnapazon* property of the first marriage. His share is independent of the share of his mother and can be sued for in her lifetime. (*Swinhoe*, J) MA EIN HLAING *v.* MA SHWA-KIN. 68 I.C. 28= (1920) 3 U.B R. 272.

———*Succession—Step-child—Joint acquisition of mother and step father.*

A step-child gets one-fourth in the property jointly acquired by his mother and step-father where there are no children of that marriage, nor any other children of the father by any other marriage, though the property is acquired during the continuance of the marriage or the step-father has married another wife. The step-child has no share in the property jointly acquired by the step-father along with another wife. (*Heald*, A J.C.) MA NYEIN *v.* MA THA GAUNG. 60 I.C. 7=(1920) 3 U.B.R. 237.

———*Succession—Brothers and sisters.*

In matters of inheritance among elder or younger brothers and sisters the youngers are preferred to elders. The principle of propinquity in inheritance is limited to full blood relations, who even in remoter degree can exclude half blood relations among themselves. (*Maung Kin*, J.) TAUNG *v.* AUNG KYDU. 58 I.C. 488= 12 Bur. L.T. 103.

———*Succession—Daughter.*

A daughter taken away by her mother on divorce loses her rights of inheritance in her natural father's family. (*Twomey*. C.J. *and Robinson*, J.) LE MAUNG *v.* MA QWE. 13 Bur. L.T. 3=56 I.C. 681= 10 L.B.R. 107.

———*Succession—Children of the marriage during which property was acquired—Dogson—Forfeiture of inheritance.*

The Buddhist Law does not give the father the right to disinherit an heir. The children of the marriage during which the property is acquired take double the share taken by the children of the other marriages and the out of time grand-children—not being the children of an *orasa* child—together take a quarter of what their parents would have taken had they survived the deceased. The law only declares that the right to share father's estate is forefeited by the child for his unfilial conduct which must be clearly proved. The rule of forfeiture operates on proof of unfilial conduct independently of the father's wish. (*Twomey*, C J. *and Maung Kin* J.) SAN PAW *v.* MA YIN. 55 I.C. 258=12 Bur. L.T. 207.

———*Succession—Death of husband or wife childless—Right of survivor.*

According to Burmese Buddhist Law, on the death of a husband or wife without children the survivor succeeds to the whole of the deceased's estate, including right of the deceased to share in undivided ancestral property. (*Pratt*, J.) MA SEIN U *v.* TUN BA. 52 I.C. 929=12 Bur. L.T. 79.

———*Succession—Widow and children from different marriages.*

Where two wives are married by a Burmese Buddhist successively and dies leaving a widow, children by her and children by his earlier wife, the widow is entitled to a one-fourth share of the deceased's property, her children to one-eighth and the children of the former wife to five-eighth. (*Twomey*, C.J.) MA LAY *v.* TUN SHWE. 12 Bur. L.T. 75=51 I.C. 588= 10 L.B.R. 10.

———*Succession—Widow—Inheritance.*

Widow owning half the joint property during her husband's lifetime, inherits this half as her own when he dies. (*Young*, J.) *In the estate of* U. PO. KHIN. 50 I.C. 545= 11 Bur. L.T. 258.

———*Succession—*Apathitha *child.*

An *apathitha* child takes half the estate of the adoptive parents (in the absence of any natural of kittima children) equally with the co-heirs of the adoptive parents. (*Ormond and Pratt*, JJ.) MA NGWE U. *v.* MAUNG THAN. 50 I.C. 524=11 Bur. L.T. 221.

———*Succession—*Pongyi*—Lay relatives.*

A *pongyi* or *rahan* divests himself of all worldly possessions at the time of his ordina-

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tion and thereafter is incapable of inheriting any property from his lay relatives. (*Heald*, J.C.) MAUNG PWE *v.* U. INGUYA.
47 I.C. 681 = (1918) 3 U.B.R. 91.

———*Succession—Step-mother — Share in property of step-father*—Thinthi—*Limitation Act, Art.* 123.

It is only when a step-father dies leaving no natural issue and no widow surviving, that the children of his deceased wife by a former husband are entitled to his property under Ss. 294 and 295 of the Digest. The step-children can immediately on their mother's death, claim a share of the property acquired jointly by their mother and step-father during their marriage. Such a claim, if not made within twelve years of their mother's death, would be barred under Art. 123 of the Limitation Act. In respect of their mother's *Thinthi* property, however, the claim can be made by the step-children even on the subsequent happening of their step-father's death. (*Twomey*, C.J. *and Ormond*, J.) SAN PE *v.* MA SHWE ZIN.
12 Bur. L.T. 44 = 47 I.C. 139 = 9 L.B.R. 176.

———*Succession—Exclusion — Neglect of disease.*

Mere non-attendance on a deceased during illness is not sufficient to exclude the heir from inheritance. The conduct must be such as to indicate an intention to destroy the natural tie between the heir and the deceased. (*Maung Kin*, J.) MAUNG NGE *v.* MAUNG ZIN BA.
44 I.C. 239 (L.B.).

———*Succession—Children of marriages.*

In the case of three marriages, children of the marriage subsisting at the acquisition of property get half of it and children of other marriages divide the rest among them. (*Maung Kin*, J.) MI SO MA SHWE *v.* CHIT MA U.
42 I.C. 950 = 11 Bur. L.T. 252.

———*Succession—Children by divorced wife when not entitled to inherit.*

Under the Burmese Buddhist Law the children of a divorced wife living with the mother and not maintaining filial relations with the father are not entitled to share in his estate when there has been a division of property at the time of divorce. (1897-01) II U.B.R. 116; 4 L.B.R. 272; 6 L.B.R. 167, foll. Filial relations imply living and working and planning with parent and not merely paying visits to the parent end receiving presents from him. S.J.L.B. 296, foll. (*Rigg*, J.C.) MA TAK *v.* MA CHIT. **(1917) 3 U.B.R. 23 = 42 I.C. 68 = 11 Bur. L.T. 229.**

———*Succession—Claim by eldest child.*

A claim by eldest child for a one-fourth share of the joint estate of his or her parents on the death of one of them must be made as soon as possible after that event. (*Maung Kin*, J.) MAUNG SEIK *v.* MA THAT PU.
33 I.C. 927 = 9 Bur. L.T. 154 = Cf. 38 I.C. 809 = 44 Cal. 379 (P. C.)

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———*Succession — Re-married mother — Children have no share in mother's share in partition.*

If the property is partitioned upon the re-marriage of their mother, the children have no rights to the property taken by her. It goes to her second husband exclusively. The children of the marriage take ¾ of the unpartitioned property and the second husband takes ¼. (*Twomey and Ormond*, JJ.) MAUNG SHWE BON *v.* MAUNG PU. **35 I.C. 731 = 9 Bur. L.T. 97.**

———*Succession—Illegitimate son.*

Per Fox, C. J., *Ormond and Twomey*, JJ.,—(*Contra Parlett*, J.)—A child begotten in pleasure whose parents do not live openly together is not entitled to share the father's estate with his widow. (*Fox*, C.J. *Orrmond*, *Twomey and Parlett*, JJ.) MA HNYA *v.* MA ON BWIN.
9 Bur. L.T. 15 = 33 I.C. 171 = 9 L.B.R. 1.

———*Succession—Death of* orasa *son.*

When the *Orasa* son or daughter predeceases his or her parents, his or her eldest son or his or her children together receive the same share at the death of their grandparents as their youngest uncle or aunt. The children of the same parents will share the share received by them together equally. (*Maung Kin*, J.) CHAN THA *v.* MI MAI PYU. **33 I.C. 127 = 9 Bur. L.T. 95.**

———*Succession—Rights of grandchildren when children are and are not alive.*

Out of time "grandchildren" rule comes in when children and grandchildren of the deceased male owner are in existence, when a distinction is made between different classes of heirs but in the absence of children, grandchildren have the same rights as children. (*Twomey and Ormond*, JJ.) MAUNG SHWE PAW *v.* MA PAN ZI. **8 Bur. L.T. 283 = 31 I.C. 332 = 8 L.B.R. 302.**

———*Succession — Kittima — Severance of family tie.*

The children of first marriage including the kittima child adopted to first marriage, are entitled to ¾ of property brought to second marriage on the death of their father and ⅓ of their *letteipwa* of the 1st marriage. In the case of kittima child living apart from his adoptive parents, the real question for determination is where the surrounding circumstances proved to exist establish an intentional severance of the family tie or not. The requirement of joint residence can be safely released in the case of an adoptive child who is also a blood relation. (*Mc Coll*, A.J.C.) MI CHAN MYA *v.* MI NGWE YON. **31 I.C. 91 = (1915) II U.B.R. 74.**

———*Succession—Orasa son — Mother not marrying again—Rule stated in Manu Kye Book X, S. 5—Kin Wun Mingyi's Digest, S. 30—Atta Sankheppa, S. 155.*

Whether the mother re-marries after the death of the father or not, the orasa son is

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entitled to get ¼ share and the mother and the younger children, ⅛. (*Fox*, C.J. *and Hartnoll*, J.) MAUNG KYI HLAING *v.* MA HTU.
8 L.B.R. 189=30 I C. 640=
8 Bur. L.T. 134.

——*Succession—Orasa son—Limitation—Right lapses if not asserted diligently.*

The right given to the eldest son to claim ¼ share of the joint estate on his father's death, should be promptly exercised and if the option is not exercised without unreasonable delay it should be regarded as having lapsed altogether. (*Ormond and Twomey*, JJ.) MA THIT *v.* MAUNJ TUN THA. 30 I C 638=
8 Bur. L.T. 138.

——*Succession — Paternal and maternal aunts succeed* per capita *and not per stirpes—Equality of division.*

Under the Burmese Buddhist Law of Succession the paternal and maternal aunts succeed to their nephew's estate *per capita* and not *per stirpes*. Equality of division is the rule followed in the division of property among persons of the same degree. (*Ormond and Parlett*, JJ.) MA ON BWIN *v.* MA TU.
30 I.C. 63=8 Bur. L.T. 141.

——*Succession—Childless widow—Sale of joint ancestral property by brother impeached by the widow of his deceased brother—Invalidity—Pre-emption.*

A childless widow of a man who had died after his parent's death succeeds to his share of the ancestral property in question provided the property in question is not held on some feudal tenure or is not appurtenant to some hereditary office. When two brothers were in joint possession of immoveable property the sale by surviving brother of the whole property was invalid and having regard to the law of pre-emption was also invalid even in regard to his own share. (*Young*, J.) MA TON *v.* MA THAN. 30 I.C. 601=8 Bur. L.T. 155.

——*Succession—Husband and wife dying without issue simultaneously or within a short interval.*

Where husband and wife die childless simultaneously or within a short interval of one another, their property is to be considered as retaining its joint character and is to be divided accordingly, *i.e.*, the respective party's parents could take the separate or ancestral property of husband or wife and would share equally the jointly acquired property of the husband and wife. (*Ormond and Twomey*, JJ.) MA EIN *v.* TIN NGA.
8 L.B.R. 197=30 I.C. 594=
8 Bur. L.T. 145.

——*Succession—Orasa child—Daughter.*

Under the Buddhist Law, a daughter no less than a son may be an *orasa* child but there cannot be an *orasa* daughter as well as an *orasa* son in the same family. An *orasa*

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daughter's position is merely presumptive and is liable to be displaced by an *orasa* son of competent age. (*Twomey and Ormond*, JJ.) MAUNG PO HMAM *v.* MAUNG TIN.
8 Bur. L.T. 140=29 I.C. 756=8 L.B.R. 113.

——*Succession—Great grand daughter—Grand-aunt.*

In Buddhist Law, the nearer relatives exclude the more remote even in case of inheritance by direct descendants. An out-of-time grand-daughter of a predeceased son cannot inherit in preference to the daughter. A widow has no claim to inherit, when her husband dies without acquiring any vested rights in the property. A great-grand-daughter is not entitled to inherit in the presence of her grand-aunts. (*Mc Coll*, A.J.C.) MI KIN *v.* MI SAN ME.
29 I.C. 741=8 Bur. L.T. 51.

——*Succession—Orasa son—Right of his younger brother—Share of orasa son—Failure to claim promptly—Presumption.*

Under the Burmese Buddhist Law, if the eldest son attains his majority and fulfils the prescribed conditions and then dies before his parents, his position as *orasa* remains unfilled and the next younger brother does not succeed to it. If the eldest son reaches the age of manhood, the presumption is that he fulfils the prescribed conditions as *orasa*. The *orasa* son must exercise his option of claiming a share promptly; if he fails to do so, he must be held to have abandoned the right. (*Twomey and Ormond*, JJ.) MAUNG KA GU *v.* MAHNIN NGWE. 29 I.C. 706=8 Bur. L.T. 196.

——*Succession—Eldest daughter—Interest during mother's lifetime.*

Under the Buddhist Law during the lifetime of her mother the eldest daughter has not such an interest in the estate of her deceased father as is contemplated in S. 91 of the T.P. Act. The eldest daughter can only claim one-fourth of the bulk of the estate if her mother dies first and she is capable of replacing her mother in the household. Sometimes the eldest daughter on marrying and leaving the parental roof is given her share in the estate during the life-time of both parents. In that case she has no further claim on the estate. If this has not happened, the eldest daughter on the death of the father, is entitled to certain specified property and her mother gets the bulk of the estate and if on the death of her father, the mother marries again, the eldest daughter is further entitled to one-fourth of her father's wearing apparel and ornaments but her mother still retains the bulk of the estate. (*Mc Coll*, A.J.C.) MI THE O. *v.* MI SWE.
28 I.C. 821=(1914) II. U.B R. 26.

——*Succession—Eldest daughter—Rights of.*

The texts giving the *orasa* daughter the right to claim a quarter share after her father's death do not authorise her to claim one-fourth

from her mother at least where her mother has not married again. (*Shaw*, J.C.) MI HAING *v.* MI THI. 28 I.C. 806=(1914) II U.B.R. 40.

——— *Succession—Eldest son—Widow—Creditors of.*

The Dhammathats that give the eldest son a right to a quarter as against the mother on the death of the father refer to the *orasa* son or in the words other eldest capable son. When all the sons are minors, there is no *orasa* son and the right in question does not accrue. The widow with an *orasa* son would have full power to dispose of the remaining three quarters and on her death without alienating that share, it would pass to her heirs. But her creditors proceeding against her estate would be at liberty to attach and sell it. (*Shaw*, J.C.) NGA E *v.* NGA AUNG THIN.
28 I.C. 804=(1914) II U.B.R. 37.

———*Succession—Auratha son—Widower's rights.*

A Burmese Buddhist and his wife jointly acquired certain property. The wife died leaving a son. The husband married again and there was no prior partition with his son by the first wife. *Held*, that the son was entitled to a fourth share of the property and the father has an absolute right to sell ¾ of the property. (*Fox*, C.J. *and Twomey and Hartnoll*, JJ.) MAUNG SHWE PO *v.* MAUNG BEIN. 8 Bur. L.T. 25=27 I.C. 632=8 L.B.R. 115.

———*Succession—Burma Laws Act.*

There is no written law of inheritance among Burmese Buddhists. Under S. 13 of Burma Laws Act, Buddhist Law should be applied to them. 2 L.B.R. 95, Fol. (*Twomey and Parlett*, JJ.) MA THEIN SHEIN *v.* AH SHEIN.
7 Bur L.T. 246=24 I.C. 357=8 L.B.R. 222.

———*Succession—Child taken away by divorced mother—Tie severed—Claim to inheritance.*

When a child is taken away by her divorced mother, the relationship with the father for purposes of inheritance is severed *prima facie* and to sustain a claim for inheritance whether of ancestral or non-ancestral property it has unmistakably to be shown that the tie was, as a matter of fact, maintained. (*Twomey*, J.) MI AH PU MA *v.* MI HNIN LI.
23 I.C. 948=7 Bur. L.T. 83.

———*Succession—Exclusion of children — Filial neglect.*

Where no divorce is proved, and the separation is entirely the act of the father, the children cannot be deprived of their right to inherit, which they lose only by proof of some filial neglect. (*Ormond and Parlett*, JJ.) MA TIN LUN *v.* MA DWE. 23 I.C. 915=7 Bur L.T. 80.

———*Succession — Step-daughter excludes want of filial relations—Effect of.*

If a daughter of parents who are divorced and living separately stays with her mother and does not resume filial relations with her father who marries a second time but dies without having any issue from the second wife, the daughter is finally excluded from inheritance and the second wife succeeds to the estate which on her death would pass to her heirs. (*Fox*, C.J. *and Hartnoll*, JJ.) MAUNG NYEIN *v.* MA SEIN.
6 Bur. L.T. 117=20 I.C. 334=7 L.B.R. 31=

———*Succession—Parent — Inheriting property during marriage—Alienation—Necessity.*

Property inherited by a parent during marriage, becomes his or her separate property. On his or her death the surviving parent has merely a life-interest in it with power to sell in case of necessity. Any of the property not sold under such necessity passes to the children of the parent who inherited it. Where half the sum got by an alienation of property is lent out to a third party, the necessity for the alienation is disproved. 4 L.B.R. 256, expl.; 4 L.B.R. 189, appr. (*Parlett*, J.) MRS. PAUDROFF *v.* MAUNG PO THA. 20 I.C. 346=6 Bur. L.T. 119.

———*Succession — Lettetpwa property—Alienation by husband—When binding on a wife—Estoppel.*

A husband under the Burmese Law, cannot sell the *Lettetpwa* properties belonging to himself and his wife except under circumstances in which it can be said that he was acting as her agent; where such circumstances are established, the wife will be estopped from denying that the husband was authorised to act on her behalf. (*Fox*, C.J. *and Hartnoll*, J.) MA NYEIN THU *v.* MURUGAPPA CHETTY.
20 I.C. 341=6 Bur. L.T. 113.

———*Succession—Grandson by eldest daughter as orasa son—Kinwun Mingyi's Digest, S.* 163.

The texts collected in S. 163 of Kinwun Mingyi's Digest are not intended to be applied where there is or has been an 'orasa' son. (*Fox*, C.J. *and Hartnoll*, J.) POZAN *v.* MAUNG NYO.
7 L.B.R. 27=20 I.C. 327=6 Bur. L.T. 105.

———*Succession*—Payin *property—Deed by second husband for illiterate wife of unsound mind—Onus of proof.*

Where deeds are amended by the husband for and on behalf of the wife, who was illiterate, and who was for some time of unsound mind and during that period the husband took another wife and surrendered all claim to the *payin* property of the former marriage. *Held*, that the onus of proving that the husband had any right in the property is on the plff. who sets it up the plea. A second husband of a woman is not entitled to more than one-fourth of the *payin* property. (*Parlett*, J.) MA GUN *v.* KARUPPA CHETTY. 20 I.C. 888=6 Bur. L.T. 210.

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———*Succession—Paternal and maternal uncle's and aunt's share.*

The paternal and maternal uncles and aunts of a deceased nephew or niece should, in the absence of any nearer relatives and in spite of the father of such nephew or niece having predeceased the mother, share equally in the estate. There is no preference of the paternal over the maternal side. (*Hartnoll and Young*, JJ.) KO KAN GYI *v.* MA PYU. **8 Bur. L.T. 283 = 18 I.C. 497 = 6 L.B.R. 164.**

———*Succession — Widow — Eldest son—Eldest daughter—Power to dispose of property inherited—Necessity.*

Where there has been a complete divorce, a daughter who goes to live with her mother and does not maintain filial relations with her father, is not entitled to inherit the latter's estate on his death. The heir of a deceased husband, under Buddhist Law, is his widow, and not any of his children except the eldest son in respect of a fourth of the estate until the death of his widow. The three-fourth's share which goes to the widow is her absolute property, to do what she will wish. But she has no right to dispose of the one-fourth share of the eldest son, even in case of necessity. To the eldest daughter also, certain specified property is allotted and the remainder goes to the widow as her absolute property. But in the case of necessity such as for the maintenance of younger children, the widow is entitled to dispose of the special property reserved for the eldest daughter. (*Mc Coll*, A.J.C.) MI SAW MYIN *v.* MI SHWE THIN. **15 I.C. 919 = (1912) I.U.B.R. 125.**

———*Succession—Husband—Share of* Hnapason *and* Lettetpwa.

Property inherited by the wife from her father after her marriage is *lettetpwa* and not *Hnapason*. The husband, as the party through whom the inheritance did not come, is entitled to ¾ share of such property. (*Twomey*, J.) TOLA RANO *v.* MA KAING. **13 I.C. 380 = 3 Bur. L.T. 98.**

———*Succession—Daughters and son.*

In a family three issues were born; 1st son died infant, 2nd and 3rd were daughters. *Held*, that 2nd was the eldest daughter; within the meaning of the S. 163 of the Digest. Even in case the eldest child dying infant would have been daughter, the inheritance would have devolved on the 2nd as the next eldest daughter: in the absence of another son born after the 1st deceased son, who would have filled the place of the deceased or as at the circumstance did not make any substantial change. Texts of S. 163 of the Digest allow the issue of the eldest daughter an equal share as that of the youngest of his aunts. There is no warrant to hold that they apply only to the families consisting of daughters only; but they apply to the families having two daughters arriving at maturity, the only third child; a son, dying infant. (*Twomey*, J.) MA EIN THU *v.* MAUNG HLADUN. **15 I.C. 360 = 5 Bur. L.T. 73.**

———*Succession — Property of an insane person.*

According to the Buddhist Law, the share of a person who is insane or otherwise incapable of managing his affairs should go on his death to the co-heir who had maintained and looked after him during his lifetime. (*Mc Coll*, A.J.C.) MI KAN YOU *v.* NGA PWE. **14 I.C. 843 = 5 Bur. L.T. 61.**

———*Succession—Woman's property.*

Where a Burmese Buddhist woman contracts a second marriage on the death of her first husband the property falling to her share on division between her and her issue by the first marriage, goes, on her death, entirely to her children by the second marriage equally between them. The children of the first marriage have no claim to this property. Property acquired by a widow by purchase after the death of her second husband passes to the children of both marriages. They take it *per stirpes* and not *per capita*. (*Hartnoll*, J.) MA WE *v.* MAUNG CHEIK. **6 L.B.R. 28 = 12 I.C. 797 = 5 Bur. L.T. 1.**

———*Succession—Second wife.*

To claim a share in inheritance with the chief wife, the onus of successfully establishing superiority of the second wife over the lesser wife falls upon the second wife, who cannot necessarily be so if she happens to be a contemporaneous wife. The presumption of having no status required by law to share in the inheritance arising out of separate residence is rebutted by the proof of having higher status. (*Shaw*, J.C.) MI SHWE MA *v.* MI ME. **12 I.C. 191 = 4 Bur L.T. 235.**

———*Succession—Death illness — Younger brother's children.*

On the death of a Burman Buddhist leaving no heir, his younger brother's children sued the deft., a stranger, who had attended the deceased and who admittedly lived with him in his last illness and also paid the expenses of the funeral with the evident intention of recouping himself from the estate, the whole of which was in his possession. *Held*, the deft. should be preferred to the plff. who failed to attend or visit the deceased in his last illness and whose neglect was not cured by their attempt to borrow money for the funeral. (*Moore*, J.) MAUNG SHWE THAUGH *v.* MAUNG TU. **11 I.C. 777 = 4 Bur. L.T. 160.**

———*Succession—Orasa son.*

If a first-born son dies in infancy, the next eldest son can be *orasa* provided he is unaffected by any of the disabilities mentioned in the texts on the subject. He can transmit the superior right of inheritance to his own issue in the same

BUDDHIST LAW—BURMESE — SUCCESSION.

way as an *orasa*, (who is actually the first born of the family) can do. 2 L.B.R. 292. Foll. (*Twomey*, J.) MA HNIN GAING *v.* MA THA LI. 10 I.C. 778=4 Bur. L.T. 74.

———*Succession—Order.*

In the absence of direct descendants and husband or wife, the parents are preferential heirs to all other relatives. U.B.R. (1892-96) Vol. II, p. 184, U.B.R. 1897—1901, Vol. II, p. 187, foll. Proved desertion and deliberate neglect of the ordinary duties of affection effect forfeiture of the right of inheritance, 11 Bur. L.R. 228, foll. (*Hartnoll and Parlett*, JJ.) U. SHWE GON *v.* MA HUIN. 4 Bur. L.T. 1= 9 I.C. 442=3 L.B.R. 231.

Widow.

———*Widow—Power of disposal.*

A widow has, under the Burmese Buddhist Law, an absolute power of disposing of her property subject to specific rights of others. (*Parlett*, J.) MAUNG PO SAING *v.* MAUNG SAN MIN. 31 I.C. 948=9 Bur. L.T. 86.

———*Widow—Alienation.*

A widow's interest in *hnapaeon* property is one half with a life-interest in the remainder. A mortgage by a widow of more than half of such property is not valid unless it is shown that the mortgage was for the necessities of the family and the burden of proof of such necessity lies on the mortgagee. (*Young*, J.) CHAN THA U *v.* NAW DI. 17 I.C. 956=3 Bur. L T. 170.

BUDDHIST LAW—CHINESE.

ADOPTION.
ALIENATION.
FAMILY HOUSE, MEANING OF.
MAINTENANCE.
MARRIAGE.
SUCCESSION.

Adoption.

———*Adoption—Burmese girl--Rights of adopted daughter.*

A Chinese Buddhist can adopt a Burmese girl and the latter will succeed to his properties in the absence of natural children or adopted son. But where she is a stranger, she will be excluded by the Agnates of the deceased. (*Twomey*, C.J. *and Ormond*, J.) MA PWA *v.* MA YIN. 61 I.C. 685=13 Bur. L.T. 132.

———*Adoption—Letters of Administration to widow for benefit of adopted son.*

Among Chinese Buddhists a person belonging to the same clan as the deceased and with the same surname may be regarded as an agnate. As the applicant belonged to the same clan, and his father had the same surname as the deceased *prima facie* he fell within the clan of the deceased; and so far as the question of Letters of Administration was concerned, the applicant is entitled to Letters of Administration. (*Twomey*, C.J. *and Ormond*, J.) GYAN SHI *v.* KIN TWE. 12 Bur. L.T. 69= 31 I.C. 608=10 L.B.R. 23.

BUDDHIST LAW—CHINESE — MARRIAGE.

———*Adoption—Consent of husband's relatives.*

A Chinese Buddhist widow can adopt a son to her husband with the consent of her husband's nearest male relatives. (*Fox*. C.J. *and Parlett*, J.) MA PWA *v* YUL WAI. 9 Bur. L.T. 187=34 I.C. 99=8 L.B.R. 404.

Alienation.

———*Alienation by guardian — Minor's liability.*

A Chinese Buddhist mother acting as guardian of her minor children's estate has a right to alienate that property even for necessity, only to the extent of her interest in the estate, in general, apart from Hindus and Mahomedans, none but the guardian appointed by Court can alienate minor's property. (*Twomey*. C.J. *and Robinson*, J.) MA SI *v.* HOKE HU. 37 I.C. 888=13 Bur. L.T. 9.

Family House, Meaning of.

———"*Family house*"—*Meaning of.*

By "family house" the Chinese Buddhist ideas mean a house which has belonged to the paternal ancestors of a person or one which a man has started for his family and their male descendants and which has been occupied by the family continuously from father to son. (*Fox* C.J. *and Parlett*, J.) MA PWA *v.* YUL WAI. 9 Bur. L.T. 187=34 I.C. 99= 8 L.B.R. 404.

Maintenance.

———*Maintenance—Widow's right.*

A rule that deprives a widow of her right to maintenance for her refusal to live in the family house, should not be enforced where the other members of the family have made themselves objectionable to her or rendered it impossible for her to live with them (*Fox*, C.J. *and Parlett*, J.) MA PWA *v.* YUL WAI. 9 Bur. L.T. 187=34 I.C. 99=8 L B.R. 404.

Marriage.

———*Marriage—Widow can remarry.*

A Chinese widow can marry again after the period of mourning for her first husband has elapsed. (*Heald and Lentaigne*, JJ.) MAUNG PO MAUNG *v.* MA PYITYA. 1 Rang. 161= 2 Bur. L J. 79=74 I. C. 933=1923 Rang. 180.

———*Marriage.*

No particular ceremony is essential for a valid marriage under the Chinese Law. (*Ormond*, J.) MA SHEIN *v.* KAM JEIN. 9 Bur. L T. 81=32 I.C. 818= 17 Cr. L J. 112=8 L B.R. 22.

BUDDHIST LAW—CHINESE—MARRIAGE.

———*Marriage—Enforcement of contract.*

Under Burmese Buddhist Law a male (adult or minor) cannot be married without his consent and the Court cannot enforce a contract of marriage entered into by the parents against his will. (*Fox*, C J.) MAUNG THEIN *v.* MA SHET HNIU. 9 Bur. L.T. 77=32 I C. 807=8 L.B R. 317.

———*Marriage—Elopement—Girl's parent's consent—Consent of father.*

Even in the absence of any ceremonies which usually accompany a first-class marriage among Chinese Buddhists an elopement of the girl followed by the subsequent consent of the parents, renders the union legal and valid. In such cases, the consent of the bride-groom's father is not necessary. (*Young*, J.) SAW MAUNG GYI *v.* MA TAU KAU.
8 Bur. L.T. 198=30 I.C. 715=8 L.B.R. 208.

Succession.

———*Succession — Widow — If there are children widow does not inherit.*

Under Chinese customary law in cases where there are children the widow takes no share in the deceased husband's estate. She has a claim for maintenance against the estate and person; in certain cases certain other claims but the estate belongs to the children. (*Lentaigne and Heald*, JJ.) BON KWI AND OTHERS *v.* MA KYE YON AND OTHERS.
2 Bur. L J. 102=1923 Rang. 236.

———*Succession—Widow—Re-marriage.*

When a man dies his property is equally divided among all his sons; daughters succeed only in the absence of sons and the widow in the absence of both sons and daughters. When a Chinese widow remarries a Burmese Buddhist and dies leaving both her first husband's property and subsequently acquired ones, the customary law of Chinese Buddhist will apply. The second husband would be entitled to all the property belonging to her at the time of the marriage, while the first husband's children would get the property which came from their father. (*Heald and Lentaigne*, JJ.) MAUNG PO MAUNG *v.* MA PYIT YA.
1 Rang. 161=2 Bur. L.J. 79=74 I C. 933=1923 Rang. 180.

———*Succession—Testamentary power.*

The Law of Succession amongst Chinese Buddhists is the Customary Law which allows disposition of property by will. 2 L.B.R. 95 foll. (*Twomey*, C.J. *and Robinson*, J.) MAUNG KWAI *v.* YEO CHOO YONE.
13 Bur. L.T. 18=37 I.C. 900=10 L.B.R. 189.

———*Succession—Sons—Unmarried daughters.*

According to the Customary Law of Chinese Buddhists, sons exclude daughters in succession to the property of the parents. Under the Chinese Buddhist Law unmarried daughters have a right of maintenance. (*Maung Kin*, J.) MA SHWE THIT *v.* MAUNG KYIN.
30 I.C. 543=11 Bur. L.T. 224.

BUILDING.

See (1) CO-SHARER.
(2) LANDLORD AND TENANT.
(3) T. P. ACT. S. 51.

Lease.

See LEASE.

Sites.

See MUNICIPAL ACTS.

BUILDING AND IMPROVING ON ANOTHER'S LAND.

See ACQUIESCENCE.

BUNDELKHAND ALIENATION OF LAND ACT (II of 1903).

———S. 3—*Pre-emption, suit for—Sanction of Collector.*

The sanction contemplated in S. 3 of the Land Alienation Act applies to a voluntary transfer and there is nothing in the Act, which provides for sanction to be given to an intending pre-emptor to bring his suit. A Court is not entitled to grant a decree for pre-emption where the pre-emptor is a person who cannot purchase the property in question as not being the member of the agricultural tribe within S. 3 of the Land Alienation Act. (*Richards*, C. J. *and Tudball*, J.) SURAJ BHAN *v.* SOMWARPURI. 37 All. 662=30 I C.. 949=13 A L.J. 949.

———Ss. 3 and 14—*Sale—Pre-emption—Consent of Collector—Mortgage—Sale after mortgage—Right of subsequent purchaser.*

The policy of Bundelkhand Land Alienation Act is to prevent persons who are not members of agricultural tribe from acquiring properties. S. 3 applies to all permanent alienations even though they are brought about by the exercise of the right of pre-emption. (*Richards*, C. J. *and Tudball*, J.) RAMNATH *v.* HARAIN.
77 All. 467=30 I.C. 404=13 A.L J. 862.

———Ss. 4, 6 and 9—*Hindu Ghosis—Agricultural tribe—Provisions of Act mandatory.*

Hindu Ghosis of Jalaun District are sub-caste of Ahirs and are members of agricultural tribes within the meaning of the above Act. The provisions of the Act are mandatory on Civil Courts and a Court will refuse to pass a final decree on a mortgage in contravention of S. 6 of the Act, independently of any objection raised by the delt. (*Piggott and Walsh*, JJ.) KALKA PRASAD *v.* RAJA RAM.
41 All. 295=50 I.C. 425=17 A.L.J. 295.

———Ss. 6, 17 and 22—*Partition of Patti by Collector—Limits of Collector's power—Lambardar—Powers of.*

BUNDELKHAND ALIENATION OF LAND ACT (II of 1903) S. 16.

There is nothing in the Bundelkhand Land Alienation Act which authorizes the Collector to make a partition of the patti behind the backs or other co-sharers for the benefit of the mortgagee from a co-sharer. The Collector could only mortgage the right which the judgment-debtor has and except as regards the plots in the possession as khudhast that right was a right to receive his share on a distribution of the profits of the patti. The fact that he happened to be a lambardar at the time is irrelevant. The lambardar is the agent of the co-sharers for purposes of collection, but the fact of his being lambardar in no way increases or alters his personal rights as proprietor. The argument that the other co-sharers are in no way prejudiced is fallacious. (*Ryves and Daniels*, JJ.) PRAG NARAIN *v.* JWALA PRASAD.

45 A. 450=21 A.L.J. 333=L.R. 4 A. 197=74 I.C. 666=1923 All. 458.

——S. 16—*Property of agricultural tribe—Sale cannot be held.*

Where a sale of the property of a member of an agricultural tribe who became insolvent was sought to be made on the ground that that property being vested in the Receiver, S. 16 did not apply in the case, *held*, that inasmuch as S. 16, sub-Sec. (2) cl. (*a*) of the Provincial Insolvency Act forbids the vestment in the Receiver of property exempted from liability to attachment by virtue of any law for the time being in force as in the present case by S. 16, the property vested in the owner and not the Receiver and as such the case was governed by S. 16. (*Banerji and Piggott*, JJ.) HANUMAN PRASAD NARAIN *v.* HARAKH NARAIN.

1 U.P.L.R. (A.) 192=58 I.C. 551=18 A.L.J. 59=42 A. 142.

——S. 17—*Mortgage decree before Act—Act does not apply.*

S. 17 of the Bundelkhand Alienation of Land is inapplicable to a decree passed on the mortgage made before the commencement of the Act. (*Banerjee and Piggott*, JJ.) HANUMAN PRASAD NARAIN *v.* HARAKH NARAIN.

1 U.P.L.R. (A.) 192=18 A.L.J. 59=58 I.C. 551=42 A. 142.

——S. 17—*Mortgage by Collector.*

A mortgage-deed which is executed by a Collector under the provisions of S. 17 of the Bundelkhand Alienation of Land Act on behalf of the mortgagor is not exempt from stamp duty which can be charged under Act (II of 1899). (*Knox, Banerji and Tudball*, JJ.) SOMWARPURI *v.* MATABADAL.

38 All. 351=34 I.C. 280=14 A.L.J. 122.

BUNDELKHAND ENCUMBERED ESTATES ACT (I of 1903).

——*Benefit claimed by some mortgagors—Integrity of mortgage broken.*

The failure of the mortgagee to make any claim against some of the mortgagors, who had obtained the benefits of the Bundelkhand Encumbered Estates Act, cannot put the mortgagee in a worse position than he would have occupied if he had allowed the integrity of the mortgage to be broken up by permitting the holder of a share in the equity of redemption to redeem that share on payment of a proportionate amount of the debt. In such a case, the mortgagee is entitled to proceed against the share of the mortgagors, who have not obtained the benefit of the Act, for a proportionate share of the mortgage money. 30 All. 141. rel. A mortgagee can obtain relief against some of the mortgagors who did not get the benefit of the Act, for their proportionate liability; because of his failure to claim against others who did get the benefit, he should not be put in a worse position or lose what he would have got had he broken the integrity of the mortgage and allowed the mortgagors to redeem their separate shares. (*Piggott*, J.) POHKAR SINGH *v.* RAM DIN. 15 I.C. 849=10 A.L.J. 171.

BURMA ANTI-BOYCOTT ACT (V of 1922), S. 3.

——Ss. 12 and 18—*Right of mortgagor to recover mortgaged property after the discharge of debt—Power of Special Judge under S. 18.*

After discharge of debt, mortgagor is entitled to recover the mortgaged property from the mortgagee under S. 12 of the Act. A Special Judge is empowered to eject a person whose debt is discharged under S. 18 of the Act but it does not debar the mortgagor from resorting to Civil Courts to recover his property (*Richards*, C.J. *and Banerjee*, J.) BAIJNATH *v.* DULARE. 39 I.C. 582 (All).

——S. 13—*Transaction in contravention of section. Is void and cannot be enforced.*

Tudball and Sulaiman, JJ.) BISHENNATH *v.* PEARY, JU. 19 A.L.J. 645=58 I.C. 542=3 U.P.L.R. (All.) 113.

BUNDS.

See (1) ALLUVION AND DILUVION.
(2) RIPARIAN OWNERS.

BURDEN OF PROOF.

See EVIDENCE ACT, SS. 102 TO 105.

BURIAL GROUND.

See (1) EASEMENTS ACT.
(2) MUNICIPAL ACTS.

BURMA—LOWER.

See LOWER BURMA ACTS.

BURMA ANTI-BOYCOTT ACT (V of 1922.)

——Ss. 3 and 9—*Sanction of Government necessary to proceed under S. 9—Nature of—Social Boycott for political reasons is no offence.*

Before launching a prosecution under the Burma Boycott Act, S. 9 requires the sanction of the Government as under S. 196, Cr. P. Code. All the facts need not be stated in the sanction order. *Quære* whether it is not enough to state that the accused had committed an offence

BURMA ANTI BOYCOTT ACT (V of 1922). S. 6.

under a certain section? The boycotting of a person by failing to invite him to a social function, if due to political differences is an offence under the Act. (*May Oung*, J.) NGA AUNG HMAN *v.* EMPEROR. 2 Bur. L.J. 196 = 76 I.C. 861 = 25 Cr. L.J. 193 = 1924 Rang. 65.

——Ss. 6 and 7 — *Ex-communication—Purpose of.*

Where a village headman who abused certain marks for making political speeches was ex-communicated by them in return the object being partly religious and partly political, an offence was committed: *held* under Burma Act VI of 1922 and S. 7 is no protection. (*May Oung*, J). U TILOKA *v.* EMPEROR. 1 Rang. 529 = 76 I.C. 719 = 25 Cr. L.J. 255 = 2 Bur. L.J. 221 = 1924 Rang. 169.

BURMA BOUNDARIES ACT (V of 1880).

——Ss. 5, 6, 11 and 12—*Determination of boundaries by boundary officer—Decision bars subsequent claim.*

The decision of a boundary officer under Burma Act (V of 1880) determining the boundaries of two plots is conclusive as to the boundaries of those lands as well as that of Government and bars a subsequent claim relating to the same. (*Hartnoll*, C.J. *and Ormond*, J.) B. DEY *v.* HALIMA BEE BEE. 11 I.C. 916 = 4 Bur. L.T. 201.

BURMA FOREST ACT (IV of 1902).

——S 26—*Selling a house built with timber is not selling timber.*

The accused had some timber made over to him by one P. He also had some round logs of unreserved kinds made over to him and in 1920 he got a saw pit license to enable him to cut up these logs with the timber so obtained he built a house in 1920. In 1922 he sold that house to one T where-upon the forest authorities to pay the fine asked for by them he was prosecuted and convicted. *Held* that no offence was committed. (*Macgregor*, J.) MAG PO MYIT *v.* EMPEROR. 2 Bur. L.J. 12 = 1923 Rang. 188.

——Ss. 33 and 77—*Licensee—Illegal acts.*

A licensee of timber is responsible for illegal acts done by himself or his servant, under cover of license. (*Saunders*, J. C.) NGA SHWE BAW *v.* EMPEROR. (1918) 3 U.B.R. 115 = 50 I.C. 668 = 20 Cr. L.J. 322.

——Ss. 71 and 72—*Sale of forest produced by auction—Liability of purchaser—Re-sale—Recovery of deficiency in price from first purchaser—Land Revenue Act, S. 45 (Burma).*

The respondent bought certain logs from the Government Forest auction sale but did not pay the price. The logs were re-sold and in proceedings for the recovery of the difference, certain property of the respondents was attached. They filed a suit for a declaration that the property was not liable to be attached.

BURMA HABITUAL OFFENDERS RESTRICTION ACT (III of 1919) S. 10.

Held, that the claim of the Forest Department was clearly within S. 71. The actual words used in S. 71 are capable of no other interpretation. (*Twomey*, C.J.) SECRETARY OF STATE *v.* MAHOMED CASSIM. 16 I.C. 90 = 5 Bur. L.T. 140.

BURMA HABITUAL OFFENDERS RESTRICTION ACT (II of 1919).

——S. 2—*Applicability of—Limitation of restriction.*

An order confining a man to the four corners of his house at night is not a proper order. The narrowest limits of the restriction should be the village of the man concerned. (*Duckworth*, J.) NGA BA SEIN *v* EMPEROR. 1 Bur. L.J. 177 = 11 L.B.R. 383 = 73 I C 175 = 24 Cr. L.J. 559 = 1923 Rang. 102 (2).

——Ss. 7 and 10—*General repute—Evidence of police and headman—Not sufficient in general but acting on such evidence is not illegal.*

It is better to satisfy on mere evidence than supplied by the police and the village authorities before taking certain action against a man as a habitual offender. But it is not rule of law and the Judge is at liberty to decide the sufficiency of evidence. (*May Oung*, J.) NGA PAN YIN *v.* EMPEROR. 2 Bur. L.J. 153 = 76 I.C. 709 = 25 Cr. L.J. 245 = 1 Rang. 447 = 1924 Rang. 22.

——S. 7 (a)—*Execution of bond—Bond under S. 118, Cr. P. Code—Legality of.*

Where an offender has executed a bond with sureties under S. 118, Cr. P. Code, it is illegal to pass an order against him under S. 7 of the Burma Habitual Offenders Act. (*Macgregor*, J.) PAN ZYAW *v.* EMPEROR. 1 Bur. L.J. 257 = 24 Cr. L.J. 735 (1) = 73 I.C. 975 (1) = 1923 Rang. 134.

——S. 10—*Evidence—Policeman.*

Under S. 10 (1) of Act (II of 1919), a Magistrate must satisfy himself that the accused had adequate means of earning his livelihood within the area of restriction. There is no rule prohibiting a Court from acting on the evidence of policemen or village authorities. (*May Oung*, J.) PAN YIN *v.* EMPEROR. 1 Rang. 447 = 1924 Rang 22 = 2 Bur L.J. 153 = 76 I.C. 709 = 25 Cr. L.J. 245.

——S. 10—*Order for execution of security bond—Legality of—Report to headmen and to the police.*

The Burma Habitual Offenders Restriction Act contains no provision for ordering an offender to execute a security bond. If the offender is confined to another village than his own, it must be proved that he would be able to earn his livelihood at that village. Under the Act a double report goes to the headman and the police is unnecessary. (*Duckworth*, J.) EMPEROR *v.* NGA KALA. 24 Cr. L.J. 551 = 73 I.C. 157 = 1923 Rang. 58 (2).

BURMA INSOLVENCY RULES, R. 189.

———R. 189—*Scope of.*

R. 189 framed under the Presidency Towns Insolvency Act relates both to moveable and immoveable property and is perfectly *ultra vires*. (*Rutledge*, J.) *In the matter of* L.W. NASSE.
1 Rang. 433=76 I C. 669=
1924 Rang. 88.

BURMA LAND REVENUE ACT (II of 1876).

———Ss. 19 and 56—*Landlord.*

An occupier who has not acquired the status of landholder comes under S. 19 or under S. 56 of the Act. In the absence of a grant made by, or on behalf of, Government, Revenue authorities alone can decide questions as to who are to occupy lands under S. 19 and no Civil Court can grant a declaration of title. (*Twomey*, J.) MAUNG POCHIT *v.* PERIAKARUPAN CHETTY.
12 I.C. 22=4 Bur. L.T. 218.

———S. 48—*Property sold by mortgagor's fraud—Auction-purchaser's title.*

Property mortgaged to plaintiff was in the occupation of the mortgagors, who did not pay the Municipal taxes and consequently the property was sold under S. 206, Municipal Act for arrears of revenue. The auction purchaser who had acted in collusion with the mortgagors, was, in the plaintiff's suit for a mortgage decree, made a co-deft. *Held*, that the auction-purchaser had not acquired a good title free from the plaintiff's incumbrance and S. 48 of the Land Revenue Act was no reply to plaintiff's action. The plaintiff was entitled to show that the Revenue Officer was misled by the fraud of the mortgagor and the purchaser acting in collusion, which induced him to confer a title free from incumbrance. 10 M.I.A. 540; foll. (*Twomey*, J.) SABEID ALI *v.* M.N.N. SWAMINATHAN CHETTY. 15 I C 433=
5 Bur. L.T. 108.

BURMA LAWS ACT (XIII of 1898).

———*Hindus—Migration—Effect of.*

If a twice born Hindu migrates across the seas, to Burma and marries a Burmese woman, that itself may not necessarily deprive him of the Hindu status in the eye of the law. But if he has descendants who have been born and have always lived in Burma and who have intermarried with its people, then even though they may form a community of their own which inherits many traces of Hindu usage, if the usages and religion are of a character divergent from Hinduism, the community cannot be regarded as Hindu. (*Haldane, Atkinson, Phillimore and John Edge*) MA YAIT *v.* MAUNG CHIT MAUNG. 11 L.B.R. 155=
30 M.L.T. 126=42 M L J. 193=
4 U.P.L.R (P C.) 45=66 I.C. 609=
48 I. A. 553=1 Bur. L J. 15=
1922 (P.C.) 197 (P.C.).

———S. 13—*'Hindu'—Kilari are not Hindus.*

BURMA LAWS ACT (XIII of 1898, S. 13.

(*Haldane, Atkinson, Phillimore and John Edge.*) MA YAIT *v.* MAUNG CHIT MAUNG.
11 L.B.R. 155=30 M.L T. 126=
42 M.L.J. 193=4 U.P.L.R. (P.C.) 45=
66 I.C. 609=48 I A. 553=
1 Bur. L J. 15=1922 P.C. 197. (P.C.).

———S. 13—*Chinaman professing Buddhism—Adoption—Law applicable to.*

It is open to a Chinaman to profess Buddhism and such a person is a Buddhist within S. 13 of the Act. For a person to be governed by S. 13, it is not necessary that he should have been born a Hindu Buddhist or a Mussalman. Where on the death of a Chinaman professing Buddhism a person claims to be his adopted son, the question of the validity of the adoption must be determined in accordance with the Chinese Customary Law. (*Twomey*, C.J. *and Ormond*, J.) KYIN WET *v.* MA GYOK.
12 Bur. L.T. 21=37 I C. 148=
9 L.B.R. 179.

———S. 13—"*Hindu*" *explained.*

"Hindu" in S. 13 of the above Act means the same thing as in S. 331 of the Succession Act and S. 2 of the Probate and Administration Act, and not necessarily an orthodox Hindu or one belonging to one or another of the four castes. Per *Ormond*, J.—The term includes all who are Hindus in common parlance. 1 W. R. (P. C.) 12 W. R. (P. C.) 4, ref. to 4 All. 343, dist. (*Ormond and Twomey*, JJ.) MAUNG CHIT MAUNG *v.* MA YAIT. 37 I.C 780=
10 Bur. L.T. 194.

———S. 13—*Pre-emption—Equity and justice—Clog on transfer—Delay.*

Right of pre-emption is generally adverse to public interest and the administration of justice and equity does not require its introduction in Burma. (*Parlett*, J.) MI AMINA *v.* KARAM ALI. 32 I.C. 488=8 Bur. L.T. 239.

———S 13—*Question of paternity of a child, if within section.*

The question of paternity of a child is not one of succession, inheritance, marriage, caste or any religious institution or usage within the meaning of S. 13 of the Act (*Shaw*, J.C.) NGA TUN E. *v.* NI CHON. 16 Cr. L.J. 84=
26 I.C. 996=II U.B.R. (1914) 28.

———S. 13—"*Buddhist Law*"—*Applicability to Chinaman.*

Under Burma Laws Act, S. 13. "Buddhist Law" should be applied to the inheritance of a Chinaman. (*Twomey and Parlett*, JJ.) MA THEIN SHIN *v.* AH SHEIN.
7 Bur. L.T. 246=24 I C. 367=
8 L.B.R. 229.

———S. 13 (1)—*Breach of promise of marriage—Suits for damages—Appeal.*

Suits for compensation for breach of a promise to marry as between Burman Buddhists residing in Burmah are suits involving questions regarding marriage and appeals in such

BURMA LAWS ACT (XIII of 1898), S. 13.

suits would lie under S. 30 of the Lower Burma Courts Act, and not merely under S. 100, C. P. Code. (*Robinson*, C.J. *Maung Kin and Heald*, JJ.) MAUNG GALE *v.* MA HLA YIN. 11 L.B.R. 99=65 I.C. 411= 1922 L.B. 6.

——S. 13 (2)—*Justice, equity and good conscience.*

Under sub-S. 2, section 13 all questions in civil cases instituted in the Courts of Rangoon were determined according to the law as then administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary Civil Jurisdiction. (*Fox*, C.J. *and Hartnoll*, J.) MG SAN U *v* MA HMYIM. 5 Bur. L.T. 169=17 I.C. 934= 6 L B R 93.

BURMA MOTOR VEHICLE RULES.

——R. 26 (3)—*Liability of owner.*

The owner is not liable for the acts and omissions of his chaffeur who drives a motor car in his absence with defective rear light. (*May Oung*, J.) MAHOMED SURTY *v.* EMPEROR. 1 Rang 600=76 I C. 564= 2 Bur. L.J. 201= 25 Cr. L.J. 193=1924 Rang. 63.

BURMA MUNICIPAL ACT (III OF 1898).

——Ss. 2 (6) and 142 (d)—*Lodging house —What is.*

A lodging house need not be let in lodging. It is enough if it is occupied in common by members of more than one family. Persons living in the lodging houses are lodgers whether they pay rent or not and the owner of the lodging house receives them when he allows them to occupy the building. (*Saunders*, J.C.) AMANATH MISTRY *v* EMPEROR. 19 Cr. L J. 370=44 I.C. 674= (1917) 3 U.B.R. 52.

——S. 42-A—*Permit to sell withheld illegally—Liability.*

Under the Burma Municipal Act, a Municipal Committee was held liable for damages for prohibiting a licensee from selling after granting permission once, on the licensee's making default in producing stamp paper. (*Po Hon*, J.) SAN YEIK *v.* MUNICIPAL COMMITTEE, PEGU. 2 Bur. L J. 231= 1924 Rang. 132.

——S. 46—*Taxation on building—Machinery.*

Though machinery placed for use in a building is not liable, as such, to taxation under S. 46 of the Act, machinery on the premises, and for the purpose of making and which makes the premises fit as premises for the particular purpose, is to be taken into account in finding out the rateable value of such

BURMA MUNICIPAL ACT (III of 1898), S. 142.

premises. (*Hartnell, Offg.*, C.J. *and Young*, J.) RANGOON ELECTRIC TRAMWAY AND SUPPLY CO., LTD. *v.* RANGOON MUNICIPALITY. 7 Bur. L.T. 44=24 I C. 393= 7 L.B.R. 119.

——Ss. 51 and 63—*Notification of tax—Civil Court cannot question legality of—Remedy of assessee.*

Where notification of the imposition of a tax under the Burma Municipal Act has been published, a Civil Court is debarred from enquiring whether the tax has been legally imposed. S. 51, Cl. 8 provides that the notification shall be conclusive evidence that the tax has been imposed in accordance with the provisions of the Act. S 63 gives a right to the assessee to object to the assessment before a sub-commitee and provided for an appeal from their decision to the Deputy Commissioner as the case may be. He can also claim a reference to the Chief Court on the question of his liability to or the principle of assessment. (*Pratt*, J.) CHAN HTOON AUNG *v.* THE AKYAB MUNICIPALITY. 1 Bur. L J. 135=74 I.C. 34= 1923 Rang. 75 (1).

——S. 98—*Duty of Municipality to remove night soil is not imperative—Nuisance by Municipality can be restrained by injunction.*

Per *Twomey*, C.J. *and* (*Young*, J. *contra.*)—S. 98 of the Act does not impose an imperative duty on the Municipality to remove and dispose of night soil. Per *Curiam*:—If a nuisance in committed by the Municipality in the act of removing or disposing of night soil, it can be restrained by injunction from doing so. (*Twomey*, C. J. *and Young*, J.) RANGOON MUNICIPAL COMMITTEE *v.* BURMA RAILWAYS CO., LTD. 10 L B R. 203= 59 I.C. 823=13 Bur. L.T. 62 and 136.

——S. 142—*Bye-law—Condition restricting rate of interest on pawnbrokers—Validity of license.*

S. 142 empowers a Municipal Committee to make bye-laws for rendering license necessary for pawnbrokers and determining the conditions subject to which they shall be granted. A condition in pawnbroker's license issued under S. 142 limiting the rate of interest chargeable by pawnbrokers does modify and restrict the law which allows the freedom of contract but it is not on that account *ultra vires*. (*Parlett*, J.) S. C. PAUL *v.* EMPEROR. 18 Cr. L.J. 1012=42 I C. 756= 11 Bur. L.T. 208.

——S. 142 (d)—*Bye-laws under — Not ultra vires.*

A bye-law under S. 142 (*d*) of the Act requiring keepers of lodging houses to pay a license fee reckoned on the maximum number of lodgers authorized, is not *ultra vires*. (*Robinson*, J.) P. S. PILLAI *v.* MOULMEIN MUNICIPAL COMMITTEE. 22 Cr. L J. 113=59 I.C. 345= 13 Bur. L.T. 107.

BURMA MUNICIPAL ACT (III of 1898), S. 142.

——S. 142 (d)—*Bye-law* 19 (c)—Ultra vires—*Notice.*

Bye-law 19 (*c*) framed by the Rangoon Municipality is not *ultra vires* as the framing of such a clause is authorised by S. 142 (*d*) of the Act. A notice, to be vaild must be reasonable and possible to comply with. (*Parlett*, J.) PARTIAL MAISTRY v. EMPEROR.
15 Cr. L.J. 585=20 I.C. 740=
6 Bur. L.T. 138.

——S. 142 (r)—*Bye-law*—'*Keep*', *meaning of.*

The word 'keep' in the bye-law made by the Rangoon Municipal Committee under S. 142 (*r*) of the Act means the keeping for some long period of time. Therefore tying a goat meant for sacrifice in the temple awaiting the sacrifice ceremony for about two hours does not amount to a breach of the bye-law. (*Fox*, C. J.) BOYHENJ CHANDRA v. RANGOON MUNICIPALITY. 10 Bur. L.T. 24=17 Cr. L.J. 352=
35 I.C. 518=8 L.B.R. 328.

——S. 162-B—*Bicycle—Vehicle.*

A bicycle driven by human energy comes under the section "vehicle driving"; includes the application of human energy, to the pedals of a bicycle A man riding a bicycle may be said to drive a vehicle under S. 162 and he commits the offence of driving a vehicle after dark without lamps, if found riding his bicycle without light after dark. (*Twomey*, J.) EMPEROR v. NGA THA ZAN.
12 Cr. L.J. 573=12 I.C. 837=
4 Bur. L.T. 134.

——S. 180—*Wall—If a building under the Act.*

The erection of a mere fence or boundary wall is not an offence under the Act. But where such a wall is built so as to enable the occupier of the main house to use the enclosed area as part of his habitation and not merely as a boundary or fence it comes within the definition of building and disobiedience to an order or direction to dismantle it, is an offence under the Act. (*Maung Kin*, J.) KALOO KHAN v. RAHIM, 1 Bur. L.J. 102=
73 I.C. 972=24 Cr. L.J. 732=
1923 Rang. 65 (2).

——S. 180 (1)—*Disposal of surface water—Order—Disobedience.*

Under Chap. VI of the Burma Municipal Act, a Town Committee cannot pass general orders or directions regarding the disposal of surface water. The neglect to comply with such an order therefore is not an offence under S. 180 (1) of the Act. (*Pratt*, J, C.) SOHAN SINGH v. EMPEROR. 21 Cr. L.J. 95=
55 I.C. 494=3 U.B.R. (1919) 188.

BURMA TOWNS ACT (III of 1907).

——S. 7—*General duties of headman.*

To provide coolies to take out a Deputy Commissioner's letters from his head-quarters does not form a part of the ordinary duty of a ward headman. (*Heald*, A.J.C.) EMPEROR v. NGA PO SIN. 60 I.C. 63=22 Cr. L.J. 207=
(1920) 3 U.B.R. 235.

BURMA VILLAGE ACT (1907), S. 19.

——S. 9 (2)—*Refusal to execute headman's orders—Ordinary duties of headman.*

If a person residing within a ward is requested by the headman to convey letters to the Deputy Commissioner's camp and he fails, he is not guilty under S. 9 (2) as to provide coolies to convey such letters is not a part of the ordinary duty of the headman. (*Heald*, A.J.C.) EMPEROR v. NGA PO SIN.
60 I.C. 63=
22 Cr. L.J. 207=(1920) 3 U.B.R. 235.

BURMA VACCINATION ACT (I of 1909).

——S. 4—*Scope of.*

Section 4 of the Act applies only when the child to be vaccinated is under six months and has been exposed to certain possibilities of infection. If the section is to be used, the second paragraph must be complied with and no summary procedure is possible. (*Saunders*, J.C.) EMPEROR v. NGA PO KAN.
20 I.C. 404=
14 Cr. L.J. 420=(1913) I U.B.R. 152.

——S. 7—*Applicability of,*

Section 7 of the Act refers to inmates of lodging houses and persons living under other special conditions. (*Saunders*, J.C.) EMPEROR v. NYA PO KAN. 20 I.C. 404=
14 Cr. L.J. 420=(1913) I U.B.R. 152

BURMA VILLAGE ACT (1907).

——S. 12—*Disobedience of Thugy's order to reap—Is an offence—Reaping in public duty.*

The reaping and measuring of paddy for the purpose of revenue assessment, is a public duty within the meaning of S. 12, and it is an offence under the Act for a villager to refuse to comply with a requisition of the Headman to assist him in such work. (*Duckworth*, J.) PAN BU AND 38 OTHERS v. KING-EMPEROR.
1 Bur. L.J. 150=11 L.B.R. 412=
1923 Rang. 81.

——S. 19—*Disobedience to remove to another site is not an offence.*

Refusing to obey an order given them by the headman to remove to another site which had been provided for them is not an offence under S. 19. (*MacColl*, A.J.C.) EMPEROR v. NGA SEIN. 4 U.B.R. 127=25 Cr. L.J. 319=
76 I C. 1039=1923 Rang. 132.

——S. 19 (1)—*Conviction—When sustainable.*

To justify a conviction under S. 19 (1) the accused should be shown to have built his house without the permission of the Deputy Commissioner and later than 1908. (*Saunders*, A.J.C.) EMPEROR v. NGA NYO.
23 I.C. 202=15 Cr. L.J. 250=
(1913) 1 U.B.R. 180.

BURMA VILLAGE ACT (1907), S. 21.

———S. 21 (3)—Pwe, *what is*—Anyein *is not* Pwe.

The object of the Act is not to control all the amusements of the villagers. An ordinary *anyein* cannot be considered to be a *pwe* within S. 21 (3), unless it is performed for profit or by travelling troupes. (*Maung Kin*, J.) EMPEROR *v.* MA LE. 63 I.C. 855=22 Cr. L.J. 705=13 Bur. L.T. 243.

———S. 28—*Sanction when required—Duty of Court.*

A village headman is protected by Section 28 of the Village Act to this extent that he cannot be prosecuted for an act or omission punishable under Section 10 of the Act or for an abuse of his power similarly punishable, even though such act or omission or such abuse of power is punishable under the Indian Penal Code or some other law, unless the prosecution is instituted by order of, or under authority from, the Deputy Commissioner. The village headman has no power to cause hurt to or insult another person and there appears to be no reason why a Magistrate should not enquire into the charges brought against the headman under Sections 323 and 504 of the Indian Penal Code. 1. R.K.R. 336, followed. (*Saunders*, J.) NGA TUN LIN *v.* EMPEROR.
24 Cr. L.J. 381=73 I.C. 325=4 U.B.R. 101=1 Bur. L.J. 255=1923 Rang. 27.

BURMA—UPPER.

See UPPER BURMA.

BURMA WASTE LAND GRANT RULES.

———R. 22—*Notice under—Ejectment suit—Plea of permanent tenancy—Duty of Courts.*

Where in a suit in ejectment brought after issue of notice under S. 12 the deft. sets up a plea of permanent tenancy, the Court is bound to enquire into its truth and record a finding thereon. (*Maung Kin*, J.) MA SHWE YAT AUNG *v.* MAUNG DALI.
9 Bur. L.T. 152=32 I.C. 883=9 L.B.R. 27.

BUTTWARA PROCEEDINGS.

See EVIDENCE ACT, S. 35.

BYE-BIL-WAFA.

See (1) MORTGAGE.
(2) T.P. ACT, S. 58 (*c*).

CALCUTTA HIGH COURT.

———*Powers of the Chief Justice.*

The Chief Justice can only hear a review application when it is impossible for the Court, which passed the judgment, to hear it or if at all events one of the Judges who decided the appeal is not available to hear it. (*Sanderson*, C.J. *and Mookerjee*, J.) GANGADHAR KARMAKAR *v.* SHAKHARBASINI DASYA.
20 C.W.N. 987=35 I.C. 955=24 C.L.J. 235.

CALCUTTA HIGH COURT RULES AND CIRCULAR ORDERS—Ch. 35, R. 32.

———Ch. 35, R. 77—*Attachment before judgment—Sheriff's poundage, if payable.*

Pending a suit, attachment before judgment was ordered and the sheriff effected the *interim* attachment. Thereafter, by consent of parties the *interim* attachment was withdrawn and the order *nisi* discharged. On a claim being made by the Sheriff of Calcutta for poundage due. *Held*, (1) A claim to poundage by the Sheriff must be made under the express terms of a statute rule or order and there is no common law right to reward for executing a writ; (2) The sheriff was not entitled to claim poundage as R. 77 is only for proceedings in which the the sheriff is employed in levying sums in execution. It does not apply to cases of attachment before judgment which does not result in any execution. (*Rankin*, J.) PICKFORD *v.* RAI BAHADUR JANKI NATH ROY.
70 I. C. 488 (2)=26 C.W.N. 673.

———Ch. 34, R. 7, Ch. 36, R. 57 (a)—*Taxation—Only one fee to be allowed in Revision applications.*

Fee to one counsel only should be allowed on taxation in an application for revision under S. 115 of the Code of Civil Procedure. In an appeal from the decision of a Judge on the Original Side dismissing an application under S. 115, C.P.C., fee to one counsel also should be allowed under Chap. 36, R. 57 (*a*) of the Rules. In respect of costs of such appeals no refresher should be allowed to counsel. (*Greaves*, J.) SARAT CHANDRA *v.* BIRAJ MOHUN. 68 I.C. 451 (1)=25 C.W.N 826.

———Ch. 36, Rr. 6, 9 32 and 72—*Solicitor—payment of counsel's fees—Right of solicitor to retain client's moneys.*

A solicitor is entitled to retain the moneys of his client only to the extent to which he is entitled to claim against the client in accordance with the rules of the High Court. The solicitor has no right at all in law to retain any of those sums after the Taxing Master has disallowed them without having made a successful application to the Court either to review or on a reference or otherwise, to increase those sums. (*Page*, J.) JADAB CHANDRA MITTER *v.* ROMESH CHANDRA BOSE.
27 C.W.N. 537=1923 Cal. 603.

———Ch. 36, R. 32—*Payment of counsel's fees as between attorney and client—No reference by taxing officer—Jurisdiction of Judge to hear and determine.*

On an application for change of attorneys by the deft. in a suit on the Original Side of the High Court, the Judge ordered that deft. should pay a sum of money to his former attorney subject to readjustment after taxation. Upon taxation of costs a question arose as to the fees of counsel and the Taxing Officer refused to allow those fees without an order of Court. On an application to the Judge by the former attorney for an order that the Taxing Officer in the taxing of his costs as between attorney and

CALCUTTA HIGH COURT RULES AND CIRCULAR ORDERS, Ch. 36, R. 69.

client might do so irrespective of the taxation rules as regards payment of counsel's fees. *Held* though the matter was not raised by a reference from the Taxing Officer, the Judge had jurisdiction to deal with the application and decide it on its merits. The proviso in Rule 32 requiring the client's written authority or ratification for payment of the fees applies only to the jurisdiction and discretion of the Taxing Officer and not of the Court. The proviso applies only where the Court or Judge has ordered or does not order otherwise. R. 6, assuming it to refer to counsel's fees, is a direction to the Taxing Officer only and does not limit or control the jurisdiction of the Court or a Judge under R. 32. (*Sanderson*, C.J. *and Richardson*, J.) SAILENDRA MOHAN DUTT *v* DHARANI MOHAN ROY. 49 Cal 618=26 C.W.N. 870= 69 I C. 823=1922 Cal. 402.

——Ch. 36, R. 69—*Application by attorney for payment order against client out of money in attorney's hand is free from the statute of Limitation.*

R. 69 of Ch. 36 of the Rules is technically free from the statute of limitation. The rule is not *ultra vires* of the High Court. The Court can exercise its discretion in favour of the attorney even where a suit, if brought, will be barred under the Limitation Act. (*Rankin*, J.) RAJAH NARENDRA *v.* TARUBALA.
48 Cal. 817=66 I C. 209=25 C W.N. 800.

——Ch. 36, R. 93—*Costs—Exaggerated claim—Important cause—Ordinary cause.*

If the plff. puts forth a grossly exaggerated claim and gets a decree for less than 1/5 of the claim, costs should be allowed as in an 'ordinary cause.' Reasons should be recorded where costs are awarded as in an important cause. (*Asutosh Mukerji*, A.C.J. *and Fletcher*, J.) MANINDRA CHANDRA NANDI *v.* ASWINI KUMAR ACHAYYA. 48 Cal. 427=32 C L J. 168= 60 I.C. 337=25 C.W.N. 297.

——*Interpretation of—Endorsement, if must be made in all cases before vakalatnamah is filed—Vakalatnamah, acceptance of, by pleader.*

An acceptance by a Pleader named in a *vakalatnamah* and allowed by Court expressly or by implication is valid and operative even without an endorsement in writing on the *vakalatnamah* by the Pleader, but R. 45 (*e*) requiring acceptance as a *vakalatnamah* by endorsement in writing ought to be complied with. *Beachcroft*, J.—Courts should insist on the rule being observed by pleaders practising before them and the pleader who does not conform to it, ought not to be heard. (*D. Chatterjee and Beachcroft*, JJ.) MOHESH CHANDRA ADDY *v.* PANCHU MODALI. 43 Cal 884=32 I.C. 395= 20 C.W.N. 287=23 C.L.J. 297.

——Vol. I, R. 122—*Commissioners' remuneration fixed by trial Court.*

The powers of Dt. Judge under the Calcutta High Court General Rules and Circular Orders

CALCUTTA HIGH COURT RULES AND CIRCULAR ORDERS—Original Side, R. 67.

Vol. I do not authorise him to set aside any orders made by Subordinate Court in respect of the remuneration of a Commissioner for local investigation pending a suit. These powers are given to the Dist. Judge for maintaining a particular standard of efficiency among pleaders who undertake commissions. (*Chatterjee and Newbould*, JJ.) PEARI MOHAN KUNDU *v.* MOHINI KANTA SAHA CHAUHURI. 34 I.C. 855 (Cal.).

——APPELLATE SIDE.

——Ch. XI, R. 4.

Ch. XI, R. 4 of the Calcutta High Court Appellate Side Rules being applicable only to a case where the Deputy Registrar gives a certificate that all proceedings on an application for review of judgment are in order, no application for review of judgment can be moved in Court, where his certificate is to the effect that the review proceedings are not in order. (*Sanderson*, C. J. *and Mookerjee*, J.) GANGADHAR KARMAKAR *v.* SHEKHARBASINI DASYA.
20 C.W.N. 967=38 I.C. 348= 24 C L J. 235.

——R. 17—*Privy Council Appeal—Printing of record.*

In an appeal against a judgment of the High Court refusing to entertain an appeal as incompetent, the papers relating to the merits of the case should not be included in the paper book. (*Jenkins*, C. J. *and Mookerjee*, J.) KHIRO DAMOYEE DASI *v.* PRODYAT KUMAR ADDYA.
21 I.C. 425=18 C.L.J. 122.

——ORIGINAL SIDE.

——Ch. 13, R. 9—*Lease—Covenant not to assign without Landlord's consent—Refusal of consent—Procedure.*

Certain premises were leased for 5 years on condition that the lessee may assign his interest with lessor's consent but the lessor should not unreasonably refuse consent. On an application by the lessee for such consent the lessor refused and then the lessee applied to the High Court for determining whether he could assign without lessor's consent. Lessor objected. *Held* the procedure was correct and the lessee could assign without lessor's consent. (*Ghosh*, J.) DUCASSEE *v.* COHEN.
48 Cal. 176=60 I.C 105=24 C.W.N. 1007.

——R. 67—*Attorney's application for recovery of costs against client—Limitation Act, Arts.* 84 *and* 181—*Plea of novation.*

The bill of costs of attorney against the client was taxed on 4—9—19. Summons for the payment of the same under R. 67, Ch. XXXVIII of the Calcutta High Court Rules and Orders was taken out on 10—5—18. The attorney pleaded novation of the contract. *Held*, that Art. 181 of the Lim. Act did not apply to the case and that the summary procedure provided by R. 79, Ch. XXXVIII, Calcutta High Court Rules Original Side, applied to applications for payment of attorney's costs where there is no

CALCUTTA HIGH COURT RULES AND CIRCULAR ORDERS—Original Side, R. 98.

contest or doubt that the parties applying are capable of giving full discharge for the amount claimed. A question of novation cannot be gone into in a summary application of this kind. The proper course for the applicant is to bring a suit within the period prescribed by Art. 84. (*Chaudhuri*, J.) SRIMATI LAKHAMONI DASSI v DWIJENDRA NATH MUKHERJEE.
46 Cal. 249=31 I.C. 941=23 C.W.N. 478.

———R. 98—*Articled clerk—Holding other office during his clerkship.*

An articled clerk cannot hold any employment during the time of his articled clerkship. The rule should be construed stringently. (*Fletcher*, J.) *In re* AN ARTICLED CLERK.
19 I C. 878 (Cal.).

———R. 370—The Registrar of a High Court has no jurisdiction to determine a question whether a decree is capable of execution. The rule was inconsistent with the Code of 1882. (*Sanderson*, C.J., *Woodroffe*, *Mookerjee*, *Chitty and Chatterjee*, JJ.) CHUTTERPUT SINGH *v.* SAIT SUMARI MAL. 43 Cal. 903=23 C.L.J. 645=36 I C. 602=20 C.W.N. 889 (F.B.).

———R. 426—*Sale by Commissioner of Partition—Inquiry into vendor's title—Direction to Registrar—If can be made.*

The High Court cannot direct the Registrar to inquire under R. 426 as to whether the vendor could make a title to the property sold by the Commissioner of partition under the authority of the Court. (*Fletcher*, J.) JOGEMAYA DASEE *v.* AKHOY COOMAR DAS.
18 I C. 954=40 Cal. 140.

CALCUTTA HIGH COURT RULES RELATING TO PRACTICE AND PROCEDURE IN DISTRICT COURTS.

———Ch. I, R. 2—*Case taken upon holiday—Effect.*

The fact that a case is taken up on a holiday is only an irregularity not affecting the jurisdiction of the Court and may be cured by the consent of the parties. Where a case is taken up on a holiday with the consent of parties but is adjourned to another holiday without the consent of the parties and the suit disposed of against the plaintiff, *held*, that the proceedings were irregular and prejudiced the plaintiff and that there should be a retrial of the suit in accordance with law (*Mookerjee*, A.C.J. *and Fletcher*, J.) LAMBONATH DAS *v.* SARUNATH DATTA. 61 I C. 775=25 C.W.N. 830.

CALCUTTA IMPROVEMENT TRIBUNAL.

———*President can make an order as to costs and to execute the same.*

The President of the Calcutta Improvement Tribunal is a Civil Court having power to make an order for costs and an inherent power to execute such order for costs made by him. (*Chatterji and Cholmer*, JJ.) BATA KRISHNA *v.* K. ROY. 65 I.C. 177=26 C.W.N. 80.

CALCUTTA IMPROVEMENT TRUST ACT (V of 1911), S. 42.

CALCUTTA IMPROVEMENT TRUST ACT (V of 1911).

———*Powers of acquisition of land.*

The legislature when it conferred powers of acquisition of land within certain well defined safe guards never intended the trust should abrogate these safeguards and acquire land indirectly through the medium of another body. (*Greaves*, J.) MANIK CHAND MAHATA *v* THE CORPORATION OF CALCUTTA AND THE CALCUTTA IMPROVEMENT TRUST.
66 I.C. 600=48 Cal. 916.

———S. 11—*Power to call for records.*

The power to call for records from another Court is a power which is inherent in the Judge of a Land Acquisition Court, and consequently in the Special Tribunal constituted under the Land Acquisition Act (I of 1894) to hear cases from the orders of the Calcutta Improvement Trust. (*Holmwood and Mullick*, JJ.) NARESH CHANDRA BOSE *v.* HIRA LAL BOSE.
43 Cal. 239=34 I.C. 263=20 C.W.N. 860

———Ss. 39 and 78—*Street scheme—Govt.'s sanction.*

The Trust need not delineate the building sites on the street scheme before submitting it to Govt. for sanction. Where land is not shown to be required for a scheme under S. 39, an application for exemption under S. 78 is unnecessary. The trustees may reject an application as one not coming under S. 78 (1) though they have made enquiries under S. 79 (2). (*Mukerjee and Fletcher*, JJ.) BEPIN BEHARI SEN *v.* TRUSTEE FOR THE IMPROVEMENT OF CALCUTTA. 47 Cal. 604=37 I C. 37=31 C.L.J. 334.

———S. 42 (a)—*Improvement scheme—Recoupment—Land acquisition—"Land affected"—Meaning of.*

S. 42 (2) of the Bengal Act (V of 1911) authorises the Board of Trustees, in carrying out a scheme under that Act, to acquire compulsorily, for the purposes of recoupment, land which is not required for the execution of the scheme but which according to the opinion of the trustees will thereby be increased in value. (*Lord Parmoor*) TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA *v* CHANDRAKANTA. 47 Cal 500=11 L.W. 566=38 M.L.J 511=18 A.L.J. 521=22 Bom L.R. 585=32 C.L.J. 65=24 C.W.N. 881=56 I C 82=47 I A. 45=2 U.P.L.R. (P C.) 98 (P.C.).
[Reversing 44 Cal. 219=24 C.W.N. 8=36 I C. 749=24 C.L.J. 246.]

———Ss. 42 (a), 78 and 81—*Board—Power to acquire land for recoupment—Land Acqn. Act—Affected.*

CALCUTTA IMPROVEMENT TRUST ACT (V of 1911), S. 54.

Per (*Full Bench, Chatterjee, J. dissenting,*) The Cal. Improvement Act authorises the Board of Trustees to acquire lands compulsorily for purposes of recoupment, *i.e.*, by selling or other wise dealing with the lands, under S. 81 or by abandoning the land in consideration of the payment of a sum under S. 78. 44 Cal. 219, over ruled. The word "affected" in S. 42 (*a*) means affected in any way and not merely adversely affected. The words "by the execution of the scheme" in S. 42 (*a*) simply mean through or owing to the execution of the scheme. S. 78 does not apply to land which was originally acquired for the execution of the scheme but was subsequently found to be unnecessary. (*Fletcher, Chatterjee. Teunon, Richardson and Chowdhuri, JJ.*) MANI LAL SINGH *v.* TRUSTEES FOR IMPROVEMENT OF CALCUTTA. **43 Cal. 343=22 C.W.N. 1= 44 I.C. 770=27 C.L.J. 1. (F.B.).**

——S. 54, Cl. 1—*Corporation lands—Board of Trustees cannot acquire for improvement scheme.*

Lands situated in the Calcutta Municipality and vested in the Corporation of Calcutta were included in an improvement scheme by the Board of Trustees for the purpose of recoupment. On question arising as to the powers of the Board, *held* that the Board was not entitled to acquire or deal with the lands under S. 54, Cl. 1 of the Act. (*Sanderson, C.J. and Richardson, J.*) CORPORATION OF CALCUTTA *v.* THE CALCUTTA IMPROVEMENT TRUST. **30 Cal. 531=75 I.C. 346=1924 Cal. 85.**

——S. 78 (1) and (2)—*Powers of trustees.*

Though the Trustees make enquiries under sub-S. (2) of S. 78 of the Act they are not prevented from rejecting the application on the ground that it does not come within sub-S. (1) of that section. (*Mookerjee and Fletcher, JJ.*) BEPIN BEHARI SEN *v.* THE TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA. **31 C.L.J. 334=57 I.C. 37=47 C. 604.**

CALCUTTA MUNICIPAL ACT (III B.C. OF 1899).

——Ss. 3 (30), 408, 575 and 622 (3).

"Occupier" in S. 622 of the Act does not mean only the person in actual occupation of the land, but would include also a lessee who had sub-leased the lands to others who are in actual occupation. (*Imam and Chapman, JJ.*) BENODI LAL GHOSH *v.* CORPORATION OF CALCUTTA. **20 I C. 746=14 Cr. L.J. 490= 41 Cal. 164.**

——Ss. 3 (32) and 408—*Owner—Shebait—Liability for non-compliance with directions to improve bustee—Shebait not in turn.*

In the case of *shebait* of a deity managing the *debutter* properties in turn, one of them not in turn is no owner under S. 3 (32) of the Calcutta Municipal Act and is consequently not liable for non-compliance with a notice under S. 408 for carrying out improvements in the *bustee*. (*Imam and Chapman, JJ.*) RATNENDRA LAL MITRA *v.* CORPORATION OF CALCUTTA. **41 Cal. 104=21 I.C. 169= 14 Cr. L.J. 569=17 C.W.N. 1084.**

——S. 3 (33) and (37) and Sch. XVII, R. 2—*Scope—Imprisonment in default of fine—Power to impose.*

There is no power under the Calcutta Municipal Act to impose imprisonment in default of payment of fine, at any rate for such offences to which a daily penalty is assigned, in addition to the substantive fine. (*Holmwood and Sharfuddin, JJ.*) BASANTA KUMARI DEVI *v.* CORPORATION OF CALCUTTA. **11 I C. 143= 12 Cr. L J. 375=15 C.W.N. 906.**

——S. 3, Cl. (39) (a) and 351—*Re-erection—Building.*

Where before the building line was laid down, a shed consisting of four posts and a tin roof stood on the same spot as they did subsequently and after the building line was laid down, the owner took the roof and eventually put up a roof either of new tin or repaired. *Held* that this was not a re-erection within S. 3 (39) (*a*) that the roof with four posts was not a building and that the replacing of the roof upon the same posts did not infringe S. 351 as no portion of any building or wall abutting on any street was constructed with in the building line. (*Holmwood and Chatterjee, JJ.*) TRIPUNDESHAR MITTER *v.* CORPORATION OF CALCUTTA. **39 Cal, 84=11 I C. 997= 12 Cr. L J. 461=16 C W.N. 23.**

——S. 3 (46)—*Street.*

Street in S. 3 (46) of the Act includes a passage less than 20 feet wide. (*Imam and Chapman, JJ.*) CORPORATION OF CALCUTTA *v.* MAHAMAYA DEBI. **20 I.C. 921= 14 Cr. L.J. 511=17 C.W.N. 1250.**

——Ss. 14 and 556—*Acquisition of land for Relief of congestion—Is within the powers of the Municipality.*

The Corporation of Calcutta passed a resolution for acquiring lands adjoining a Hindu temple for the purpose of relieving congestion at the place and providing for a *dharmsala* which had been endowed by a private citizen. It was objected that the acquisition was beyond the powers of the Municipal Council. *Held*, that the proceedings were within the powers conferred on the Municipal Council by Ss. 14 and 556 of the Calcutta Municipal Act and that the exercise of their discretion by the Municipal Council could not be questioned by the Civil Courts. (*Lord Shaw.*) AMULYA CHANDRA BANERJEE *v.* CORPORATION OF CALCUTTA. **43 M.L.J. 634= 31 M.L.T. (P.C.) 185=16 L.W. 673= 69 I.C. 115=49 Cal. 838= 27 C.W.N. 125=L.R. 3 (P.C.) 229= 49 I.A. 255=21 A L.J. 27= 37 C.L.J. 67=1922 P.C. 383 (P.C.).**

CALCUTTA MUNICIPAL ACT (III B.C. of 1899), S. 20.

——Ss. 20, 357, 555, and 558—*Acquisition of land by the Corporation for the Improvement Trust is not proper.*

It is not the policy of the Calcutta Municipal Act that the special powers given to the corporation to acquire land should be used to enable another body to acquire land through its medium. Hence where there was no sanctioned project of the Calcutta Corporation or any scheme of the Calcutta Improvement Trust, and the lands were ostensibly sought to be acquired by the former but the work to be carried out and paid for by the latter, the whole proceedings are bad. The powers of acquisition under the Act are confined to cases in which the Corporation itself is to execute the work. (*Greaves, J.*) *In re* MANICK CHAND MAHATAB *v.* THE CORPORATION OF CALCUTTA AND THE CALCUTTA IMPROVEMENT TRUST.
66 I.C. 600=48 Cal. 916.

——S. 37 — *Persons living in flats — Electors.*

Persons living in flats, are not eligible to be enrolled as voters in Municipal Election roll. (*Chaudhuri, J.*) *In the matter of* AMULYADHAN ADDY. **30 I.C. 307=46 Cal. 132.**

——S. 37—*Occupier—Meaning of—Association of individuals—Rules* 8, 9, 11 *of Sch. IV.*

The word "occupier" in S. 37 (2) (1) (c) of the Calcutta Municipal Act means an occupier in the ordinary sense and not as defined, in S. 3 sub-section 30 of the Act. The only person who falls within that sub-section is a person who occupies a building separately numbered and valued for assessment. Associations of individuals unless associated for a common object do not become such by the mere fact they occupy portions of a house sub-divided into flats. Rule 2 (b) of the Act applies only to persons actually liable for the rates in respect of the two quarters specified. A notice under rule 8 need not be signed by the person giving it. (*Greaves, J.*) *In re* SURENDRACHANDRA GHOSE. **42 I.C. 454=45 Cal. 950.**

——S. 38, Sch. IV, Rr. 3 (4), 9 and 10 (9)—*Stranger—Representation of body corporate—Joint Hindu family or firm to be entered on the list of voters—Mandamus.*

Rules 9 and 10 Cl. (9) of Sch. IV of the Calcutta Municipal Act taken together merely authorise a person, who is a member of an association, etc. to be entered on the list of voters. Therefore, a person foreign to the body corporate, *e g.* joint Hindu family or firm as the case may be, cannot be authorised by such body corporate to represent them. (*Jenkins, C.J. and Woodroffe, J.*) *In re* NISITH CHANDRA SEN. **39 Cal. 754=15 I.C. 441=15 C.L.J. 488.**

——S. 55—*Election petition, if can be treated as suit—Corrupt practices—Effect.*

The matter of corrupt practices in elections has not been provided for in the Act except by the expression 'for any other cause,' in S. 56 of the Act. *Mens rea* is essential to constitute impersonation. If no fraud is shown against the candidate or his agents the election will not be set aside. A petition to set aside an election cannot be treated as a suit. Influencing individual voters avoids an election only if it is done by the candidate or his agents. To avoid an election on the ground of intimidation or undue influence, it must be shown that the candidate or his agents instigated it, or that it prevailed to such an extent as to prevent the election from being free. (*Choudhuri, J.*) *In the matter of* BROJO GOPAL GOSWAMI.
46 I.C. 729=22 C.W.N. 678.

——Ss. 158 and 160—*Valuation—Objections—Court of Small Causes—Notice.*

S. 158 provides for a notice upon which a valuation is made and objections are then taken under S. 160. After the decision of the objection under S. 160 any person dissatisfied with the order passed on his objection may appeal to the Court of Small Causes. The Law does not contain any provision for a fresh notice. Where the Chairman of the Calcutta Municipal Corporation issued a notice for the re-valuation of a holding on the ground of the cost of construction and made certain valuation and afterwards when on hearing objections of the owner altered the valuation on the rental basis: *Held*, that the notice was sufficient and not defective. (*Chatterjee and Walmsley, JJ.*) CORPORATION OF CALCUTTA *v.* NRITYA KALI DASSEY.
37 I.C. 932 (Cal.).

——S. 162 — *Valuation— Jurisdiction—Small Cause Court—Assessment.*

In appeals under S. 162 of the Calcutta Municipal Act, a Small Cause Court Judge can deal with the question of valuation and that question alone. 26 C. 74 rel. As to the manner in which land is to be assessed after the valuation has been settled, whether it is or is not to be assessed as vacant land, is a question entirely beyond the jurisdiction of the Small Cause Court Judge. (*Mookerjee and Teunon, JJ.*) CORPORATION OF CALCUTTA *v.* PEARY MOHAN ROY. **15 I.C. 452=13 C.L.J. 300.**

——Ss. 223 and 228—*Inter-relation.*

S. 223 deals with liability *in personam* for unsatisfied arrears. S. 228 deals with liability *In rem* for rents due and makes the consolidated rent a first charge on the property (subject to arrears of land revenue). S. 228 cannot be controlled by S. 223. (*Mookerjee and Beachcroft, JJ.*) AKSHOY KUMAR BANERJEE *v.* CORPORATION OF CALCUTTA. **42 Cal. 625=19 C.W.N. 37=27 I.C. 261=21 C L J. 177.**

——S. 286 — *House drain—Extent of—Corporation's ownership.*

Though the drain is a house drain made by the owner of the adjoining premises for the outlet of water therefrom, it is covered by S. 286 of the Calcutta Municipal Act. The effect of the vesting of a road or a drain in a

CALCUTTA MUNICIPAL ACT (III B.C. of 1899), S. 299.

Municipality, is not to confer the full proprietary right in the soil itself covered by the road or the drain on the Commissioner. The property of the Local Authority concerned does not extend to more soil and air than is necessary for the maintenance and user of the highways; subject to this qualification the original owner's rights in property remain and therefore if the way ceases to be so, the owner becomes entitled to full rights of ownership in the property. (*Mookerjee and Cuming*, JJ.) KISHETRA MOHAN GHOSH *v.* CORPORATION OF CALCUTTA. **44 Cal. 689=24 C.L.J. 358=37 I.C. 93=21 C.W.N. 234.**

——S. 299 and 575—*Effect of delay.*

Under S. 575 proceedings were instituted on the petitioner on 15-8-16 which were stayed at his request for negotiations between himself and the Municipality. On an application to revive the proceedings made on 28-2-17, the petitioner was ordered to pay daily fine of Rs. 30 from 16-5-16. *Held*, that delay vitiated the proceedings and so the conviction was invalid. (*Sanderson*, C.J. *and Walmsley*, J.) NANDO LAL GUHA *v.* CORPORATION OF CALCUTTA. **24 C.W.N. 467=56 I C 862=21 Cr. L.J. 558=31 C.L.J. 342.**

——Ss. 299 and 593—*Service of notice on one co-owner, if good.*

Service of a notice under S. 299 of the Calcutta Municipal Act upon one of the co-owners of the property in the manner provided in S. 593 is effectual and has full force against the other co-owners. (*Teunon and Newbould*, JJ.) THE CORPORATION OF CALCUTTA *v.* HEMANGINI DASSI. **44 I.C. 413 (Cal.).**

——Ss. 341, 450 (3) and 617—*Removal of superstructure—Payment of compensation, if a condition precedent—Suit for declaration—Spec. Rel. Act*, S. 42.

Where the Corporation of the City of Calcutta gives notice to the owner of a building encroaching on a public street to remove it, the payment of compensation provided in case of buildings erected before 1863, is not a condition precedent to its removal or demolition under S. 450, sub section 3; it may be paid afterwards. The compensation to be paid to the owner, is assessable by the Court of Small Causes under S. 617 and no suit for the purpose will lie in the ordinary Civil Courts. If, however, the Corporation refuses to admit the owner's right to compensation on the ground that the building was erected after 1863, and proceeds to demolish it, the Civil Court has a discretionary power, in a suit by the owner, to make a declaration that the building was erected before 1863 and that the owner was entitled to compensation. (*Lord Chancellor.*) JOSEPH *v.* CORPORATION OF CALCUTTA. **44 Cal 87=20 M L T. 383=18 Bom. L R. 878=24 C.L.J 498=(1916) 2 M W.N. 545=21 C W.N. 191=5 L.W. 199=22 M.L.J. 631=36 I C. 912=43 I.A. 243 (P.C.).**

CALCUTTA MUNICIPAL ACT (III B.C. of 1899), S. 343.

——S. 341—*Fixtures.*

Tin sheds attached to a shop by hinges at one end, supported at the other by props forming a verandah, and hanging down straight when the props are taken away, are not fixtures within S. 341. (*N.R. Chatterjee and Cuming*, JJ.) NARAYAN KISSEN SEN *v.* CORPORATION OF CALCUTTA. **48 Cal. 602=63 I.C. 155=22 Cr. L.J. 619=33 C.L.J. 377.**

——S. 341—*Fixture attached to a building—Removal.*

A Magistrate directed the removal of a masonry platform extending in front of the petitioner's building and over a drain in the public street. There was no evidence as to when the platform was erected. *Held*, the words "when a fixture has been attached" mean that the building must be first in existence and the attachment of the fixture must be subsequent to the erection of the building. In the absence of proof that the platform in question was constructed after the erection of the building, the Magistrate's order must be set aside. To make the section applicable, the prosecution must prove the facts showing that the section applies. (*Chaudhuri and Newbould*, JJ.) MOHAMED RAZIUDDIN *v.* CORPORATION OF CALCUTTA. **23 C.W.N. 752=58 I.C. 352=21 Cr. L.J. 761=29 C.L.J. 605.**

——S. 341—*Platform—Erection of—Fixture.*

A *rowak* or platform built by an owner as an integral part of his building over a portion of the street is not a fixture within S. 341 of the Act. (*N R. Chatterjee and Sheepshanks*, JJ.) ASHUTOSH SADUKHAN *v.* CORPORATION OF CALCUTTA. **49 I.C. 93=28 C.L.J. 491.**

——S. 341—*Fixture—Meaning of.*

A *veranda* standing for 60 years is not a fixture within S. 341. (*Jenkins*, C.J. *and Cave*, J.) BARADA PRASAD ROY *v.* CORPORATION OF CALCUTTA. **13 C.L J. 611=10 I C. 310=15 C.W.N. 730.**

——Ss 313 and 442—*Notice for removal on the landlord—Dilapidated hut.*

The definition of owner as given in S. 4 subsec. (32) includes both the landlord and tenant. A notice under S. 343 for the removal of a hut belonging to the tenant can be served upon the person who is the owner of the land and such person is liable to comply with the terms thereof. S. 442 of the Act which contemplates a different set of circumstances, *i. e.*, cases of urgency, does not in any manner abridge the power conferred by S. 343. (*Fletcher and Beecheroft*, JJ.) THE CORPORATION OF CALCUTTA *v.* MANMOTHA NATH SAIT. **19 C.W.N. 291=28 I.C. 653=16 Cr. L.J. 317=21 C.L.J. 497.**

CALCUTTA MUNICIPAL ACT (III B.C. of 1899), S. 370.

——— **Ss. 370 to 375**—*Plans for building—Disapproval by chairman and General Committee—Whether suit lies for—Mandamus—Specific Relief Act, S. 45.*

The Chairman of the Calcutta Corporation disapproved of certain building plans submitted and the General Committee dismissed an appeal therefrom as being out of time; *held* there is no cause of action for a suit for sanction of the approval of the plan. Under Ss. 370 to 375 the Chairman and the General Committee are special tribunals to decide about the plans for buildings and so long as they act *bona fide* within their rights, their decision cannot be reviewed by a Court of Law and if they act *mala fide*, the only remedy is by application under S. 45 of the Spec. Rel. Act. (*Fletcher*, J.) PROSAD CHUNDAR RAY *v.* THE CORPORATION OF CALCUTTA. **40 Cal. 835 = 22 I C. 338 = 17 C W.N. 929**

———**Ss. 408, 409 and 622**—*Municipal requisition — Non-compliance by owner — Occupier of a portion of the property rendering compliance impossible—Action under S. 409.*

It is unreasonable to construe S. 622, Cl. 3 of the Calcutta Municipal Act as meaning that an owner, who has not complied with a requisition for effecting improvements to any extent, is discharged from liability, merely, because the occupier of a portion of the land has rendered compliance impracticable only in part. Where though some of the tenants refused to afford facilities to the owner and thus rendered it impracticable for him to carry out completely all the improvements required by the Corporation, still the owner could have carried out some at least of the improvements, the owner is discharged from liability only to the extent that the conduct of the occupier makes the compliance impossible. Even though the General Committee of the Corporation decides to take recourse to S. 409 of the Calcutta Municipal Acts the owner is not forthwith absolved from the liability he has already incurred by reason of his failure to comply with the requisition under S. 401. If the requisite improvements are carried out by the General Committee under S. 409, the default on the part of the owner vanishes but till the work is completed the default remains and with it the liability for prosecution. (*Mookerjee and Rankin*, JJ.) CORPORATION OF CALCUTTA *v.* BEJOY KUMAR ADDY **50 Cal 813 = 38 C.L J 360 = 27 C W N. 787 = 77 I C. 529 = 1924 Cal. 334.**

———**Ss. 408, 419, 574 and 598**—*Notice under S. 408 requiring construction of structures within three months—Extension of period on objection—Negotiation pending notice, whether makes requirements of notice unenforceable—Complaint giving wrong particulars—No bar to prosecution under S. 574 on amended application.*

A petitioner was served with a notice under S. 408 on 3-1-16 to construct certain structures

CALCUTTA MUNICIPAL ACT (III B.C. of 1899), S 466.

in 3 months. On 10th March the petitioner gave a notice under S. 419 to the Corporation intimating that he proposed to remove the land from the category of *bustee* and on the 20th March he took certain objections under S. 598, at the hearing of which, the period was extended to 6 months. The petitioner having done nothing, the Corporation applied for summons but the Magistrate refused to take action upon it as the period of the notice was stated by mistake to be 3 months. A second application was then made on 31st July and the petitioner was prosecuted and convicted. *Held* that the Magistrate's action on the previous application did not bar the prosecution: that the extended period of six months ran from 3-1-1916, not from 20th March when the objections were taken and that the negotiations and arrangements about the requirements of notice between the petitioner and the Corporation that were going on after the notice, did not render the requirements of notice unenforceable. (*Teunon and Choudhury*, JJ.) NIBARAN CHANDRA KHUNDU *v.* CHAIRMAN OF THE CORPORATION OF CALCUTTA. **38 I.C. 980 = 18 Cr. L.J. 400.**

———S. **408**—*Estate vested in Receiver—Notice to owner to improve trustee—Position of receiver—Procedure.*

A receiver of an estate is neither an owner nor agent of trustee in respect of the same. Where notice under section 408 of the Act is served on a person whose estate has already been vested in a Receiver, it is the duty of the former to transmit the same to the Receiver requesting him to take the necessary directions from the Court; on the receiver's failing to comply with the same, the owner may apply to the Court making the Receiver a party to his application. (*Caspersz and Sharfuddin*, JJ.) CORPORATION OF CALCUTTA *v.* CASSIM ARIFF BAHU. **38 Cal 714 = 12 Cr. L.J. 361 = 11 I.C. 129 = 15 C.W.N. 1002.**

———**Ss. 416 (1), 419, 361**—*Private street—Public way—Dedication—Consent of owner.*

A roadway made originally as part of a bustee and in accordance with the plan approved by the Corporation, remains a private street until the General Committee of the Corporation and the owner otherwise agree or until the owner initiates a proceeding under S. 419 of the Act. To create a public right of way there must be a dedication by the owner. The effect of S. 416 (1) is that the owner cannot dedicate without the consent of the General Committee of the Corporation. (*Imam and Chatman*, JJ.) CORPORATION OF CALCUTTA *v.* MAHAMAYA DEBI. **20 I.C. 991 = 14 Cr. L J. 511 = 17 C W.N. 1250.**

———**S. 466**—*License—Carrier.*

A carrier must obtain the trade license as well as those for keeping the animals and for the premises wherein he keeps them, under

CALCUTTA MUNICIPAL ACT (III B.C. of 1899), S. 495.

S. 466 of the Act. (*Chaudhuri and Newbould*, JJ.) SURENDRA NATH BANERJEE *v.* MANAGER OF W. LEWIS AND CO.
24 C.W.N. 744=21 Cr. L.J. 845=58 I C. 924=47 Cal. 809.

——S. 495—*Article of human food or drink—Tea dust.*

Tea dust is an "article of human food or drink" within S. 495 of the Calcutta Municipal Act. "Food" includes any article which ordinarily enters into or is used in the composition or preparation of food and includes flavouring matters and condiments. (*Walmsley and Huda*, JJ.) THE CHAIRMAN OF THE CORPORATION OF CALCUTTA *v.* PAGLI. **47 Cal. 53=30 C.L.J. 130=82 I.C. 223=20 Cr. L.J. 607=23 C.W.N. 911.**

——Ss. 493 and 574—*Adulteration of ghee by servant—Master responsible.*

S. 495 of the Act makes all persons liable who are responsible for the sale of adulterated articles so that a master is not exempt, if the servant commits the offence, though the former is not guilty of any connivance. Non-connivance may be a ground for mitigation of the penalty. (*Holmwood and Sharfuddin*, JJ.) SEW KARAN *v.* CORPORATION OF CALCUTTA.
39 Cal. 682=14 I.C. 205=13 Cr. L J. 205=16 C.W.N. 455.

——S. 493-A—*As amended by the Cal. Munl. Act* (1917) *S.* 495-*A*—*Adulteration—Proof.*

In a prosecution for adulteration of Ghee, it is not safe to rely on technical treatises alone without the aid of an expert to whom their alleged effect may be put. (*Woodroffe, Chitty and Smither*, JJ.) GIRANDE VENKATA RATNAM *v.* CORPORATION OF CALCUTTA.
22 C.W.N. 745=46 I.C. 593=19 Cr. L.J. 753=28 C.L J. 32.

——S. 493 (a) Sub. Cl. 1—*Bengal Ghee Adulteration Act* (I *of* 1917) S. 2 (2)—*Standard of purity—Chemical tests—Value of.*

There is no standard of purity of ghee fixed by Legislature; Courts of Law have, therefore, to decide a question of adulteration upon such evidence as is available in each case. As there is no statutory presumption, every case must depend on its own evidence. A statutory standard should be laid down as raising a presumption of adulteration and such cases should not be made to depend on evidence forthcoming in each case to test the value of the Corporation standard. The Court should determine whether the Corporation standard ought to be acted upon or not, but the Court ought not to fix a standard of its own. (*Chaudhuri and Newbould*, JJ.) GRANDE VENKATA RATNAM *v.* CORPORATION OF CALCUTTA.
24 C W N. 388=56 I C. 586=21 Cr. L.J, 490=47 Cal. 633.

——S. 557 (c)—*Measure of value.*

The "market value" of a certain bustee land compulsorily acquired by the Calcutta Municipality shall be determined according to the market value then existing of the land as matters then stood and not by any use to which the land may be put in future, nor by any valuation based on the most advantageous disposition of the land. (*Fletcher and Richardson*, JJ.) MANINDRA CHANDRA NANDI *v.* SECY. OF STATE. **41 Cal. 967=23 I.C. 412=18 C.W.N. 884.**

——S. 557 (d)—*Presumption under—Evasion of—Estoppel.*

The Calcutta Corporation are not estopped by their having assessed two plots as one from proceeding to acquire the land in two separate proceedings though the owners are deprived of the presumption under S. 557 (*d*) in their favour by the action of the Corporation. (*Chatterjee and Greaves*, JJ.) SOSHI LAL DAS *v.* SECRETARY OF STATE FOR INDIA.
22 C.W.N. 538=46 I C. 138=28 C.L.J. 145.

——Ss. 559 (52) and 561—*Bye-law 45—Limitation of hours of theatrical performance.*

Bye-law 45 framed by the General Committee of the Corporation of Calcutta regulating the hours of theatrical performance is not *ultra vires*. Statute 24 and 25 Vict. Chap. 67 gives ample authority to the Bengal Legislature to pass such an act as the Calcutta Municipal Act and to empower the General Committee of the Municipality to frame bye-laws and the General Committee has clear authority to make breaches of the bye-laws punishable. (*Chaudhuri and Newbould*, JJ.) PROBODH CHANDRA BOSE *v.* CORPORATION OF CALCUTTA. **47 Cal. 547=34 I.C. 781=21 Cr. L.J. 173=24 C.W.N. 196.**

——S. 561—*Bye-laws Nos.* 83 *and* 85—*Liability—Breach.*

Bye-law No. 85 under the Act is not *ultra vires* and each of the persons jointly committing a breach of bye-law 83 is liable to be fined to the extent of Rs. 20 and each of the persons who have jointly committed a breach of Bye-law 85 is liable to be punished with the maximum amount of the prescribed fine. 26 C.L.J. 29, overruled. (*Sanderson*, C.J., *Woodroffe, Fletcher and Richardson*, JJ.) AMRITA LAL BOSE *v.* CORPORATION OF CALCUTTA.
44 Cal. 1025=21 C.W N. 1016=42 I.C. 305=18 Cr. L J. 945=26 C.L.J. 215.

——S. 567 and Sch. IV, R. 10—*Rules under—Revision of—Election roll—Omission to give notice.*

Rules framed under S. 567 and contained in Sch. IV have the effect of law and failure to give 3 days' notice required by R. 10 amounts to a very grave irregularity. Persons objecting to the final publication of the election roll, should take steps to prevent publication before the election roll is finally published according is

CALCUTTA MUNICIPAL ACT (III B.C. of 1899), S 575.

rules. (*Chaudhuri*, J.) *In the matter of* AMULYADHAN ADDY. 30 I.C. 307=46 Cal. 132.

——Ss. 578 and 631—*Pleader practising without license—Offence.*

Where a pleader practises in a Court in 1917-1918 without taking a license, *held*, he was guilty of an offence under S. 578 of the Calcutta Municipal Act on the last date of 1917-1918, that is on the 31st March 1918 and a complaint lodged within three months of that date was not barred under S. 631 (1). *Per Richardson*, J.—The offence under S. 578 of the Act lies in the person exercising a profession after the first of July in any year without having the prescribed license. If the profession is so exercised on subsequent days, whether a separate offence is committed on each day or whether it is all one continuing offence, is doubtful. If the profession is exercised on one day only, the profession must be commenced within the following three months. If it is exercised on a number of days, whether the offence is a continuing one or not, the prosecution must be commenced within three months of the last of such days. *Per Shamsul Huda*, J.—For the purposes of carrying on a pleader's profession he need not daily conduct a case or attend or address the Court. The facts of keeping an office for the purpose of receiving his clients, giving them advice or being generally open to engagement as a pleader will constitute the carrying on of a pleader's profession. (*Richardson and Huda*, JJ.) THE CHAIRMAN OF THE HOWRAH MUNICIPALITY *v.* BARADA PRASANNA PAIN. 21 C.W.N. 413=55 I.C. 731=21 Cr. L.J. 363=31 C. L.J. 127.

——Ss. 589, 541, 102 and 63 (3)—*Notice on behalf of General Committee—Proceedings of committee—Legality of—Absence of Chairman's signature—Evidence Act S.* 78.

S. 589 of the Act is no bar to the Secretary of the Corporation, who is also the Secretary of the General Committee signing notices under the Act, but unless a notice purports to have been signed by the Chairman, the special rule of evidence contained in S. 589 cannot apply and the proceedings of the General Committee can be proved only under the general law of evidence. Printed proceedings themselves would not be sufficient legal proof unless the provisions of S. 78 of the Evidence Act are complied with. The mere fact that the Secretary had signed the notice under S. 589, instead of the Chairman, does not in any way affect the merits and is a mere irregularity within S. 102 of the Cal. Muni. Act. (*Fletcher and Beachcroft*, JJ.) THE CORPORATION OF CALCUTTA *v.* PROMOTHO NATH MULLICK. 30 I.C. 643=16 Cr. L.J. 659.

——S. 631—*Limitation—Starting point.*

The limitation under S. 631, runs from the date of the first commission of the offence, *i.e.*, the date when the obstruction or projection was first placed over the street. (*N. R. Chatterjee and Cuming*, JJ.) NARAYAN KISSEN SEN *v.* CORPORATION OF CALCUTTA. 33 C.L.J. 377=63 I C 155=22 Cr. L.J. 619=48 Cal. 602.

CALCUTTA MUNICIPAL ACT (III B.C. of 1899), Sch. V, R. 2.

——S. 631—*Limitation.*

The applicant was prosecuted on a complaint dated 11—5—'20; the complaint alleged that the accused had about 5—9—'19 committed an offence under Ss. 574 and 466 of the Calcutta Municipal Act by keeping and using an unlicensed workshop for manufacturing articles of iron for purposes of trade. *Held*, that the complaint was time-barred under S. 631. *Newbould and Suhrawardy*, JJ.) N.K. SARKAR *v* HOWRAH MUNICIPALITY. 22 Cr. L.J. 589=62 I.C. 575.

——Sch. IV, Rr. 7, 8—*Omission to perform public duty.*

There can be no standard of right and justice except to see whether the public officer has properly performed the duties cast upon him by the statute or not. (*Fletcher*, J.) *In re* ROMESH CHANDRA SEN. 15 C.L.J. 494=16 C.W.N. 472=14 I.C. 682=39 Cal. 598.

——Sch. V, R. 2—*Election of Commissioner—Nomination paper—Description of candidate in the letter—Proposer, seconder and approver—Approver being a firm.*

A nomination paper is invalid in law if it did not contain the description of the candidate. Sch. 5, R. 2 of the Calcutta Municipal Act contemplates that a nomination paper should be self-contained and complete in itself and a letter could not be taken as part of the nomination paper. The 2nd and 3rd forms could not be taken as part of the nomination paper inasmuch as they did not contain the name of the candidate. The nomination paper was bad in law inasmuch as it did not contain the signature of 18 approvers in addition to those of the proposer and seconder. It is clear from Sch. 5, R. 2 that if a person signs a nomination paper of a candidate, either as a proposer or seconder, he cannot also sign it as an approver. Signature of approver No. 15 not being that of an individual but of a firm name, was bad in law and should be rejected. *Per Woodroffe*, J.:—Alternative nomination papers may be sent to the Chairman, so that if one is held either in whole or in part, to be invalid, the other may be used. In such a case, however, each nomination paper should be complete in itself. A candidate may also send in a nomination paper with names of more than 18 voters as mentioned in the rule, in order to meet the case of possible objections to any of the voters whose names appear upon the paper. In such a case more than one nomination paper may be used but the paper must be connected by placing on each papers, the name, description and address

CALCUTTA PORT ACT (III B. C. of 1890), S. 83.

of the candidate as appearing on the first paper. (*Sanderson*, C.J. *and Woodroffe*, J.) NARENDRA NATH MITTER *v.* RADHA CHARAN PAL.
46 Cal. 119=22 C.W.N. 943=48 I.C. 314=28 C.L.J. 289.

CALCUTTA PORT ACT (III B C. OF 1890).

——— S. 83—*'Erection'—Adding* bandh *to Hoogly river is an Erection.*

If a person adds a platform or *bandh* to the existing bed of Hoogly river, within the limits of the Port of Calcutta it is an erection within S. 83. (*Teunon and Suhrawardy*, JJ.) BENODE BEHARI BAGEHHI *v* HOOK.
62 I.C. 328=22 Cr. L J. 504 (Cal.).

——— S. 84—*Conviction—Further direction for removal of erection is bad.*

Where a person is convicted under S. 84, he shculd not be directed to remove the obstruction. The Port Commissioners should themselves remove the obstruction under S. 84 (1) (*Tenuen and Suhrawardy*, JJ.) BENODE BEHARI BAGEEHI *v.* HOOK. 62 I.C. 328=22 Cr. L.J. 804.

——— Ss. 113 and 114—*Liability for loss of goods.*

Port Commissioners are liable in respect of the goods for three days from their arrival, but not afterwards unless they are in default. (*Greaves*, J.) PURNA CHANDRA KUNDOO *v.* PORT COMMISSIONERS OF CALCUTTA.
50 I.C. 58=46 Cal. 56.

CALCUTTA RENT ACT, (III B.C. OF 1920).

—— S. 2 (e)—*Premises—Part of hut is not.*

A part of hut is not covered by the definition of premises in S. 2 (e) of the Calcutta Rent Act for finding a standard rent in respect of a portion of a hut cannot be maintained. (*Woodroffe and Ghose*, JJ.) RAM GOLAM KALWAR *v.* GUMTI SHAW. 69 I.C. 976 (Cal.).

——— Ss. 2 (e) and 15—*'Premises'—Work-shop is not—Standardisation of rent.*

A workshop does not come within the definition of 'premises' in S. 2 of the Act and the fact that the engineer used a room for retiring or for office, does not make a difference. An application for standardisation of rent, therefore, is not applicable to a workshop. (*Chatterjee and Cuming*, JJ.) INDIAN ENGINEERING CO., LTD. *v.* GLADSTONE WYLLIE & CO.
68 I.C. 907=26 C.W.N. 102.

——— Ss. 2 (f) (ii) and 15—*Portion of premises—Sub-letting—First letting—Standard rent how calculated.*

The object of including in the definition of "landlord", a tenant and in the definition of a "tenant" a sub-tenant is to extend the benefit of the Rent Act to sub-tenants. Standard means a rule or model and can only be one. The whole object of the Act is to prevent tenants being made to pay rents which the legislature considers excessive or unreasonable. Standard rent means the rent at which the premises were originally let. Consequently if a tenant sub-lets a portion of the premises, the standard rent of the portion so sub-let is to be determined according to S. 15 (3) of the Act and not under S. 2 (f) (ii) of the Calcutta Rent Act. Under S. 15 (3) the part sub-let is taken to have been first let when the entire premises were let out to the tenant. (*Chatterjee and Cuming*, JJ.) ROBEIRO *v.* ELIAS S. M. JACOB. 27 C.W.N. 569=1923 Cal. 553.

CALCUTTA RENT ACT (III B. C. of 1920), S. 4.

——— Ss. 2 (g) and 11 (5)—*Tenant, meaning of—Suit before the Act—Non-payment of rent—Forfeiture.*

The word 'tenant' is used in a special sense in the Act of 1920 and includes a person whose tenancy has expired even before the Act. Such a tenant is entitled to the benefit of the Act even if a suit for ejectment was instituted before the Act came into operation. If the tenant does not pay rent under S. 11 (5), he is not entitled to the benefits of S. 11. (*Rankin*, J.) BITHALDAS CHANDAK *v.* LALBEHARI DUTT. 25 C.W.N. 957=68 I.C. 361=49 Cal. 369=1922 Cal. 391.

——— Ss. 4 and 11—*Monthly tenant under owner of premises—Statutory tenant—Standard rent—Agreement to pay increased rent to owner—Lease for two years—Illegality of object—Contract Act, S. 23.*

The defendant, a tenant, of a flat at a rent of rupees 65 a month, under the owner of the premises, was holding as a monthly tenant. The position of the defendant while the Calcutta Rent Act was in force, was that he was the statutory tenant of the flat liable to pay the standard rent defined in S. 2, cl. (f). The owner on 11—6—1920 wrote to the defendant refusing the defendant's tender of rent at the old rate and suggesting that the defendant should move the Rent Controller to fix the standard rents. In August, the owner gave the defendant notice to quit by the end of September on the ground suggested by S. 11, cl. 5 *i.e.*, for arrears of rent. The defendant replied that he had deposited the rent with the Controller. On 26-10-1920 the owner granted to the plaintiff a lease of the flat for a term of 2 years at a monthly rent of rupees 100 for the first year and rupees 110 for the second year. The owner gave the defendant notice of the lease, requested him to attorn to the plaintiff as landlord till the end of October, and thereafter, in pursuance of a notice to quit already served upon him, to give vacant possession to the plaintiff. The defendant replied claiming the protection of the Rent Act and refusing to vacate. Subsequently however he attorned to the plaintiff to the extent of depositing with the Controller rent at the old rate for payment to the plaintiff and of applying to the Controller to fix the standard rent as between the plaintiff and himself. The application was made in March 1921, and by an

CALCUTTA RENT ACT (III B. C. of 1920), S. 4.

order, dated 30-6-1921, the Controller fixed the standard rent at Rs 85. After the order on the 31st May the plaintiff's solicitors wrote to the defendant giving him a fresh notice to quit by the end of June 1921. It was asserted that the plaintiff required the premises for his own occupation. This notice was also ineffectual and in July 1921, the plaintiff filed his suit claiming vacant possession of the flat and mesne profits at the rate of Rs. 100 per mensem. *Held*, that the object of the lease by the owner in favour of the plaintiff was clearly to avoid the provisions of the Rent Act and to get a higher rent than was allowed by the Act and that the agreement of lease was void as being opposed to public policy and the provisions of the Rent Act. (*Sanderson*, C.J. *and Richardson*, J.) SALEH ABRAHAM *v.* MANEKJI COWASJI. 50 Cal. 491 = 75 I.C. 521 = 1924 Cal. 57.

——S. 4 (3) (iv)—*Lease for 3 years with option to renew for like period is not one for five years and upwards.*

A lease for a period of three years reserving an option to renew it for another period of three years, cannot be taken to be a lease for "five years and upwards" within the meaning of S. 4 (3) of the Calcutta Rent Act. Hence an application to standardise the rent does lie. (*Greaves and Ghose*, JJ.) BASANTA CHARAN SINHA *v.* RAJANI MOHAN CHATERJI. 39 C.L.J. 85 = 49 Cal. 928 = 26 C.W.N. 711 = 1922 Cal. 514.

——S. 8—*Standard Rent, increase of, by President of Tribunal—Notice is not necessary to entitle landlord to recover rent.*

A notice under S. 8 of the Rent Act is not necessary when the standard rent is fixed by the Controller and has been further increased by the President of the Tribunal, the landlord having complied with the provisions of s. 8 as regards the increase allowed by the Controller. A certificate from the Controller is not necessary in order to entitle the landlord to recover the rent so increased by the President of the Tribunal. (*Sanderson*, C.J., *and Richardson*, J.) COHEN *v.* DIAS. 70 I C. 551 = 26 C.W.N. 961 = 1922 Cal. 475.

——S. 10—*Proviso*—Bona fide *requirements of landlord—Standardisation of rent—Refusal to accept—Deposit of rent with Controller.*

A landlord who has premises sufficient for his requirements should not be allowed to eject tenants because he chooses for his own convenience or profits to deprive himself of the use of the premises which he is occupying and then to say to his other tenants "having deprived myself of the use of the premises which I hitherto occupied, I therefore require the house in which you live for my own occupation and I now propose to eject you." To allow such a plea would be to defeat the object of the Act and in such circumstances a landlord cannot be said *bona fide* to require the premises for his own occupation. It is not enough that a plff. in order to defeat a plea under the Calcutta Rent Act should merely say that the desires the premises *bona fide* for his own occupation. The word in the Act is not "desire" but "require". This involves something more than a mere wish and it involves an element of need. It is not necessary for a tenant to offer rent to his landlord every month and obtain a refusal every month from him before he is entitled to pay to the rent collector. It was not intended that by the Act that such a pass should be gone through every month when the relations are such that the landlord refuses to accept the rent and the tenant is justified in paying the rent to the Controller month by month once there has been a refusal by the landlord to accept. Where the rent had not been standardized by the Rent Controller and no agreement between the parties to pay the increased rent had been entered into, the question as to whether the tenant has paid rent to the fullest extent allowable by the Act does not arise. (*Buckland*, J.) REKHABCHAND DOOGAR *v.* J.R.D' CRUZ. 26 C.W.N. 499 = 69 I.C. 933 = 1923 Cal. 228.

CALCUTTA RENT ACT (III B. C. of 1920), S. 11.

——S. 11—*Applicability.*

The Rent Act does not expressly exclude S. 114, T. P. Act and it cannot abrogate the provisions of the section. (*Greaves*, J.) AHINDRA *v.* TWISS. 49 C. 160 = 70 I C. 75 = 1922 Cal. 394.

——S. 11—*Benefit of section—A defaulting tenant is not entitled to it.*

The Act gives to a mere monthly tenant considerable fixity of tenure upon a condition namely, that he is a rent-paying and not a defaulting tenant. Where the sum of money which the tenant had paid to the Rent Collector was insufficient to meet either the contractual rent or the rent allowed under S. 2 (1) of the Act or the rent ultimately fixed as the standard rent by the Controller: *Held*, the tenant was not in the circumstances a person who was entitled to the benefit of the provisions of S. 11 of the Act. (*Rankin* J.) I. J. COHEN *v.* S. E. HOTTINGER. 49 Cal. 383 = 69 I.C. 988 = 1922 Cal. 380.

——S. 11—*Satisfactory cause.*

Where the defendant-lessee of certain premises intimated to the plff. landlord of his intention to quit the premises on the expiration of the lease, and thereupon the plff. agreed with E to let it to him from that date, *held*, that this was a cause which ought to be deemed satisfactory within S. 11 (1) of the Act. The grounds upon which a landlord can successfully claim an order for possession are not limited to the grounds mentioned in the section. The Court can exercise discretion in his favour upon any other grounds which might appear to the Court to be satisfactory. (*Ghose*, J.) KUMAR MANMATHA NATH *v.* WALTER LOCKE. 68 I.C. 417 (2) = 25 C.W.N. 1012.

CALCUTTA RENT ACT (III B. C. of 1920), S. 11.

——S. 11 (5)—*Benefit of Act when claimable—Failure to pay in time—Effect—Agreement to extend time.*

Where in a suit in ejectment, the benefit of the Rent Act is claimed, the defendant must show that he has paid arrears within 3 months of the Rent Act coming into force, and subsequently paid his rent regularly within the time fixed in the contract with his landlord, or in the absence of any such contract, by the 15th day of the following month, or in the event of the landlord refusing to accept rent, by depositing it with the Rent Controller within a fortnight of its becoming due. Where there is an agreement to extend time for payment before the rent actually becomes due under the lease, then the time within which rent has to be paid under S. 11 (5) may be the extended date, but where default has already taken place, subsequent acceptance of rent by the landlord does not take the matter out of S. 11 (5). (*Buckland*, J.) JETHA BHULCHAND *v* GRACE.
26 C.W.N. 678=70 I.C. 494 (2)=1923 Cal. 227.

——S. 15—*Order rejecting — Application for standard rent—Interference—Government of India Act, S.* 107.

The Rent Controller is a Court subordinate to the High Court which can revise orders under S. 15 of the Calcutta Rent Act in virtue of its powers of superintendence under S. 107 of the Government of India Act. Under S. 15 of the Rent Act it is obligatory on the Rent Controller to grant a certificate certifying the standard rent. Where the rooms let are certain, easily ascertainable ones and subject to no doubt, the order of the Rent Controller rejecting an application for fixing a standard rent is liable to be set aside. (*Rankin*, J.) ALLEN BROS & CO. *v.* BANDO & CO. 49 Cal. 931=1923 Cal. 169=70 I.C. 371=26 C.W.N. 845.

——S. 15—*Rent Controller—Status and functions of—Order of Rent Controller—Revision—Govt. of India Act, S.* 107.

The High Court has the power of revising the Rent Controller's orders under its original powers of superintendence under S. 107 of the Government of India Act. (*Chatterjee and Cuming*, JJ.) H. D. CHATTERJEE *v.* L. B. TRIBEDI. 26 C.W.N. 78=49 C. 528=68 I.C. 274=1922 Cal. 427.

——S. 15—*Order rejecting—Application for standard rent*—Locus standi *of applicant—Revision of rent—Controller's order.*

The petitioner a woman of the town applied to the Rent Controller under S. 15 of the Act for standardisation of the rent of the premises occupied by her. The application was dismissed on the ground that the petitioner had no *locus standi*. It appeared, however that the landlord, the opposite party did not set up the invalidity of the tenancy but invited the Court to fix the standard rent at a certain amount. *Held*, that in the circumstances of the case the Rent Controller should have entered the application. An

CALCUTTA RENT ACT (III B. C. of 1920), S. 18.

application in revision against the order of the Rent Controller made under S. 15 lies on the Appellate Side of the High Court. (*Chatterjee and Pearson*, JJ.) KALI DASI *v.* KANAI LAL.
64 I.C. 709=26 C.W.N. 52.

——S. 15 (1)—*Standard rent.*

Standard rent can be fixed before expiry of the lease. (*Chatterjee and Cuming*, JJ.) CHATTERJEE *v.* TRIBEDI. 26 C.W.N. 78=68 I.C. 274=49 Cal. 528=1922 Cal. 427.

——S. 18—*Objection to Controller's jurisdiction—Revision by Improvement Tribunal—Competency.*

In a rent standardising case the landlord objected to the Controller's jurisdiction on the ground that the subject-matter of the proceedings could not come under the term 'premises'—On the objection being overruled, he applied to the President of the Improvement Tribunal for revising the order—*Held*, the landlord was entitled to a decision on the question, and the fact that he objected to the jurisdiction of the Rent Controller did not disentitle him to his remedy under S. 18 of the Rent Act. (*Ghose and Panton*, JJ.) DAMANIA BROTHERS & CO. *v.* JASTON & CO. 27 C.W.N. 287=73 I.C. 47=1923 Cal. 180.

——S. 18—*Order of Rent Controllor fixing standard rent is open to revision.*

The Act contemplates fixing of the standard rent by the Controller even in cases not coming under S. 16; in other words in cases coming under S. 2 (*f*) (*i*). The order under S. 2 (*f*) (*ii*) of the Rent Controller is therefore liable to revision under S. 18 of the Act. (*Chatterjee and Panton*, JJ.) ASUTOSH CHATTERJEE *v.* UPENDRA CHANDRA AICH. 37 C.L.J. 101=72 I.C. 221=27 C.W.N. 50=1923 Cal. 33.

——S. 18—*Calcutta Improvement Tribunal Rent Controller—Order—Revision.*

The President of the Improvement Trust Tribunal had no jurisdiction to revise the Rent Controller's order when the latter did not fix a Standard rent. (*Chatterjee and Cuming*, JJ.) CHATTERJEE *v.* TRIBEDI.
26 C.W.N. 78=68 I.C. 274=49 Cal. 528=1922 Cal. 427.

——Ss. 18, 24, 141—*Calcutta Improvement Tribunal—Power of President—Order for costs.*

The jurisdiction exercised by the President of the Calcutta Improvement Tribunal under S. 18 of the Rent Act, is civil jurisdiction, so that in proceedings under the section, the President is a Court of Civil jurisdiction within the meaning of the Code of Civil Procedure and under S. 141 of that Code as well as under the specific provision of S. 24 of the Rent Act, the procedure laid down in the Code in regard to suits, applies as far as may be to such proceedings. Thus the president is vested with powers of a Civil Court and he can pass an order for

CALCUTTA RENT ACT (III B. C. of 1920), S. 20.

costs and enforce the same. *(Chatterjee and Chotzner, JJ.)* BATAKRISTO PRAMANIK *v.* A. K. ROY. **68 I.C. 177=26 C.W N. 30.**

——**S. 20**—*Summary enquiry—President of Improvement Tribunal has power to hold—Criminal Procedure Code, Ss. 5 (2) and 29.*

The President of the Calcutta Improvement Tribunal is competent to hold the summary enquiry referred to in S. 20 of the Calcutta Rent Act under the provisions of Chapter 22 of the Criminal Procedure Code. *(Ghose and Cuming, JJ.)* ISHAN CHANDRA SARKAR *v.* MANMATHA NATH DUTTA.
37 C.L J. 298=71 I.C. 611=1923 Cal. 339.

——**S. 20, R. 4**—*Is ultra vires.*

S. 20 of the Calcutta Rent Act, because it constitutes a new Criminal Court is not *ultra vires* of the Governor-in-Council of Bengal and the Acts mentioned in it come within the definition of 'offence' contained in S. 4 (*o*) of Cr. P. Code and create a new offence. Rule 4 under the Act is not an "enactment" under S. 5 (2) of the Cr. P. Code and is *ultra vires* of the rule-making power of the Government. *(Sanderson, C. J. and Richardson, J.)* GOBARDHONE DAS *v.* DOOLICHAND.
33 C.L.J. 551=25 C.W.N. 661=61 I.C. 210=22 Cr. L.J. 354.

——**S. 23, R. 25**—*Jurisdiction—Rent Controller's Court is one of Civil jurisdiction.*

(Chatterjee and Cuming, JJ.) CHATTERJEE *v.* TRIBEDI.
26 C W.N. 78=68 I.C. 274=49 Cal. 528=1922 Cal. 427.

CALCUTTA SUBURBS ACT (XXI OF 1837).

——**S. 2 (1)**—*Accused found in possession of cement — No evidence of loss—Suspicion—Penal Code, S. 411.*

The accused was convicted under S. 2 of Act XXI of 1857 for being found in possession of some cement on the mere evidence, that he was a maistry of the E. I. Ry. Co., and that there was a heap of cement lying on the premises of the Ry. *Held*, that in the absence of evidence of any missing of the cement by the Co., shortly before or previous to the finding of the cement, there could not be any reasonable suspicion within S. 2 of the Act. The only difference between an offence under this Act and one under S. 411, I.P C., is that under this Act, Proof that the stolen property has been in the hands of a third person who actually stole it, need not be given as is required under S. 411. *(Holmwood and Imam, JJ.)* ABDUL KARIM *v.* EMPEROR.
15 I C. 492=13 Cr. L.J. 492.

CALCUTTA UNIVERSITY ACT (II OF 1857) AND (VIII OF 1904.)

——*Trusts and grants to.*

Power of the Calcutta University under the above Acts to hold and possess property are extensive and the University can accept trusts, grants, etc., even when burdened with conditions and the grant cannot fail even if the conditions accompanying it, are invalid or incapable of fulfilment by the University. The discretion of the Calcutta University to accept gifts subject to conditions is not fettered by either Act II of 1857 or Act VIII of 1904. An acceptance of a gift or trust by the Calcutta University under the Acts without obtaining the sanction of the Governor-General or without a formal acceptance by the Senate as required by Regulations is valid as these are mere irregularities curable at any time. *(Imam and Greaves, JJ.)* JITENDRANATH PALIT *v.* LOKENDRANATH PALIT. **34 I.C. 657=22 C.L.J. 393.**

CALCUTTA UNIVERSITY REGULATIONS.

——*Object.*

The Calcutta University Regulations which are derived from the Acts themselves, do not curtail the power of the University to accept endowments of professorships made by donors subject to conditions. *(Imam and Greaves, JJ.)* JITENDRANATH PALIT *v.* LOKENDRANATH PALIT. **34 I.C. 657=22 C.L.J. 393.**

——**Ss. 1 and 2**—*Scope of.*

The sections read together do not mean that the University can accept such professorships only as are sanctioned by the Governor-General. The discretion is vested exclusively in itself. *(Imam and Greaves, JJ.)* JITENDRANATH PALIT *v.* LOKENDRANATH PALIT,
34 I.C. 657=22 C.L.J. 393.

CANCELLATION—

See (1) LIMITATION ACT, ARTS. 91 AND 95.
(2) SP. REL. ACT, S. 39.

CANON LAW.

——*Roman Catholic Churches.*

The Canon law should be invoked to decide questions of temporal rights in Roman Catholic Churches. *(Benson and Sundara Aiyar, JJ.)* AMLALAN PAKKIYA UDAYAN *v.* BATHE.
39 Mad. 418=(1912) M.W.N. 152=13 I.C. 599=24 M L.J. 630.

CANTONMENT.

See CANTONMENT ACT.

CANTONMENTS ACT (XIII OF 1889).

——**S. 32**—*Oral gift of property.*

Under S. 32 of Cantonment Act a gift of property, situate in a Cantonment must be made in the manner provided by S. 123 of the T.P. Act. An oral gift by a Muhammadan of such property is not valid. *(Abdul Rahoof, J.)* MUHAMMAD BEG *v.* AMAR NATH.
54 I.C. 829=2 U.P.L.R. (Lah.) 33.

——(II OF 1902).

——**S. 19**—*Liability of landlord for repairs by tenant—Procedure.*

To entitle a tenant to deduct the cost of repairs carried out by him from the rent, the pro-

CANTONMENTS ACT (II of 1902), S. 19.

CANTONMENT CODE (1899), S. 89.

cedure laid down in Act II of 1902 should have been adopted. (*Kiramat Husain*, J.) DEBI PERSHAD *v.* MATHEWS. 11 I.C. 471 = 8 A. L.J. 1050.

CANTONMENT CODE (1899).

———Ss. 89 and 104—*Conviction under a wrong section—Legality—Ignorance of law.*

It is illegal to convict an accused person under a wrong section of the Cantonment Code; whether the conviction can be maintained on other grounds is perfectly immaterial. A conviction under section 104 cannot be set aside on the ground of mere ignorance on the part of the accused of the amendment to that section. Ordering payment of a future daily fine on default of compliance with an order of Court is improper. The proper procedure in cases, where such an order is not complied with, is to institute further proceedings giving the accused an opportunity of defending himself. The penal sections of the Cantonment Code must be construed strictly both in favour of and against an accused. (*Kensington*, J.) EMPEROR *v.* SITA RAM. 12 Cr.L J. 371 = 60 P.W.R. Cr. 1911 = 11 I.C. 139 = 206 P. L.R. 1911.

———S. 94—*Notice of nature—Extent of repairs, if necessary.*

Under S. 94 of the Code, notice must be given to the owner as to the precise nature and extent of the repairs to be carried out and a notice not containing these particulars is illegal. (*Shahdin*, J.) EMPEROR *v.* QUADIR BAKSH.
3 P R. (Cr.) 1912 = 9 P.W.R. (Cr.) 1912 = 13 Cr. L.J. 17 = 13 I.C. 209 = 56 P.L.R. 1912.

———1912.

———Ss. 92 and 107—*Occupier—Magistrate ordering prosecution—Cr. P. Code, Ss.* 191 *and* 556.

An offence against S. 92 of the Cantonment Code may be committed by the occupier or trespasser and not merely by the owner or lessee. On a report by a Cantonment Official, the Cantonment Magistrate directed a prosecution and then tried the case himself. *Held*, the Magistrate should have informed the accused that he was entitled to have the case tried by another Magistrate and should not have tried the case himself. (*Wilberforce*, J.) ANANDI PRASAD *v.* EMPEROR. 21 Cr. L J 394 = 55 I.C. 1002 = 2 U.P.L.R. 78 (Lah.).

———S. 103-B—*Proceedings without notice.*

Proceedings without written notice to accused under S. 103-B are illegal. (*Richards*, C.J.) GUR DIN *v.* EMPEROR.
50 I.C. 992 = 20 Cr. L.J. 384 = 17 A.L.J. 303.

———S. 231, Cl. (2)—*Absence of nine days—Failure to appoint agent—Effect of.*

An absence of nine days from Cantonment station without appointing an agent renders the delinquent liable to conviction and punishment

CANTONMENTS HOUSE ACCOMMODATION ACT (II of 1902), S. 6.

under S. 231, sub-section (2) of the Code. (*Pratt*, J.C. *and Fawcett*, A.J.C.) HOTCHAND *v.* EMPEROR. 19 Cr L J. 974 = 47 I.C. 874 = 12 S.L.R. 40.

———Rr. 97 and 107-A.—*Building—Ruinous condition—Order—Penalty.*

It is competent to a Magistrate to sentence a person for having persisted in his failure to carry out his order only as regards the past; but not as regards the failure in the future. A notice under R. 97 of the Code may require the owner to do one of two things, *i.e.*, to remove the building or cause repairs to be made. The notice need not be in the alternative or give a choice to the owner. (*Heaton and Shah*, JJ.) BYRAMJI *v.* EMPEROR. 43 Bom. 836 = 32 I.C. 288 = 20 Cr. L.J. 624 = 21 Bom. L.R. 759.

CANTONMENTS HOUSE ACCOMMODATION ACT (II OF 1902).

———Ss. 6, 8, 18 and 21—*Dispute as to rent—Reference to arbitration—Decision final—Military Officers, meaning of—Amount of rent when matter of contract—Procedure—Fresh appropriation.*

The decision of the Committee appointed under the Act on a matter referred to them under S. 21 is final. The words 'a Military Officer' and the 'Military Officer' in Ss. 6, 8 and 18 refer only to the particular Military Officer at whose instance a notice under S. 9 is issued and not to his successor-in-office. The Act contemplates a fresh appropriation of rent whenever the owner of a house in Cantonment refuses to let it at reasonable rent to a Military Officer who can bring himself under S. 8 (2) of the Act. When the procedure prescribed in the Act is not followed, the amount of rent payable by the Military Officer is a matter of contract expressed or implied between the owner and that officer. (*Chamier*, J.) RAHIM BAKSH *v.* S.M. RICE. 18 I.C. 708 = 11 A.L.J. 129.

———Ss. 6 and 11—*Lands in cantonment—Conditions as to alienation—Validity.*

Cantonment land was granted by Government to plff. on condition that the grantee wishing to alienate must take the permission of military authorities. Plff. wanted to sell the land to defendant and on applying for sanction, the military authorities proposed to give it on condition the defendant would let out the bungalow to a military officer when required and should not claim to live in it as owner. *Held* the condition was perfectly justifiable and defendant was bound to complete the sale. (*Mulla*, J.) ARDESHIR FRAMJI *v.* TRIGAMDASS GORDHANDAS. 25 Bom. L.R. 933 = 1924 Bom. 258.

———Ss. 6, 35 and 37—*Officer commanding division—Finality of, order by.*

Under S. 35 of the Act, the Officer Commanding the division is the tribunal to which a person aggrieved by a notice under S. 6, must

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apply for redress, and the decision of the officer thereon is final under S. 37 of the Act. (*Crouch*, A.J.C.) DE'VERTENIL *v.* CANTONMENT COMMITTEE, KARACHI. 37 I C. 267 = 10 S.L.R. 113.

CANTONMENT LAND.

——*Ownership of, vested in Government —Adverse possession cannot be had against Secy. of State.*

The Secretary of State is the absolute owner of all cantonment land, unless it can be proved satisfactorily that he has parted with the ownership. In the absence of evidence, all cantonment land belongs to the Secretary of State. There can be no adverse possession against him. The only position open to a person occupying land in cantonments which has not been specifically transferred by the Secretary of State, is the position of a tenant or the position of a licensee. (*Stuart*, J.) SECY. OF STATE *v.* MULLA. 66 I C. 682 = L.R. 3 A. 169 (Rev.) = 1922 All. 57.

——*Permanent tenancy—Evidence of—Building on land—Estoppel.*

The burden of proving permanent tenancy in Cantonment area is on him who pleads it. The facts that they and their predecessors held the lands without a lease for a very long time, that the rent was never altered, that succession to the lands by transfer and inheritance has been established, and that buildings have been erected on the lands are not sufficient to establish permanent tenancy, nor do they raise any presumption of ownership in favour of the defts. or their predecessors-in-title. Plff. is not estopped from denying the permanent character of the tenancy though permanent structures are constructed on such lands to his knowledge. (*Sultan Ahmed*, J.) ONKAR MAL MARWARY *v.* SECRETARY OF STATE.[1]
66 I.C. 813 = 2 U.P.L.R. (Pat.) 124.

CANTONMENT TENURE.

——*Military zone — Right of private individuals—Licensees—Right to compensation —Presumption of title from possession.*[3]

The Secretary of State sued to eject deft. from premises within limits of the Poona Cantonment on the ground that the land belonged to the Government and deft. held it only on Cantonment or Military tenure which entitled the Government to resume it at their will and pleasure, subject to payment of compensation for the structures erected thereon. Deft. contended that he was the absolute owner of the land and claimed compensation on that footing: *Held*, on the evidence and on the construction of Bombay Regns. I of 1819, and XXII of 1827, etc. that the Military had the full proprietary right in the whole Cantonment. The deft. was a mere licensee of the land in suit and the house thereon was subject to expropriation at a price to be fixed by the authorities. Mere possession or occupation of the site of the house in question did not afford any presumption that deft. was the owner in fee. (*Lord Robson.*) KAI KHUSRU ADERJI *v.* SECRETARY OF STATE.
36 Bom. 1 = 38 I.A. 204 = 15 C.W.N. 909 = 10 M.L.T. 97 = (1911) 2 M.W.N. 23 = 14 C.L.J. 268 = 13 Bom. L.R. 788 = 8 A.L.J. 1219 = 12 I.C. 117 = 21 M.L.J. 1100 (P.C.).

CARRIAGE.

See CARRIER.

CARRIER.

See also (1) CONTRACT ACT, Ss. 150 to 164.
(2) RAILWAYS ACT, Ss. 72 to 77.

——*Railways—Liability of carriers.*

Whether the goods are to be delivered to the consignee at his house or at the termination of the journey, depends on agreement and on the usual course of business. If the goods are delivered at the house to which they are addressed, the carrier has done all that he had contracted to do and the mere fact that he delivers to some other person than the consignee at that house is no proof of breach of duty on his part. But if he delivers at any other place to any person other than the consignee, he does so at his peril. But where the carrier is not bound to deliver at the house of the consignee, his liability as carrier ceases when he has brought the goods to the station of destination and has tendered or delivered them within a reasonable time, to the consignee or has allowed him reasonable time in which to remove the goods. (*Kanjji*, J.) RAMACHANDRA JAGANNATH *v.* GREAT INDIAN PENINSULA RAILWAY.
44 I.C. 401 = 20 Bom. L.R. 591.

——*Railway Company — Negligence — Action for personal injuries—Condition relieving from liability—Special contract.*

A carrier is liable for injury arising from negligence in the execution of his contract to carry unless he has effectively stipulated that he shall be free from such liability. If the contract is one which deprives the passenger of the benefit of a duty or care which he is *prima facie* entitled to expect that the Railway Company has accepted, the latter must discharge the burden of proving that the passenger assented to the special terms imposed. This he may be shown to have done either in person or through the agency of another. Such agency will be held to have been established when he is shown to have authorised antecedently or by way of ratification the making of the contract under circumstances in which he must be taken to have left everything to his agent. In such a case, it is sufficient to prove that he has been content to accept the risk of allowing terms to be made without taking the trouble to learn what was being agreed to. In such cases, the Railway Company may infer his intention from his conduct. Where, therefore, a passenger who is to be carried upon special conditions at a reduced fare has allowed terms to be made for him by an agent the presumption

is that the passenger was content to accept the risk without enquiring what the terms agreed upon by his agent were. (*Viscount Haldane*) GRAND TRUNK RY. CO. OF CANADA *v.* ROBINSON.

31 I.C. 684=19 C.W.N. 905 (P.C.).

———*Railway—Duty to re-weigh goods.*

At the time of delivery a Railway Company is not bound to give, after re-weighing, a certificate of shortage. Refusal on the part of the consignee to take delivery in consequence of the refusal to give a certificate is sufficient to throw the loss arising from deterioration of the goods on the consignee. (*Fletcher and Huda*, JJ). JAGAN NATH MARWARI *v.* EAST INDIAN RAILWAY COMPANY. **45 I.C. 933=22 C.W.N. 902.**

———*Damages—Degree of care.*

Goods consigned to a Railway Company for carriage were, during transmission, destroyed by a severe cyclone. *Held*, in a suit for value of the goods that the Company was not liable. Where the negligence of a person together with some ordinary cause, causes injury to some other person, the happening of such ordinary cause extraneous to the negligent person will not excuse the person. But when an extraordinary cause co-operating with the negligence of a person produces injury to some other person, the negligent person is not liable. (*Mookerjee and Cuming*, JJ.) SURENDRA LAL CHAUDHURI *v.* SECRETARY OF STATE. **38 I C. 702=25 C.L.J. 37.**

———*Wrong delivery of goods—Liability—Calcutta Port—Sch. S. 91.*

A contract of carriage by a shipping company is at an end when it delivers the goods to the Port Commissioners. The act of the Company in sending out notice of arrival and issuing a delivery order to a person, whom, they *bona fide* believed to be the person entitled to the goods was not an act for which they could be made liable. It is the duty of the consignee to ascertain when the goods will arrive and to be ready to take delivery. (*Chitty*, J.) FREEMAN *v.* P. AND O.S.N. CO. **25 I.C. 885=41 Cal. 703.**

———*Bill of Lading—Special clause against liability—Shipper cannot sue—Different ink.*

Where in a bill of lading a special clause is stamped with a rubber-stamp and with different ink, 'Goods within mentioned have not been tallied and it is agreed that neither the shippers nor the receivers of Cargo have any claim under this bill of lading for shortage', and the bill is accepted by the shipper he cannot sue the shipping company for short delivery on the ground that the clause was not properly brought to his notice. (*Wallis*, C. J. *and Krishnan*, J.) BRITISH INDIA STEAM NAVIGATION CO. *v.* KRISHNASWAMI AIYAR. **62 I.C. 709=30 M.L.T. 18 (H.C.).**

———*Freight paid cannot be recovered.*

Where freight is paid in advance for the carriage of goods by sea to a shipowner, he

gets it absolutely and the shipper of goods cannot recover it. (*Ayling and Odgers*, JJ.) KRISHNA NAIK AND SONS *v.* CAYYA IRVINE & CO. **44 Mad. 145=40 M.L.J. 87=62 I C. 372=13 L.W. 273=(1921) M.W.N. 38=29 M.L.T. 85.**

———*Liability of—Non-delivery of goods—Continuous carriage.*

A carrier in its general sense means a person or company which undertakes to transport the goods of another person from one place to another for hire. Where goods have to be carried with the aid of different agencies to arrive at the destination, the carrier with whom the contract is made at one end is, in the absence of a contract, limiting his liability to his own transport system, liable for loss or destruction of the goods beyond his own system or in consequence of act done by or default of persons other than his own servants. Unless there is a contract to the contrary, the consignor cannot hold the Company with whom he did not contract, liable for the loss, when all that is complained of, is non-feasance. Where there is an agreement between two Companies constituting one as the agent of the other and both are working for joint benefit, either Company may be sued. (*Wallis*, C. J. *and Kumaraswami Sastri*, J.) MYLAPPA CHETTIAR *v.* BRITISH INDIA STEAM NAVIGATION CO., LTD. **34 M L.J. 553=45 I C. 485=8 L.W. 46=24 M.L T. 175.**

———*Carried by sea--Law governing common carriers—Railways Act, Carrier Act* (1865)—*Contract Act, S.151--Warranty of seaworthiness.*

Carriers by sea for hire are common carriers though the Carriers Act of 1865 does not apply to them. 28 Mad. 400, foll. The duties and liabilities of a common carrier are governed in India by the principles of the English common law on the subject expect where they have been departed from by the Carriers Act, 1865 or by the Railways Act of 1878 and 1890. A common carrier's responsibility is not within the Contract Act. 18 Cal. 620 (P. C.), foll. There is no implied warranty of seaworthiness for lighters and boats etc. employed to land goods. *Lane v. Nixen*, 14 W. R. 641, Rel. (*Sadasiva Aiyar and Tyabji*, JJ.) KARIADAN KUMBAR *v.* B. I. S. N Co., LTD. **38 Mad 941=20 I C. 546=(1913) M.W.N. 558=14 M L.T. 137=25 M.L.J. 162.**

———*Negligence—Common Law liability—contract to the contract is valid.*

Under Indian Law, a common carrier by Sea can contract out of the Common Law liability for negligence of himself and his servants provided the saving clause is expressed in clear and unambiguous terms. (*Twomey*, C.J., *Robinson and Rigg*, JJ.) B. I. S. N. CO. *v.* ALIBHAI. **62 I C. 378=10 L.B.R. 292 (F.B.).**

CARRIER.

———*By sea—Goods carries at shipper's risk—Carrier not liable.*

Where the bill of lading contained the clause 'At shipper's risk with option of carrying on deck' and the goods (betel leaves) went bad for want of ventilation, *held* that the carrier was not liable in damages, being exempted by the special clause. (*Fox*, C J.) BRITISH INDIA STEAM NAVIGATION CO. *v.* JIAWOOLA.

8 Bur. L.T. 273=30 I C. 939 (1)= 8 L.B.R. 293.

———*Negligence — Stipulation exempting from liability—Construction.*

Stipulations exempting the carrier from liability will be held to limit his liability as insurer and not his liability for negligence unless negligence is expressly included. 32 Mad. 96, foll. Words of exception in contracts and grants are construed strictly against the persons in whose favour they are inserted on the principle that no man shall derogate from his grant. (*Pratt*, J.C. *and Hayward* A.J.C.) AJUMAL *v.* SECRETARY OF STATE.

17 I.C. 37=6 S.L.R. 103.

CARRIERS ACT (III of 1865).

———*Contract to carry—No route fixed—Convenient route to be followed—Cartage.*

In a contract to carry a load from one place to another, where no fixed route is settled upon, the more convenient route may be followed though it is a longer one and cartage should be calculated on the same. (*Richards*, C.J. *and Banerjee*, J.) AGENT OF B.N.W. RAILWAY *v.* RAM SUNDER. 11 I.C. 43 (Cal.).

———*Application—Carriers by sea in India.*

In India carriers by sea do not get the benefit of Act III of 1865. (*Macleod*, J.) BOGGIANO & CO. *v.* ARAB STEAMERS, LTD.

40 Bom 529=33 I.C. 536=18 Bom. L.R. 126.

———*Common carrier, liability of—Negligence—Burden of proof.*

A common carrier in India is liable as an insurer. He is responsible for safety of goods entrusted to him except when loss or injury arises from Act of God or King's enemies. But this liability may be varied by contract. The burden of proving absence of negligence is on the common carrier, loss or damage being deemed to be *prima facie* proof of negligence. (*Mookerjee and Richardson*, JJ.) AKHIL CHANDRA SHAHA *v.* INDIA GENERAL NAVIGATION AND RAILWAY CO., LTD.

29 I.C. 260=21 C.L.J. 565.

———*Scope.*

The Carriers Act is not exhaustive. The liability of the common carriers is governed by the English Common Law as modified by the Carries Act. A common carrier is therefore subject to two distinct classes of liability, the one as insurer, in which the element of default is absent, the other for losses, as he is under an

CARRIERS ACT (III of 1865), S. 6.

obligation to carry safely, in which that element is present. The Carriers Act modifies this by providing that the liability as insurer for goods not mentioned in the schedule may be limited by special contract where the loss is due to negligence. (*Jenkins*, C.J. *and Woodroffe*, J.) BRITISH AND FOREIGN MARINE INSURANCE COMPANY *v.* INDIA GENERAL NAVIGATION AND RY. CO., LTD.

38 Cal. 28=9 I.C. 364=15 C.W.N. 226.

———*Indian Railways Act.*

A common carrier does not cease to fill that character, if he enters into a special contract limiting his liability both under the Carrier's Act, and under the Indian Railways Act, which contemplates such limitations. (*Drake-Brockman*, J.C.) ALI MOHAMMAD *v.* GREAT INDIAN PENINSULA RAILWAY COMPANY.

31 I.C. 474=11 N.L.R. 174

———*Position of.*

Carrier is ordinarily the agent of the buyer not only to take delivery but also to assent to appropriation. (*Pratt*, J.C. *and Fawcett*, A.J.C.) MAYAMAL BISHINDAS *v.* SANDAY PATRICK & CO.

12 I.C. 662=5 S.L.R. 97.

———S. 2—*Carrier—Meaning of.*

The definition of a "Common Carrier" in S. 2 of the Carriers Act, 1865, is framed without reference to the extent of his liability. (*Drake-Brockman*, J.C.) ALI MUHAMMAD *v.* GREAT INDIAN PENINSULA RAILWAY CO.

31 I.C. 474=11 N.L.R. 174.

———Ss. 2 and 6—*Contract Act—Bailee—Common carrier.*

Duties and liabilities of common carriers in India are governed by English Common Law and Carriers Act and not by the law relating to bailees under the Contract Act. Common carriers are liable as insurers and not merely as bailees protected by statute or special contract. A licensee of a ferry is a common carrier. (*Saunders*, J.C.) MAUNG PO TAW *v.* HARAMDI MISSAY. 30 I C. 862= 3 U.B.R. (1918) 120.

———Ss. 3, 4 and 8—*Liability for loss of property—Negligence or criminal act.*

The liability for loss or damage is not defeated by the fact that the goods delivered as luggage are in fact merchandize. 19 I.C. 756, ref. (*Chatterjee and Walmsley*, JJ.) INDIA G. S. N. CO., LTD. *v.* GOPAL CHANDRA GUIN. 41 Cal. 80=19 I C. 756= 17 C.W.N. 970.

———Ss. 6 and 8—*Steamer Company—Negligence or criminal act of common carrier.*

Where by a special contract a Steamer Company, common carriers were exempted from liability for any loss or damage unless it arose from the negligence or criminal act of their servants or agents. *Held*, that if the carries seek exemption from liability they must prove

CARRIERS ACT (III of 1865), S. 8.

that the loss must have been occasioned otherwise than by the negligence or criminal act of themselves, their servants or agents. The loss of goods is *prima facie* evidence of the negligence or criminal act of the carriers, their servants or agents. (*Stephen and Holmwood*, JJ.) INDIA GENERAL STEAM NAVIGATION CO., LTD. *v.* BHAGAWAN CHANDRA PAUL.
40 Cal. 716=17 C.W.N. 633=19 I.C. 245=17 C.L.J. 639.

——S. 8—*Carriage of goods—Goods delivered to Railway Company—Carriage by Steamship Company under arrangement with Railway Company—Loss—Liability of Steamship Company.*

Where by an arrangement with Railway Company goods delivered to it, were to be transported by a Steamship Company and the goods were destroyed on board a steamer. *Held*, that although there was no contract between it and the plff. the Steamship Company was nevertheless liable as a common carrier for the loss. (*Rankin*, J.) DEKHARE TEA CO. *v.* ASSAM BENGAL RAILWAY CO.
47 Cal. 6=57 I.C. 406=23 C.W.N. 998.

——S. 8—*Agreement limiting liability of carrier.*

A clause in a contract of carriage agreeing to hold the carriers indemnified from and against all claims which may be insured against, nevertheless is governed by S. 8 and does not relieve the carriers of liability arising from the negligence of their servants. It is not a separate contract of indemnity but part of the contract of carriage. (*Jenkins, C.J. and Woodroffe*, J.) BRITISH AND FOREIGN MARINE INSURANCE CO. *v.* INDIAN GENERAL NAVIGATION AND RAILWAY CO., LTD. **15 C.W.N. 226=9 I.C. 384=38 Cal. 28.**

——S. 9—*Negligence—Onus of proof.*

The loss or damage to the goods is *prima facie* proof of a negligence and under S. 9 of the Act, the burden of proof as to the absence of negligence is thrown upon the common carrier. (*Mookerjee and Fletcher*, JJ.) INDIA GENERAL NAVIGATION AND RAILWAY CO., LTD. *v.* EASTERN ASSAM COMPANY, LTD.
47 Cal. 1027=61 I.C. 14=33 C.L.J. 72.

——S. 9—*Burden of proof.*

The onus of proving negligence of the carrier is not upon the plff. (*N.R. Chatterjee and Walmsley*, JJ.) INDIA G. S. N. CO LTD *v.* GOPAL CHANDRA GUIN. **41 Cal. 80=19 I.C. 756=17 C.W.N. 970.**

——S. 10—*Notice—Necessity of—Damages—Suit for.*

To maintain a suit for damages for short delivery against a common carrier, a notice of claim under S. 10 of the Act must be given even though the carrier came to know of the claim *aliunde* within six months' time and had no difficulty in tracing the goods. (*Chitty and Beachcroft*, JJ.) RIVER STEAM NAVIGATION COMPANY, LTD. *v.* HAZARIMAL MULTANMAL.
41 I.C. 919=27 C.L.J. 294.

——S. 10—*Notice—Essentials.*

It is necessary that notice should be given by the plff. to the carrier upon institution of the suit. It is not sufficient that the carrier is aware of the loss from some other source. (*Jenkins, C.J. and Woodroffe*, J.) BRITISH AND FOREIGN MARINE INSURANCE CO. *v.* INDIA GENERAL STEAM NAVIGATION AND RAILWAY CO. **9 I.C. 960=38 Cal. 50.**

——Ss. 58 and 9.—*Carrier's liability—Injuries of goods—Through booking of goods—Negligence—Onus of proof—Non-feasance and misfeasance.*

Plff. delivered 343 chests of tea to the first deft. (Railway Company) for transport to Chittagong and thence to England the railway receipt being in the usual form used for land transport from Assam to Chittagong. The first deft. delivered the goods to the second deft. by river in steamers and flats belonging to the second deft. under some arrangement which was notified. The tea was burnt during transit. Plff. sued both the defts. for the recovery of the value of the tea. The action against first deft. was dismissed under S. 77 of the Railways Act, 1890 for want of the requisite notice. *Held* there was no contract between the plff. and the second deft. and that under the arrangement there was a general contract between the defts. whereby one became a sub-contractor to the other. Under the circumstances the 1st deft. had no authority to act as agent of the second deft. to enter into a contract for carriage on the latter's behalf. The second deft. was a common carrier and as such was liable to the plff. who was the owner of the goods. The Carriers Act, 1865 makes a common carrier liable to the owner of the goods as such, though not as insurers. Plff. was entitled to succeed inasmuch as he had established negligence on the part of the second deft. 5 Bom. 371; 24 Cal. 786; 39 Bom. 191; 27 C.L.J. 615, ref. (*Rankin*, J.) THE DEKHARE TEA CO., LTD. *v.* THE ASSAM BENGAL RAILWAY CO., LTD.
47 Cal. 6=57 I.C. 406=23 C.W.N. 998.

CASBATI.

See LAND TENURE.

CASE LAW.

See PRACTICE—PRECEDENT.

CASTE.

See also (1) C.P. CODE, S. 9.
(2) HINDU LAW—CASTE, CONVERSION.

——*Duty of Court is not to interfere.*

Courts in India should refuse to interfere with the autonomy of caste, *i.e.*, with the decisions of caste Panchayats provided they are not opposed to natural justice. (*Tudball and Rafique*, JJ.) BESHAMBAR DAS *v.* GOBINDAS. **23 I.C. 301=12 A.L.J. 352.**

CASTE DISABILITIES REMOVAL ACT (XXI of 1850).

———*Bengal Regulation* (VII *of* 1832), *S.* 9 —*Effect of—Joint Hindu family—Conversion of father to Islam—Right of son—Adverse possession—Lim. Act* (XIV *of* 1859), *S.* 12.

The effect of S. 9 of the Bengal Regulation (VII of 1832) and of Act (XXI of 1850) which extended the principles of the Regulation to the whole of British India is virtually to set aside the provisions of Hindu law which penalise the renunciation of religion or exclusion from caste by enforcing forfeiture of the property of the convert. A Hindu who was joint in estate with his son became a convert to Mahomedanism in 1845 and died in 1851, his son having predeceased him. *Held*, that the convert's son who remained a Hindu did not acquire any enforceable right to his father's share in the joint family property which he could either assert in himself or transmit to his heirs for enforcement in a British Court of justice. Even otherwise, a suit to enforce the right was barred under S. 12 of the Lim. Act, (XIV of 1859) by the lapse of 12 years. The later Acts of Limitation did not revive the barred right. 21 Cal. 8, Ref. (*Mr. Ameer Ali.*) KHUNNI LAL *v.* GOBIND KRISHNA NARAIN.
**33 All. 356=38 I.A. 87=15 C.W.N. 545=
8 A.L.J. 552=13 C.L.J 575=
13 Bom. L.R 427=10 M.L.T. 25=
(1911) 1 M.W.N. 432=10 I.C. 477=
21 M.L.J. 645 (P.C.).**

———*Mahomedan Law — Non-Muslim — Right to succeed—Presumption.*

The Caste Disabilities Removal Act has abrogated the rule of Mahomedan law by which a Non-Muslim is excluded from succession to a Muslim. 11 All. 100, Foll. The fact of the vendees being Christians did not deprive them of their rights of succession to the vendors who being Christians were converted to Islam. (*Shadi Lal and Martineau*, JJ.) RUPA *v.* SARDHAR MIRZA. **1 Lah. 376=
55 I.C. 420 =2 Lah. L.J. 523.**

———*Effect on rights of property.*

Act XXI of 1850, secures after apostacy the same rights to individuals in property as they enjoyed before apostacy. (*Shah Din and Le Rossignol*, JJ.) KISHEN SINGH *v* BHAGWAN DAS. **31 I.C. 476=98 P.R. 1915.**

———*Conversion of member of a Malabar Tarwad—Effect of.*

Apostacy from Hinduism does not entitle a member of a Malabar Tarwad to claim partition of the property and delivery to him of his share, under the Removal of Caste Disabilities Act. The effect is not to enlarge the convert's interest in any property or to get rid of any condition of restriction to which it was originally subject. (1912) M. W. N. 386, Diss. from. (*Wallis*, C.J., *Spencer and Kumaraswami Sastri*, JJ.) PATHUMMA *v* NAMBIAR.
**44 Mad. 891=41 M.L.J. 243=
(1921) M.W.N. 894=64 I.C. 676=
14 L.W. 257 (F.B.).**

CATTLE TRESPASS ACT (1 of 1871), S. 1.

CASTE DISABILITIES REMOVAL ACT (XXI of 1850).

———S. 1—*Provisions apply only to the convert and not to his descendants.*

When a convert to Christianity leaves descendants behind him, they cannot, as reversioners, claim the estate of a deceased Hindu, as the provision for removal of disabilities under the above Act applies only to the apostate and does not extend to his descendants. 11 All. 100, Dis. from. (*Oldfield and Bakewell*, JJ.) VAITHILINGA ODAYAR *v.* AYYATHORAI ODAYAR. **37 I.C. 753=40 Mad. 1118.**

———S. 1.—*Hindu son of a Mahomedan convert—Inheritance.*

A convert's son must be put in the position in which he would have been, if his father had not changed his religion. The words 'any right of inheritance' in Act, (XXI of 1850) refer to any right of inheritance accruing to any person which right is not affected by conversion. A Hindu son is entitled to inherit the property of his father who was converted to Mahomedanism. But the burden of proving that he will not be excluded as a '*Kafir*' is on him (though he is entitled to a share even under the Mahomedan Law as a son) because of the fact of his being a Hindu. 11 All. 100, Foll.; 38 I.A. 87, 23 M. 171; 21 Cal. 697; Ref. (*Fawcett*, J.C. *and Boyd*, A.J.C.) HASSOMAL MURIJMAL *v.* GHULAM MAHOMED.
27 I.C. 357=8 S.L.R. 155.

CASTE PANCHAYAT.

———*Function.*

Caste Panchayats deal with families as units. (*Tudball, and Rafique*, JJ.) BISHEMBARDAS *v.* GOBINDAS. **23 I.C. 301=12 A.L.J. 352.**

CATTLE.

See CATTLE TRESPASS ACT.

CATTLE POUNDS.

See CATTLE TRESPASS ACT.

CATTLE TRESPASS ACT (I OF 1871.)

———Ss. 1 and 18—*Object of—Private cattle pounds—Abolition of, by Government—Not actionable.*

The maintenance of private cattle pounds is incompatible with the provisions of the Cattle Trespass Act and the establishment and maintenance of cattle pounds under the superintendence and control of Government. Officials assisted by the police, may be considered essential for the maintenance of law and order and the peace and good Government of the country. It is an act of the Executive Govt. with which it is not competent to the Civil Courts to interfere. (*Lord Macnaghten.*) BIR BIKRAM DEO *v.* SECRETARY OF STATE.
**39 Cal. 615=39 I.A. 31=
13 I.C 965=16 C.W.N. 362=
9 A.L.J. 585=15 C.L.J. 633=
(1912) M.W.N. 657=14 Bom. L.R. 812 (P.C.).**

CATTLE TRESPASS ACT (I of 1871), S. 10.

——— S. 10.—*Burgadar—Statutes.*

Unless the burgadar is shown to be a mere servant of lessor, the lessor is chargeable for cattle trespass on land under *Burga* lease. (*Chitty and Beachcroft*. JJ.) MANIKCHANDRA ROY *v.* ISMAIL KALU.
50 I.C. 1006=20 Cr. C L J. 398=
23 C.W.N. 387.

———S. 10—*Occupier, meaning of.*

A person in exclusive possession of land is an occupier thereof under S. 10. He can seize any cattle trespassing on his land. (*Shadi Lal*, J.) EMPEROR *v.* SOUDAGAR.
3 P.R Cr. 1916=17 Cr. L J. 63=
32 I.C. 655=54 P.W.R. Cr. 1916.

———S. 10—*Watchman—His authority to seize cattle.*

Under S. 10 of the Cattle Trespass Act a watchman watching crops on land on behalf of a cultivator or occupier is entitled to seize cattle trespassing on the land under his charge when he is given general instructions to seize them while so trespassing. (*Adami*, J.) DUSADH *v.* SARATI DUSADH. 1922 P. 317.

———Ss. 10 and 24—*Occupier defined.*

A man in exclusive possession of a plot of land is an occupier under S. 10 and is entitled to seize cattle and any resistance to the removal is punishable under S. 24. (*Twomey*, J.) EMPEROR *v.* NGA AW. 8 Bur. L.T. 246=
8 L.B.R. 217=17 Cr.L J. 62=
32 I.C. 654.

———S. 22—*Suit for damages for illegal seizure.*

In a suit for damages for illegal seizure of cattle the onus lies on deft. to prove that the seizure was justifiable in law. Such a suit is not barred by reason of Ch. V of the Cattle Trespass Act. 15 W.R. 279; 16 Cal. 159, Foll. (*Drake Brockman*, J.C.) BALA *v.* VITHU.
44 I.C. 237.

———S. 22—*Compensation—Award of, when proper.*

Where no compensation is claimed in the petition of complaint and no allegation is made as to the loss caused by the seizure of the cattle, the magistrate is not justified in awarding compensation under S. 22 of the Cattle Trespass Act. (*Ross*, J.) BAIJNATH SAHAY *v.* EMPEROR.
1 Pat. L R((Cr.) 34=4 Pat. L.T. 231=
24 Cr. L.J. 311 (1)=72 I.C. 71 (1)=
(1923) Pat. 96=1923 P. 292.

———S. 24—*Rescue of cattle.*

Rescue of cattle not seized in accordance with the Act is not illegal. (*Chitty and Beachcroft*, JJ.) MANIK CHANDRA ROY *v.* ISMAIL KALU. 50 I.C. 1006=20 Cr.L.J. 393=
23 C.W.N. 387.

———S. 24—*Plea of title to land.*

Persons claiming that they are the owners of he cattle and also of the land, are liable under S. 24, if they do not remove the cattle. Their claim will not affect the title of the true owner. (*Shadi Lal*, J.) EMPEROR *v.* SOUDAGAR.
3 P R Cr 1916=16 Cr L J. 63=
32 I.C. 655=54 P.W.R. Cr. 1916.

CENTRAL PROVINCES COURTS ACT (II of 1894), S. 15.

———S. 24—*Driving away cattle constitutes rescue.*

Driving cattle by shouts and cries constitutes rescuing them under S. 24 of the Cattle Trespass Act. Inducing an animal to move, may even amount to using force. (*Spencer*, J.) *In re* KAMMAKONDIAH. 17 L.W. 546=
32 M.L T. (H C.) 365=(1923) M.W.N. 437 (2)=
24 Cr.L.J. 456=72 I.C. 616=1923 Mad. 608.

———S. 24—*Offence under—Proof of damage.*

There can be no conviction under S. 24 of the Cattle Trespass Act, unless it is proved and found that the cattle were liable to be seized within Section 10 and that damage was caused. (*Das*, J.) DASSI GOALA *v.* SARDAR MAHTON.
57 I.C. 464=21 Cr. L J. 640=1 Pat. L.T. 176.

———S. 24—*Conviction under.*

For a conviction under S. 24 of the Cattle Trespass Act there must be a finding of trespass of damage as contemplated by S. 10 of the Act. (*Jwala Prasad*, J.) SUKHANANDAN RAI *v.* EMPEROR. 43 I C. 445=19 Cr. L.J. 157 (P).

CAUSE OF ACTION.

See (1) C. P. CODE, S. 20 and O. 2, R. 2.
(2) DAMAGES.
(3) TORT.

CAVEAT.

See PROB. AND ADMN. ACT, SS. 50, 70.

CAVEAT EMPTOR.

See (1) C. P. CODE, O. 21, R. 93.
(2) T. P. ACT, S. 55.

CENTRAL PROVINCES COURTS ACT (II of 1894).

———S. 15—"*Value of suit*"—*Appeal—Forum—Valuation of plaint.*

Jurisdiction in the matter of appeals in the Central Provinces is governed by S. 15. The words "Value of the suit" as used in that section invariably mean value of the relief originally claimed by the plff. in the plaint or when increased or reduced by voluntary amendment, the value of such relief as is made the subject-matter of the Court's decision. 20 Bom. 675; 11 N.L.R. 13, dist. Where a plff. voluntarily reduces an original claim, it is the reduced claim which represents the value of the suit for the purposes of appeal. A Court cannot adjudicate itself out of the jurisdiction given to it by law over the suit as instituted. (*Stanyon*, A.J.C.) DINDAYAL *v.* DEONATH.
44 I.C. 237 (Nag.)

CENTRAL PROVINCES COURT OF WARDS ACT (XVII of 1883), S 6.

———Ss. 6 and 18—*Joint Hindu family—Court of Wards, if can take charge of properties of—Mortgage by Court of Wards—Sanction of Chief Commissioner.*

On the application of the Managing members of a joint Hindu family the Court of Wards can assume the superintendence of the joint family property under S. 6 of Act XVII of 1865. The interest of a member of an undivided *mitakshara* family is not individual property of which the Court of Wards could assume charge under the Act. It is not necessary under S. 18 of Act XVII of 1865 that the actual mortgage to be executed by the Court of Wards should be submitted to the Chief Commissioner for sanction or that his previous sanction should be obtained to its precise terms. It is enough if sanction is obtained for effecting a mortgage. (*Sir John Edge.*) GULAB SINGH *v.* RAJA SETH GOKUL DAS.

40 Cal 784=40 I.A. 117=17 C L J. 619= 17 C.W.N 918=15 Bom. L R 613= (1913) M.W.N. 542=14 M.L T. 55= 25 M.L.J. 179=19 I C. 521= 9 N.L.R. 117 (P.C.).

———(XXIV of 1899).

———*Court of Wards—Commissioner—No powers of alienation.*

The Commissioner of a division cannot make a voluntary alienation in perpetuity of immoveable property of a person who is under Court of Wards. (*Macnair*, A.J.C.) DHARAM SINGH *v.* LOKNATH SINGH. **62 I C. 193.**

———Ss. 12 and 10—*Applicability.*

Section 12 does not apply to a claim already submitted to the arbitration of a Civil Court before publication of a notification under S. 10. (*Drake-Brockman*, J.C.) GANESHLAL *v.* DHONDIBA. **17 I C. 621=8 N L R. 169.**

———S. 16 (2)—*Powers of guardian—Contract for sale of minor's property—Specific performance.*

The words "for the preservation and benefit of such property" must be taken to mean the usual powers of guardians to bind the minor's estates. No agreement of transfer by a guardian should be specially enforced against a minor unless it is beneficial to him in the opinion of the Court. (*Batten*, A.J.C.) PURAN LAL *v.* VENKAT RAO GUJAR.

45 I C. 192 (Nag).
See also **13 I.C. 331 (P.C.)**

———S. 26—*Applicability.*

S. 26 of the Act, has no application to a suit filed already against the predecessor-in-title of a Government ward and continued against the ward who was legal representative of the original deft. in accordance with O. XXII, R. 4 Civil Procedure Code. (*Drake-Brockman*, J.C.) GANESHA LAL *v.* DHONDIBA.

17 I.C. 621=8 N L.R. 169.

———S. 31—*Minor— Powers of Court of Wards to bind minor's estate are not greater than those of natural guardian.*

CENTRAL PROVINCES LAND ALIENATION ACT (II of 1916), S. 16.

The powers of the Court of Wards to bind the minor ward by a simple money bond executed on his behalf are no greater than those of a natural guardian. Except in so far as the Court of Wards Act gives special powers to bind the minor's estate, the powers of the Court of Wards are co-extensive with those of a natural guardian. (*Hallifax and Dhobley*, A.J.C.) JIWANDAS *v.* JANKI.

5 N.L J. 49=65 I.C. 53=18 N.L.R. 145= 1922 Nag. 98.

———S. 31—*Effect of.*

The effect of S. 31 of the Act as amended by the Act of 1915 is to declare that the property or person of a ward is not liable for necessaries under S. 68 of the Contract Act. (*Mittra*, A.J.C.) HEMRAJ SHA *v.* PANNALAL.

61 I.C. 563=17 N.L.R. 20.

CENTRAL PROVINCES JAIL MANUAL.

———Rr. 235 and 300—*Escape of prisoner—Head warder liable.*

Under R. 224 of the Jail Manual the head warders shall be held primarily responsible for the escape of a convict unless they can satisfactorily prove that the escape was due to no laxity of duty on their part. Under R. 235 of the Jail Manual, it is the duty of the gate-keeper to note every change in a gang passed out of the Jail in a gate register and under R 300 every change of a prisoner from one gang to another must be recorded in a gang-book. The record in the gang-book is essential for fixing reponsibility upon the officer to whose negligence a prisoner's escape is due. (*Drake-Brockman*, J.) RAMAUTAR *v* EMPEROR.

4 N.L.J. 171.

CENTRAL PROVINCES LAND ALIENATION ACT (II of 1916).

———S. 9 (3)—*Pending suit is governed by the Act—Mortgage—Foreclosure—Procedure.*

Pending suits as well as suits instituted after the passing of the C.P. Land Alienation Act are governed by the Act. In a suit on a mortgage executed by a member of an aboriginal tribe providing for foreclosure on default of payment on the due date, the Civil Court must declare the mortgage to be enforceable and to refer the case to the Deputy Commissioner. (*Dhobley*, A.J.C.) MUSAMMAT GORA *v.* RAMLAL.

64 I.C. 729.

———S. 16 (1)—*Construction of the section.*

According to the section, a sale shall not be held in execution of a decree or order if it is passed after a certain date, but a sale can be held if the decree or order is passed before the date though an application for execution is before or after the date. The word 'made' in the section qualifies the phrase 'decree or order' and not 'execution.' (*Hallifax*, A.J.C.) INDAL BAHU *v.* MUHAMAD ALI. **60 I.C. 545.**

Comparative table of the sections of the C. P. Land Revenue Act of 1881 and the corresponding sections of the Land Revenue Act of 1917.

C. P. Land Revenue Act, 1881.	C. P. Land Revenue Act, 1917.	C. P. Land Revenue Act, 1881.	C. P. Land Revenue Act, 1917.	C. P. Land Revenue Act, 1881.	C. P. Land Revenue Act, 1917.
1	1	29	58 amended	67 B (ii)	207 amended
2	...	30	60 amended	67 C	211 amended
3	...	31	...	67 D	215 amended
4 (1)	2 (2)	32	61 amended	67 E (1)	212 (1) amended.
4 (2)	2 (7) amended	33	...	67 E (2)	212 (2)
4 (3)	2 (21) amended	34	...	67 E (3)	212 (3) amended.
4 (4)	2 (14) amended	35	...	67 E (4)	...
4 (5)	2 (1) amended	36	...	67 F	...
4 (6)	2 (18) amended	37	...	67 G	...
4 (7)	2 (8) amended	38	..	67 H	..
4 (8)	2 (20)	39	...	69	66
4 (8 *a*)	2 (13) amended	40	63	69 (1)	68 (1)
4 (9)	...	41		69 (2) *a*	68 (2) amended
4 (10)	2 (9) amended	42	64	69 (2) *b*	...
4 (11)	2 (6) amended	43	...	69 (3)	68 (4)
4 (12)	2 (15) amended			69 (4)	68 (5) & (6)
4 (13)	2 (10) amended	44	65	69 (5)	68 (7)
4 (13 *a*)	2 (11) amended	45	...	69 (6)	...
4 (13 *b*)	2 (12) amended	46	81 amended	70	77 amended
4 (14)	2 (19) amended	47	...	71	...
4 (15)	...	48	...	72	70 (1)
4 (16)	2 (19) amended	49	82 & 83 (1) amended	73	73 amended
4 (17)	...			74	75 (1) & (2) amended
4 A	2 (17) amended	50	83 (2)		
5	3 & 4	51	83 (3)	75	..
6 (1)	3	52	...	76	76 amended
6 (2)	5 (4) amended	53	85 amended	77 (*a*)	...
7	7, 9 & 10			77 (*b*)	78 (*a*)
8	11	54	86 (1) & (2)	77 (*c*)	78 (*b*)
9	...	55	87 amended	77 (*d*)	78 (*c*)
10	8	56	88 amended	78	80 amended
11	14 (2)	56 A	...	79	79
12	14 (4)	57	89	80	...
13	15	58	90 (1) (2) & (3) amended	81	...
14	6 (2)			82	80 (3)
15	...	59 (*a*) & (*b*)	91 amended	83	80 amended
16	...	60	92	84	...
17	18 & 19 amended	61	93 (*a*) & (*b*) amended	85	98
18	17	62	...	86	99
18 A (1)	20 amended	63	...	87	100 (1) & (2)
18 A (2)		64	...	88	101
19	...	65	122(1) amended	89	...
20	32 amended	65 A (1)	107 (1)	90	124 (1) & (2)
21	29 amended	65 A (3)	114	91	125
22	33 (1) amended	65 A (4)	109 amended	91 A	...
23	35 amended	S.65 A (4)(*d*)	108 (2)	92	126
24	39	66	...	93	127 amended
25		67	...	94 (*a*)	128 (*a*)
26	40 amended	67 A	204	94 (*b*)	128 (*b*)
27	...	67 B (i)	206 (1)	94 (*c*)	128 (*c*)
28	57 amended			94 (*d*)	128 (*d*)

C. P. Land Revenue Act, 1881.	C. P. Land Revenue Act, 1917.	C. P. Land Revenue Act, 1881.	C. P. Land Revenue Act, 1917.	C. P. Land Revenue Act, 1881.	C. P. Land Revenue Act, 1917.
94 (*e*)	128 (*e*)	124 A (2)	202 (4) *a*	137	227 (*o*), 192, Provisos 1 and 2.
94 (*f*)	128 (*f*)	124 A (3)	202 (6)		187 proviso to (4).
94 (*g*)	128 (*g*)	124 A (4)	202 (7) amended		190 (1), (2), (3), (4) & 191.
94 (*h*)	216 (1-A)	124 A (5)	202 (8)		
94 Proviso 1	128 Proviso 1	124 A (6)	202 (9)		
94 „ 2	128 „ 3	122 A (7)	202 (3) amended	138 (*a*)	188 (*a*)
94 „ 3	128 „ 4	124 A (8)	202 (10)	138 (*b*)	188 (*b*)
94 Last para	129	125 (*a*) & (*b*)	227 *f* (1) & (2)	138 (*c*)	188 (*c*)
95 Para. 1	130 (1)	126	47 (4) & (5) amended	139	...
95 „ 2	130 (2)	127	48 amended	140	...
96	130 (3)	128	51 amended	141	193
97	131 (1)	129	50 (*a*) and (*b*) amended	142	194
98	133 (1)			143	...
99	133 (2)	130	103 (*a*) & (*b*)	143 (A)	210
100	133 (3)	131	226 (1)	144	227 (*d*) Repealed.
101	133 (4)	132 (*a*)	...	145	
102	134 (1), (2), & (3)	132 (*b*)	106 (*a*)	146	...
103	135 (1) & (2)	132 (*c*)	...	146 A	
				147	...
104	135 (3) amended	132 (*d*)	106 (*b*)	147 A	227 (*q*)
105	135 (4)	132 (*e*)	106 (*i*)	148	...
106	136	132 (*f*)	106 (*e*)	149	197
107	137 (1)	132 (*g*)	...	150	...
108	138 (1)	132 (*h*)	...	151	218 (1) & (4)
108 (*a*)	138 (2) amended	132 (*i*)	...	152 (*a*)	...
108 (*b*)	138 (2) (*b*)	132 (*j*)	106 (*c*) amended	152 (*b*) 1	220 (*c*)
108 (*c*)	...	133	102 amended	152 (*b*) 2	220 (*g*)
108 last para	138 (3)	134	54 amended	152 (*b*) 3	220 (*f*)
109 (*a*)	143 amended.	135	...	152 (*b*) 4	220 (*h*)
109 (*b*)	139 amended.	136 (1)(2)&(3)	161 amended	152 (*b*) 5	220 (*j*)
109 (*c*)	...	136 A	162 amended	152 (*b*) 6	220 (*k*)
109 (*d*)		136 B	163 amended	152 (*b*) 7	...
109 (*e*)	141(3) amended	136 C	...	152 (*b*) 8	—
109 (*f*)	...	136 D	164	152 (*b*) 9	220 (*d*)
109 (*g*)	...	136 E	167	152 (*b*) 10	220 (*m*)
109 (*h*)	...	136 F	168 amended	152 (*b*) 11	...
110 (*a*) (*b*) & (*c*)	151 (*a*) (*b*) & (*c*)	136 G	169 amended	152 (*b*) 12	220 (*a*)
111	153	136 H	...	152 (*b*) 13	220 (*q*)
112	154	136 I	...	152 (*b*) 13*a*	220 (*o*)
113 (*a*)	227 *k* (i)	136 J	170	152 (*b*) 14	220 (*p*) amended
113 (*b*)	227 *k* (ii)	136 K	171	152 (*b*) 15	220 (*s*)
113 (*c*)	227 *k* (iii)	136 L	173	153	221
114	155 amended	136 M	174	154	222
115 (*a*) & (*b*)	156 (*a*) & (*b*)	136 N	175	155	...
116	157 amended	136 O	176	156	223
117	159 (1) & (2) amended	136 P	177	157	224
118	160 amended	136 Q 1	...	157 A	225
119	...	136 Q 2	165	158	...
120	46 (1)	136 R	...	159	...
121	46 (2)	136 S(1)&(2)	182	160	...
122	...	136 T	184 amended	161	...
123	201 amended	136 U	185	161 A	198 (1)
124	201 Proviso 1	136 V	227 (*n*)	161 B	199
124 A (1)	...	136 W	183	162	227 (1)

C.P. LAND REVENUE ACT (XVII of 1881), S. 69

———S. 69—*Suit under—Limitation.*

Provisions of S. 6 of the Limitation Act, 1908 are not applicable to a suit brought under the first part of sub-S. 40 of S. 69 of the Central Provinces and Revenue Act, 1881. (*Batten*, A.J.C.) BALKRISHNA *v.* BALA. **4 N.L.J. 136.**

———S. 136-H (1)—*Amended by Bengal Act* IV *of* 1916.

Under this section an appeal from Dy. Commissioner's order dismissing an application for partition lies to the Dt. Judge. If the appeal is wrongly preferred to the Commissioner, no second appeal lies. (*Woodroffe and Cornduff*, JJ.) RAGHUNATH SINGH *v.* ABHUDIT SINGH. **38 Cal. 391=9 I.C. 202=13 C.L.J. 412.**

———(II of 1917).

———*Not retrospective—Settlement Record—Entry—Effect of.*

A statute like the Central Prov. Land Rev. Act (II of 1917) which prejudicially affects vested rights in existence has no retrospective operation. The bare entry in a Settlement Record of a person as *Malik Makbuza Muafidar* is not sufficient to justify a Civil Court in holding that his heir is entitled to enjoy a like privilege. (*Drake-Brockman*, J.C.) NATHURAM *v.* JAGANNATH. **55 I.C. 426=16 N.L.R. 105.**

———Ss. 33 (1) and 168—(1881), Ss. 136 and 22—*Partition—Title of applicant admitted—Duty of Court—Rights of the parties—Appeal.*

Where the title of an applicant for partition is admitted, the Court is bound to partition the land unless an objection has been made by a co-sharer in possession under S. 136-F and the objection has been upheld by the Court. If no such objection has been made and the Court declines to partition the land, the decision is appealable to the High Court since such a decision virtually decides "the right of the parties" within S. 106-H inasmuch as it decides whether the land should be held jointly or separately. (*Jwala Prasad and Adami*, JJ.) ANANDA CHANDRA PATI *v.* SADANAND PATI. **55 I.C. 438=5 Pat. L.J. 140.**

———S. 46 (5)—*Trees in occupancy holding—Mortgage.*

Mortgage of trees amounts to a transfer of the rights in the occupancy tenure in a portion of the tenancy holding and the document cannot be registered in contravention of S. 46 (5) of the C. P. Tenancy Act of 1898. The mortgage is not operative as regards the other property except the trees covered by it. An instrument so registered cannot operate in respect of any part of the property ostensibly transferred by it. 13 N.L.R. 165, Fol. (*Prideaux*, A.J.C.) TUKARAM *v.* NAIBA. **70 I.C. 34=1922 Nag. 252.**

———S. 68 (1)—(1881), S. 69—*How land becomes* Sir *and when.*

Land, not falling under section 69 (1) of the Act, cannot become *Sir* land until it is finally recorded as such by the Settlement Officer and the date of its so becoming *Sir* is the date of the officer's order. (*Batten*, A.J.C.) SADHU *v.* KALIYA. **20 I.C. 554=9 N.L.R. 99.**

C. P. LAND REV. ACT (XVII of 1881), S. 80.

———S. 68 (5)—(1881), S. 69 (4) (1)—*Suits under—Limitation Act—Applicability.*

The Limitation Act does not apply to suits under S. 69 (4) (1) of the C.P. Land Revenue Act as the Act itself provides for limitation for such suits. (*Batten*, A.J.C.) BALKRISHNA LAXMAN *v.* BALA. **46 I.C. 879.**

———Ss. 68 (5) and (6) and 80—(1881), Ss. 69 (1) and 83—*Record of rights—Wrong entry—Remedy of aggrieved person.*

Ss. 69 (4) and 83 of C.P. Land Rev. Act, (1881) exhaust the remedy open to a person for alleged wrong entry in the Record of Rights regarding *sir* land. Such an entry regarding *sir* land cannot be questioned otherwise than in a suit under S. 83, (1881) and is, subject to any such suit, final and conclusive. (*Hallifax*, A.J.C.) KESHA *v.* HIRAJI. **28 I.C. 888=11 N.L.R. 88.**

———S. 70 (1)—(1881), S. 72—*Settlement Officer, power to reduce rent—Decision how far binding.*

A Settlement Officer can allow a reduction or exemption from rent and his decision is binding during the course of the settlement. (*Batten*, A.J.C.) NAMPRASAD *v.* JAGDARI. **42 I.C. 292=13 N.L.R. 179.**

———S. 76—*Levy and not the rate of cess—Need be sanctioned by the Board of Revenue.*

Under S. 76 of the C.P. Land Revenue Act all that the Board of Revenue has to do is to sanction the levy of a cess and not the rate at which such cess is leviable. Hence in a case where the Settlement Officer had determined the cesses and the rate at which they were leviable in accordance with the village custom, and the levy of cess had been sanctioned by the Board of Revenue, the cess was legally payable. (*Dass and Adami*, JJ.) RAKHYAPAL SINGH *v.* LAL BIR SURJODAY SINGH DEO. **69 I.C. 672=1 P. 83=1922 P. 399.**

———Ss. 78, 83—*Scope of—Suit under, when maintainable.*

For a suit under S. 83 of the C.P. Land Rev. Act to be maintainable in respect of a matter in the Record of Rights, it must fall within S. 78 of the Act. (*Hallifax and Kotval*, A.J.C.) THE ZAMINDAR OF HATTA *v.* RATAN. **64 I.C. 722=1922 Nag. 19.**

———Ss. 80, 66, 70 (1) 36 (1) and 220—(1881), Ss. 68, 72, 83, 120 (b) and 152 (b)—*Record of rights—Entry in—Correction of—Suit under S. 83—Civil Court—Jurisdiction.*

In the Record of Rights prepared under Ch. VI of the C.P. Land Revenue Act, 1881 defts. were described as shikmi gaontias or permanent tenants under the plaintiffs who were the gaontias of the village. A suit was brought

C. P. LAND REV. ACT (XVII of 1881), S. 80.

under S. 83 of the Act to have the entry amended so that the defts. may be described as mortgagees in possession and not as permanent tenants. *Held*, that in deciding the question between the parties or in making the disputed entry in the Record of Rights the settlement officer acted either under S. 68 or S. 72 of the Act and his decision or the entry, was open to review by the Civil Court under S. 83. A suit under S. 83 is governed not by Art. 14 but by Art. 120 of the Lim. Act. It is in the nature of a declaratory suit as to how the Record of Rights should be amended, but the Court can execute its decree only by the decree being taken to the Deputy Commissioner who can give effect to it under S. 120 of the Act. (*Richardson and Mullick*, JJ.) NABHOGAN BADHAI *v.* RAGHUNATH BABU. 19 C.W.N. 1303 = 30 I.C. 61 = 21 C.L.J. 646.

——S. 80—(1881), S. 83, Proviso (1)—*Suit under—Parties—Secretary of State—Notice of suit.*

The plffs. in a suit under S. 83 of the Act are not bound to give notice of the suit to the Secretary of State and where the latter does not intervene to be joined as a party the suit is not bad under the first proviso to the section. 18 I.C. 84, expl. (*Mookerjee and Beachcroft*, JJ.) BAKTAWAR SINGH *v.* BHUBANO SINGH. 20 I C. 312 = 17 C.L.J. 468.

——S. 80—(1881), S. 83—*Entry in Record of Rights—Suit for amendment or cancellation of—Lim. Act* (1877), *Art.* 14 *or* 120.

As the statutory power given under S. 83 is not to set aside but to cancel or amend an entry made in the Record of Rights a suit for the cancellation or amendment of certain entries in the Record of Rights is not one for setting aside an act of an Officer of Government within Art. 14 but such a suit is governed by Art. 120, Limitation Act. (*Chatterjee*, J.) DASRATHA PANDA *v.* SATYABADI GANUTIA. 14 I.C. 80.

——S. 80—(1881), S. 83—*Suit for amendment of settlement record—Notice to Govt., if necessary.*

Under Section 83 of the Act, notice is necessary to be given to the Govt., where a suit is brought for a declaration that a plff., is the maintenance grant-holder and for amendment of settlement papers wherein he is described as a *ticcadar*. (*Stephen and Coxe*, JJ.) UJAL SINGH *v.* DEBYA SINGH SARDAR. 13 I.C. 184 = 16 C.L J. 28.

——S. 80—(1881), Ss. 82 83 and 39—*Record of Rights—Settlement—Ejectment—Onus.*

A Record of Rights prepared by a Settlement Officer under S. 82 of the Act is complete even before the Chief Commissioner has under S. 39 declared the Settlement to be completed. A plaintiff, who sues to eject a person who has been recorded as a tenant and in whose favour a settlement *pacha* has been issued must prove that the defendant is not a tenant. (*Batten*, A.J.C.) TUKARAM *v.* DINAJI. 15 I.C. 470.

C. P. LAND REV. ACT (XVII of 1881), S. 107.

——S. 83—*Suit under—Limitation.*

A suit for amendment of settlement entries is governed by Art. 14 and not Art. 120. (*Hallifax and Dhobley*, A.J.C.) ONKARLAL, *v.* SHALIGRAMLAL. 65 I C. 970 = 3 N.L.J. 199 = 1922 Nag. 76.

——S. 108—(1881), S. 65-A.—*Powers of Deputy Commissioner.*

S. 132 was intended to enable the Deputy Commissioner merely to determine the claim to protection under S. 65-A, and to enforce the provisions of that section. It was never intended that the Deputy Commissioner should be empowered to deal with an ejectment suit or for recovery of a gaontiaship. (*Chapman, Atkinson and Imam*, JJ.) LAL NRIPA RAJ *v.* MOHAN GAONTIA. 3 Pat. L J. 229 = 44 I.C. 817 = 4 Pat. L.W. 256.

——S. 107—(1881), S. 65-A.—*Joint family property—Certificate of protected status in the name of one member.*

A certificate of protected status issued under S. 65-A in the name of one member of a joint family with regard to joint family property does not convert it into self-acquired property of the *thikadar*. The certificate merely curtails the rights of the Zemindar as regards ejectment and enhancement of rent; joint family property does not cease to be such merely because a subsequent statute forbids partition. (*Mittra and Prideaux*, A.J.C.) FAGWA *v.* BUDHRAM. 24 I.C. 855 = 10 N.L.R. 64 (F.B.).

——Ss. 107 and 109—(1881), Ss. 65-A, 132 and 132 (A)—*Gaontia—Registration of eldest heir—Whole of the estate—Estoppel.*

S. 65-A of the Act was not enacted for the benefit of the zamindar but to retain certain selected families in the gaontiaships of their villages and to protect them against the transfer and sub-divisions. The rights of the eldest male to resign or renounce his rights as *gaontia* with a view to giving up all claims to inherit the estate which has by statutory devolution descended upon him must be exercised at the time when the succession opens, *viz.*, on the death of the last protected *gaontia*, and it is not open to him subsequently to transfer the estate by sale or gift in favour of a younger brother.—*Quære.*—Whether if he did so, he would be estopped from contesting the transfer. Per *Atkinson*, J. (*Imam* J., *contra*). If two or more villages form the protected tenure of a *gaontia*, even though they may have been declared protected by separate certificates at different times, the eldest male heir must exercise his choice of resignation or adoption of all or none of such villages. There can be no splitting up of the estate or tenure into different parts having distinct entities. Where the election is made by the person upon whom the tenure devolves by inheritance, it is irrevokable in its operation, and automatically one heir is succeeded by another of equal degree.—In the absence of evidence to show that the eldest son

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of the last protected *gaontia* resigned his claim to the *gaontiaship*, a younger son is not entitled to surrender the estate to the zemindar.—Per *Atkinson*, J.—The onus of establishing resignation lies on the person who affirms it.—*Obiter.*—A *gaontia* is not entitled to surrender his estate in favour of his zemindar. Per *Atkinson*. J. The word "resign" in S. 65-A means "release." (*Chapman, Atkinson and Imam*, JJ.) LAL NRIPA RAJ SINGH RAI BAHADUR *v.* MOHAN GAONTIA. 3 Pat. L.J. 229= 44 I.C. 817=4 Pat. L.W. 256.

——Ss. 107 and 109—(1881), S. 65-A.—Gaontia *can surrender tenure.*

In a case of surrender of tenure by a "protected" *Gaontia* to a Zemindar plff. it was held that S. 65-A of the above Act did not prohibit such a surrender, and that there could be no adverse possession of defts. against the plffs. who could himself claim no present possession till the relinquishment of the tenure. Permanent rights in the village which would bind the Zemindar after cessation of the *Gaontia* tenure cannot be conferred by the *Gaontia*. (*Chamier* C.J. *and Sharfuddin*, J.) NARRUPRAJA *v.* BHABANI TELI. 1 Pat. L.T. 293= 37 I.C. 107=1 Pat. L.W. 449.

——Ss. 108 (2) and 80—(1881), Ss. 65-A and 83—*Suit for correction of entry in* Khewat *as to status of plff.—If maintainable.*

A suit for a declaration that an entry in a *Khewat* of the Dewar Settlement is incorrect and that the plffs. hold the property in dispute as a maintenance grant and are not liable to pay any rent therefor to the *zemindar*, falls within S. 83 of the Act and is maintainable. S. 65-A of the Act does not apply where a suit is instituted, not to have a fair and equitable *ticca jamma* assessed in respect of a land, but to determine the true status of the plaintiffs. (*Mookerjee and Beachcroft*, JJ.) BAKTAWAR SINGH *v.* BHUBANO SIGH. 20 I.C. 322= 17 C.L.J. 468.

——S. 108 (2)—(1881), S. 65-A (4) (d).

Where the amount of Thekajama has to be fixed by Deputy Commissioner under S. 65 (A) (d), no arrears of jama become due within Art. 110, Lim. Act until the amount is finally ascertained by concluding the dispute regarding the jama; when the landlord has to proceed to have the proper rate of rent ascertained time runs from the date on which the rent is finally determined and not from the close of the year for which the rent is payable. (*Drake-Brockman*, J.C.) RAGHUNTH *v.* SARVA. 12 I.C. 804=7 N.L.R. 169.

——S. 109—(1881), S. 65-A (4)—*Thekadar —Right to fell trees.*

Apart from the grant of protected status the thekadar of a village has no right to cut down and appropriate timber trees. And the mere grant of protected status does not confer the right to cut down and appropriate trees to his own use. (*Batten*, A.J.C.) JASWANT SINGH *v.* MT. JASODA. 33 I.C. 686=18 N.L.R. 1.

C. P. LAND REV. ACT (XVII of 1881), S. 137.

——S. 109—(1881), S. 65-A.—*Joint family property—Certificate of protected status in the name of one member.*

A certificate of protected status issued under S. 65-A in the name of one member of a joint family with regard to joint family property does not convert it into self-acquired property of the Thikadar. The certificate merely curtails the rights of the Zamindar as regards ejectment and enhancement of rent; joint family property does not cease to be such merely because a subsequent statute forbids partition. (*Mittra and Prideaux*, A.J.Cs.) FAGWA *v.* BUDHRAM. 24 I.C. 855=10 N.L.R. 64 (F. B.).

——S. 109 (1) (a), Proviso (ii)—(1881), S. 65-A—*Unregistered lease by Thekadar whether confers permanent title—Sanction of Zamindar—Effect of.*

An unregistered lease by a Thekadar does not confer a permanant title though the lessee is in possession for a long time and the sanction of Zamindar in guarded terms does not improve the position. (*Chatterjee*, J.) SARDAKAR PODH *v.* BISSESWAR GOANTIA. 26 I.C. 476.

——S. 109 (1) (a)—(1881), S. 65-A (4)—*Thekadari—Transferability of — Legality of award directing sale.*

S. 65-A (4) (*a*) states that the tenure of a thekadari is not transferable; and cannot be sold in execution of a decree. An award which directs it to be sold, is therefore illegal and unenforceable. (*Prideaux*, A.J.C.) TIKARAM *v.* TEJRAM. 34 I.C. 274.

——S. 109 (1) (b)—(1881), S. 65-A (4) (b) proviso (1)—'*Joint*' '*Separate*'—*Meaning of when applied to Hindus.*

In applying to Hindus S. 65-A (4) (*b*), proviso (1) of the Act, the terms 'joint' and 'separate' must be taken in the sense in which they are used in Hindu Law and therefore a separation must be proved, not by a mere separation in mess nor by the receipt of a maintenance grant, but by separation in worship and estate as well. (*Mookerjee and Beachcroft*, JJ.) SUKDEB BISWAL *v.* BALIA BISWAL. 20 I.C. 28= 19 C.L.J. 255.

——S. 137—Mukaddam gomastha's *remuneration* — Lambardari haq—*Village Management—Expenses.*

The proprietors of village are not liable for the remuneration of *Mukadham Gomastha* over and above 5 per cent. on the land revenue. In calculating *Lambardari haq* the cesses must be exoluded, the 5 per cent. being limited to the land revenue. Festival expenses not being expenses of village management cannot be debited against the proprietary body nor can the legal expenses which are not incurred on behalf of the body. (*Batten, Offg.*, J. C.) GOVINDRAM *v.* MANAKCHAND. 63 I.C. 1000.

C. P. LAND REV. ACT (XVII of 1881), S. 138.

——S. 138—*Surrender or transfer—Test of—Transfer of possession by tenant—Validity of.*

Surrender or transfer depends upon the intention of the parties. A surrender can only be to a landlord. The lambardar is not the only person who can receive a surrender. The whole proprietary body can receive surrender or conceivably any other co-sharer not a lambardar may take a surrender for the common benefit by authority, express or implied, from the other co-sharers. (*Joshi*, H. M.) GOPALSA v. BULA. 6 N.L.J. 73.

——S. 138—(1881), Ss. 64, 108 and 116—Malik—Malguzar—*Sale for arrears of revenue due to* malguzar—*Incumbrances.*

S. 108 of the Act applies only when a sale takes place for recovery of the arrears of revenue payable to the *malguzar* in respect of *malik makbuza* plot as S. 64 makes it clear that land revenue in respect of a *malik makbuza* plot is paid not directly to the Government but through the *malguzar*. *Quære*; what would be the result if an application had been made under S. 116 of the Act. (*Mittra*, A.J.C.) GUNESH PARSAD v. GHASITILAL. 48 I.C. 92.

——Ss. 153 and 132 (h)—*Village cess—Suit for recovery—Entry in wajib-ul-arz.*

S. 153 of the C.P. Land Rev. Act bars a suit for the recovery of "village cesses" paid compulsorily at some time previous unless they are sanctioned by the Chief Commissioner or recorded either at the last settlement or by the Dy. Commissioner under S. 132 (*h*) of the Act. (*Hallifax and Kotwal*, A.J.C.) ZAMINDAR OF HATTA v. RATAN. 64 I.C. 722=1923 Nag. 19.

——S. 160—*Limitation for suit for agricultural profits—Mode of computation.*

The period allowed for a suit for the profits of the agricultural year which ended on 30th April 1917 by S. 160 of the C.P. Land Revenue Act, 1917, is complete only at the end of 1st May, 1920. (*Hallifax*, A.J.C.) NARAYAN PATEL v. ABDUL GANI. 69 I.C. 527= 1922 Nag. 261.

——S. 160 (2)—*Suit filed after the bet—Limitation.*

The period of limitation for a suit filed after the coming into force of Act II of 1917 is that provided by the Limitation Act. (*Hallifax*, A.J.C.) SHANKARGIR v. CHINNUJI. 6 N.L.J. 1=71 I.C. 140=1923 Nag. 164.

——S. 181—(1881), S. 136—*Revenue partition—Date of—Effect.*

A revenue partition under the provisions of the Act does not take effect from the date of sanction by the Commissioner but from the date of the first agricultural year next after the publication of the Notification by the Dy. Commissioner with the Commissioner's sanction. A Revenue partition is unaffected by the rule of Hindu Law that partition dates from the ascertainment of shares. (*Batten and Stanyon*, A.J. Cs.) RATAN LAL v. BHARKAR. 17 I.C. 144=8 N.L.R. 139.

C. P. LAND REV. ACT (XVII of 1881), S. 169.

——S. 169—(1881), Ss. 136-G and 136-H—*Order of Dy. Commissioner—Appeal—Second appeal.*

An order of a Dy. Commissioner under S. 136 (G) of the Act is appealable as if passed by the Court of the Dt. Judge acting as a Court of civil jurisdiction of first instance under the Bengal Civil Courts Act. If the appeal is preferred to the Commissioner no second appeal to the High Court will lie. (*Coxe and Imam*, JJ.) GAJRAJ DAS v. KRIPA SINDHU DAS. 14 I.C. 160=17 C.W.N. 153.

——S. 169—*Suit under—Lim. Act, S.* 14.

In the case of suits contemplated by S. 169, the period fixed therein, *i.e.*, 6 months cannot be extended by the application of S. 14. S. 29 of the Lim. Act excludes its operation. (*Baker*, J.C. *and Hallifax*, A.J.C.) LAXMAN v. KESHEO. 6 N.L.J. 205=73 I.C. 1021= 1923 Nag. 306.

——S. 169—(1881), S. 136-G—*Appeal only to High Court against an order of Deputy Commissioner as an order of Dt. Judge.*

The Court of the Dt. Judge under the Bengal N.W.P. and Assam Civil Courts Act (XII of 1887) having taken the place of the Court of the Deputy Commissioner in Sambalpur under the C.P. Civil Courts Act (XVI of 1885), an appeal can be preferred only to the High Court against an order of the Deputy Commissioner under the C.P. Land Revenue Act (XVIII of 1881) S. 136-G as an order of the Dt. Judge. (*Chamier*, C.J. *and Sharfuddin*, J.) PADMAN LOCHAN MISRA v. KRISHNA CHANDRA MISRA. 1 Pat. L.J. 290=37 I.C. 115= 2 Pat. L.W. 404.

——S. 169 (1) (a)—Suit under—*Limitation.*

The order of a Revenue Officer declining to make a partition or to proceed therewith until the question of partition has been decided does not amount to an order to any of the parties to file a civil suit and does not confer on a Civil Court jurisdiction which it did not previously possess. A Civil Court can enquire into the question as to whether the *Khudkhast* or *sir* lands are or are not the sole property of a person or whether they are joint property though it cannot decide whether there should be a partition or not; the question of title may have to be decided for other purposes than for the purposes of partition. A suit for ascertaining what the titles of the parties respectively are over the lands in the Mahal, is not barred by time merely because the Revenue Officer declined more than six years before the institution of the suit, to proceed with a partition until the question of title had been decided in a Civil Court. (*Batten*, J.C.) DONGAR SINGH v. VISHWANATH SINGH. 19 N.L.R. 11= 71 I.C. 205=1923 Nag. 88.

C. P. LAND REV. ACT (XVII of 1881), S. 173.

——Ss. 173 and 178—Imperfect partition—*Land held in severalty allotted to a patti, nature of*—*Ss.* 136-*L and* 136-*N, Central Provinces Land Revenue Act*, 1881.

When at an imperfect partition *sir* or *khudkast* merely held in severalty by a co-sharer and not his exclusive property is allotted to a *patti* other than his, he does not become a tenant of that land in the absence of an order to that effect by the Deputy Commissioner or he is recognized or created a tenant by the co-sharer in whose *patti* it falls. (*Hallifax*, A.J.C.) NAGESWAR *v.* KRISHNA.

17 N.L.R. 107.

——S. 187 (3)—(1881), Ss. 137 to 140—*Lambardar — Appointment of gumashtah—Right to claim contribution from other shares for wages.*

A Gumastah appointed by a non-resident Lambardar Mukkaddam to discharge the duty of Mukkaddam is his agent alone and not that of the whole proprietary body. The principle of contribution is not applicable between the lambardar and the other co-sharers, for the wages paid by him to the Mukkaddam Gumastah. (*Drake-Brockman*, J.C.) BALI RAM *v.* NARAIN RAO. 43 I C. 967.

——S. 188—(1881), S. 138—*Lambardar—Settlement.*

Custom in the Dt. of Sambalpore authorises a lambardar *gaontia* of a village to make settlement of *raiyati* lands without his co-sharer's consent. *Quaere*. Can permanent lease of such land be similarly granted. (*Walmsley and Newbould*, JJ.) SIDHESWAR PANDA *v.* PITDAS GAONTIA. 37 I C. 261=24 C.L.J. 88.

——S. 188—*Appointment of Lambardar—Unit of area in a divided mahal is the patti.*

Where a mahal has been divided the unit for the appointment of the lambardar is the patti and not the mahal. S. 188 (2) (A) of the Land Revenue Act embodies the case law on the subject as it existed prior to the enactment of that Act. In other words, that clause simply enacts a rule in regard to burden of proof. It does not clothe the lambardar with higher rights than those already possessed by him. It simply gives statutory recognition to his status as the accredited agent of the proprietary body in the absence of the evidence in regard to revocation of his authority generally or with respect to a particular transaction. (*Hallifax*, A.J.C.) RAMKRISHNAPURI *v.* TANBA.

6 N.L.J. 85=19 N.L.R. 59=71 I.C. 777=1923 Nag. 153.

——Ss. 188 and 192—*Co-sharer — Non-resident lambardar—Servant's wages.*

Unless there is an agreement between the co-sharers of a village about the remuneration of a servant employed by Lambardar to act for him, he cannot charge them for the same. (*Batten*, A.J.C.) RAGHUBAR DAYAL *v.* MADHO RAO. 58 I.C. 958.

C. P. LAND REV. ACT (XVII of 1881), S. 188.

——S. 188 (2) (a)—*Construction—Section only gives effect to pre-existing custom.*

Before 1917 the custom of appointing the lambardar as the agent of the whole of the proprietary body was so general that it was held that he must be deemed to have been so appointed unless and until the contrary was proved, and the enactment in S. 188 (2) (*a*) of the Act II of 1917 can only have been intended to give the legislative sanction and confirmation to this view, which after all is only an inference of fact drawn in each particular case from the known facts of that case and the judge's knowledge of the common course of human conduct and public and private business. The entire proprietary body is not bound by the consent of one though he may if he has received consideration be bound by his own consent. 13 C.P.L.R. 45=8 N.L.R. 29 Disc. (*Hallifax*, A.J.C.) LACHMAN *v.* THAKUR BALWANT SINGH.

6 N.L.J. 231=1923 Nag. 286.

——S. 188 (2) (b)—*Lambardar—Consent of every co-sharer in every case not necessary.*

Where under the wazib-ul-arz of the village the lambardar was to manage the village with the consent of the co-sharers. *Held*, that the lambardar need not obtain the consent of every individual co-sharer, especially in petty cases such as allowing a cow to graze in the village. (*Baker*, J.C.) PARASARAM *v.* KANHAIYA. 1923 Nag. 235.

——S. 188 (2) (c) and S. 160—*Suit against Lambardar—Suit within six months.*

A suit within six months of the end of the year by co-sharers against lambardar mentioned in S. 188 (2) (*c*) is not premature in view of S. 160. (*Prideaux*, A.J.C.) SARJE RAO *v.* HARAKCHAND. 6 N.L.J. 234=1923 Nag. 287.

——S. 188 (2) (c)—*Tenants in common of a village—Suit for profits.*

Where divided members of a Hindu family being tenants-in-common put their profits into a common chest and meet expenses from the chest and this arrangement subsequently fell through and a lambardar, a member of the family, managed the village, *held* that a suit lay for village profits against the lambardar without bringing a general suit for accounts. (*Batten*, J.C.) MAKUNDRAM *v.* SHRIKRISHNA.

19 N.L.R. 24=73 I.C. 142=1923 Nag. 197.

——S. 192—*Remuneration of Lambardar.*

A lambardar is not disentitled to his remuneration simply because the Deputy Commissioner had never fixed the remuneration for the village lambardar under S. 192 of the Act of 1917. (*Hallifax*, A.J.C.) BHOLARAM *v.* TUKARAM. 66 I.C. 465=1922 Nag. 111.

——S. 193—(1881), Ss. 137 and 141—*Mukadom Gumasta—Penal Code*, S. 176—*Cr. P. Code*, S. 45—*Mukadom receiving information of non-bailable offence—Agent omitting to report—Offence.*

C.P. LAND REV. ACT (XVII of 1881), S. 203.

The Mukadam is not relieved of responsibility by the appointment of a Gumasta, for the Gumashta works as his agent. The Gumashta should discharge the duties laid upon the Mukadam by the Land Revenue Act but if Mukadam finds that the Gumashta is neglecting his duties, he must take steps to get them performed by the Gumashta or perform them himself. If a Mukadam receives information of a non-bailable offence, he must report the offence under S. 45 of the Cr. P. Code an omission to do so will constitute an offence under S. 176, I.P.C. (*Batten*, A.J.C.) LOCAL GOVERNMENT *v.* MANHAR SINGH.
11 I.C. 785 = 12 Cr. L.J. 441 = 7 N.L.R. 101.

——S. 203—*License — Revocability of*—Abadi *plot—Cultivation.*

Where a person holds an *abadi* plot as licensee under another, the license is revocable at will by the grantor unless the licensee is protected by S. 60 of the Easements Act or S. 203 of the Land Revenue Act or the wajib-ul-arz of the village. Where the land had been under cultivation for some fifteen years neither of these Acts nor the wajib-ul-arz can give him any protection. (*Hallifax*, O.J.C.) RAJARAM *v.* CHOUDHRI MANOHAR LAL. **67 I C. 373.**

——S. 212—*Ryotwari land in possession of one heir—Right of others to share therein—Rights of holder.*

S. 212 of the Land Revenue Code makes it clear that the right of a Raiyat to hold Ryatwari land devolves as if it were land. Where Ryotwari fields are in the possession of one heir, and they are entered in his name in the Rev. papers, the right of other heirs to a share therein is not lost by such entry. They can sue for a share in the produce or for partition. 8 C. P. L. R. 11, Dist. (*Baker*, O J.C.) RAHMAT BI *v.* BHURI BI. **6 N.L J. 161 = 73 I.C. 959 = 1923 Nag. 307.**

——S. 212—(1881), S. 67-E — *Government ryot—Judgment-debtor deceased—If legal representative—Attachment of.*

Crops grown by the deceased Government ryots' widow cannot be regarded as property and hence are not attachable in execution of a decree against the deceased ryot where S. 67 is applicable to him. (*Mittra*, A.J.C.) NATHIMAL *v.* MUSSAMMAT MATTOO.
21 I.C. 272 = 9 N.L.R. 137.

——S. 219—*Deputy Commissioner can eject but cannot decide rights.*

The right to exclude a trespasser on communal land permanently is not a matter which the Deputy Commissioner can determine under section 219; he can only eject him summarily and the section itself expressly saves the jurisdiction of the Civil Court to decide the question of the right of permanent exclusion. (*Hallifax*, A.J.C.) SAKHARAM *v.* RAMACHANDRA. **1923 Nag. 326.**

CENTRAL PROVINCES MUNICIPAL ACT (XVIII of 1889), S. 66.

——S. 219—*Disobedience of order under—Punishment under S.* 188, *Penal Code.*

The Central Provinces Land Revenue Act (No. II of 1917) contains no provision for enforcing an order of summary ejectment passed under S. 219 of the Act, and the person who disobeys such an order is liable to be punished under S. 188 of the Indian Penal Code for disobedience of the order. (*Batten*, O.J.C.) HIRASINGH *v.* EMPEROR. **17 N.L.R. 88 = 23 Cr. L.J. 19 = 64 I.C. 499 = 1922 Nag. 209.**

——S. 220—(1881), S. 152—*Jurisdiction of Civil Court.*

A suit for a gaontiaship is maintinable in the Civil Court. (*Chapman, Atkinson and Imam*, JJ.) LAL NRIPA RAJ SINGH RAI BAHADUR *v.* MOHAN GAONTIA, **3 Pat. L.J 229 = 44 I.C. 817 = 4 Pat. L.W. 256.**

——S. 229—*Scope of—Remuneration of lambardars.*

S. 229 of Bengal Act II of 1917 continues the state of things existing under Act XVIII of 1881 in regard to the remuneration of lambardars. (*Hallifax*, A.J.C.) BHOLARAM *v.* TUKARAM. **66 I.C. 465 = 1922 Nag. 111.**

CENTRAL PROVINCES LAWS ACT (X OF 1875).

——S. 5—*Hindu Law—Apostacy, effect of—Conversion to Muhammadanism—Succession—Gonds.*

Apostates from the Hindu religion cease to be Hindus and where such apostacy takes the form of conversion to a religion which in itself regulates the devolution of property, *e.g.*, Muhammadanism, then except on proof of well established custom to the contrary and that only in regard to inheritance and succession, the convert becomes subject to the law of his adopted religion. The term 'Hindu' in S. 5 refers to the persons who profess some form of Hindu religion, whatever be the branch, school sect, or off shoot to which they belong, but it does not extend to persons who have never possessed any form of the Hindu religion or to those who have been converted from it to some entirely different religion. The word would apply to dissenters and non-conformists but not to appostates. Thus a Jain is a Hindu but a Brahmin converted to Buddhism or Islam is not. Gonds in the Central Provinces are not Hindus and they are not governed by the Hindu Law except when it is adopted by any family, sect or branch. (*Stanyon*, A. J. C.) UJIYARA *v.* TRILOCHAN GOND. **44 I C. 435.**

CENTRAL PROVINCES MUNICIPAL ACT (XVIII OF 1889).

——S. 66 (3)—*Notice requiring alteration—Reasonable time to be granted.*

A notice given by a Municipal Committee requiring a person to alter or demolish a building is bad unless a reasonable time is given; what is "reasonable time" is determined

according to circumstances of the case and with particular reference to the means and ability of the person by whom the duty is to be discharged. (*Drake-Brockman*, J. C.) ABDUL SATTAR *v.* SECRETARY MUNICIPAL COMMITTEE. 29 I.C. 660= 16 Cr. L.J. 532=11 N.L.R. 87.

———(XVI OF 1903).

———Ss. 2 (f) and 45—*Tax—Rent for Municipal building is not a tax and cannot be recovered by summary procedure.*

The essential quality of a tax and of those similar imposts mentioned in S. 2 (*f*) of the C. P. Municipal Act seems to be that the amounts or rates of payment are fixed by the levying authority without reference to the payer; in regard to some of them there is option of making no payment if no benefit is taken but in none of them has the payer any option as to the amount to be paid. That essential quality is absent in a case where the amount to be paid was fixed by agreement between the two parties. A tax recoverable under S. 46 of the Act is a tax imposed under S. 35, that is to say, a tax impsoed with the previous sanction of the Local government or in special cases with that of the Governor-General in Council as well, "in the manner required by S. 39." That section requires a proposition of the tax at a special meeting, publication of details of its incidence, consideration at another special meeting of any objections made, sanction of the Local Government after consideration of those objections and notification in the official Gazette of the date of the imposition of the tax. Whether therefore, the payment to be exacted from the applicant was a "market due" or not, and it certainly was a "due" or debt for using a market or exposing goods for sale in a place belonging to the Municipal Committee, it was certainly not a "market due" or tax of the kind mentioned in S. 35 of the Municipal Act, as it was never imposed in the manner prescribed by that section. It cannot therefore be recovered by the summary procedure provided by S. 44. (*Hallifax*, A.J.C.) YESHWANT RAO PANDE *v.* SECRETARY, MUNICIPAL COMMITTEE. 19 N.L.R. 122=24 Cr. L.J. 516= 73 I.C. 52=1923 Nag. 264.

———Ss. 52 and 53—*Municipal Committee—Land within Municipal limits—Ownership of.*

There is no rule that all the land within the limits of a Municipal town must, in the absence of evidence to the contrary, be taken to belong to the Municipal Committee. (*Drake-Brockman*, J. C.) PRALHAD SINGH *v.* ABDUL AZIZ KHAN. 47 I.C. 892.

———Ss. 66 and 139—*Encroachment—Conviction—Imposition of daily fine is illegal.*

The accused was convicted under S. 139 read with S. 66 (1) of the C. P. Municipal Act and sentenced to pay a fine of Rs. 5 in addition to Re. 1 per day from 14th August 1922, onwards, in case he did not remove the encroachment or

obtain the sanction of the Municipal Committee to its continuance. *Held* that the order imposing a daily fine in the future could not stand. No person can be sentenced to punishment for a thing which he has not done but may possibly do in the future or even is likely to do in the future. (*Hallifax*, A.J.C.) BABU RAO *v.* MUNICIPAL COMMITTEE, NAGPUR. 72 I.C. 78=24 Cr. L.J. 318.

———Ss. 66 (1) 122—*'Building'—Essentials for conviction implies structure with roof.*

A "building" within S. 66 (1) of the C. P. Mun. Act, implies a structure with a roof. *Moir* v. *Williams*, (1892) 1 Q. B. 264, Ref. Where the petitioner is convicted for encroaching upon a street in a Municipal town by putting up a new structure in the place of an old one. *Held*, in the absence of proof that the new structure occupied more space than the old one, the conviction was bad. A prosecution under the Act can only take place after a resolution passed at a meeting properly convened and conducted. (*Drake-Brockman*, J. C.) THAKURLAL *v.* SECRETARY MUNICIPAL COMMITTEE, KHANDWA. 64 I.C. 274=22 Cr. L.J. 753.

———S. 66 (1) (3)—*Delay in passing orders—Notice under S. 66 (1)—Presumption—Sanction.*

Under S. 66 of the C. P. Municipal Act, delay in passing orders on a valid notice given under S. 66 (1) of the Act may, if followed by a failure to reply to a written reminder, lead to a conclusion that the proposed building has been absolutely sanctioned. (*Drake-Brockman*, J.C.) MAHOMED YACUB *v.* THE SECRETARY, MUNICIPAL COMMITTEE, NAGPUR. 48 I.C. 889=20 Cr. L.J. 89.

———Ss. 67 (1), (2), 122 and 139—*Old encroachment—Punishment.*

S. 122 cannot reasonably be construed as making punishable an existing encroachment not made by the accused person but by his predecessor-in-title. In the case of an encroachment not made by the accused S. 67 (2) of the Act provides full means of redress which can be enforced by the penal provisions of S. 139. The word 'such' in sub-S. (2) of S. 67 of the Act refers back to the words "structure encroaching on any street" in sub-S. (1) and not only to new encroachments as is clear from the provision in which encroachments of old standing are referred to. (*Batten*, A.J.C.) MADAN GOPAL DHOKARAN *v.* THE SECRETARY, MUNICIPAL COMMITTEE, NAGPUR. 47 I.C. 879=19 Cr. L.J. 979.

———S. 85—*Notice to erect latrine—Contents of—Duty of Committee.*

A notice under S. 85 (1) of the C.P. Municipal Act must contain the directions as to the nature and position of the latrine. Delegation to

CENTRAL PROVINCES MUNICIPAL ACT (XVI of 1903), S. 122.

an individual officer of the power to give directions, is improper. (*Drake-Brockman*, J.C.) ABDUL SATTAR *v.* SECRETARY, MUNICIPAL COMMITTEE, NAGPUR. 48 I.C. 882= 20 Cr. L.J. 82.

——S. 122—*Encroachment by predecessor—Successor is not liable.*

The word "encroaches" in S. 122 of the C.P. Municipal Act *prima facie* means commits an act of encroachment' and one no can be held liable for an act or admission unless such act or admission is declared to be an offence. The section cannot be interpreted as making punishable an omission to remove an existing encroachment not made by the accused person. The word "obstructs" in S. 122 would apply to the person who built or caused to be built the encroachment and not to the accused who originally had nothing to do with the erection of the building. (*Prideaux*, A.J.C.) CHUNI LAL *v.* THE MUNICIPAL COMMITTEE, ARVI. 18 N.L.R. 92=65 I.C. 559= 23 Cr. L.J. 127=1922 Nag. 167.

——S. 122—*Conviction under—Absence of proof that structure occupies more space—Notice for prosecution—Authority for sanction.*

In the absence of proof that a new structure put up occupied more space than the original one a conviction under S. 122, C.P. Municipal Act cannot be supported. Meaning of "Building" explained. A prosecution under the Act can take place only after a resolution passed at a meeting properly convened and conducted. (*Drake Brockman*, J.C.) THAKUR LAL *v.* SECRETARY, MUNICIPAL COMMITTEE, KHANDWA. 64 I.C. 274=22 Cr. L.J. 754.

——S. 122—*Conditions not communicated—Failure to comply with, is not an offence.*

Failure to comply with any conditions which are not placed on record or shown to have been actually communicated to him and subject to which, permission to build, was given to him under S. 66 of the C. P. Municipal Act, 1903,

CENTRAL PROVINCES SETTLEMENT CODE, Art. 223.

does not amount to an offence in the absence of departure from the sanctioned plan. (*Drake-Brockman*, A. J. C.) NANDLAL. *v.* KHANDWA MUNICIPALITY. 4 N.L.J, 266.

——S. 139—*Fine in respect of future breach.*

The daily fine may be increased under S. 139 of the C. P. Municipal Act. It must relate to a period anterior to the Magistrate's order of conviction. There cannot be punishment for future breach. 6 C.P.L.R. 32. Foll. (*Drake-Brockman*, J.C.) MAHOMED YACUB *v.* SECRETARY, MUNICIPAL COMMITTEE, NAGPUR, 48 I.C. 889=20 Cr. L.J. 89.

——S. 152—*Notice—Attestation of service by non-official persons.*

S. 152 does not require that the report of services of notice should be attested by any non-official person. (*Drake-Brockman*, J.C.) BIJARAM *v.* SECRETARY, MUNICIPAL COMMITTEE, NAGPUR. 49 I.C. 928= 20 Cr. L.J. 256.

——S. 159—*Complaint — Accused tried jointly.*

A complaint has to be made as required by S. 159 of the C.P. Municipal Act in order to enable a Court to take cognizance of an offence punishable under the Act. Once cognizance has been legally taken of an offence the Magistrate is seized of the whole matter as to all other accused whose guilt may appear during the trial of the case. (*Drake-Brockman*, J.C.) GAMBHIR CHAND *v.* SECRETARY, MUNICIPAL COMMITTEE, NAGPUR. 46 I.C. 886= 20 Cr.L .J. 86.

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——Art. 223—*Sewaijama meaning.*

Under Art. 223 Sewaijama includes the produce of forest lands. But such produce means the normal annual produce. A malguzar's Sewaijama does not include the wholesale cutting down of timber trees. (*Batten*, A.J.C.) JESWANT SINGH *v.* MT. JASODA. 38 I.C. 686= 18 N.L.R. 1.

Comparative table of C. P. Tenancy Acts of 1898 and 1920.

C. P. Tenancy Act, 1898.	C. P. Tenancy Act, 1920.	C. P. Tenancy Act, 1898.	C. P. Tenancy Act, 1920.	C. P. Tenancy Act, 1898.	C. P. Tenancy Act, 1920.
1	1	36	35 Do.	58 (2)	46 & 47
2 (1)	2 (1)	37	90	59	37 amended
2 (2)	2 (3)	38	...	60	38 (1)
2 (3)	2 (4)	39	4	61	40 amended
2 (4)	2 (5)	40 (1)	8	61-A	41
2 (5)	2 (6)	41 (1)	5 & 6 (1)	62	...
2 (6)	2 (7)	41 (2)	6 (2) amended	63	...
2 (7)	2 (8)	41 3 (*a*)	6 (4) *a*	64	...
2 (9)	2 (10)	41 3 (*b*)	...	65	...
2 (10)	2 (11)	41 (4)	6 (1) *b*	66	...
3	3 amended	41 (5)	6 (4) *c*	67	...
4	59	41 (6)	6 (5)	68	...
5	60	42	7	69	...
6	61	43	9 (1)	70	...
7	...	44	10 amended	71	...
8	68 amended	45 (1)	49 (1)	72	...
9 (1)	70 (2)	45 (2)	50 (1) & (2) amended	73	...
9 (2	...			74	78
9 (3	...	45 (3)	49 (2)	75	79 amended
10	74 amended	45 (4)	51 (2)	76	80
11	75 (1)	45 (5)	...	77	81
12	77	45 (6)	49 (3)	78	...
13	56	45 (7)	105 (*g*)	79	...
14	57	46 (1)	11 amended	80	82
15	62	46 (2)	12 (2)	81	83
16	63	46 (3)	12 (1) i & ii &(3)	82	84
17 (1)	64 (1) amended	46 (5)	12 (4)	83	85
17 (2)	64 (2)	47 (1)	13	84	...
17 (3)	...	47 (2)	14 (3)	85	...
18	65	48	14 (1) & (2)	86	86 amended
19, 20, 21, 22	...	48 Proviso	14 Proviso	87	27
23 (*a*) & (*b*)	20 (*a*) (*b*)	49	15 amended	88	28
24, 25, 26, 27	...	50 (1) & (2)	...	89	29
		50 (3)	15 (2) amended	90	...
28	22	51	16 Do.	91	...
29	...	52	25	92	100
30	88	53	91	93	103
31 (1)	52 amended	54	92	94	104 amended
31 (2)	53 Do.	55	42 amended	95	105 Do.
32 (1)	30	56 (1;	43	96	107
32 (2)	31 (1) & (2)	56 (2)	44 (1)	97	106
33 (2) & (3)	33 (1) & (2)	56 (3)	44 (2)	98	108
34	55	57	...	99	109
35	89 amended	58 (1)	45	100	111

C. P. TENANCY ACT (IX of 1883), S. 32.

———*Amending Act—Occupancy rights in Malik Makbuza land cannot be acquired.*

No occupancy tenant in Malik Makbuza lands could be acquired any where by force of any provision in the Tenancy Act of 1883 which must be read as if originally framed in the form given to it by the amendments of 1889. (*Stanyon*, A.J.C.) TEJ SINGH *v.* LALJI.
14 I.C. 788=8 N.L.R. 39.

———S. 38 (2)—*Mortgage includes* Zar-i-peshgi *lease—Interest.*

For the purpose of S. 38 (2) the sum secured by any previous mortgage includes interest on it for five years or for the period since its execution, whichever is longer. 'Mortgage' in S. 38 (2) includes a *zar-i-peshgi* lease. (*Hallifax*, A.J.C.) SHIOBAKSH SINGH *v.* JAGANNATH. 64 I C. 89.

———S. 42—*Mortgage decree—Form altered at instance of mortgagor—Estoppel.*

A decree for sale provided that cultivating rights in *sir* were included. The judgment-debtor (mortgagor) got it altered into "all actual and reputed rights in the *sir* land" it being agreed between the parties that the question whether such rights included the cultivating right should be left over. Afterwards the mortgagor contended that the decree did not comply with S. 42 of the Act *held* that it was not open to him to assert that by reason of the alteration the rights of the mortgagee under the original decree were taken away, *held* also that the Lower Court should have decided whether the rights sold included the cultivating rights also. (*Lord Buckmaster.*) GULAB SINGH *v.* BALLABHDAS.
48 Cal. 891=48 I.A. 220=
61 I.C. 769=40 M L.J. 418=17 N.L.R. 84=
(1921) M.W.N. 310=3 U.P.L.R. P.C. 20=
19 A.L.J. 361=25 C.W.N. 938=
34 C.L.J. 1=14 L.W. 228=
29 M L.T. 348 (P.C.)

———S. 42—*Applicability to mortgages.*

S. 42 of Tenancy Act (1883) applies only to sales of three specified kinds and not to mortgages whether by conditional sale or of any other kind. 7 C.P.L.R. 25, foll. (*Stanyon and Hallifax*, A.J.Cs.) SHEOLAL *v.* NANHELAL.
17 I.C. 129=8 N.L.R. 123.

———(XI of 1898).

———Ss. 21 and 32—*Permanent lease by Thekadar—Improvement by tenant—Compensation—Landlord if bound by equities affecting Thekadar.*

A Munsif authorised under the C. P. Tenancy Act to assess compensation for improvements in a holding with the aid of assessors commits an irregularity, if he does not associate them in doing so, which may however be waived by the parties. An unregistered lease "for ever" by a Thekadar cannot confer any permanent title though the lessee may have been in possession under it for a long time, nor

C. P. TENANCY ACT (XI of 1898), S. 31.

the assent of the Zamindar in guarded terms has such an effect. If a tenant under a *bona fide* belief that his tenancy is permanent makes permanent improvement with the knowledge of the landlord, he is entitled to compensation on ejectment. A landlord who gets possession of his holding by the surrender of the person who held it and who gave a permanent lease for valuable consideration may be bound by the equities binding on the surrenderor. (*D. Chatterjea*, J.) SARDAKAR PODA *v.* BISSESWAR GOANTIA. 26 I.C. 476.

———S. 32—*Improvements compensation for—When legally due—Position of sub-tenant.*

Under S. 32 (1) a tenant can claim compensation for improvements only if the improvements were made in accordance with the Act, if the tenant was an absolute occupancy or ordinary tenant. If the tenant is a sub-tenant, he can claim compensation, if the improvements have been made with the landlord's consent. (*Batten*, J.C.) BALARAM *v.* BHAGIRATHIBAI.
1922 Nag. 47.

———S. 35—*Surrender by Hindu widow is Binding on reversioners.*

A surrender by a Hindu widow if not impeachable for fraud or on other like ground, is binding on the widow's husband's reversioners. (*Prideaux*, A.J.C.) MUKUND *v.* DIWAKAR.
73 I C. 126.

———S. 35—*Surrender of portion of tenancy is invalid.*

There cannot be a valid surrender of a portion of the holding at the instance of a tenant. 7 N L.R. 8, Ref. (*Prideaux* A J.C.) ALLIBHAI *v.* SHAM RAO. 1922 Nag. 216=64 I C. 902=
18 N.L.R. 82.

———S. 39—*Absolute occupancy holding—Gift of, by widow with consent of landlord—Surrender and re-grant.*

There is no difficulty in regarding the transfer by way of gift by a widow of her absolute occupancy holding with the consent of the landlord, even though it was a subsequent consent, as a surrender to him by the widow and a fresh grant by him to the transferee. In respect of surrenders the absolute occupancy right is a tenancy and not a proprietary right. The surrender would be binding on the reversioner, for the limitations of the widow's interest in the tenancy are subject to the provisions of the Tenancy Act as to surrender and alienation. (*Hallifax*, A.J.C.) RAMCHANDRA BALAKRISHNA *v.* RAMCHANDRA. 65 I C. 952=
1922 Nag. 232.

———S. 41—*Pre-emption—Right of landlord.*

S. 41 of the C.P. Ten. Act confers a right of pre-emption on the landlord whether or not the intended sale has taken place. (*Hallifax*, J.C.) RAI *v.* SIDAKALLI. 68 I.C. 959=
1922 Nag. 16.

C. P. TENANCY ACT (XI of 1898), S. 41.

——S. 41—X of 1883, S. 38 (2)—"*Interest*"—*Meaning of—Whether includes re-payment in cash and in grain.*

The meaning of " Interest " in S. 38 (2) is a compensation for the use of money or grain and therefore includes a re-payment in cash or in grain. (*Mittra, Offg.* A.J.C.) RAGHUNATH *v.* GANPAT. 23 I.C. 213=10 N.L.R. 21.

——S. 41 (2)—*Mortgage in the form of lease is inoperative against landlord.*

A document though given as a lease of an absolute occupancy holding is a mortgage where the transfer is meant to secure a debt contracted. Such a document violates the provisions of S. 41 (2) and hence is inoperative against the landlord. (*Dhobley*, A.J.C.) RAM PRASHAD *v.* CHANDULAL. 4 N.L.J. 262= 65 I.C. 241=1922 Nag. 156.

——S. 41 (2)—*Notice under—Contents and particulars of.*

A notice under S. 41 (2) of the C. P. Tenancy Act need not be worded with the accuracy of a plea. Where the information given in the notice is amply sufficient to inform the landlord of the tenant's intention to mortgage the whole of his absolute occupancy holding, it is sufficient compliance with the law. S. 41 (2) does not say that the particulars specified in that sub-section should be given in the notice but it merely states the circumstances under which the tenant must give notice, and presupposes a knowledge on the part of both landlord and tenant as to the particulars of the tenant's holding. (*Batten*, A.J.C.) RAGHOJI RAO *v.* RAJESWAR. 65 I.C. 816= 4 N.L.J. 131.

——S. 41 (2)—*Mortgage—Includes—Zur-ipeshgi lease—Interest.*

Under S. 38 (2) of the C. P. Tenancy Act of 1883 or S. 41 (2) of the Act of 1898 the sum secured by any previous mortgage includes interest on it for five years or for the period since its execution, whichever is longer. The term " mortgage " in S. 38 (2) includes a zur-i-peshgi lease. (*Hallifax*, A.J.C.) SHIOBAKSH SINGH *v.* JAGANNTH. 64 I.C. 99.

——S. 41 (2)—"*Premium*" *does not include periodical payment.*

The term " Premium " in S. 41 (2) of the Act means a payment made in a lump and does not include what is ostensibly a merely periodical payment. (*Drake-Brockman*, J.C.) JAGANNATH *v.* BEHARI. 59 I.C. 419.

——S. 43—*Charge—Suit to enforce, cannot be brought by other than the sole landlord or the representative of his co-sharers.*

No person can institute a suit to enforce a charge created by S. 43 of the Act unless he is the sole landlord or the representative of his co-sharers for collection of rent. (*Drake Brockman*, J.C.) DEOKARAN *v.* NATHU. 62 I.C. 382=4 N.L.J. 138.

C. P. TENANCY ACT (XI of 1898), S. 45.

——S. 45—Sir *land—Section does not bar registration of will in respect of.*

The section does not apply to a case of devolution by death, and therefore S. 45 (3) does not bar the registration of a Will, by which *sir* land is bequeathed. The section does not take the proprietor's right to alienate the cultivating rights in his *sir* land. It merely lays down a condition precedent to the exercise of that right *intervivos*. The restriction on the power of alienation is imposed by the C.P. Tenancy Act and not by Hindu Law. (*Hallifax and Prideaux*, A.J.C') MURLIDA. *v.* HARIDAS. 62 I.C. 256.

——Ss. 45 (3) and 69 (c)—*Proprietor becoming tenant—Effect—Position of tenant.*

When the proprietor becomes the occupancy tenant of the *sir* land under S. 45 (1) of the Act the relations between him and the ordinary tenant of *sir* are not changed by virtue of cl. (5) of the section. The ordinary tenant does not thereby become a sub-tenant and is liable to be ejected by the ex-proprietary occupancy tenant only under the provisions of S. 69 (c) of the Act. (*Batten*, A.J.C.) GOPIKISHN *v.* KULPAT. 31 I.C. 470=11 N.L.R. 170.

——S. 46—*Transfer need not be to nearest heir.*

S. 46 does not make it obligatory that the transfer should be in favour of the nearest existing heir of the transferor at the time it is made. (*Hallifax*, A.J.C.) MT. KRISHNA BAI *v.* DEBI SINGH. 71 I.C. 409= 1923 Nag. 195.

——S. 46—*Personal law of inheritance—Is not affected by section.*

If a female is entitled, according to her personal law, to succeed to an occupancy holding. S. 46 of the C. P. Tenancy Act will not disqualify her from inheriting such property. The expression 'in the male line of descent' does not necessarily mean that the person at the lower end of the line must be a male. The expression 'In the male line' should be distinguished from the expression 'male lineal' and the former does not mean 'a male in the line of males' which is the meaning ascribed to the latter. (*Hallifax*, J.) SAKHUBAI *v.* HARI. 5 N.L.J. 261=67 I.C. 229=1922 Nag. 207.

——Ss. 46 and 47—*Co-proprietors dividing sir land—Position of.*

When two co-proprietors of a village divide up the *sir* land between them to hold portions of it separately, they make an imperfect partition of that village ; each has a share a separate *patti* composing the *sir* land he holds in severalty, and the whole of the rest of the village forms what is called a *Shamilat patti*. (*Hallifax*, A.J.C.) CHUNGA PRASAD *v.* PHULWA. 67 I.C. 121=1922 Nag. 126.

——S. 46—*Partition of holding has the effect of surrender and regrant.*

A partition of a holding with the landlord's consent cannot be distinguished from a surren-

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der of the whole by all of them jointly and a grant of a new lease in respect of the parts to each of them separately. Each part then is a parcel of land held on a lease which is not the same as that on which the original whole was held and it cannot be the same holding. 7 N.L.R. 8; 10 N.L.R. 129. Rel. Further, if a tenant takes fresh land from the malguzar in addition to what he already holds, and the rent of the fresh lands is not kept separate, but one single sum is payable in respect of the old and the new land, then he undoubtedly has a new holding, because the new parcel is held under a different lease, and a different set of conditions from those of the old smaller parcel. (*Hallifax* A.J.C.) SON SINGH *v.* THAKUR RAM.
18 N.L.R. 48=69 I.C. 359=
5 N.L.J. 243=1922 Nag. 21.

——S. 46 (1)—*Succession—Disqualification of near collaterals, does not give any right to the remote.*

The condition requiring the collateral who claims succession to have shared in the cultivation is a disqualification which disentitles the nearest collateral if he has not fulfilled the condition. But it does not confer any right of succession to the occupancy tenure on a more remote collateral even though he may have shared in the cultivation. 15 C.P.L.R. 89=17 A. 33, Ref. (*Batten*, A.J.C.) AHILIA *v.* BADAN SINGH.
5 N.L.J. 270=65 I.C. 292=
18 N.L.R. 105=1922 Nag. 117.

——S. 49—Sir *land—Alienation of—Effect of.*

The *sir* right is made up of two parts one proprietary, and the other the occupancy and it can accrue synthetically by union of these two parts in the same person. But it must be in the same person. Where a proprietor alienates ownership of land, the *sir* right in the land is a constituent part of his ownership of the *sir* land. (*Hallifax*, A. J. C.) SHEORAM *v.* TIKARAM.
19 N.L.R. 26=
71 I.C. 129=1923 Nag. 93.

——Ss. 50 and 70—*Sale contrary to—Rights of transferee—Dispossession—Compensation.*

Where a sale of a holding is prohibited under S. 71 of the C.P. Tenancy Act, the alienee in possession can claim compensation from the plaintiffs (seeking to set aside the sale) before they are given possession. 6 N.L.R. 12, foll. If however the alienee had not obtained possession and he sought to enforce the sale, he could not recover the consideration paid. 6 A.L.J. 555, Ref. (*Prideaux*, A.J.C.) DHONDIBA *v.* PANDURANG.
68 I.C. 252=
1923 Nag. 111.

——S. 60—*Sub-lease can be only for one year unless renewed—Notice — Possession of sub-lease after notice is that of trespasser.*

Under S. 60 of the C.P. Tenancy Act a sub-lease of occupancy land cannot be made from year to year, it could only be made for a term of one year. If before the end of the year no notice is given there may be a presumption

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that the parties intend to make a fresh lease for the ensuing year; but in case a notice is given by the occupancy tenant to his sub-tenant that he does not intend to renew his lease, it comes to an end with the end of the agricultural year with the effect that after the date of the notice the sub-tenant becomes a trespasser and it is competent to the occupancy tenant to maintain an ejectment suit. (*Batten*, A.J.C. GOVINDA *v.* CHINDHOO.
48 I.C. 948.

——S. 60—*Sub-tenancy — Presumption regarding termination of lease.*

When there is nothing to show the nature of tenancy, it may fairly be taken to be one from year to year. A tenancy from year to year does not *ipso facto* terminate at the end of every year but it must be presumed to be the intention of the property that it cannot come to an end without a reasonable notice given by one to the other. So also if there is no agreement regarding the termination of a sub-tenancy of an absolute occupancy field by the end of every year, the intention of a reasonable notice before putting an end to the same should be presumed. (*Batten*, A.J.C.) SHEOMANGAL *v.* SETH NANHELAL. 48 I.C. 392=
14 N.L.R. 3.

——Ss. 62 (2), 63 (1) and 69 (c)—*Applicability—Tenant of holding entirely of* sir *land—Suit for ejectment cognizable by Revenue Officer.*

Section 62 (2) of the C.P. Tenancy Act concerns itself only with the cultivation of land in partnership with the proprietor and its effect is to enable the Local Government to make a person a tenant, who would not otherwise be one. A tenant whose holding consists entirely of *sir* land is an ordinary tenant and a suit for ejectment under S. 69 (*c*) is one between land-lord and tenant and so cognizable by a Revenue Officer. If the plaintiff had once stated that the defendant was a tenant of *sir* land, he cannot afterwards set up the plea that he is a trespasser so as to oust the jurisdiction of the Revenue Officer. Until actually ejected, the person to whom *sir* land is let continues to be in law a tenant though the period contracted for had expired. (*Drake-Brockman*, J.C.) NARAYAN *v.* BISRAM. 21 I.C. 607=9 N.L.R. 188.

——Ss. 64 (4) and 69—*Correction of Record of Rights.*

The special rule of limitation under S. 69 (4) has no application to the correction of an entry in the Record of Rights that the deft. is the proprietor instead of occupancy tenant of *sir* land. (*Batten*, A.J.C.) HAZARILAL MOTILAL *v.* SHYANIBABU. 48 I.C. 932.

——S. 65 (7)—*Thika Jama—Default in payment—Re-entry.*

S. 65-A, sub-section (7) though not expressly providing for ejectment on the ground that the thekadar has failed to pay the kajan, recognize

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the validity of an agreement providing for re-entry in such a case. (*Mittra*, A.J.C.) RAJAH KOMAL SINGH *v.* JAGANNATH. 49 I.C. 840= 15 N.L.R. 39.

——S. 69—*Bhogra land—Permanent lease by* gaontia—*Validity of.*

In a suit for ejectment from Bhogra land, the deft. can rely on a permanent lease granted by the *gaontia* who subsequently acquired proprietary rights. (*Miller*, C.J. *and Mullick*, J.) ADITYA PRASAD *v.* PARMANANDA PATEL. 53 I.C. 96=4 Pat. L.J. 505.

——S. 70—*Succession — Hindu widow can accelerate, by surrender.*

In all matters of tenancy the personal law applies except in so far as it is limited or altered by the tenancy law and there is nothing in the C.P. Tenancy Act to limit a Hindu widow's power to accelerate the succession to her late husband's estate by retiring from the ownership of it by surrender. On such surrender the estate passes to the next heir not by transfer but under the law of inheritance. If the next heir is a limited owner, *e.g.*, a daughter, the heirs of the last male owner would succeed after the daughter's death and on default of such heirs, the malguzar can resume possession of the tenancy. In a contract creating a tenancy the parties may agree that it shall be subject to any conditions that are not forbidden by the law. (*Hallifax*, A J.C.) SUNDAR LAL *v.* BISAMBHAR. 65 I.C. 180=1922 Nag. 24.

——Ss. 70 and 71—*Incomplete sale—Ejectment—Suit, maintainability of.*

Where a transaction falls short of a complete sale, S. 70 of the Act does not apply and the plff. cannot apply to the Revenue Officer under S. 71 of the Act. He can come to a Civil Court and eject the deft. who had acquired no title to the holding. 13 I.C. 909, dist. (*Mittra*, A.J.C.) BATANAND *v.* MADHO RAO. 42 I.C. 288.

——S. 70 (5)—*Deed of surrender in favour of lambardar—Registration prohibited—Trespass.*

Surrender of ordinary tenure in favour of one co-sharer landlord in his personal capacity is a sale the registration of which is forbidden by Section 70 (5). As the deft. was in possession with consent of other landlords only and was a trespasser to the extent of plff.'s share, the latter was entitled to a decree for joint possession to the extent of that share. (*Mittra*, A.J.C.) BALWANTRAO *v.* RAMA RAO. 41 I.C. 934.

——S. 85—*Holding—Separation into two plots—Forfeiture—Decree as to the plot—Effect on mortgagee of tenant.*

If the landlord agrees to distribute the rent on each parcel separately there is a splitting of the original holding. Under S. 85 the tenant may pay up the arrear on one holding and save it from forfeiture without paying the arrear on the other. If a tenant consents to a decree as against the holding from which no arrear is due, it is binding on him but not on the mortgagee just as in the case of a surrender by the tenant. (*Mittra*, A.J C.) TIKARAM *v.* SETH GHASIRAM. 26 I.C. 810=10 N.L.R. 129.

C. P. TENANCY ACT (XI of 1898), S. 93.

——S. 93—*Successor of a tenant is not a tenant.*

As a successor of a tenant does not necessarily become a tenant, and the status of tenant can only arise by its acceptance by both the parties, S 93 does not apply where there is no such acceptance and therefore Civil Court can entertain a suit for wrongful dispossession. (*Hallifax*, A.J.C.) NILKANTH *v.* KASUBAI. 63 I.C. 46=4 N.L.J. 55.

——Ss. 93 and 94 — *Costs not awarded by Rev. Officer—Suit does not lie in Civil Court.*

A Revenue Officer holding an enquiry under S. 93 of the C.P Ten. Act has the powers of Civil Court in awarding costs. If he has not made an order as to costs he must be deemed to have disallowed them and fresh suit does not lie in the Civil Court for the same. (*Batten*, J.C.) MOTIRAM *v.* HARI. 65 I C. 67= 18 N.L.R. 65=1922 Nag. 168.

——S. 95—*Applicability—Disputes between neighbouring tenants—Act does not apply.*

The object of the C.P. Ten. Act is to provide for the relations between landlords and tenants. The Act does not contain any provision for settling disputes between neighbouring tenants. Their remedy is under the ordinary law in a Civil Court. (*Batten*, J.C.) MOTIRAM *v.* HARI. 18 N.L.R. 65=65 I C. 67= 1922 Nag. 169.

——S. 95—*Jurisdiction—Dispute between Tenant and former landlord Civil and Revenue Court.*

The division of *Khud Kasht* or *sir* among co-sharers of a village to be held in severalty is undoubtedly a partial private partition of the village lands and each co-sharers separately held parcel of land is a separate *patti* of the village of which he is the sole landlord, and if he leases that land to a tenant, he is still the sole landlord. But there is nothing to prevent the co-sharers having a re-distribution of the lands held in separate ownership at any time, and either Khudkhast or tenancy land can always be transferred to another patti or to what may be called the *shamilat patti*. Of tenancy land so returned to the body of co-sharers they are the landlords and are ordinarily represented by the lambardar and the co-sharer who held the land previously in separate ownership is no longer the landlord. His suit between him and the tenant in respect of that, is therefore, not a suit between landlord and tenant and therefore the Judge trying such a suit need not be also a revenue officer. (*Hallifax*, A.J.C.) JAGANNATH *v.* SAHEBRAO. 65 I.C. 127=1922 Nag. 37.

C. P. TENANCY ACT (XI of 1898), S. 97.

———Ss. 97 and 67—*Suit to eject—Jurisdiction.*

A suit to eject tenant under S. 69 of the Act, is triable only by the Civil Court of a Revenue Officer under S. 97 and an ordinary Civil Court has no jurisdiction. (*Hallifax*, A.J.C.) AMAN SINGH v. CHURAMAN SINGH. 61 I.C. 593.

———(I of 1920).

———*Malgusari share—Devise of, can be made without—Sanction of Revenue authority.*

Occupancy rights in *sir* land can be devised by will along with the malgusari share to which they appertain without the sanction of the Revenue Authority. 62 I. C. 246, referred to. (*Hallifax*, A.J.C.) GADI v. GOVINDA. 71 I.C. 207 = 1923 Nag. 141.

———*Ejectment — Only the landlord is entitled to.*

Nobody but a landlord can eject a tenant for arrears of rent. Any other person who obtains a decree for arrears of rent cannot execute the decree by the special process of ejecting him. (*Hallifax*, A.J.C.) GANPATI TELI v. DAJI. 68 I.C. 855 = 1923 Nag. 351.

———S. 2—*Agricultural purpose—Meaning.*

The term "agriculture" is not confined to the cultivation by annual tilling, ploughing and sowing of that which yields an annual crop, cultivation of betel (pan leaf) is an agricultural purpose. Everything treated as "agricultural" by settlement authorities must be so treated by Civil Courts. (*Stanyon*, A.J.C.) LOOLA v. PYARE. 33 I.C. 497 = 12 N.L.R. 57.

———S. 2 (6)—(X of 1859), S. 2 (5)—*Land let or occupied for agricultural purpose.*

A village tank over which the landlord gives a right to fish and grow water nuts (singhara), is not land let or occupied for agricultural purposes or for purposes subservient to agriculture within the meaning of that phrase as used in S. 2 (5). (*Drake-Brockman*, J.C.) HARI v. WANU. 31 I.C. 291 = 11 N.L.R. 122.

———Ss. 2 (6) and (11) (b)—*Landlord and tenant—Land let for cultivation of water nuts—Tenant.*

A village tank which is let for the cultivation of water nuts is not land let or occupied for agricultural purposes or for purposes subservient to agriculture within the meaning of the Act and the cultivator is not a tenant. (*Stanyon*, A.J.C.) BATTOO v. NARAIN PRASAD. 28 I C. 869 = 11 N.L.R. 49.

———S. 2 (7)—(1898), S. 2 (6) "*Landlord*"—*Meaning.*

The term "landlord" denotes in a village having more than one proprietor, the whole body of landlords and therefore anything that a landlord is required or authorised to do under the Act must be done by the whole

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proprietary body or an agent acting in their behalf. (*Prideaux*, A.J.C.) GANPAT SAO v. PANDURANG. 33 I.C. 758 = 12 N.L.R. 24.

———S. 2 (11)—*Tenant, rights of—Whether may be joint family property.*

There is no warrant for the proposition that the rights of a tenant cannot be joint family property. (*Hallifax*, A.J.C.) SUKA v. RAKHI. 37 I.C. 339.

———S. 2 (11)—*Tenancy.*

In the Central Provinces a tenancy cannot be acquired by prescription. A person who occupies land without the consent of the landlord and claims to hold it as a tenant, does not hold even the limited right of a tenant adversely to the landlord. (*Batten*, A. J.C.) KANHAIYA LAL v. DULAR SINGH. 17 I.C. 606 = 8 N.L.R. 163.

———S. 3—(1898), S. 41 (1)—(1883), S. 38.

A Hindu widow on whom an absolute occupancy holding has devolved under S. 38 (11) of C. P. Tenancy Act of 1898 obtains an interest analogous to that of a Hindu widow subject only to the provisions of the statute as to surrender and alienation. (*Stanyan*, A. J. C.) BHURA v. RAMRAO. 17 I.C. 356 = 8 N.L.R. 154.

———Ss. 6 and 10—*Transfer under the old Act—Rights of landlord are not taken away by the new Act.*

Where there was a transfer of an absolute occupancy holding while the Act of 1898 was in force the rights of the landlord to sue in ejectment or for pre-emption are not taken away by the new C. P. Ten. Act. (*Prideaux*, A. J. C.) VINAYAK v. MAHEBULLA KHAN. 68 I.C. 427 = 1923 Nag. 33.

———S. 6—(1898), S. 41, (7)—*Alienation of part of absolute occupancy holding.*

Landlord cannot eject the transferee as trespasser and enter on the holding when a part of absolute occupancy holding is sold without his consent. (*Hallifax*, A. J. C.). JODHRAJ. v. DAULAT. 58 I.C. 112.

———S. 6—(1898), S. 41—*Absolute occupancy holdings — Mortgage of—Suit by malgusar—Subsequent sale of holding in execution—Purchaser's rights.*

Where a malguzar obtains a declaration that a mortgage of the absolute occupancy holding by the tenant is invalid as against him and subsequently obtains a decree against the tenant for money and not for rent and sells the holding in execution thereof, the purchaser at the sale is not entitled to impeach the mortgage. (*Mitra*, A.J.C.) NARAIN RAO v. FATHELAL. 43 I.C. 907 = 15 N.L.R. 48.

———S. 6 (1)—(1898), S. 41 (7)—*Transfer of sub-lease—Consent of landlord.*

The Tenancy Act requires the consent of the landlord only in respect of a transfer by the

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tenant and not in respect of a transfer of a sub-lease which is valid and binding against the landlord. (*Kotwal, Offg.* A. J. C.) NARYANDAS KHUSALIRAM MARWADI *v.* KRISHNAROW. 14 N.L.R. 188=48 I.C. 970.

——S. 6 (1) (b)—(1898), Ss. 41 (5) and 47—*Absolute occupancy holding—Mortgage without landlord's consent—Decree—Sale—Ejectment.*

A mortgage of an absolute occupancy holding without the consent of the landlords or their lambardar is voidable and not void. In an execution sale of the mortgage decree the lambardar can only claim pre-emption and not an avoidance of sale. The purchaser of an absolute occupancy holding, at a sale in execution of a mortgage decree, is not a trespasser. (*Prideaux*, A. J. C.) GANGADHAR *v.* GOSAI. 50 I.C. 936.

——S. 6 (1) (b)—(1898), S. 41—*Mortgage without notice—Apportionment.*

A mortgagee of an absolute occupancy holding along with other property cannot ask the Court to value such other property and apportion the mortgage debt so as to render the mortgage without notice to the landlord valid. (*Skinner*, A. J. C.) GANGADHAR RAO *v.* LAXMAN RAO. 10 I.C. 698=7 N.L.R. 20.

——S. 6 (2) and (4)—(1898), S. 41 (2) (5)—*Absolute occupancy holding — Mortgage by vendee—Absence of prescribed notice—Landlord's right of pre-emption.*

An absolute occupancy tenant after giving his landlord notice under sub-sec. (2) of S. 41 sold the holding by a registered conveyance and on the same day took a mortgage from the vendee to secure payment of so much of the price as had not been paid. The requisite notice of intention to mortgage was not given to the landlord, but the original tenant regained possession of the holding in execution of a final decree for foreclosure. *Held*, that the sale and the mortgage were distinct transactions and that the landlord was entitled to eject the original tenant. 3 N. L. R 19 and 14 C. P.L.R. 177 ref. The landlord was not entitled to pre-empt under sub-S. 41 (5) of the C. P. Ten. Act as the sub-section has no application and the mortgage foreclosed is effective without notice to the landlord. 6 N. L. R. 69, Foll. (*Drake-Brockman*, J. C.) MOOLCHAND *v.* BISNOO. 31 I.C. 721=15 N.L.R. 109.

——S. 6 (2)—(1898), S. 41 (2)—Ejusdem generis—*Previous sums secured by mortgage.*

The expression "and the previous sums, if any, secured by mortgage of the holding" includes sums due to one taking the contemplated mortgage and the other creditors. Landlord's special right to pre-empt is not affected by the concealment of a prior mortgage by a tenant to different persons. Rule of *Ejusdem generis* does not apply to principal interest and the previous sums secured by the mortgage. These must be taken into account. (*Drake-Brockman*, J.C. *and Stanyon*, A.J.C.) BALAJI *v.* GOPAL RAO. 33 I.C. 489=12 N.L.R. 51.

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——S. 6 (2)—(1898), S. 41 (2)—*Notice, sufficiency of—Posting of notice.*

The word "give" in S. 41 (2) means something more than posting. A notice by being put into post is not "given" or "served" and a period of a month allowed to the landlord under that sub-section begins from the date on which he receives the notice. (*Drake-Brockman*, J.C.) DINA *v.* PARASRAM. 32 I.C. 991=12 N.L.R. 42.

——S. 6 (2)—(1898), S. 41—*Mortgage of occupancy holding—Notice—Where necessary—Interest.*

The test for determining whether notice to the landlord is necessary on the mortgage of an absolute occupancy holding is the rent of the entire holding if the entire holding is to be transferred or so much as corresponds with the portion intended to be transferred if only a part is to be transferred. In applying the test prescribed by S. 38 (2), (1883) the whole interest payable for the succeeding 5 years should be taken into consideration even though repayment in full is contemplated within 5 years. (*Drake-Brockman*, J.C.) MADHO *v.* UMRAO. 17 I.C. 870=8 N.L.R. 147.

——S. 6 (4) and (6)—(1898), S. 41 (8)—*Scope.*

S. 41 (8) pre-supposes the right of a landlord to bring a suit for ejectment against the transferee and specially provides against both the landlord and the transferee. 15 C.P.L.R. 17 dist. (*Batten*, A.J.C.) NAKUL SAO *v.* RAMADHIN SAO. 34 I.C. 698=12 N.L.R. 86.

——S. 6 (5)—(1898), S. 41 (6)—*Charge.*

Where a second mortgagee forecloses the mortgage of an absolute occupancy holding and remains in possession and afterwards the malguzar purchases the holding from him under the provisions of S. 38 of the C. P. Tenancy Act, (1883), the mortgage debt due to the first mortgagee which was a charge on the land in possession of foreclosing second mortgagee is converted into a charge on the purchase money held by him in exoneration of the land within the meaning of S. 41 (6). The first mortgagee therefore, does not obtain a new cause of action. (*Drake-Brockman*, J. C.) VISWANATH *v.* SHANKERLAL. 34 I.C. 704=12 N.L.R. 90.

——S. 9—(1898), S. 43—*Priority—Charge for rent—Money claim—Incumbrances otherwise binding on landlord.*

S. 43 gives the landlord a *real* remedy in the form of a charge enforceable by a suit for sale as distinguished from *personal* remedy *enforceable* by a money suit for arrears of rent. The section gives priority to the first over the second remedy. A landlord wishing to enjoy the priority given to his charge must enforce it according to law. A landlord who himself purchases the tenant's holding in execution of a mere money decree for rent cannot claim priority over an existing incumbrance on the

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holding which is otherwise binding on him. 3 N.L.R. 164, Foll. (*Stanyon*, A.J.C.) NATHURAM v. FULI CHAND.

11 I.C. 695=7 N.L.R. 107.

——Ss. 10 and 44 (1)—(1898), Ss. 44 and 56 (2)—*Village service land—Occupancy right—Sub-lease for a period not exceeding a year—Effect.*

Occupancy rights under S. 44 of the Act cannot be acquired in village service lands and a sub-lease thereof for a year or less is void under S. 56 (2). (*Teunon and Mullick*, JJ.) BHUBAN SAHU *v.* LAL SUNDAR JAHAN KAR.

23 I.C. 604.

——S. 10—(1898), S. 44—*Presumption—Continuance of—Possession.*

The presumption as to continuance of possession of a person is not retrospective. Possession once proved to exist is presumed to continue until the contrary is shown. (*Drake-Brockman*, J.C.) PURUSHOTTAM *v.* DULI CHAND.

30 I.C. 196.

——S. 11, Proviso (1)—(1898), S. 46—*Devolution.*

When an occupancy tenant dies, his right in his holding devolves as if it were land. A Hindu son, who had remained joint with his father is his heir and succeeds to his separate or self-acquired property in preference to a separated son. (*Skinner*, A.J.C.) ATMARAM *v.* LALA. 10 I.C. 738=7 N.L.R. 36.

——Ss. 12 and 13—(1898), Ss. 46 (3) and 47—*Mortgagee in possession—Occupancy holding—Consent of one of the landlords.*

Mortgagee foreclosing the mortgage and entering into possession of the tenancy, may be said to become a tenant. A mortgage of occupancy holding with the consent of one of the body of landlords, cannot be avoided. (*Drake-Brockman*, J.C.) GURUDAYAL DAS *v.* NATHU.

30 I.C. 275.

——Ss. 12 and 105—(1898), Ss. 46, 47, 48, 70, 71, 72 and 95.

Where a transfer of tenant right would be valid in the absence of prohibition under S. 46, or S. 70 of the Act, it cannot be avoided except in the manner and to the extent provided by that Act. 16 C.P.L.R. 135; 1 N.L.R. 112, Ref.; 17 C.P.L.R. 49, Not Foll. (*Stanyon*, A.J.C.) GANESHDAS v. SHANKAR. 13 I.C. =909 8 N.L.R. 22.

——Ss. 12 and 13—(1898), Ss. 46 and 47—*Mortgagee in possession.*

It is doubtful whether Ss. 46 and 47 apply to a mortgagee in possession of property under a foreclosure decree. (*Mullick and Atkinson*, JJ.) CHAMRU SATPASTRI *v.* DIRBA BABU.

1 Pat. L.J. 525=38 I.C. 98=3 Pat. L.W. 77.

——S. 12 (1) and (3)—(1898), S. 46—*Civil Court—Suit for possession of occupancy tenancy*

C. P. TENANCY ACT (1 of 1920) S. 12.

by heir—Occupancy tenancy—Testamentary disposition.

Where the suit is one for possession of an occupancy tenancy and not to set aside an alienation made by the former tenant in contravention of the Act, the Civil Court has jurisdiction to entertain the suit. Apart from the provisions of the C.P. Tenancy Act the deed of gift regarded as an attempt to alienate anything more than a life-interest of a Hindu widow is invalid. An occupancy tenant cannot leave any testamentary direction for disposal of his right by his widow after his death. (*Stanyon*, A.J.C.) KALWA *v.* BHAWAR SINGH.

45 I.C. 1001.

——Ss. 12 (1) (i) and (3), 13 and 105—(1898), Ss. 46 (3), 47 and 95.

Occupancy right is transferable under S. 46 (3); but the landlord can avoid it only by applying to a Rev. Officer within 2 years from the date when the tenant parted. Civil Court has no jurisdiction in such a case. (*Chitty and Teunon*, JJ.) BAIKUNTHA NATH *v.* LABBO NAG. 17 C.W.N. 621=18 I.C. 273=17 C.L.J. 656.

——S. 12 (2)—(1898), S. 46—*Sale decree of occupancy rights—Unregistered mortgage, if allowed.*

Under S. 46 of the Act, no sale decree of occupancy rights can be passed on an unregistered mortgage even though the deed was executed before the Act. (*Mittra, Offg.* A.J.C.) MIYA SAHEB *v.* CHAMPA LAL.

23 I.C. 888=10 N.L.R. 42.

——S. 12 (4)—(1898), S. 46 (5)—*Deed presented for registration—Recitals—Registrar—If can question.*

The Registration Officer is not expected under S. 46 (5) of the C.P. Ten. Act to decide as to the soundness of the recitals in a deed presented for registration. If the document contains a recital of any of the kinds mentioned, he is not precluded from effecting registration. (*Drake-Brockman*, J.C.) DEORAM v. RUKHMINI BAI. 32 I.C. 754.

——S. 12 (4)—(1898), S. 46 (5)—*Registration induced by false recitals—Fraud.*

If owing to fraudulent recitals in a document, the registering officer has been deceived into registering a document, which he is not empowered to register, the document must be deemed to have been not registered and not effective for the purpose for which it is created. If the recitals in a deed of gift which induce the Sub-Registrar to register it are false, the jurisdiction of the Civil Courts to declare the deed to be inoperative is not barred. 8 N.L.R. 22 Expl.; 1 N.L.R. 112, Foll. (*Batten*, A.J.C.) KHADAK SINGH *v.* DEEPCHAND.

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——S. 12 (4)—(1898), S. 46 (5)—*Mortgage of occupancy holding—Prohibition of registration.*

C. P. TENANCY ACT (I of 1920), S. 13.

Nothing in S. 46 (5) of the Act justified a Registering officer to admit to registration, after the Act, an instrument executed before that date and falling within the prohibition contained in the section. A registration in contravention of the law is invalid *in toto* and cannot operate. (*Drake-Brockman*, J. C.) NILKANT *v.* GHULYA. 42 I.C. 384 = 13 N.L.R. 165.

——Ss. 13 and 105—*Surrender of tenancy —Determines sub-tenancy — Jurisdiction of Civil Court.*

Where a tenant surrenders his holding the sub-tenancy also is determined and a suit to eject the sub-tenant thereafter is one between a landlord and a trespasser. 8 N.L.R. 22, Dist. (*Batten*, J.C.) GOPALA *v.* SAKHARAM.
6 N.L J. 224 = 73 I.C. 15 = 1923 Nag. 261.

——Ss. 13 and 105—(1898), S. 47 (1)—*Avoidance of transfer—Jurisdiction of Civil and Revenue Courts.*

The question of avoidance of transfer of occupancy or ordinary holding is cognizable by Revenue Courts, but the question of illegality of document of transfer is cognizable by Civil Courts. (*Batten*, A.J.C.) VISHWANATH *v.* MANIK RAO. 60 I.C. 681.

——S 15—(1898), S. 49—*Rent.*

Occupancy holding under S. 49 of the Tenancy Act is subject to any contract between the parties and to conditions settled under S. 72 of the Land Revenue Act. (*Batten*, A.J.C.) RAMPRASAD *v.* JAGORI.
42 I.C. 292 = 13 N.L.R. 179.

——Ss. 15 and 16—(1898), Ss. 49 and 51 —*Rent—Private agreement—Validity.*

Ss. 49 and 51 must be read together; and their united effect, is that a private agreement, not inconsistent with the Act as to the rent payable is valid until the next settlement, when the rate of rent agreed upon is superseded by the rate fixed by the Settlement Officer. (*Batten*, O.C.J.) BHIKAJI *v.* TUKARAM.
10 I.C. 697 = 7 N L.R. 17.

——S. 25 (b)—(1898), S. 52—*Non-agricultural purposes—Orange trees.*

Planting orange trees is not a diversion of the holding to non-agricultural purposes so as justify ejectment of an occupancy tenant. 22 Mad. 39, Foll. (*Batten*, A.J.C.) HARBA *v.* RAGHUNATH. 50 I.C. 987 = 15 N.L.R. 60.

——S. 28—(1898), S. 88 — *Ejectment—Compensation for crops—Claim by sub-tenant.*

An ejectment of a tenant on legal grounds is binding on a sub-tenant and the sub-tenant is not entitled to any remedy not open to the tenant. His only valid cause of action is as representative of the tenant within S. 47, C. P. C. and he can claim compensation for crops raised by him and reaped by the landlord under S. 88 of the C.P. Ten. Act. (*Batten*, A.J.C.) GOPAL DAS *v.* RAMUSA.
29 I.C. 836 = 11 N.L.R. 105.

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——S. 30—(1898), S. 32—*Improvements by Tenant bona fide made—Compensation—Landlord whether bound by equities binding on his Thekadar.*

A tenant who makes an improvement under a *bona fide* belief that he is a permanent tenant, within the knowledge of his landlord, which are also beneficial to the other holdings of the landlord is entitled to get compensation on ejectment. A landlord getting possession of a holding by surrender of a person who has given permanent lease for valuable consideration is bound by the equities binding upon the person surrendering. (*Chatterjee*, J.) SARDAKAR PODH *v.* BISESWAR GOANTIA.
26 I.C. 476.

——S. 33 (1)—(1898), S. 33—*Assessor—Failure to appoint, effects of—Irregularity.*

A Munsif at the time of assessing compensation for an improvement of a holding should under rules of S. 33 take some assessors and if he does not take them, he commits an irregularity which however could be waived. (*Chatterjee*, J.) SARDAKAR PADH *v.* BISSESWAR GOANTIA. 26 I.C. 476.

——Ss. 35 and 12 (1)—(1898), Ss. 36 and 46—*Occupancy tenancy—Surrender consideration—Reinstatement of tenant's heir—Rights of landlord.*

When an occupancy tenant surrenders his holding for consideration, and his nearest heir is placed in possession under S. 36 (1) of the Act, the landlord can recover from the surrendering tenant in a Civil Court the consideration less any sum to be paid by the heir. A surrender for consideration is not a transfer within the meaning of S. 46 (3). (*Batten*, A.J.C.) JAIRAM *v.* GOPIKISHAN.
47 I.C. 32 = 14 N.L.R. 125.

——Ss. 35 and 49 (1)—(1898), Ss. 36 and 45 (1)—*Object of S. 36.*

The object of S. 36 is to defeat an exproprietary tenant of *sir* who tries to circumvent S. 45 (1) which gives him occupancy rights. (*Drake-Brockman*, J.C.) DAJI BA *v.* RAGHUNATH. 20 I.C. 920 = 9 N.L.R. 126.

——S. 35 (4)—*Transfer by tenant.*

An ordinary tenant is deemed to leave the holding uncultivated and the rent of it unpaid after a transfer (after which he leaves the village), even if it is cultivated by the transferee who is not a sub-tenant or the malguzar or anybody else and the rent is paid in full, and there is clearly an implied surrender. (*Hallifax*, A.J.C.) LAKSHMI PRASAD *v.* DADU.
1993 Nag. 4.

——S. 38, Proviso (1)—(1898), S. 60—*Perpetual lease by occupancy tenant—Sub-lessee —Title by prescription.*

Under S. 60 of the C. P. Ten. Act an occupancy and ordinary tenant cannot grant a perpetual lease. A sub-tenant of such a tenant

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cannot therefore acquire title by prescription as such a title is not recognised by law. (*Mitra*, A.J.C.) NATHU *v.* GANGADHAR. 53 I.C. 212.

——S. 38, Proviso (1)—(1898), S. 60—*Occupancy tenant—Sub-lease by lessee—Ejectment of sub-lessee—Civil Court.*

Under S. 60 of the C.P. Ten. Act a sub-lease of an occupancy land cannot be made from year to year but it can be made for a term of one year only. If before the end of the year no notice is given, there may be a presumption that, the parties intend to make a fresh lease, for the ensuing year, but where a notice is given by the occupancy tenant to his sub-tenant that he does not intend to renew the sub-lease, the sub-lease comes to an end with the end of the agricultural year, and the sub-tenant is under the circumstances a trespasser and can be ejected in a Civil Court. (*Batten*, A.J.C.) GOVINDA *v.* CHINDHOO. 48 I.C. 948.

——S. 38, Proviso (1)—(1898), S. 60—*Sub-tenancy from year to year — Notice—Necessity for.*

A sub-tenancy from year to year of a field of an absolute occupancy tenant does not create a presumption if there is no express agreement and hence it cannot terminate. It can be terminated with notice being given. It must be presumed that the intention of the parties was that the sub-tenancy would not come to an end without reasonable notice given by one party or the other. (*Batten*, A.J.C.) SHEEMANGAL *v.* NANHELAL. 43 I.C. 392 = 14 N.L.R. 3.

——S. 44 (1)—(1898), S. 56 (2)—*Kotwar—Service holding settlement—Kotwar in possession after loss of office.*

J. and N. two Kotwars in a village held each, one of two fields constituting the village service tenure. It was decided that the one Kotwar would suffice and the question as to who was to be retained was decided by the parties drawing lots. It was understood that the loser would continue for his life in possession of the field he was cultivating. J. lost and was thus deprived of the office of the Kotwar, but continued in possession of the field. In the new settlement some years later, the entire holding was recorded in the name of N's son D, who consequently ejected J. *Held*, that section 56 (2) did not apply. As the sub-tenancy in favour of J was part of the arrangement under which N became the village service tenant J, should not be ejected merely because a new settlement had been made or because D was substituted in place of N. (*Drake-Brockman*, J.C.) JHIBAIA *v.* DAWLATYA. 56 I.C. 749.

——S. 46 (b)—(1898), Ch. V.—*Bhumak—If servant—Refusal to do private work of malguzar—Village—Ejectment.*

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A Bhumak in the Chanda District of the Central Provinces is no longer a village servant, but one who renders service to the *Malguzar* alone, and his rights in the land held by him are not governed by Ch. V of the C. P. Ten. Act. If he refuses to do the private work of the Malguzar, he is liable to be ejected from the land. (*Kotwal*, A.J.C.) BALA *v.* BALLABHDAS. 46 I.C. 779 = 14 N.L.R. 182.

——S. 45 (5)—*Lease in respect of sir for 5 years—Renewal—Sub-tenancy—Effect of Act of 1920.*

Plff. was granted a lease of *sir* lands for 5 years ending with April 1917 and put him in possession. During the term of the lease defts. granted to plff. another lease for 11 years commencing on the expiry of the term of the first lease. In a suit for possession by plff. after the expiry of the period of the first lease, the defts. set up, that under the Tenancy Act they had become occupancy rights of the *sir* land on the loss of their proprietary rights in the village and hence the lease which was subsequently to take effect could not be enforced being void. *Held* that the plea of the defendants was valid and that the plaintiff's suit must fail. (*Dhobley*, A. J. C.) SETH LAKSHMI CHAND *v.* BAJIRAO, 69 I.C. 870 = 5 N.L J. 251.

——S. 47—*Exchange not affected.*

About 1903 the defendant started to cultivate an absolute occupancy holding belonging to another and allowed him to cultivate an occupancy holding of his own in exchange, each finding the land of the other more conveniently situated than his own. The record remained unchanged and each paid rent for the land he cultivated but in the name of the other till in 1917-18 the Settlement Officer recorded each of them as the occupancy tenant of the land he was actually cultivating. *Held* if the arrangement of 1903 was an out and out exchange he lost his right to set it aside many years before he filed his suit. If it was only an arrangement by each tenant for the cultivation of land by the other, which it undoubtedly was, he has no right whatever to interfere with it. (*Hallifax*, A.J.C.) CHIMNA PATIL *v.* INDRARAJ SINGH. 1923 Nag. 144.

——S. 49 (1) and (3)—(1898), S. 45, sub-S. (1) and (6)—*Proprietary right—Transfer by decree in pursuance of award—Occupancy Tenant right in sir land—Accrual of.*

By two deeds of 1881 and 1884 certain malguzari villages including that *sir* lands were mortgaged and on 30-6-1899 the mortgagee obtained a decree *nissi* for foreclosure. In 1905, while proceedings for an order absolute were pending, the parties referred the whole case for disposal to a Board of Conciliation acting as arbitrators. The Board made an award that on default of payment within a certain date, the creditor should be entitled to enforce the whole of his rights under the deeds of 1881 and 1884, against seven of the mortgaged villages

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specified in the award, the rest of the mortgaged villages being released from liability. Default in payment having occurred, a final decree was made on 16-6-1916. The mortgagees claimed possession of the *sir* lands. *Held* that the conciliation award of 1905 was, for the purposes of the case, a fresh origin of rights between the parties; that S. 45 (6) consequently did not apply, and that under S. 45 (1) the mortgagors had occupancy rights in the *sir* lands of the seven villages. (*Lord Sumner.*) NARAYAN GANESH GHATATE *v* BALIRAM.

46 Cal. 76=45 I.A. 179=24 M.L.T. 345=14 N.L.R. 165=28 C.L.J. 447=(1918) M.W.N. 885=23 C.W.N. 297=48 I.C. 141=21 Bom. L.R. 53 (P.C.)

———S. 49 (1)—*Not retrospective.*

The latter portion of sub-S. (1) of S. 49 of the C.P. Tenancy Act (I of 1920) cannot possibly have a retrospective effect. (*Batten*, J.C.) HINDU SINGH *v.* MANGAL. 6 N.L.J. 227=19 N.L.R. 110=72 I.C. 488=1923 Nag. 227.

———S. 49 (1)—(1898), S. 45 (1)—*Sale of ex-proprietary rights—Rights in* sir.

An ex-proprietor whose rights in a village are sold in execution of a decree has only the status of an occupancy tenant of the *sir* land, unless the decree expressly directs the sale of his rights therein. (*Findlay and Mittra*, A.J.Cs.) GANPAT RAO *v.* KUAR DAULATSHA. 55 I.C. 578.

———S. 49 (1)—(1898), S. 45 (1)—*Sale of share in a village—Surrender of occupancy rights in* sir.

Defts. sold plff. their share in a village reserving to themselves the occupancy right in the *sir* land. On the same day they executed another deed by which they surrendered their occupancy right in the *sir* land accrued to them by virtue of the sale. *Held*, that the mere fact of the possession having been delivered to plff. did not suffice to separate the transaction of surrender from that of sale and the surrender must be held to be void under S. 45 (1) of the C.P. Ten. Act (1898). Plff. was not entitled to a refund of the consideration for the surrender as both the parties knew that they were contravening the provisions of the C. P. Ten. Act and the maxim in *pari delicto potior est condito etc.* applied. The test as to whether a surrender in such a case is an invasion of S. 45 (1) of the C.P. Ten. Act consists in the fact as to whether the transaction is distinctly separate from that of sale of the village share. (*Drake-Brockman*, J.C.) BHURE *v.* SHEO GOPAL. 54 I.C. 795.

———S. 49 (2)—(1898) S. 45 (1)—*No applicability to devolution by death.*

Section 45 of the Tenancy Act cannot possibly be applied to a case of devolution by death, and therefore sub-section (3) of that section does not forbid the registration of a Will by which *sir* land is bequeathed. Under the Hindu Law a malguzar has powers to alienate the all cultivating and proprietary rights in his

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sir land without any sanction at all. The restriction on the power of transfer is imposed only by the Tenancy Act and not by the Hindu Law. Even so. S. 45 of the Tenancy Act does not take away the proprietor's right to alienate the cultivating rights in his *sir* land. It merely lays down a condition which must precede the exercise of that right *inter vivos*. (*Hallifax and Prideaux*, A.J.Cs.) MURLIDAS *v.* HARIDAS. 62 I.C. 430=4 N.L.J. 44.

———S. 49 (3)—(1898), S. 45—(1898), S. 42—*Execution of decree on—Mortgage.*

A mortgage decree for sale should expressly direct the sale and not leave this to be inferred. Although it is desirable that the decree should be self-contained, it need not necessarily be so. The Court is empowered to refer to anything outside the decree. A Court is competent to interpret a decree but not when it would be premature to do so. (*Prideaux and Mittra*, A.J.Cs.) BALLARADAS *v.* GULAB SINGH. 57 I.C. 177.

———S. 49 (3)—(1898), S. 45 (6)—Sir *right—Nature of.*

The cultivating or occupancy rights do not come into existence on the loss of proprietary right in *sir* land. The proprietary and cultivating rights are co-existing and component parts of the *sir* right. 11 C.P.L.R. 133, foll. (*Stanyon and Hallifax*, A.J.Cs.) SHEOLAL *v.* NANHELAL. 17 I.C. 129=8 N.L.R. 123.

———S. 50—(1898), S. 45—*Transfer of* sir.

Unconditional sanction for transfer of the cultivation rights in *sir* by Financial Commissioner can be used in favour of any man. (*Hallifax*, A.J.C.) MUNIR MOHAMMAD *v.* RAMA. 58 I.C. 25.

———S. 60—*Applicability of— Tenancy—Creation of, by occupancy raiyat—Section not retrospective.*

S. 60 of the C.P. Ten. Act does not apply to contracts entered into before the passing of the Act. (*Mittra*, A.J.C.) MT. LAHINI *v.* BALA. 18 N.L.R. 85=1922 Nag. 227.

———S. 60—*Lease by occupancy tenant for term exceeding one year is invalid and the lessee can be ejected without notice to quit.*

A lease for a period exceeding one year granted to a sub-tenant by an occupancy or ordinary tenant is absolutely invalid, irrespective of whether the sub-tenancy was consented to by or on behalf of the landlord or not and a lessee under such a lease cannot plead absence of notice to quit prior to being ejected. (*Drake-Brockman*, A.J.C.) SURATSINGH *v.* RANI. 59 I.C. 461.

——— S. 93—(1898), S. 91—*Appeal—Maintainability—Test of.*

The test of determining whether an appeal lies from a decree under S. 91 is the nature of the suit as originally framed and not the form

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it may assume subsequently. Though a suit for rent due by a tenant of *Malik Makbuza* fields is not triable by a Small Cause Court, it is still one of a nature cognizable by a Small Cause Court and unless the subject-matter involved in the suit exceeds Rs. 500, there is no second appeal from a decree in it. (*Findlay*, A.J.C.) RAMKRISHNA *v.* NARAIN. 38 I.C. 845.

——S. 83 (b)—(1898), S. 81 (b)—*Rent suit—Rival claimants—Second appeal.*

To have a right of second appeal in a suit for rent for less than Rs. 100 in value, there should have been an adjudication between persons impleaded as parties to the suit and having conflicting interests. 14 C.P.L.R. 31, Foll. (*Mittra*, A.J.C.) DINDAYAL *v.* SUKHA. 47 I.C. 540.

——S. 89—(1898), S. 35—*Landlord and tenant—Abandonment of undefined share of holding—Landlord—Right of re-entry.*

A claim for partition of a holding and for separate possession of the share of the tenant based on the allegation of abandonment or implied surrender of an undefined share of the holding is not sustainable. There is no abandonment or implied surrender of a holding where a person has either paid rent or tendered it. (*Mittra, Offg.* A.J.C.) NILKANTH *v.* BHAGWANT. 42 I.C. 270=13 N.L.R. 175.

——S. 89 (1)—(1898), S. 35 (4)—*Death—Abandonment by tenant—Landlord if bound to wait for 2 years.*

If an occupancy or ordinary tenant abandons his land or dies, the landlord need not wait for two years before introducing some one else as his tenant. In the case of the death of the tenant, if the real heir is not forthcoming to take up the tenancy, the *malguzar* may put in anybody he likes as his tenant. The right of such a tenant is liable to be defeated, if the real heir comes forward and cultivates or pays rent or does both within two years. But after the two years the landlord can successfully plead implied surrender. Implied surrender may be pleaded by the landlord or by anybody accepted as a tenant by the landlord but not by a trespasser. (*Batten*, A.J.C.) FAKRU *v.* SRAWAN. 43 I.C. 219.

——S. 89 (1)—(1898), S. 35 (4)—*Implied surrender—Alienation by female holder—Necessity—Proof—Alienee's possession if adverse.*

The doctrine of implied surrender in S. 35 (4) of the Act of 1898 is intended to apply to normal circumstances where the landlord of the person put in by him, holds adversely to the tenant. Where, however, a female holder alienates an occupancy tenancy and the alienation is not for legal necessity, the alienee does not begin to hold adversely to the ultimate reversioner until the death of female holder, and the doctrine of impiled surrender has no application to such a case. (*Batten*, A.J.C.) NAGO *v.* PAIKU. 48 I.C. 628.

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——S. 89 (1)—(1898), S. 35 (4)—*Applicability—Case of obstruction by landlord.*

S. 35 (4) of the C. P. Ten. Act (1898) has no application where the case is not one of voluntary inaction on the part of the tenant but one of obstruction on the part of the landlord. (*Drake-Brockman*, J. C.) PANDU *v.* SITAL PRASAD.

48 I.C. 188=14 N.L.R. 176.

——Ss. 89 (1) and 104—(1898), Ss. 35 (4) and 94—*Tenancy right—Will—Ouster of true tenant by devise—Suit by tenant to recover possession—Limitation — Surrender implied—Payment of rent on behalf of tenant.*

A lessee of the ordinary tenant's right in *sir* lands has no right to will away the tenant right; and S. 94 is not applicable where the ouster, if any of the plff. by the lessee from the holding is not at the instance of the landlord. There is no surrender under S. 35 inasmuch as the payment of rent in advance must be taken to have been on behalf of the true tenant. Mere non-cultivation of a holding by or on behalf of a tenant is not sufficient to constitute an implied surrender. (*Mittra*, A.J.C.) SHAM RAO *v.* SATYA BHAMA BAI. 47 I.C. 28.

——S. 89 (1)—(1898), S. 35 (4)—*Implied surrender of holding—Plea of surrender if available to other than malguzar.*

A mortgage of the tenancy right is annulled by operation of law on the extinguishment of the tenancy right. S. 35 (4) comes into operation when the tenant has, in a way, abandoned the holding. The provisions of the section do not justify the view that the plea of the implied surrender can only be taken by the malguzar. (*Mittra*, A.J.C.) SURJBRA *v.* TUKARAM. 46 I.C. 244=14 N.L.R. 107.

——Ss. 89 (1) and 104—(1898), Ss. 35 (4) and 94—*Dispossession—Lambardar mortgagee.*

S. 94 of the C. P. Ten. Act has no application to a case where the deft. took possession in 1909 *qua* mortgagee and not *qua* lambardar. (*Findlay*. A.J.C.) BHIKAM CHAND GOKUL CHAND *v.* HARPRASAD. 48 I.C. 184.

——S. 89 (1)—(1898), S. 35 (4)—*Implied surrender—Knowledge of landlord—Payment of rent to one of several.*

There can be no implied surrender according to S. 35 (4) of the C. P. Tenancy Act, without the knowledge and intervention of the landlord. Where the holding is in the name of an uncle and his minor nephews, the rent paid by the uncle is presumed to be paid on his behalf and on account of his nephews especially where the nephews continue as the recorded tenants. (*Batten*, A.J.C.) SURTI *v.* MUNNI. 48 I.C. 189.

——S. 89 (1)—(1898), S. 35 (1).

A Hindu widow's surrender of an absolute occupancy tenure cannot be questioned by a reversioner. (*Drake-Brockman*, J.C.) DAJIBA *v.* RAGHU NATH. 20 I.C. 920=9 N.L.R. 126.

C. P. TENANCY ACT (I of 1920), S. 89.

———S. 89 (1)—(1898), S. 35 (4)—*"Leaves his holding uncultivated"—Meaning of.*

The expression "leaves his holding uncultivated" in the section means "omits to cultivate the holding himself or to arrange for its cultivation"; the proviso applies to a case where a minor's guardian makes a bad bargain in surrendering on his behalf. (*Drake-Brockman*, J. C.) GANPAT *v.* TRIMBAK. 19 I.C. 759= 9 N.L.R. 54.

———S. 89 (1)—(1898), S. 35—*Surrender of portion of holding with consent of landlord.*

According to the rule referred to in 14 C. P. L.R. 33 no tenant can give up a portion of the holding without the landlord's consent but if a landlord has accepted the surrender of a defined portion of a holding and allowed the tenant to continue as tenant of the remainder on a defined rent, the tenant cannot resile from the transaction. (*Batten*, O.J.C.) SUNDER *v.* SITARAM. 10 I.C. 692=7 N.L.R. 8.

———S. 92 (2)—*Applicability—Power of Court.*

Where a landlord ejects the plaintiff who is a tenant and the latter sues the landlord as a trespasser, *held*, the form of the pleadings does not alter the real nature of the case and it is open to the Court to take notice of the true position of the parties and determine whether the second proviso to S. 92 applies which is set up by the defendant for the purpose of taking the advantage of the bar created by it. (*Kotwal*, A.J.C.) KHAZAMIRZA *v.* VITHOBA. 38 I.C. 966.

———S. 97—*Trees—If can be attached.*

The attachment of trees apart from the land on which they stand under S. 97 cannot be prohibited where the trees and the land belong to different persons. (*Baker*, O.J.C.) GULSHER KHAN *v.* RAMSWARUP. 19 N.L.R. 180= 77 I.C. 620=1924 Nag. 42.

———Ss. 100 and 105—*Village service tenant—Suit for possession does not lie in Civil Court.*

A suit for possession of his holding by a village service tenant asserting that he had been ejected by the landlord on 5-1-1920 is not maintainable in the Civil Court by reason of Ss. 100 and 105 of the C.P. Tenancy Act. (*Hallifax*, A.J.C.) BALARAM *v.* ATMARAM. 71 I.C. 48=1923 Nag. 51.

———S. 104—(1898), S. 94 (1)—*Ejectment by a co-sharer—Limitation—Landlord.*

The special period of limitation prescribed by S. 94 (1) applies only to cases in which the ejectment is by the whole body of proprietors or by the *Lambardar* representing it and not to cases of ejectment by a fractional co-sharer in the village, acting on his own account. The term "landlord" does not include one of two or more co-sharers in an undivided village acting independently, in respect of a transfer voluntary or involuntary on the part of the tenant. 7 C.W.N. 542; 28 Cal. 127, ref. (*Hallifax*, A.J.C.) PAIKU KALAR *v.* JAIRAM GANDLY. 28 I.C. 250.

C. P. TENANCY ACT (I of 1920), S. 105.

———S. 104—(1898), S. 94 (1)—*Ejectment—Peaceable dispossession.*

"Ejectment" in S. 94 means a dispossession, that is to say, a loss of possession through some Act of the defendant which was a taking of possession with the intention of excluding the plaintiff. Force also includes the moral equivalent of force. (*Batten*, J.C.) AMBA *v.* SHEORAM. 27 I.C. 864=11 N.L.R. 8.

———S. 104—(1898), S. 94 (3)—*Proviso—Retrospective effect—Change in procedure law, Gen. Cl. Act, S.* 6 (*c*) *and* (*e*).

The proviso to S. 94 (3) is retrospective and governs all claims for arrears of rent to which its terms are applicable from the moment of its passing, as the right to sue for arrears of rent does not accrue under the Tenancy Act, but under the general law of contract and the fact that the Tenancy Act of 1883 was repealed by the Act of 1898, does not make the present period of limitation inapplicable. (*Drake-Brockman*, J.C.) SHANKARGIR *v.* RAMACHANDRA. 11 I.C. 912=7 N.L.R. 125.

———Ss. 105 and 106—(1898), Ss. 93 and 97—*Civil and Revenue Court—Suit for possession by occupancy tenant is cognizable by Civil Court—Mesne profits.*

A suit for possession of land of which plff. is occupancy tenant, by operation of law, upon the sale of the proprietary rights in sir, is a suit between landlord and tenant and cognizable by a Revenue Officer, though plff. has not obtained possession of the land as tenant and has not been recognized as such by the landlord. A claim for mesne profits and for a house which plff. seeks to recover as an agriculturist is ancillary to the main relief and does not change the nature of suit. (*Mitra*, A.J.C.) POONABHAI *v.* SETH BALLABHADAS. 84 I.C. 827.

———Ss. 105 and 106—(1898), Ss. 93 and 97—Nazarana—*If rent—Small Cause Court.*

The *nazarana* paid or agreed to be paid as price for the grant of a lease is rent and a suit therefore is not cognizable by a Small Cause Court, 5 B.L.R. ap. 1 expl. (*Stanyon*, A.J.C.) NAM DAG *v.* GUBHARA PRASAD. 20 I.C. 261=9 N.L.R. 95.

———Ss. 105 and 106—(1898), Ss. 93 and 97—*Civil and Revenue Courts—Jurisdiction.*

A suit for possession on the allegation that the possession of the landlord is due to a sale by an unauthorised guardian of the tenant is cognizable by the ordinary Civil Court. (*Drake-Brockman*, J.C.) GANPAT *v.* TRIMBAK. 19 I.C. 759=9 N.L.R. 54.

———S. 105—*Scope—Trespass, suit for.*

A suit based on trespass does not fall under C. P. Tenancy Act and is thus cognizable by

C. P. TENANCY ACT (I of 1920), S. 105.

Civil Court. (*Mullick and Atkinson, JJ.*) CHAMRU SATPASTRI *v.* DIRBA BABU.
1 Pat. L.J. 625 = 38 I.C. 98 = 3 Pat. L.W. 77.

———S. 105 (1)—*Rent free land—Suit—Civil Court's Jurisdiction.*

Where the land has been recorded rent free, and held without payment of rent and the tenant claims it to be held rent free, S. 105 (2) applies and the suit is removed from the cognizance of the Civil Court. (*Kotwal*, A.J.C.) GANPAT *v.* MOHANLAL. 1922 Nag. 207 (1).

———S. 105—(1898), S. 97—*Illegal ejectment—Jurisdiction.*

A suit for recovery of possession by tenant illegally ejected is triable only by a Judge who is also a Revenue Officer. Mere exclusion from possession constitutes ejectment of the tenant from the holding. (*Drake-Brockman*, J.C.) BASANT RAI *v.* BHURI. 80 I.C. 770.

———S. 105—(1898), S. 97—*Suit between landlord and tenant—Jurisdiction of Civil Court.*

The policy of S. 97 of the Act is that all questions concerning the right of a tenant, as such, of an agricultural holding which arise out of the relationship of tenant and landlord should, except in so far as appeals are concerned, be tried by a Judge who is also a Revenue Officer. The mere fact that some one, not a landlord, is joined as a co-defendant in a suit between a landlord and a tenant is not inoperative of S. 97A (*Drake-Brockman*, J.C.) KAMA *v.* BHAJANLAL CHANTANLAL. 48 I.C. 684.

CEREMONIES.

See (1) HINDU LAW—MARRIAGE.
(2) PRE-EMPTION.

CERTIFICATE.

See (1) C.P.CODE, O. 21, R. 93.
(2) EVIDENCE.
(3) EVIDENCE ACT.

CERTIFYING COUNSEL.

See LEGAL PRACTITIONER.

CERTIORARI.

——*Writ of—Power of High Court.*

Semble the High Court power has to issue a writ of *certiorari* in cases not coming within S. 115, C.P.C. or S. 435, Cr. P.C. *Quaere*:—If S. 22 of the Press Act takes away the power. (*Lord. Phillimore*) ANNIE BESANT *v.* ADVOCATE-GENERAL, MADRAS.
43 Mad. 156 = 46 I.A. 176 = 37 M L.J. 139 = 17 A.L.J. 925 = 23 C.W.N. 986 = 21 Bom L.R. 857 = (1919) M.W.N. 555 = 10 L.W. 451 = 20 Cr. L.J. 593 = 26 M.L.T = 508 = 52 I C. 209 = 1 U.P.L.R.(P.C.) 75 = (1919) 35 T.L.R. 500 (P.C.).

CHANDAWAND.

———*Powers of Courts as to.*

Unless the power to issue a writ of *certiorari* is expressly taken away, it inherits in Court and it is also well established that the provision taking away such power does not apply where there is an absence of jurisdiction. (*Abdur Rahim*, O.C.J., *Ayling and Seshagiri Aiyar*, JJ.) MRS ANNIE BESANT *v.* EMPEROR.
39 Mad. 1164 = 32 M.L.J. 151 = 21 M.L.T. 190 = (1916) 2 M.W.N. 497 = 37 I.C. 607 = 18 Cr. L.J. 239 = 4 L.W. 625.

CESS.

See (1) B. T. ACT, S. 74.
(2) LANDLORD AND TENANT.
(3) MADRAS ESTATES LAND ACT, SS. 143, ETC.

CESSION OF TERRITORY.

See (1) ACT OF STATE.
(2) CROWN.
(3) GRANT.

CESTUI QUE TRUST.

See (1) TRUST.
(2) TRUSTS ACT.

CEYLON INSOLVENCY ORDINANCE (1853).

———Ss. 126 and 130.

The effect of an insolvency certificate is to extinguish the debt. (*Miller and Sadasiva Aiyar*, JJ.) DEIVANAYAGAM PILLAI *v.* MUTHUKUMARASWAMY PILLAI. 18 I.C. 560.

CHAIRMAN.

See (1) COMPANY.
(2) CORPORATION.

CHAMPARAN AGRARIAN ACT (I of 1918).

———S. 4—*Rent noted in Record of Rights—Finality of.*

In proceedings under S. 4 of the Act, the Asst. Settlement Officer recorded in the Schedule, the rent before the enhancement, the new rent, and also ordered the new rent mentioned in the schedule to be noted in the Record of Rights. *Held*, there was a decision as to the amount of rent which had become final and its correctness could not be contested in a Civil or Revenue Court. The decision of the authority prescribed under S. 4 (3) (*a*), is final under the Act, with respect to the matters contained therein but not with respect to any questions other than those referred to in S. 4. (*Mullick and Jwala Prasad*, JJ.) HILL *v.* SATAN SINGH.
4 Pat. L.J. 312 = 50 I.C. 857 = (1920) Pat. 4.

CHAMPERTY.

See CONTRACT ACT, S. 23.

CHANDAWAND.

See CUSTOM (PUNJAB).

CHARGE.

See (1) DEED—CONSTRUCTION.
(2) MORTGAGE.
(3) T. P. ACT, SS. 58, 95 AND 100.

CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV of 1920).

——Ss. 10 and 11—*Deposit of security—Order for deposit of specific sum of money is bad.*

Under S. 10 of Act XIV of 1920 the defendant has the option either to deposit money or to furnish security. The Court can order him to do one of these two things but cannot specify which he is to do. The security furnished under S. 10 of Act XIV of 1920, however relates to the expenditure actually incurred or likely to be incurred by the plaintiff which is quite a different matter from the costs of the suit. The Court cannot direct payment of this expenditure otherwise than in accordance with that section, and when security has been furnished the Court is incompetent to order execution against the surety. (*Brasher*, J.) MAHANT KIRPAL SINGH *v.* NARINJAN SINGH.
69 I.C. 658.

CHARITABLE ENDOWMENTS ACT.

——S. 14—*Charity — Managing Committee—Claim against—Suit against treasurer or ex-officio secretary.*

The administration of the property of a hospital was vested in the Treasurer of Charitable Endowments under S. 4 of the Charitable Endowments Act. Hence a suit could not be filed against the Secretary alone as representing the Committee. (*Daniels*, J. C.) AJODHIA NATH *v.* THE CITY MAGISTRATE OF LUCKNOW. 26 O.C. 332=1924 Oudh. 128.

CHARITY.

See (1) C. P. CODE, S. 92.
(2) CYPRESS.
(3) HINDU LAW—RELIGIOUS ENDOWMENT; WILL.
(4) MAHOMEDAN LAW—WAKF.
(5) T. P. ACT, S. 14.
(6) WILL.

CHARTER ACT (24 and 25 Vic., Ch. 104).

See also GOVERNMENT OF INDIA ACT, (1915) S. 107.

——S. 15—*Cr. P. Code, S. 145—Jurisdiction.*

The High Court has no jurisdiction to interfere with an order of a Magistrate passed under S. 145, Cr. P. Code. (*Krishnan*, J.) KRISHNAPPA NAIDU *v.* ALAMELU AMMAL.
18 Cr. L.J. 53=25 I.C. 855=5 L.W. 165.

——S. 15—*Scope of.*

The power under S. 15 of the Charter Act should only be exercised in extraordinary cases and subject to the enactments of the Indian Legislature. (*Sadasiva Aiyar and Moore*, JJ.) SUPPU NAYKAN *v.* PERUMAL CHETTY.
19 M.L.T. 364=30 M.L.J. 486=35 I.C. 372=(1916) 1 M.W.N. 301.

CHILD.

——S. 15—*Cr. P. Code, S. 145—Power to interfere with the order under S. 145 of the Code.*

The High Court will not under S. 15 of the Charter Act interfere with order under S. 145 of the Cr. P.C. except where the question of the Magistrate's jurisdiction is involved or there is a gross miscarriage of justice. (*Sadasiva Aiyer*, J.) PALANI CHETTY *v.* RATHINA CHETTY.
15 Cr. L.J. 509=24 I.C. 527=26 M.L.J 208=(1914) M.W.N. 352.

——S. 15—*Contempt of Court — High Court—Jurisdiction—Common Law.*

In dealing with cases of contempt of Civil or Criminal Courts, subordinate to a High Court, the High Court possesses the same jurisdiction as the old King's Bench in England but no such jurisdiction has been conferred on the High Court by virtue of Sec. 15 of the Charter Act. (*White*, C.J., *Munro and Sankaran, Nair*, JJ.) *In the matter of* VENKAT RAO.
21 M.L.J. 832=12 I.C. 293=12 Cr. L.J. 528=10 M.L.T. 209.

——S. 15—*Revision of interlocutory orders.*

Under the Charter Act, the High Court can revise interlocutory orders. 31 Mad. 60; 28 Mad. 28, foll. (*Abdur Rahim and Ayling*, JJ.) NAGARAJA PILLAI *v.* VYTHINATHA AIYER.
9 M.L.T. 273=21 M.L.J 484=9 I.C. 672=(1911) 2 M.W.N. 363.

CHARTER PARTY.

See (1) BILL OF LADING.
(2) CONTRACT.

CHASTITY.

See HINDU LAW—WIDOW.

CHAUKIDARI CHAKRAN LAND.

See (1) BENGAL VILLAGE CHAUKIDARI ACT.
(2) CHOUKIDARI CHAKRAN LAND.

CHELAS.

See HINDU LAW—SUCCESSION.

CHEQUE.

See (1) BANKER AND CUSTOMER.
(2) NEGOTIABLE INSTRUMENT ACT.

CHIEF COURT—JURISDICTION.

See (1) JURISDICTION.
(2) C.P.CODE, S. 115.

CHILD.

See FATAL ACCIDENTS ACT.

CHIT FUND.

———*Bidder—Bond executed by in favour of stake-holder—Stipulations in, when a penalty —Default in payment of subsequent instalment —Right to enforce stipulations—Waiver.*

Stipulations in a bond executed by a bidder in favour of stake-holder are penal if they are so unreasonable that the parties never contemplated that they should take effect. Right to enforce stipulations revives, though once waived, in case of default in payment of subsequent instalment. (*Oldfield and Ramesam*, JJ.) VAITHINATHA AIYAR *v.* GOVINDASWAMI ODAYAR. 42 M.L.J. 551 = (1922) M.W.N. 208 = 67 I.C. 995 = 1922 Mad. 67.

———*Manager's discretion to accept security—Test.*

When according to the rules of the Chit Fund, security had to be furnished by the prize-winner to the satisfaction of the Manager, the latter is entitled to refuse a security not so given so long as he has acted not unreasonably or capriciously. 121 Eng. Rep. 904, foll: *Dalman* v. *King*, 4 Bing. (N.C.) 105, dist. (*Ayling and Napier*, JJ.) KRISHNA AIYAR *v.* RAMASWAMI AIYAR, (1914) M.W.N 715 = 1 L.W. 818 = 25 I.C. 669 = 27 M.L.T. 447.

———*Stake-holder—Members—Relationship —Assignee of rights—Set off.*

A Kuri is not a partnership composed of the stake-holder and the members but a transaction between the stake-holder and each individual member independent of the transaction between him and each of the other members. 20 Mad. 68, ref. The auction-purchaser of the rights of a benefited ticket-holder may claim, a set off against the assignee of the stake-holder. S. 132 of the T.P. Act allows such a set off. (*Sadasiva Aiyar and Napier*, JJ.) SUBRAMANIAN PATTAR *v* KIRDADSAN.
16 I.C. 686 = (1912) M.W.N. 1235.

CHOSE-IN-ACTION.

See T.P. ACT, Ss. 130 TO 137.

CHOTA NAGPUR.

———*Custom.*

The expression 'Putra Poutrica' according to Chota Nagpur Custom means 'heirs male' and the expression 'putra poutradik' mai warisan 'kayem mokamiyan' means also only heirs male. (*Roe and Coutts*, JJ.) BROJOKISHORE RAM *v.* JAGAT MOHAN NATH SAHI DEO.
1919 Pat. 209 = 53 I.C. 486 = 5 Pat. L.J. 265.

CHOTA NAGPUR ENCUMBERED ESTATES ACT (VI of 1876).

———*Applicability of—Powers of manager.*

The Chota Nag. Enc. Est. Act (VI of 1876) has no application to immoveable property outside the limits of Chota Nagapur. Consequently a manager appointed under the Act has no power to reduce the rate of interest provided by a mortgage of land not situated within Chota Nagpur. 16 C.L.J. 527. appr. (*Viscount Haldane.*) RAJA JOYTI PRASAD SINGH DEO BAHADUR *v.* KUMUD NATH. 46 Cal. 1 = 45 I.A. 108 = 16 A.L.J. 369 = 5 Pat.L.W. 65 = (1918) M.W.N. 441 = 24 M.L.T. 66 = 28 C.L.J. 165 = 8 L.W. 186 = 22 C.W.N. 1009 = 20 Bom. L.R. 856 = 45 I.C. 827 = 38 M.L.J. 347 (P.C.).
[Affirming 27 I.C. 928.]

———*Scope and effect.*

The statute having no application to lands situate outside the limits of Chota Nagpur, cannot prevent a mortgagee from enforcing his rights in Courts of Ordinary Civil Jurisdiction. Political or Administrative considerations determine the scope of the Act. As this statute gives special privileges, to a particular class, to have their liabilities determined not by a regular Court, but by a manager, it must be strictly construed; when the Act is silent as to its application to all estates in British India owned by holders in Chota Nagpur, it should be limited in its application to estates in Chota Nagpur. The Chota Nagpur Encumbered Estates Act has no application to land lying outside of Chota Nagpur, and consequently, the privilege of a mortgagee in respect of such land to enforce his rights in a Civil Court has not been abrogated. (*Per Mookerjee*, J.) Under the Act the question of liability for debts and the mode of their satisfaction is determined by the manager. A statute of this description limiting the jurisdiction of the Civil Court must be strictly construed. (*Mookerjee and Beachcroft*, JJ.) BHICHA RAM *v.* BISHAMBHAR NATH. 17 C.W.N. 754 = 17 I.C. 937 = 16 C.L.J. 527.

———Ss. 2, 3 and 21—*Section* 21 *does not restrict S.* 3.

S. 21-B of the Chota Nagpur Encumbered Estates Act cannot restrict the provisions of S. 3; it refers to suits other than proceedings in regard to the debts or liabilities referred to in S. 2-A. (*Coutts and Macpherson*, JJ.) BANSIDHAR DHAR *v.* TIKAIT HARNARAYAN SINGH. 6 Pat. L.J. 685 = 68 I.C. 283 = (1922) Pat. 112 = (1922) P. 85.

———Ss. 2, 12—*Mortgage suit against several persons—Suit barred as against one—Revival.*

Where in a mortgage suit against several defendants, one defendant is struck out under S. 2 of the Act, the plaintiff, can revive his claim as against that person, if under S. 12 of the Act he is restored to possession and enjoyment of the estate. (*Das and Ross*, JJ.) JYOTI PRASAD *v.* RANJIT SINGH.
63 I.C. 753 = 6 Pat. L.J. 328.

———Ss. 3 and 12-A—*Scope of.*

S. 3 contemplates the existence of an heir of the holder of property under management under the Act. Any contract by an heir during the life-time of the holder involving either of

CHOTA NAGPUR ENCUMBERED ESTATES ACT (VI of 1876), S. 3.

them in pecuniary liability is bad. (*Chapman and Mullick*, JJ.) GOPINATH BHAGAT *v.* LAKSHMINARAYAN SINGH. 32 I.C. 937.

——Ss. 3, 12 and 22—*Estate held by Revenue Authorities—Order of Manager—Civil Court Jurisdiction.*

S. 22 of the Act bars a suit against the Manager of an incumbered estate in respect of an order made *bona fide*. During the time that an estate is held by the Revenue Authorities under the Act, a Civil Court has no jurisdiction to interfere on a suit brought by the creditors. The creditors have their remedy against any order of the Manager before the Deputy Commissioner and the Commissioner. Where the Manager finds that the accumulation of interest would render the estate insolvent, he must at once get the Deputy Commissioner to release the estate. (*Holmwood and Walmsley*, JJ.) HIRANAND OJHA *v.* SATISH CHANDRA ROY. 29 I.C. 420.

——Ss. 3, 12—*Scope of.*

S. 3 of the Act gives a statutory protection to a person whose property is brought within the operation of the Act. S. 12 removes that protection when the proprietor is restored to possession and then all remedies by a creditor could be enforced against him. (*Das and Ross*, JJ.) JYOTI PRASAD *v.* RANJIT SINGH. 63 I.C. 743=6 Pat. L.J. 328.

——S. 3—*Proprietor and holder of property—Protection—"Debt" and "liability"—Meaning of.*

The liability in respect of which protection is accorded under the Act is a liability to which the holder of the property or his heir is subject. If the proprietor is not the holder of the property but is an expropriated proprietor, then he does not come within the bar under S. 3 and other connected sections of the Act. *Obiter.* The words 'debt' and 'liability' in S. 3 mean pecuniary debt and pecuniary liability and do not cover contractual liability. 20 Cal. 609 and 33 Cal. 1065, dist. (*Mullick and Atkinson*, JJ.) LAL MRITIUNJAY NATH *v.* THAKUR PUNCHAKAURI NATH. (1918) Pat. 8=3 Pat L.J. 156=43 I.C. 120=4 Pat. L.W. 116.

——Ss. 3 (c) and 12-A—*Debt incurred during disqualification—Fresh contract after removal of disqualification—Validity.*

In a suit on the basis of a handnote, after the death of a Rajah against his son and grandsons, executed by the Rajah who was a disqualified proprietor under the Act, VI of 1876, and was therefore, incompetent to enter into any contract involving him in any pecuniary liability under S. 3 (c) of the Act. *Held*, that although the late Rajah had ratified the said debts by execution of a handnote, the suit was barred under S. 12-A. of the Act as amended. S. 12-A was a bar to the suit against the sons and grandsons of the late Rajah also. (*Jwala Prasad and Imam*, JJ.) HANUMAN BUKSH *v.* TIKAIT GANESH NARAIN. 4 Pat. L.J. 1=47 I.C. 705=(1918) Pat. 318.

CHOTA NAGPUR ENCUMBERED ESTATES ACT (VI of 1876), S. 17.

——Ss. 8 and 19—*Mortgage—Property outside Chota Nagpur—Liability of proprietor—Rights of Manager.*

A Manager of an Encumbered Estate appointed under the Act and the Revenue authorities in Chota Nagpur has no jurisdiction to reduce the interest on a mortgage debt created by the proprietor of the estate on a property outside Chota Nagpur. The Act itself does not apply to the case. (*Fletcher and Richardson*, JJ.) JYOTI PRASAD SINGH BAHADUR *v.* KUMUD NATH CHATTERJEE. 27 I.C. 526.

——Ss. 8 and 22—*Interest—Decree by Court—Power to induce—Manager—Jurisdiction.*

The Manager of an estate under the Act can cut down interest already decreed by Court under S. 8 of the Act. If the Manager's action was in good faith under S. 8, no suit would lie for a declaration against him; but if what he purported to do was not really authorised by S. 3, a suit would lie for a declaration that what he had done was outside the scope of the Act altogether. (*Roe and Coutts*, JJ.) THAKUR PRASAD AURORA *v.* MANAGER, BARABHUM ENCUMBERED ESTATE, PURULIA. 4 Pat. L.J. 321=51 I.C. 69=(1919) Pat. 285.

——Ss. 9 and 17—*Powers of Manager—Lease—Delegation of authority to Commissioner—Powers of holder.*

So long as the estate is under the Manager under the Act, the holder of the estate is incompetent to mortgage, charge or lease under S. 8 of the Act. The power to lease vests in the Manager and the mere fact that the sanction of the Commissioner was refused, does not in itself give the Dy. Commissioner power to grant a lease without consulting the Manager at all. R. 5 of the rules framed by the Lt.-Governor does not dispense with the functions of the Manager and does not empower the Dy. Commissioner to exercise the powers vested in the Manager by the statute, which, however, are to be construed strictly. The power to grant leases given to the Manager by S. 17 of the Act does not include the power to enter into an executory contract such as an agreement to lease. (*Miller*, C.J. *and Mullick*, J.) SETH HAKUN CHAND *v.* RAJA RAM BAHADUR SINGH. 4 Pat. L.J. 580=53 I.C. 833=(1919) Pat. 305.

——S. 17—*Lease of incumbered estate—Sanction of Commissioner—Grant to a limited company—Sanction for lease to unincorporated company—Effect of.*

Where it is affirmatively established that a proposed patni lease transaction in all its essential particulars has been sanctioned by

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the Commissioner it is not necessary that the actual deed by which it is carried out should have been submitted for his sanction. Where the Commissioner purported to sanction the grant of a patni lease to R. W. & Co., (*i.e.*) to a firm of individual men, but the lease was ultimately granted to R. W. & Co., Limited (*i. e.*) to a different and incorporated *personal* the change was a change in the essentials of the transaction. As it appeared however that during the negotiations R. W. & Co. was understood by the parties to mean R. W. & Co., Ltd., the question was one of misdescription only and did not affect the validity of the transaction. (*Lord Shaw.*) RAMKANAI SINGH *v.* MATHEWSON. **42 Cal. 1029 = 42 I.A. 97 = 19 C.W.N. 585 = 17 M.L.T. 377 = 30 I C. 55 = 13 A.L.J. 531 = 21 C.L.J. 446 = 17 Bom. L.R. 449 = 2 L.W. 555 = 29 M.L J. 80 (P.C.).**

CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT (I of 1879).

———*Tenant, holding over — Reasonable notice to quit necessary for ejectment.*

Under Act (I of 1879) a reasonable notice to quit is necessary to eject a tenant, holding over after the expiration of his period of lease; what is reasonable notice is a question of fact in each particular case. (*Coxe and Teunon*, JJ.) NARAPAT SINGH *v.* HANGRA MUNDA. **11 I.C. 868 = 16 C.L.J. 30.**

———**S. 10 (a) and (b)**—*Chota Nagpur Tenancy (Amendment) Act, S. 1 (3)—Occupancy holding, transfer in execution.*

A transfer in execution of an occupancy holding is binding on the raiyat unless it is set aside. 42 I.C. 172, rel. on. Such a transfer effected before the Tenancy (Amendment) Act is not affected by S. 10 (*a*), (*b*) of the Act of 1879 as amended by the Act of 1903. (*Chapman and Atkinson*, JJ.) GANPAT MAHTO *v.* CHOTAN RAM. **42 I.C. 387 = 2 Pat. L.W. 159.**

———**Ss. 21 and 24**—*Object of.*

Ss. 21 and 24 of the Act have effected vital alterations in the law invalidating all private agreements. S. 26, Tenancy Act, was framed to soften the rigour of the law on the landlords and not to prejudice their position if the contention of the appellant were accepted. (*Mookerjee and Beachcroft*, JJ.) GAJOO MAHATO *v.* COOKE. **16 C.L.J. 422 = 16 I.C. 929 = 17 C.W.N. 430.**

———**Ss. 31 and 88**—*Decree— Ejectment— Suit by ryot for possession.*

A decree in favour of the landlord for rent and ejectment against a ryot under Ss. 31 and 88, Chota Nagpur Landlord and Tenant Procedure Act, does not terminate the tenancy. S. 31 provides that no ryot shall be evicted except in execution of a decree; and in spite of the ryot's mortgagee repudiating the mortgagor's

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title and attorning to the landlord, the ryots had yet a subsisting title. (*Mookerjee and Beachcroft*, JJ.) MADAN DASAD *v.* ABDUL RAHMAN KHAN. **21 I.C. 955.**

———**Ss. 37 and 144**—*Revenue Court—Suit for arrears of rent—Appeal to Commissioner—Denial of title of plff.—Suit by tenure holder—Deft. inducted into land by proprietor—Subsequent success of tenure holder—Tenure holder leasing land to plff.—Suit for rent and ejectment.*

S. held a tenure under B who unlawfully resumed the same. S thereupon sued for possession, during pendency of which deft. was settled as a raiyat by the Manager under the Chota Nagpur Encumbered Estates Act, who was in possession of the properties of B.S. being ultimately successful, subsequently granted a lease in favour of the plff. who brought an action against the deft. in the Rev. Court for arrears of rent and ejectment. *Held*, that the decision of the lower appellate Court denying the claim for rent was a decree as defined in Sec. 2, C.P.C.; As after the suit being decreed by the first Court, deft. appealed to the lower appellate Court under S. 144 and the appeal was allowed, the appellate decree was passed under the Act and therefore a second appeal lay. The suit was one for arrears of rent within Sec. 37 of the Act and was maintainable in the Revenue Court. (*Mookerjee and Beachcroft*, JJ.) HIRANUND OJHA *v.* RAGHUBAR SINGH. **16 I.C. 904.**

———**Ss. 37 (6) and 42**—*Possessory suit— Title suit—Jurisdiction.*

S. 37 (6) of the Act refers only to possessory suits and not to title suits in which possession may be asked in pursuance of the declaration of title. S. 42 does not apply to such a title suit which is cognizable by the Civil Court. 7 W. R. 186; 16 Cal. 741, rel. on. (*Coxe*, J.) TEMWA URAON *v.* RAM URAON. **14 I.C. 54.**

———**S. 123**—*Rent—Decree for—Exemption of portion of tenure—Sale of unexempted portion free of encumbrance—Sale proclamation— Apportionment of rent — Exempted and unexempted portion.*

A decree for rent was obtained in respect of a tenure comprising several villages over some of which the judgment-debtor had created encumbrances by way of maintenance grants in favour of defendants. When the decree-holder applied for execution of his decree by sale of the tenure, the maintenance grantees applied for exemption of villages comprised in their grants under S. 123 and an order of exemption was made by the Commissioner. *Held*, that notwithstanding the order for partial exemption of the tenure for sale, the decree was to be executed as a decree for rent in respect of the unexempted portion, and the effect of a sale of the unexempted portion was to pass the property to the purchaser free of all encumbrances. The decree-holder was not bound to apportion the

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rent and he would comply with the provisions of S. 5 of the Beng. Rent Recovery Act of 1865 if he stated in the sale proclamation the yearly rent payable in respect of the entire tenure together with a remark that the villages named were exempted from sale under the order of the Commissioner. (*Mookerjee and Beachcroft*, JJ.) MADAN MOHAN NATH SAHI DEO *v.* PRATAP UDAI NATH SAHI DEO. **40 Cal. 623 = 15 I.C. 842 = 16 C.W.N. 1024.**

——S. 123 (2).

A Rent Court cannot in execution of a rent decree sell, free of encumbrances, a part of a tenure. (*Mullick and Jwala Prasad*, JJ.) GOBIND DAS *v.* DURHAM WAITE. **38 I.C. 451 = (1918) Pat. 333.**

——S. 124 *and Chota Nagpur Tenancy Act (V B.C. of 1903), S. 35.*

Under S. 124 of the Old Act, a resumable under-tenure could not be sold but the right and title of the judgment-debtor could be sold and the new Act made the rule applicable to all cases pending at its commencement so that a tenure sold on August 18th, 1903, conferred upon the purchaser only the right and title of the defaulting tenure holder. (*Carnduff*, J.) DWARKA NATH *v.* PRALHADRAM. **18 I.C. 201.**

CHOTA NAGPUR TENANCY ACT (V of 1901).

——Ss. 208 (1) and 211 (1)—*Rent decree—Sale of portion—Whether valid—Alternative relief.*

S. 208, sub-section 1 of the Act contemplates the sale of an entire tenure and not of any share thereof, so that a decree-holder in a rent suit cannot bring to sale ¾ of a tenure owing to the ¼ share having been exempted from sale under S. 211 (1) but could treat the decree as one for money and execute it in the Civil Court. 15 I.C. 842; 40 Cal. 623, dist. (*Mookerjee and Beachcroft*, JJ.) CHANDRA NATH *v.* PRUTAPUDAI NATH. **28 I.C. 105 = 18 C.W.N. 170.**

——VI of 1908.

——*Remand—Appeal—Revision.*

An order of remand by the Judicial Commissioner of Chota Nagpur in a case tried by a Revenue Court is neither appealable nor revisable, as no provisions of the Civil Procedure Code have been incorporated in the Tenancy Act. (*Stephen and Mullick*, JJ.) BHAKTA MAHTO *v.* UDIT NARAIN SINGH DEO. **28 I.C. 899.**

——*Rent decree—Sale of property—Applicability of C.P. Code.*

Sale of homestead of a tenant, which was not part of his holding, in execution of a rent decree is governed by C.P.C. (*Chamier*, C.J. *and Sharfuddin*, J.) JAGDISWAR DAYAL *v.* RAMAN BARAI. **1 Pat. L.W. 188 = 42 I.C. 359 = (1919) Pat. 120.**

CHOTA NAGPUR TENANCY ACT (VI of 1908), S. 11.

——*Bengal Rent Act (X B.C. of 1859), S. 2—Under-raiyat, position of, after ejectment.*

The ejectment of an occupancy tenant for non-payment of rent makes his under-raiyat a trespasser liable to ejectment by the landlord; and the under-raiyat cannot question the decree for ejectment against the occupancy tenant. (*Sharfuddin and Roe*, JJ.) BISHEN NARAIN DAS *v.* CHANDRA KANTA NAIK. **20 C.W.N. 1240 = 1 Pat. L.J. 558 = 37 I.C. 658 = 2 Pat. L.W. 485.**

——S. 3 (11)—*Forest produce—If includes live animals.*

The "forest produce" in S. 3 of the Act includes live animals. (*Mullick and Jwala Prasad*, JJ.) MAHARAJ BAHADUR SINGH *v.* GAUDAURI SINGH. **2 Pat. L.J. 323 = 39 I.C. 868 = 2 Pat. L.W. 282.**

——S. 4—*Classification of tenants in, is not exhaustive—Tenure holders with* khunt katti rights, *position of.*

The enumeration of classes of tenants in S. 4 of the Act is not exhaustive and the fact that tenure holders had *khunt katti rights* did not exclude the possibility of their being temporary holders and liable to ejectment. (*Jwala Prasad and Ross*, JJ.) JEO LAL *v.* WAZIR NARAIN. **33 I.C. 764 = 2 Pat. L.T. 638.**

——S. 4—*Prodhani patta—Rights of holder—Ejectment—Forum.*

The holder of a *prodhani pattah* is not in the position either of a non-occupancy raiyat, or of an occupancy raiyat, but is a *quasi* service-tenure-holder, (i.e.) tenure holder of a kind but not one under the Chota Nagpur Tenancy Act. There is no provision in the Chota Nagpur Tenancy Act to justify a Court, constituted to hear suits under that Act, to eject a tenure-holder. (*Chapman and Atkinson*, JJ.) THE TATA IRON AND STEEL CO. *v.* RAGUNATH MAHTO. **5 Pat. L.W. 199 = 45 I.C. 73 = (1918) Pat. 65.**

——S. 5—*Construction of lease—Tenure holder—Execution sale—Pattah—Raiyat.*

Where a pattah grants something more than the mere right to cultivate, in fact, where it grants all the rights save and except the right to receive the rent payable to the superior landlord, the grantee comes within the definition of tenure holder under S. 5 of the Chota Nagpur Tenancy Act. Therefore there is no bar to the sale of his interest in execution of a decree. (*Mullick and Jwala Prasad*, JJ.) BAIKUNTHA GORAIN *v.* GANGA PRASAD TRIVEDI. **70 I.C. 976.**

——S. 11—*Rent for period prior to application for registration.*

The transferee of tenure cannot recover rent and that no decree can be passed in his favour for the period prior to his application to the

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landlord for registration in his office. (*Holmwood and Carnduff*, JJ.) ANGNU GHASI v. CHAITHU PATRAS.

27 I.C. 603 = 19 C.W.N. 461.

——S. 11—*Transfer of tenure—Necessity of registration.*

The landlord is not entitled to recover from the tenant the rent due between the date of transfer and the date of registration. (*Atkinson and Jwala Prasad*, JJ.) ZALIKA BIBI *v.* KRISHNA DAYAL GIR. 41 I.C. 778 = 2 Pat. L.W. 146.

——S. 11 (4)—*Registration of tenure—Burden of proof.*

Under S. 11 of the Act, where the plaintiff's title to recover rent is questioned on the ground of non-registration of his tenure, the *onus* is upon him to prove that he had got his name registered prior to the date of the suit. 23 I.C. 844 distinguished. 1917 Pat. 68, dissented from. (*Coutts and Macpherson*, JJ.) DUBEY SHIVA SAHAY RAM *v.* THAKUR SHIVA BHANJAN LALL. 2 Pat. L.T. 380 = 65 I.C. 358 = (1921) Pat. 355 = 6 Pat. L.J. 677.

——S. 11(4)—*Rent suit—Transfer of tenures—Effect of non-registration under Beng. General Clauses Act* (I of 1899). *S.* 8 (*c*)—*Whether payment of rent to superior landlord and entry in Record of Rights amount to registration.*

Plffs. purchased a tenure on 28th May 1899, and thus were bound to have their names registered under the provisions of S. 34 (1) of the Amendment Act of 1903; they could not recover arrears of rent from the *fasli* years 1317 to 1320 in spite of the fact that S. 11 of theChota Nag. Act. Ten. (1908) contains no provision for the past transfers. The repealed statute of 1903 prohibited the plff. from exercising his right of suit for rent by reason of S. 8 (*c*), Beng. General Clauses Act (1899). Payment of rent to the superior landlord and his acceptance of the same and the entry in the Record of Rights do not suggest a presumption of registration under the Chota Nag. Ten. Act. The term "recover" in cl. 4 of S. 11 of the Act of 1908 means to recover legally. (*Mullick and Atkinson*, JJ.) MUNSHI RAM SAHAI *v.* KHEMAN MAHTO. (1917) Pat. 68 = 38 I.C. 89 = 1 Pat. L.W. 571.

——S. 14—*Resumption of Jagirs annuls all sub-tenures.*

Where a jagir is resumed in Chota Nagpur all the sub-tenures created by the previous jagirdar are annulled and become void. 27 C. 156, foll. But land whereon a mine has been sunk is expressly exempted from annulment. A tenure holder cannot create a sub-tenure to exceed in duration the subsistence of his own tenure. The delivery of symbolical possession in respect of a large parganah consisting of several villages of a large area of *bakasht* and *zerait* lands, has the same binding force against

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the judgment-debtors and his representatives (*i.e.*) the under-tenure holders whose encumbrances stand annulled under S. 14 of the Act. (*Adami*, J.) MAHARAJA PRATAP UDAI NATH SAHI DEO *v.* BHAIAIN SUNDERDAS KOER.

3 Pat. L.T. 618 = 24 Cr. L.J. 279 = 71 I.C. 999 = 1923 P. 76.

——Ss. 14, 208, 212—*Raiyat at fixed rates can make a deposit.*

It is immaterial whether the right or interest of a raiyat is liable to annulment under Ss. 14 and 208 of the Act. The words of the section are so general that they entitle a raiyat at fixed rates to make the deposit and have the sale set aside. (*Mullick and Thornhill*, JJ.) PANCHANAN MAHTA *v.* KANAI MAHTO. 49 I.C. 198 (1) = 4 Pat. L.J. 11.

——Ss. 20 and 39—*Occupancy rights—Cultivation of lands in Thika does not confer.*

Mere cultivation of the lands comprised in a thika does not confer an occupancy or non-occupancy right on a thekadar if prior to the theka he had no connection with the lands. (*Adami and Bucknill*, JJ.) RAJNATH SINGH *v.* WAHID KHAN.

3 Pat. L.T. 107 = 1922 P. 28.

——S. 26—*Applicability of.*

S. 26 of Chota Nagpur Tenancy Act was not meant to apply to enhanced rents by private agreement under the law in force at that time. (*Mookerjee and Beachcroft*, JJ.) GAJOO MAHATO *v.* COOKE. 16 C.L.J. 422 = 16 I.C. 929 = 17 C.W.N. 430.

——Ss. 26 and 27—*Occupancy tenant—Contract for enhancement of rent.*

A *kabuliyat* which an occupancy tenant executes to pay enhanced rent is illegal and not binding upon the tenant under S. 27. (*Das*, J.) JUGAL KISHORE SAH *v.* SHAMBU NATH PANDE. 51 I.C. 27.

——Ss. 41 and 4—*Under-raiyat—Suit for ejectment.*

An under-raiyat is distinct from non-occupancy raiyat. Provisions dealing with tenants generally can be applied to under-raiyats. No notice in writing is needed for terminating a tenancy of an under-raiyat as the tenancy is ordinarily from year to year. (*Chapman and Mullick*, JJ.) GURU CHARAN HAJAM *v.* SUKLAL HAJAM. 50 Cal. 858 = 19 I.C. 588 = 17 C.W.N. 810.

——S. 41—*Right of Thekadar to make settlement—Grounds of ejectment of a non-occupancy tenant on surrender of ticca.*

A thekadar is entitled to make an ordinary settlement with tenants under the Act and confer the status of non-occupancy raiyats on them. The landlord on the surrender of Theka can eject such a raiyat on the ground stated in

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S. 41 and on no other ground. (*Chamier*, C.J. *and Sharfuddin*, J.) PITAMBAR SINGH *v.* KHAJA KUMHAR. **39 I.C. 521 = 3 Pat. L.W. 333.**

——— **S. 46**—*Mortgage—Subsequent surrender—Not invalid.*

The provisions contained in S. 72 of the Chota Nagpur Tenancy Act are similar to those contained in S. 86 of the Bengal Tenancy Act with this difference that the provisions contained in clause (6) of the Bengal Tenancy Act do not find place in S. 72 of the Chota Nagpur Tenancy Act, A mortgage, as distinguished from a sale is an incumbrance, and where the mortgage as in the present case was secured by a registered instrument, if the Bengal Tenancy Act applied a surrender would have been invalid, unless it was made with the consent of the landlord and the mortgagee. That clause has been omitted from the Chota Nagpur Tenancy Act and the reason probably is that the legislature did not consider it desirable in the peculiar circumstances of the tenancy of the Chota Nagpur to recognise the right of transfer in the tenants with respect to their holdings. This intention is also to be gathered from the restrictions imposed upon the tenants under Chapter VIII of the Chota Nagpur Tenancy Act, namely, S. 46. A *raiyat* is not permitted to transfer his holding or a portion thereof by a mortgage or lease for a longer period than five years to sell or make a gift of his holding by any contract or agreement. Be that as it may the absence of a provision similar to clause (6) of S. 86 of the Bengal Tenancy Act from S. 72 of the Chota Nagpur Tenancy Act leaves no power of surrender conferred by the section unhampered by the existence of any incumbrance over the property. It, therefore, logically follows that in spite of a prior sale or mortgage by a *raiyat* he is free to exercise his right of surrender of the holding in favour of the landlord, for under clause (2) of S. 46 no transfer by a raiyat of his right in his holding or any portion thereof is binding on the landlord unless it is made with his consent in writing. A fraudulent surrender confers no right on the landlord. (*Jwala Prasad and Ross*, JJ.) RAM ORAON *v.* DOMAN KALAL. **2 Pat. 898 = 4 Pat. L.T. 562 = 75 I.C. 209 = 1924 P. 100.**

——— **Ss. 46 and 47**—*Applicability of—Mortgage before the extension of the Act to Manbhum is not within the provisions of section.*

A mortgage bond of 4-10-09 executed in the District of Manbhum does not attract the provisions of Ss. 46 and 47 of the Chota-Nagpur Tenancy Act inasmuch as the Act had been extended to the District of Manbhum in December, 1909. The mere fact that an instalment of the mortgage money is payable after 1920 in pursuance of a compromise decree entered into after 1920 does not attract the provisions of Ss. 46 and 47 of the Act. (*Mullick and Kulwant Sahay*, JJ.) ISHAN CHANDRA KUNDU *v.* NILRATAN. **4 Pat. L.T. 311 = 1 Pat. L.R 217 = (1923) Pat. 184 = 2 Pat. 838 = 1923 P. 375.**

CHOTA NAGPUR TENANCY ACT (VI of 1908), S. 51.

——— **S. 47**—*Right of raiyat in holding—Mortgage—Order for sale after extension of the Act wholly illegal.*

When between the dates of a preliminary and final decrees of a mortgage of properties situate in the Manbhum, the Chota Nagpur Tenancy Act is extended to the area, the sale of the mortgaged property in execution by the Court is illegal. (*Chitty and Teunon*, JJ.) LAKSHMI BIBI KUJRANI *v.* ATAL BEHARI HALDAR. **21 I.C. 117 = 40 Cal. 535.**

——— **S. 47**—*Not retrospective.*

S. 47 of the Act is not retrospective and a suit can be brought to enforce a mortgage executed in 1906 by sale of the raiyati interest. (*Mullick and Jwala Prasad*, JJ.) BRAJA LAL DUTTA *v.* KENARAM PAL. **50 I.C. 515 = 4 Pat. L.J. 411.**

——— **Ss. 47 and 231**—*Lim. Act, Art.* 166.

In execution of a mortgage decree, the mortgaged property was sold and purchased by the decree-holder and the sale confirmed. More than one year afterwards the judgment-debtor applied to set aside the sale on the ground that under S. 47, the sale was null and void. *Held*, that the application was time-barred under S. 231 of the Act if not under Art. 166 of the Lim. Act. (*Sharfuddin and Roe*, JJ.) NILAMONI GOSWAMI *v.* ROBAN MAJHI. **1 Pat. L J. 483 = 20 C.W.N. 1243 = 32 I C. 683 = 3 Pat. L.W. 57.**

——— **S. 47**—*Objection to sale.*

An objection to the sale of raiyati right in execution of a mortgage decree under S. 47 may be taken after the passing of the decree and the executing Court must determine the question. 40 Cal. 534, ref to. (*Chamier*, C.J. *and Jwala Prasad*, J.) JADHO MAHTO *v.* KALI PRASANNA BHATTACHARJEE. **1 Pat. L.J. 38 = 34 I.C. 783 = 3 Pat. L.W. 399.**

——— **Ss. 51 and 177**—*Suit for rent—Plea of payment to third person—Procedure.*

On tenant's plea of payment to third party, he should be made a party under section 177 and the suit decided after going into the question of the *bona fide payment* by the tenant. In rent suits, when plff. has obtained delivery of possession from the Civil Court, and his possession is recognised in the survey proceedings, he should be permitted to realize his rent leaving it to any third person who disputes plff.'s title to bring a civil suit. (*Chapman and Jwala Prasad*, JJ.) SUNDAR ROY *v.* HEMA MAHTO. **2 Pat. L.J. 286 = 41 I.C. 191 = (1917) Pat. 189.**

CHOTA NAGPUR TENANCY ACT (VI of 1908), S. 52.

——Ss. 52, 234—*Suit for arrears of rent—Limitation.*

As under S. 52 read with S. 234 of the Act rent falls due on the last day of each quarter of the Agricultural year, a suit for arrears of rent should be bought within 3 years from the end of the Agricultural year in which the arrears become due. But if a co-sharer landlord brings a suit for apportionment of rent making the tenant and the other co-sharers parties to the suit the right to recover rent is deemed to be in suspense till the date of decree in the suit. (*Jwala Prasad*. J.) MIDNAPUR ZAMINDARY CO. *v.* JAGANATH SARANGI. **59 I.C. 314.**

——Ss. 59 and 79—*Lease of permanent tenure—Applicability.*

Ss. 59 and 79 of the Act do not apply to cases of permanent tenure and therefore a stipulation therein that the lease is liable to be cancelled for non-payment of rent is a valid stipulation. (*Chapman and Newbould*, JJ.) NAYAN SINGH *v.* AJIT LAL,
20 I.C. 294=17 C.W.N. 1068.

——Ss. 64 (3), 67 — *Failure to eject* — *'Korkardar'* — *Occupancy rights, in* korkar *gives him lands.*

Where a landlord fails to eject a '*Korkardar*' within 2 years from the time when the latter commenced to convert lands into the '*Korkar*,' the consent of the landlord to the conversion will be presumed under S. 63 (3) of the Act and the *Korkardar* acquires under S. 67 an occupancy right in the lands from which he cannot be ejected. (*Coutts and Macpherson*, JJ.) PARASHRAM *v.* PRATAB.
68 I.C. 783=2 Pat L. T. 635.

——Ss. 64 (3) and 67—*Occupancy rights—Acquisition of by trespasser.*

Defts. wrongfully obtaining possession of land settled on plff. by Government converting it to *Korkar* land, and holding it over for more than 20 years and then obtaining settlement of it from Government become occupancy tenants of that land and cannot be ejected by plff. (*Atkinson*, J.) RAHAMALI KALAL *v.* CHINTAMON KUMAR. **38 I.C. 478.**

——S 68—*Decree, meaning of.*

The word "decree" in S. 68 should not be read with the expression "passed under the Act." (*Teunon*, J.) BHOLANATH MANDAL *v.* CHOTA GUNARAM MIGHI. **28 I.C. 407.**

——Ss. 71 and 217—*High Court—Order under S. 217—C. P. Code, S. 115—Govt. of India Act (1915), S. 107—Interference.*

A landlord turned out a transferee of a non-transferable holding in Chota Nagpur as a trespasser and the latter was restored to possession by Deputy Commissioner. The landlord moved the High Court under S. 115 of the C.P. Code and under S. 107 of the Govt. of India Act. In cases falling within S. 217 of the Act where the Legislature has deliberately placed the power of revision in the hands of the Revenue

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authorities, the High Court should not usurp that power until it has been shown to be abused. (*Sharfuddin and Roe*, JJ.) UDHAB CHANDRA SINGH *v.* LACHMI BIBI KUARANI,
3 Pat. L.W. 281=43 I.C. 933=3 Pat. L.J. 143.

——Ss. 77 and 208 — *Ghatwali tenure, liability to sale for arrears of rent—Govt's. right to nominate ghatwal.*

Where the right of nomination of the ghatwal rests with the Govt. and not with Raja, a ghatwali tenure cannot be sold in execution of a decree for arrears of rent. 9 Cal. 187, foll. (*Mullick and Atkinson*, JJ.) MIDNAPORE ZEMINDARI CO., LTD *v.* AJAMBAR SINGH MURA.
1 Pat. L.J. 601=36 I.C. 963=2 Pat. L.W. 427.

——Ss. 78, 224, cl. (2) and 264 (8)—*Decision under S. 87—Second appeal.*

There is no second appeal to the High Court from a decision in a suit under S. 87 of the Act. The word 'decision' in S. 87 is not synonymous with a "decree" and therefore S. 100 of the C.P. Code does not apply to the decision of an appeal under S. 87. 40 I.C. 891, not foll.; 39 I. C. 241, foll. (*Coutts and Sultan Ahmad*, JJ.) JAGDESHAR DAYAL SINGH *v.* BHAGDI MAHTON. **5 Pat. L.J. 697=38 I.C. 434=1 Pat. L.J. 703=(1920) Pat. 302.**

——Ss. 80, 127 and 132—*Entry in Record of Rights—Effect of — Jurisdiction of Civil Court.*

Entries in Record of Rights are correct until disproved, if the Record is made by notification under S. 80; but they are conclusive proof if the Record is made by Notification under S. 127 of the Act. The rights and obligations of tenants with reference to landlords, once they are ascertained, cannot be questioned by any Civil Court. (*Atkinson and Dass*, JJ.) SHAIBA PRASAD *v.* GOLAM MANJHI.
50 I.C. 454=(1919) Pat. 147.

——S. 81, cl. (n)—*Scope.*

S. 81 (*n*) does not include coal contained in a mine not yet opened but only minerals lying on the surface of the soil which may be taken by any person whether tenant or not. (*Mookerjee and Holmwood*, JJ.) RAM NARAYAN SINGH *v.* KRISHNA CHANDRA.
17 C.W.N. 408=17 I.C. 490=17 C.L.J. 239.

——Ss. 83 and 87—Mundari Khuntkatidari *tenant.*

A Settlement Officer has jurisdiction to record a tenant as Mundari Khuntkatidar, in a settlement proceeding, under the Act, on deciding a dispute between the tenant who claims to be a *Mundari Khuntkati* tenant and the landlord who says he is not, although there is no suit between the parties under S. 87 of the Act. (*Chatterjee and Mullick*, JJ.) JOGENDRA NATH DAY *v.* GOUR SINGH MURA. **34 I.C. 385=20 C.W.N. 582.**

CHOTA NAGPUR TENANCY ACT (VI of 1908), S. 84.

———S. 84 (3)—*Entry in record of right—Evidentiary value of—Admission by Appellate Court.*

An entry in the record of rights has only a presumptive value under S. 84, cl. (3) and an Appellate Court is not bound to receive in evidence the record of right published after the institution and decision of the trial Court. (*Adami and Bucknill, JJ.*) RAJNATH SINGH *v.* WAHID KHAN. 3 Pat. L.T. 104=1922 P. 28.

———Ss. 87, 258 and 264 (8)—*Judicial Commissioner hearing appeals in cases under S. 87 if Revenue Officer—Order not modifiable by suit in Civil Court*—Res judicata.

The Judicial Commissioner by virtue of his appointment under S. 264 (8) performed the functions of a "Revenue Officer" within the meaning of S. 258 in disposing appeals from decisions of Revenue Officers under S. 87. The decision under S. 87 is a bar to the trial of a subsequent suit in a Civil Court for the same relief but the party who is in possession can defend his title in a suit for resumption of the tenure. (*Holmwood and Walmsley*, JJ.) THEKAIT GANESH NARAIN *v.* MAHARAJAH PROTAB UDAI NATH.

43 Cal. 135=19 C.W.N. 998=
31 I.C. 691=23 C.L.J. 118.

———Ss. 87 and 224—*Order under if open to second appeal.*

An appellate order under S. 87 of the Chota Nagpur Tenancy Act is not open to second appeal. (*Stephen and Coxe*, JJ.) RAGHUBIR SAHI *v.* PROTAP UDOY NAUTH SAHI DEB.

39 Cal 261=16 C.W.N. 295=
13 I.C. 193=15 C.L.J. 155.

———S. 83—*Record of rights—Presumption of correctness—Rebuttal—Proceedings leading to final record are admissible.*

The presumption of correctness about the entries in a Record of Rights arises only with the finally published Record of Rights, but to rebut the presumption the proceedings which resulted in the final record such as a draft record on what took place at the attestation stage are admissible in evidence. (*Miller*, C.J., *and Kulwant Sahay*, JJ.) CHAND RAY *v.* BHAGWATI CHARAN GOSWAMI.

2 Pat. 814=1924 P. 248.

———Ss. 87 and 224 (2)—*Decision, under is not a decree—Second appeal does not lie.*

Under S. 224 (2) there is no second appeal to the High Court from the decision of the Judicial Commissioner passed in an appeal from a decision under S. 87 of the Chota Nagpur Tenancy Act. A decision under S. 87 is not a decree and no appeal lies to the High Court under the C.P Code. 5 Pat. L.J. 697; 16 C.W.N. 295, foll.; 40 I.C. 891, not foll. (*Das and Ross*, JJ.) FOUJDAR SAHU *v.* NEMA BHOGTA.

4 U.P.L.R. (Pat.) 25=65 I.C. 285=6 Pat. L.J. 634=(1922) Pat. 109=1923 P. 135.

CHOTA NAGPUR TENANCY ACT (VI of 1908), S. 88.

———Ss. 87 and 258 — *Decree of Revenue Court—Finality of.*

Though S. 258 of the Chota Nagpur Tenancy Act has the object of securing to some extent finality for any order or decree of any Deputy Commissioner or Revenue Officer in any suit or proceeding under, *inter alia*, S. 87, the section does not say, as it might have done that no Court shall try any issue already decided by such a decree so as to bar a defendant in a suit brought against him from raising the issue. (*Miller*, C. J, *and Jwala Prasad*, J.) MAHARAJA PRATAP UDAINATH SAHI DEO *v.* GANESH NARAIN SAHAI.

70 I.C. 232=(1921) Pat. 369.

———S. 87—*Second appeal—Limitation Act, S. 14 — Deduction of time spent on appeal to Commissioner.*

No second appeal lies to the High Court from the decision of a Judicial Commissioner passed on appeal against the decision of a Revenue Officer under S. 87. 39 Cal. 24, foll. "Decision" in the Chota Nagpur Tenancy Act does not mean "decree" as used in S. 100 of the C. P. Code. Where the three months provided for a suit under S. 87 of the Act having expired, the plff. sought to exclude the time taken up by a previous application under S. 89 followed by an appeal to the Commissioner; *Held*, that though the appeal to the Commissioner was incompetent, the Settlement Officer had jurisdiction to entertain the application under S. 89 and the period during which the application was pending before the officer could not be excluded. (*Coutts and Sulton Ahmad*, JJ.) THAKUR JAGADESHWAR DAYAL SINGH *v.* BHAGDI MAHTOM.

1 Pat. L.T. 705=(1920) Pat. 302=
58 I.C. 435=5 Pat. L.J. 697.

———S. 87—*Second appeal.*

In a suit under S. 87 filed in the Revenue Court for a declaration that an entry in the Record of Rights is worng and that the lands are the Zerait lands of the plff. and that the deft. has no right of occupancy therein, a second appeal can be made to the High Court from the decision of the Judicial Commissioner in appeal. (*Mullick*, J.) LAL MAN NAIK *v.* KANHAIYA LAL PANDHEY 40 I.C. 891.

———S. 88—*Ijaradar—Lease of the entire mauza—Inclusion of man lands — Notice to quit—Necessity for.*

Where the deft, got *ijara* of a mauza including the *man* lands from 1291-1296-F. and having also remained in possession from 1297-1305-F. he got another *ijara* from 1306-1313 and a fresh *ijara* from 1314-1323, and the plff. who was lessee of the entire *mauza* brought a suit in ejectment against the deft. who did not give up his possession over the *man* lands in which he set up a tenancy and claimed a notice to quit before ejectment. *Held*, that the deft. could not claim any sort of tenancy in the *man* lands, and on the expiry of his *ijara*,

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he was not entitled to retain possession of them,—he having neither an occupancy nor non-occupancy right therein; and that no notice was required before the suit for ejectment was brought. The *man* lands having been held as remuneration for the collection of rents, when the period of the *ijara* expired, the *ijaradar* was bound to deliver up possession of the subject of the *ijara*, not only the lands held by the tenants but also the *man* lands. 16 C.L.J. 30, dist. (*Coutts and Macpherson*, JJ.) CHIGU CHAUDHURI *v.* SRIMABYA CHAND MONI DEBYA. **64 I.C. 695 = 2 Pat. L.T. 777.**

——S. 91 (1)—*Scope of.*

A plaintiff can obtain relief under S. 91 (1) only when waste or damage has actually been committed and even then he can only prohibit the commission of further waste or damage and cannot obtain an order for injunction or for the appointment of a Receiver. S. 91 (b) does not refer to suit when the status of the tenant only comes up for consideration. S. 91 does not authorise the dismissal or the suit but only adjustments pending the final publication of the Record of Rights. 8 Cal. 422; 7 Bom. 169; 34 Cal. 305; 15 C.W.N. 925; 21 Bom. 351 Cons. (*Mookerjee and Holmwood*, JJ.) RAM NARAYAN SINGH *v.* KRISHNA CHANDRA GHOSE. **17 C.W.N. 408 = 17 I.C. 490 = 17 C.L.J. 239.**

——S. 132—*Relates only to* Khuntkatti *lands.*

The provisions of S. 132 of the Chota Nagpur Tenancy Act relate only to *Khuntkatti* lands, and under S. 84 (3) a record of rights, is not a conclusive proof of any tenancy right. (*Adami and Bucknill*, JJ.) RAJNATH SINGH *v.* WAHID KHAN. **3 Pat. L.T. 107 = 1922 P. 28.**

——S. 139—*Suit to eject non-occupancy rights holding over does not lie in Civil Courts.*

A Deputy Commissioner, and not Civil Court can take into consideration a suit for ejectment of non-occupancy rights holding after the lease is over. (*Miller*, C.J. *and Foster*, J.) Mt. JAGESHWAR KOER *v.* TILAKDHARI SINGH. **2 Pat. 746 = 77 I.C. 587 = 1924 P. 267.**

——Ss. 139 and 231—*Suit by auction purchaser for delivery of possession—C.P. Code, S. 47.*

Neither Act X of 1859, nor Act VIII of 1865, nor the Chota Nagpur Tenancy Act, has enacted that the provisions of the C.P. Code should apply to the suits or the decrees obtained under those Acts; therefore S. 47 of the C.P. Code does not apply to decrees passed and executed and sales held under the Rent Act (X of 1859). 21 Cal. 428 and 28 Cal. 368, foll. (*Miller*, C.J. *and Jwala Prasad*, J.) SRIDHAR SIRDAR *v.* JAGESHWAR SINGH. **4 Pat. L.J. 716 = 52 I.C. 711 = (1919) Pat. 354.**

CHOTA NAGPUR TENANCY ACT (VI of 1908), S. 139.

——Ss. 139 (2), 61 (2) and 61 (3)—*Suit to correct entry in Record of Rights does not bar —Commutation of rent by Rev. Officer.*

In the finally published Record of Rights, it was entered that the rent was payable in kind and also small cash payments in addition. The tenants applied for the commutation of the rent. The landlord sued in the Civil Court for a declaration that the rent was payable wholly in cash. The Revenue Officer during the pendency of the civil suit allowed the commutation. *Held* that the Revenue Officer's jurisdiction was not ousted by the institution of the suit in a Civil Court and that the suit was barred by S. 139 (2). (*Jenkins*, C.J. *and N.R. Chatterjee*, J.) RAKHAL CHANDRA CHATTERJEE *v.* BAJI SANTHAL. **23 C.W.N. 372.**

——S. 139, Cls. (2) and (4)—*Suit for ejectment—Jurisdiction of Civil Courts.*

S. 139 (2) and (4) do not bar jurisdiction of Civil Courts in a suit under the provisions of general law for ejectment of an under-raiyat by a raiyat. (*Teunon*, J.) BHOLA NATH MANDAL *v.* CHHOTA GUNARAM MIGHI. **23 I.C. 407.**

——S. 139 (3)—*Suit for rent—Homestead land—Crops on part of land—Civil or Revenue Court—Ghatwali property including agricultural land.*

Where rent is claimed in respect of *Bustee* or homestead land, the mere circumstance that crops have been grown on a part of the land, does not change its character. Such a suit is not one for arrears of rent due on account of agricultural lands and is cognizable by the Civil Court and not by the Revenue Courts, although the *Bustee* land forms part of a *Ghatwali* property including agricultural land. (*Mookerjee and Holmwood*, JJ.) MIDNAPUR ZEMINDARI Co., LTD. *v.* MUKTAKESHI DASI. **40 Cal. 402 = 16 I.C. 776 = 17 C.W.N. 615.**

——S. 139 (5)—*Application, meaning of.*

"Application" in S. 139 (5) is not interchangeable with "suits". The distinction between application and suit is recognised by the Act. (*Woodroffe and Carnduff*, JJ.) KHITRA NATH *v.* PERU BAIRI. **13 C.L.J. 250 = 9 I.C. 478 = 15 C.W.N. 387.**

——S. 139 (6)—*Suit for recovery of possession by headman—Maintainability.*

S. 139 (6) of the Act bars only a suit which relates to agricultural land and is instituted by the headman of a village as such, but has no application in a suit for recovery of possession on declaration of title. A raiyat with a right of occupancy in his agricultural lands, who is at the same time the rent collector of the village and is remunerated as such does not lose his right of occupancy. (*Mookerjee and Beachcroft*, JJ.) DURGA PROSAD SINGH *v.* HARI RAM MAHTO. **19 C.W.N. 578 = 27 I.C. 536 = 21 C.L.J. 629.**

CHOTA NAGPUR TENANCY ACT (VI of 1908), S. 139.

——S. 139 (6) and (8)—*Prodhan—Suit to eject—Forum.*

S. 139 (6) of the Act confers jurisdiction on the Deputy Commissioner to deal with disputes as between parties claiming the office of *prodhan* coupled with possession of land attached to such office in a civil proceeding between parties other than landlord and tenant, which would otherwise apparently be outside the scope of the Act. A suit to eject a *prodhan* is not clearly within this sub-section nor under sub-section 8. The Deputy Commissioner has, therefore, no jurisdiction under the Act to hear such a suit. (*Chapman and Atkinson*, JJ.) TATA IRON AND STEEL CO., LTD, *v.* RAGHUNATH MAHTO. 3 Pat. L.W. 199= 45 I.C. 72=(1918) Pat. 65.

——S. 157—Ex parte *decree.*

A decree which has actually been passed *ex parte* is an *ex parte* decree though it does not appear as such on its face. A rent decree passed against several tenants, one of whom only appeared and admitted plff.'s claim is *ex parte* against the other tenants. (*Coutts and Macpherson*, JJ.) SHYAM NARAIN SINGH *v.* SIWCHARAN SAHU. 2 Pat. L T. 734= 62 I.C. 886=(1921) Pat. 345.

——S. 177—*Applicability—Suit for rent—Plea of payment to third party.*

S. 177 of the Act applies when a right is claimed by or on behalf of a third person. Where in a suit for rent, the defendant pleads payment to a third party, but the right to receive payment is not claimed by or on behalf of such third party, S. 177 does not apply and the third party need not be impleaded in the action. (*Das and Adami*, JJ.) BALKI LAL *v.* SURENDRA NATH ROY. 1 P. 255= 69 I.C. 858=1922 P. 480.

——S. 177—*Applicability—Suit for rent—Plea of payment to third person.*

A right to receive rent can only be claimed by or on behalf of the person entitled to receive it and not by a person who is under an obligation to pay it. Where therefore in a rent suit, the tenant pleads payment to a third person, and such third person does not intervene, S. 177 of the Act does not operate. 57 I.C. 28, foll. (*Coutts and Ross*, JJ.) GHURA MANJHI *v.* PROBODH CHANDRA MOZUMDAR. 3 Pat. L T. 131=6 Pat. L J. 603= 64 I.C. 1003=(1922) Pat. 54=1923 P. 55.

——S. 177—*Scope.*

S. 177 does not bar a suit where the tenant pleads the right of a third person as landlord nor is plff. bound to implead such a person. (*Das*, J.) BUDHAN SINGH *v.* MAWAL KALICHARAN SINGH. 57 I.C. 28= 2 U.P.L.R. (Pat.) 190.

——Ss. 177, 218 and 224—*Rent suit—Appeal—Claim of third person.*

CHOTA NAGPUR TENANCY ACT (VI of 1908), S. 208.

An appeal from rent suit in which no question of title is decided, lies to Deputy Commissioner and not to Judicial Commissioner. (*Chapman and Atkinson*, JJ.) LACHMI NARAYAN *v.* THAKUR HARI. 50 I.C. 712=5 Pat. L.J. 163.

——S. 178 (2) and (3)—*Rent decree—Enlargement of time to pay—Application made after execution—Power of Court to grant time.*

In respect of a decree for rent passed under S. 178 (2) of the Act, Court executing the decree being the Court which had tried the suit and made the decree, has power to grant an extension of time and thus in a manner to alter the decree even after the expiry of the period prescribed in the decree in conformity with sub-S. (2) and even after the decree-holder had applied for execution. 17 Cal. 1, 17 Cal. 512, 10 I.C. 268, rel. (*Mookerjee and Carnduff*, JJ.) SURNAMAN SINGH *v.* SHAM CHARAN OHDAR. 16 C.W.N. 1090=15 I C 689= 15 C.L.J. 520.

——S. 178 (3)—*Power to extend time—Not exercisable after execution proceedings are closed—Order of extension is appealable.*

The power under S. 178 (3) of the Act to extend time for payment of arrears of rent can be exercised only so long as the whole decree is not satisfied and cannot be exercised after execution proceedings are closed. An order under S. 178 (3) of the Act relates to the execution of the decree and an appeal from that order lies to the Court in which an appeal from the decree lies. (*Jwala Prasad and Adami*, JJ.) BISESWAR SAHU *v.* MUHAMMAD ZAINUL. 6 Pat. L.J, 300= 63 I C. 779=(1921) Pat. 195.

——S 191 (2)—*Landlord's rights.*

A landlord who has obtained a decree for rent of a tenure under the Act may proceed at once to execute it against the person of the tenant. He is not bound to put up the tenure to sale in the first instance. The warrant of arrest so taken out has the effect of staying proceedings for the sale of tenure. S. 191 (2) of the Act does not apply. (*Holmwood and Walmsley*, JJ.) THAKUR MADAN MOHUN *v.* MAHARAJA PRATAP UDAI NATH SAHI DEO. 34 I.C. 22=20 C.W.N. 111.

——S. 208 (2)—*Execution of rent decree.*

A warrant for the arrest of a person against whom a decree for rent has been obtained, has the effect of only staying the proceedings for sale of the tenure and neither S. 208 nor S. 199 has any application to the case. (*Holmwood and Walmsley*, JJ.) MADAN MOHUN *v* PRATAP UDAI NATH SAHI DEO. 34 I.C. 22= 20 C.W.N. 111.

——Ss. 208 and 209 (a)—*Sale certificate—Order — Appeal — Bengal Rent Recovery Act, S. 1.*

No appeal lies to the High Court from an order of a Deputy Collector directing the issue

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of a sale certificate under S. 208 read with S. 11 of the Beng. Rent Recovery Act, unless the order is one passed after decree and relating to the execution thereof. The phrase "confirmation of sale" in S. 209 (*a*) must refer to the completion of the sale proceedings by deposit of the balance of purchase-money under S. 11 of the Beng. Rent Recovery Act. The practice of confirming sales held under the Chota Nagpur Tenancy Act is not warranted by the Act. (*Coutts Trotter and Sultan Ahmed*. JJ.) LAL NILMANI NATH SAI DEO *v.* RAI BAHADUR BALDEO DAS. 5 Pat. L.J. 101 = 1 Pat. L.T. 146 = 55 I.C. 27 = 2 U.P.L.R. (Pat.) 69 = (1920) Pat. 73.

——S. 210 (2)—*Scope of.*

S. 210 (2) applies whether or not the decree-holder has proceeded under S. 208. If in execution of a rent decree an application for sale of the entire holding is refused, the decree-holder can ask permission from the Deputy Commissioner to proceed against the other properties of the judgment-debtor. Even if one of the judgment-debtors pays a portion of a joint decree, he remains jointly liable with the others for the balance. (*Mookerjee and Carnduff*, JJ.) JAGANNATH SAHAI *v.* RAM NARAIN. 12 I.C. 599.

——Ss. 211 and 270—*Execution of rent decree—Objection by transferee from tenant—Appeal.*

No appeal lies to the Deputy Commissioner from a decision of a Deputy Collector under S. 211 of the Act. If a Deputy Collector whilst exercising the delegated powers of the Deputy Commissioner, fails to exercise a jurisdiction or usurps a jurisdiction, then the Deputy Commissioner has power to order him either to exercise that jurisdiction or to refrain from exercising it as the case may be. The same rules apply in the case of the Commissioner and the Board of Revenue dealing with acts performed by the Deputy Commissioner. Where the circumstances of the case show that there had been recognition by the landlord of the tenancy of the objector, there is sufficient reason for not having the transfer registered under S. 211. (*Miller*, C.J., *and Das*. J.) TIKAIT GANESH NARAYAN SAHI DEO *v.* CHANDU MISTRI. 5 Pat. L.J. 468 = 58 I.C. 268 = 1 Pat. L.T. 729.

——S. 212—*"Claims", meaning of—Sale setting aside of—Court, duty of—Sale in execution of decree—Right to deposit purchase-money—Jurisdiction to determine the right—Appeal, if lies.*

The word "claims" in Section 212 is used in the sense of asserting that a thing is one's own or affirming one's possession over it. A sale is not set aside by mere statements. A person claiming to hold *dar-mokarari* interest in the tenure sold in execution of a decree, claimed to be entitled to deposit the money under Section 212. His application being rejected he

CHOTA NAGPUR TENANCY ACT (VI of 1908), S. 213.

appealed to the Judicial Commissioner. *Held*, the appeal lay to Judicial Commissioner. (*Chamier*, C.J. *and Sharfuddin*, J.) PANCHANAN MAHTO *v.* KUNAI MAHTO. 2 Pat. L.J. 153 = 37 I.C. 891 = (1917) Pat. 97.

——S. 213—*Execution of rent decree—Court cannot exempt portion of property from sale—Legality of—Right to set aside sale.*

Where in execution of a decree for arrears of rent, the holding of a tenant is put for sale, the Court has no power to order that a portion of the property shall be exempt from sale. Where therefore such an order was made and in pursuance of it a sale is held and the property is purchased by the decree-holder it is open to the judgment-debtor to bring a suit for setting aside the sale and his remedy is not confined to an application under S. 213 of the Chota Nagpur Tenancy Act. (*Coutts and Das*, JJ.) KUMAR RAMYAD SINGH *v.* CHHEDIA BARHI. 1 Pat. 750 = 4 Pat. L.T. 439 = 71 I.C. 345 = 1923 P. 64.

——Ss. 213, 265 and 230—*Rent sale—Application to set aside—Death of party—Substitution not applied for within time—Application abates.*

An application to set aside a sale held in pursuance of an application for the execution of a decree is not an application for execution of a decree and order. Therefore, if on the death of the person who presents such application no steps are taken within the time allowed by law for substitution of names, the application abates. (*Das and Adami*, JJ). LAL NILMONY NATH SAHI DEO *v.* MAHARAJ PROTAP UDAI NATH SAHI DEO. 1 Pat. L R. 55 = 4 Pat. L.T. 367 = (1922) Pat. 363 = 2 Pat. 243 = 1923 P. 29.

——Ss. 213 and 215—*Execution sale—Application to set aside—Refusal to summon witnesses—Revision.*

A person applied under S. 213 to set aside a rent sale on the ground of material irregularity and inadequacy of price and applied for summonses on a number of witnesses. The Deputy Collector refused to issue summonses on the witnesses on the ground that they were not necessary. *Held*, the High Court ought to interfere under S. 115 of the C.P. Code or under S. 107 of the Government of India Act because there has been something in the nature of a denial of the right of fair trial. Per *Mullick*, J.—S. 215 of the Chota Nagpur Tenancy Act is wide enough to make an appeal competent in the case. (*Miller*, C.J. *and Mullick*, J.) LAL NILMANI *v.* USAI NATH. (1919) Pat. 60 = 49 I C 389 = 4 Pat. L J. 371.

——Ss. 215 and 212—*'Relating to execution thereof'—Nature of proceeding.*

"Relating to the execution thereof" includes order about payment for getting a sale set

CHOTA NAGPUR TENANCY ACT (VI of 1908), S. 217.

aside. A person merely alleging a lawful title in him, may apply to have a sale set aside under S. 212. The proceeding under this section is a summary one. (*Mullick*, J.) PANCHANAN MAHATA *v.* KANAI MAHATA. **36 I.C. 829.**

——Ss. 217 and 227, 228—*Rent suit*—Ex parte *decree*—*Application to set aside*—*Dismissal*—*No appeal lies.*

A suit for rent was tried by the Dy. Collector as Dy. Commissioner and was decreed *ex parte*. An application to set aside the decree was dismissed in default and a further application for restoring the previous one was also dismissed. In an appeal to Dy. Commissioner who set aside the decree and remanded the suit for re-trial. *Held*, on revision that (1) the second application is incompetent not being provided for in the Act, (2) that no appeal lay to the Dy. Commissioner against the order dismissing the application and therefore the Dy. Comr.'s order setting aside the *ex parte* decree was invalid but could not be revised by Rev. authorities under S. 227 but the High Court could revise the order and set it aside, if illegal. (*Mullick and Jwala Prasad*, JJ.) MUNSHI LAL CHAUDHARI *v.* NIDHI RAM DUTT.
60 I C. 175=3 U.P.L.R. (Pat). 13.

——S. 218—*Rent suit for less than Rs.* 100 —*Second appeal.*

No first appeal or second appeal lies from a rent suit for less than Rs. 100 unless a question relating to title to land or to some interest in land as between parties having conflicting claims thereto has been determined. (*Chamier and Sharfuddin*, JJ.) DURGA PRASAD NATH MISRA *v.* GANPAT DORI.
2 Pat. L.W. 154=42 I.C. 790=(1917) Pat. 183.

——S. 224—*Suit for rent against several tenants*—*Appeal lies if amount sued for exceeds Rs.* 100.

In a collective suit for rent against several tenants, if the amount sued for exceeds Rs. 100, S. 224 applies and an appeal lies to the Judicial Commissioner whether the 'amount sued for' in respect of a particular tenant does or does not exceed Rs. 100. (*Coutts and Macpherson*, JJ.) SHYAM NARAIN SINGH *v.* SIWCHARAN SAHU. **2 Pat. L.T. 734= 62 I.C. 886=(1921) Pat. 345.**

——Ss. 224 (2), 87—*Decision under S.* 87 *is not open to second appeal.*

(*Dass and Ross*, JJ.) FAUJDAR SAHU *v.* NEMA BHOGTA. **6 Pat. L.J. 634= 4 U.P. L.R. (Pat.) 25=65 I C. 285= (1922) Pat. 109=1923 P. 135.**

——S. 224 (2)—*Suit for declaration*—*Appellate decree by Judicial Commissioner*—*Second appeal to High Court*—"*Decree*", *meaning of.*

Where the Judicial Commissioner makes an appellate decree within the meaning of S. 224(2),

CHOTA NAGPUR TENANCY ACT (VI of 1908), S. 270.

there is a second appeal from his decree to the High Court and the provisions of Chapter XLII of the C. P. Code 1882 apply. The word "decree" in S. 224, clause (2) means nothing more than "decision." (*Mullick*, J.) LAL MAN NAIK *v.* KANHAYA LALL PANDHEY.
40 I.C. 891.

——S. 225—*Transfer of appeal from rent suits of less than Rs.* 100 *to Judicial Commissioner*—*Second appeal lies.*

Five rent suits were instituted, one of the value of above Rs. 100 and the others below that value. Appeals were preferred to the Judicial Commissioner in the former, and the Deputy Commissioner in the latter, but under S 225 of the Chota Nagpur Tenancy Act, the latter were transferred to the Judicial Commissioner. *Held*, the appeals having been transferred and decided, second appeals lay. (*Mullick and Atkinson*, JJ.) SADANAND TEWARI *v.* DEB NATH MANJHI. **(1922) Pat. 154= 1922 P. 184.**

——S. 237—*Application — Suit — Civil Court*—*Ejectment by landlord.*

"Application" in S. 237 does not refer to a suit. S. 237 has no application to a suit where plff. alleged that he was ejected by the landlord or any person claiming under or through him, and seeks in the Civil Court to recover possession from defts. as trespasser. (*Mookerjee and Beachcroft*, JJ.) LAHAR SINGH *v.* JOHAR MUNDA. **16 I.C. 418.**

——S. 258—*Scope of.*

S. 258 of the Act is no bar to a suit for possession by one set of tenants against another set of tenants for joint possession, in a Civil Court. (*Atkinson and Das*, JJ.) SHAIBA PRASAD *v.* GOLAM MANIGI. **50 I.C. 454= (1919) Pat. 197.**

——S. 270—*Scope of*—*Powers of Commissioner over subordinate officers.*

S. 270 provides for giving certain powers of control both to the Commissioner and to the Deputy Commissioner over acts performed by subordinates whilst exercising the powers of their superiors. If it can be shown that the Deputy Collector whilst exercising the powers delegated to him of the Deputy Commissioner has failed to exercise a jurisdiction which he might have exercised or has usurped a jurisdiction which it was not within his competency to exercise, then the Deputy Commissioner would have power to order him either to exercise that jurisdiction or to retrain from exercising it as the case may be. The same of course would apply in the case of the Commissioner and the Board dealing with acts performed by the Deputy Commissioner. (*Dawson-Miller*, C.J. *and Das*, J.) TIKAIT GANESH NARAYAN SAHI *v.* CHANDU MISTRI. **(1922) Pat. 3=1923 P. 83.**

CHOWKIDARI CHAKRAN LANDS.

———*Resumption—Transfer of zemindari—Patnidar and darpatnidar—Rights of—Bengal Act* (VI *of* 1870), *S.* 51.

The expression "Chaukidari Chakran lands" means lands held on service tenure by Chaukidari or village watchmen who also rendered acts of personal service to the Zamindar. In fixing the Jamma payable for the Zemindari, the Chaukidari Chakran lands were usually left out of account, as the services were such as the public were interested in them. Since the Permanent Settlement Regn. I (1793) the Zemindars have had at least a *prima facie* title to all lands for which they pay revenue, such lands being commonly known as *malguzari* lands. All Chakran lands are to be considered as malguzari for the purpose of ascertaining the lands in respect of which the jamma is paid and upon which it is secured. Though, having regard to the performance by Chaukidars of public duties, Chaukidari Chakran lands could not be resumed by the Zemindar, the Zemindar subject to the requirements of the public interest, was the owner of these lands. Therefore a patni grant by a Zemindar of certain lands includes his interest in Chaukidari Chakran lands within the area granted. If the chakran lands are resumed and transferred to the Zamindar under S. 51 of the Village Chaukidari Act, the patnidar or darpatnidar holding from him is entitled to the possession of those lands subject to a fair and reasonable rent. 10 M.I.A. 16, rel; 42 I.A. 30, dist. (*Lord Parker*) RANJIT SINGH *v.* KALIDASI DEBI.

44 Cal. 841=21 C.W.N. 609=32 M.L.J. 565=15 A.L.J. 390=25 C.L.J. 499=19 Bom. L.R. 462=(1917) M.W.N. 459=6 L.W. 101=2 Pat. L.W. 1=22 M.L.T. 489=40 I.C. 981=44 I.A. 117 (P.C.).

———*Zamindari—Onus of proof.*

The onus of proving that certain lands in a zemindari are Chaukidari Chakran lands is on the Govt.; the zamindar has no power of resumption over them, under Bengal Regn. I of 1793 and XIII of 1805. 42 I. A. 30, rel. (*Lord Parker.*) RAMCHANDRA BHANJ DEO. *v.* SECRETARY OF STATE. **43 Cal. 1104=43 I.A. 172=20 M.L.T. 285=20 C.W.N. 1245=(1916) 2 M.W.N. 175=4 L.W. 251=14 A.L.J. 1009=18 Bom. L.R. 838=24 C.L.J. 296=31 M.L.J. 745=37 I.C. 223 (P.C.)**

———*Service tenure—Right to resume—Government or Zemindar—Bengal Regn.* I *of* 1793, *S.* 8—*Bengal Regn.* VII *of* 1793, *S.* 41—*Chaukidari Act* (VI *of* 1870), *S.* 1.

(1) From time immemorial it has been customary in India to renumerate officers charged with certain public or quasi public duties by grants of land to be held either rent-free or at a reduced rent. The lands known as chaukidari chakran lands were granted in lieu of wages to individuals who were charged with the performance of police duties in rural areas. 10 M.I.A. 16, Ref. (2) The power of

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resumption under S. 8 (4) of Beng. Regn. I of 1793 and S. 41 of Regn. VIII of 1793 was reserved in respect of such chaukidari lands as had been set apart by the zemindars with the permission or under the authority of the Govt. and which although included in the mahal and annexed to the malguzari lands were not taken into consideration for the assessment of revenue. (3) It was proved that a Zemindari was held under a sanad of 1803, confirmed by Regn. XII of 1805, the grantee being thereby required to maintain peace and order within the Zemindari. The Zemindar employed chaukidars, to whom he assigned lands from time to time and changed the lands so granted. On some occasions the appointments were made with the approval of Govt. Officers. It was not proved that in fixing the assessment for the Zemindari, any parcel of land within the Zemindari was not taken into account as being chaukidari lands. *Held*, that the Govt. had no right to resume the Chaukidari chakran lands and that the provisions of the Bengal Village Chaukidari Act (VI of 1870) did not authorise the resumption by Govt. of lands assigned by the Zemindar as in the present case. (4) A Zemindar as such has *prima facie* title to the full enjoyment of every parcel of land within the Zemindari for which he pays revenue to the Govt., and it rests on the Govt. to show that the settlement with the Zemindar was subject to reservation in respect of any land which gave Govt. the power of resuming and assessing it. 12 M.I.A. 292, 331, Ref. (*Mr. Ameer Ali*). SECRETARY OF STATE *v.* KIRTIBAS BHUPATI HARI CHANDAN MAHAPATRA. **42 Cal. 710=41 I.A. 30=26 I.C. 676=19 C.W.N. 65=2 L.W. 11=17 M.L.T. 1=21 C.L.J. 31=17 Bom. L.R. 32=28 M.L.J. 457 (P.C.).**

———*Resumption does not affect patni rights.*

The patni right is not disturbed on resumption of Chaukidari Chakran Lands. A suit by the patnidar for recovery of possession of these lands against the zemindar is not barred by limitation, unless for more than 12 years prior to the date of the institution of suit the possession of the zamindar had become adverse to the plaintiff. (*Ghose and Panton, JJ.*) NAGENDRABALA CHAUDRANI *v.* BEJOY CHAND MAHATAB. **28 C.W.N. 114=74 I. C. 183=50 Cal. 577=1923 Cal. 734.**

———*Resumption—Rights of patnidar and Zemindar.*

Where chaukidari chakran lands comprised in a patni are resumed, the zemindar is not entitled to a share in the profits derived from the settlement of such lands by the patnidar. To allow him to share such profits would be to vary the terms of the patni. 44 C. 841; 46 C. 173, foll; 34 C.L.J. 275, not foll. (*Greaves and Ghose, JJ.*) NARPAT SINGH *v.* RAJA BHUPENDRA NARAIN SINGH.

26 C.W.N. 953=36 C.L.J. 145=67 I.C. 450=1923 Cal. 473.

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———*Resumption by Government—Settlement with semindar—Effect.*

If chowkidari chakran lands are resumed by Government and are settled with a zemindar, all rights created in such lands by the Chowkidar in favour of third parties comes to an end, although if a transfer has been made by the zemindar before the resumption, the transferee becomes entitled to the benefits of the settlement with the semindar. (*Mookerjee*, A.C.J. *and Fletcher*, J.) SATYENDRA NATH BANERJEE *v.* KRISHNASAKHA KAR.

69 I.C. 67=35 C.L.J. 185=1922 Cal. 193.

———Putni *lease*—Zemindar *is entitled to rent.*

Where a *putni* lease, does not contain any condition as to rent payable for the *chakran* lands to the *Zemindar*, the latter is entitled to some rent. What the amount of such rent is, depends upon the facts of each case. (*Chatterjee and Newbould*, JJ.) MAHARAJA BEJOY CHAND *v.* KRISHNA.

34 C.L.J. 275=66 I.C. 357=1922 Cal. 281.

———*Resumption—Settlement—Patni grant—Zemindar's powers to appoint chowkidars.*

The *chowkidari chakran* lands which formed part and parcel of the permanently settled estate of the Zamindar vested in the *patnidar* subject to the rights of the *chaukidars*. 44 Cal. 84 P. C. The clause authorising the Zemindar to appoint a *chaukidar* did not exclude *chaukidari chakran* lands from the *patni* lease. The terms of an unambiguous document cannot be controlled by the conduct of the parties. (*Mookerjee*, O.C.J. *and Fletcher*, J.) KAIRANSASHI DEBI *v.* ANANDA CHANDRA MOOKERJEE. **38 I.C. 851=32 C.L.J. 15.**

———*Resumption by Government—Settlement with Zemindar—Patnidar's rights.*

The Zemindar's interest to chaukidari chakran lands which are resumed by the Government and transferred to the Zemindar passes by virtue of such transfer to the holder of the patni lease in the village within which such lands are situated. 22 C.W.N. 487, foll. (*Newbould*, J.) ANANDA CHANDRA MUKERJEE *v.* KIRANSHASHI DEBI.

53 I.C. 1005.

———*Resumption of—Title of patnidar—Liability to rent.*

Chawkidari chakran land situate within the ambit of patni belong on their resumption, to the patnidar. If the patnidar, has been enjoying the service of the chowkidar before the resumption, he is not liable to pay for those lands any rent in excess of what the zemindar has to pay to the chowkidari fund unless by the terms of the patni lease the zamindar is entitled to profit in respect of such lands. (*Walmsley and Panton*, JJ.) MANOHAR MOOKERJEE *v.* KALIDAS NANDI. **47 I.C. 859.**

———*Resumption—Patnidar and Zamindar—Rights of.*

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Chowkidari Chakran land included within a patni belong to the patnidar after they are resumed and Zamindar's settlement of those lands after their resumption with a third person is ineffective as against the patnidar. (*Fletcher and Huda*, JJ.) MURARI MOHAN DAS *v.* TOFEL SHA. **47 I.C. 153.**

———*Settlement by Collector in disregard of Government order—Effect.*

A settlement of *Chowkidari chakran* lands by the Collector in disregard of a Government order is *ultra vires* and nugatory and does not affect the rights of person entitled to the settlement under the Government order. (*Fletcher and Huda*, JJ.) AGORE NATH BANERJEE *v.* KALYANESWARI DASI. **46 I.C. 883.**

———*Resumption of—Effect on rights of patnidar.*

When *Chawkidari Chakran* lands are enfranchised, the Zamindar does not acquire a new title and the patnidar is entitled to hold possession of the lands subject to the liability to pay new assessment, and in some circumstances a sum by way of profits. (*Mookerjee and Walmsley*, JJ.) SURENDRA MOHAN *v.* RAJENDRA NATH ROY. **22 C.W.N. 660=46 I.C. 435=28 C.L.J. 150.**

———*Resumption under Village Chowkidhari Act—Zemindar and Patnidar—Rights of.*

The effect of the transfer of resumed *Chowkidari Chakran* lands under the Village Chowkidari Act is to make the zemindar hold the property subject to the rights previously created by him in favour of subordinate holders. The assessment of rent for those lands as between the patnidar and the Zemindar should be on the same basis of calculation as between the Zemindar and the State. (*Mookerjee and Beachcroft*, JJ.) RADHA CHARAN CHANDRA *v.* RANJIT SINGH. **46 I.C. 187=27 C.L.J. 532.**

———*Patni lease—Power to Zemindar to appoint and dismiss Chowkidars—Reservation of—Effect of.*

Where a patni is granted in respect of a whole *mouza*, unless there is a provision to the contrary in the terms of the patni lease, the *chowkidari chakran* lands which form part of the Zemindari estate in the *mouza* must be held to be included in the patni. A clause in a patni lease which reserves to or confers on the Zemindar, the right to appoint and dismiss chowkidars has not the effect of reserving the *Chowkidari Chakran* Land. (*Teunon and Newbould*, JJ.) NAFAR CHANDRA *v.* BIJOY CHAND. **44 I.C. 536=22 C.W.N. 487.**

———*Resumption of—Patnidar—Rights of.*

A patnidar can recover possession of *Chowkidari Chakran* lands, included in his lease which on resumption by Government under the Bengal Chowkidari Act have been settled by the Collector with the Zemindar. He can hold them as part of the patni under the zamindar on-

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condition of paying the assessment of those lands as well as a proportionate share of the profits of all the lands including the chakran lands unless the profits were fully taken into account, at the time of assessing the lands including the chakran lands. (*Mookerjee and Walmsley*, JJ.) KHONDKER MEHDI HOSSEIN v. UMESH CHANDRA. 45 Cal. 685 = 41 I.C. 965 = 27 C.L.J. 494.

———*Title of Zemindar—Right of purchaser of the Zemindari at revenue sale—Bengal Rev. Sales Act* (XI *of* 1889.)

Chowkidari Chakran lands form part of the original estate and when they are resumed and transferred to Zamindar, the latter does not acquire thereby a new estate but the new estate is a continuance of his existing estate. 21 C.W.N. 609 (P.C.); 33 Cal. 596; 15 C.W.N. 61; 34 C. 109, foll. A purchaser of an estate at a revenue sale acquires no title to these lands where the Collector has constituted the lands into a separate estate and has put up to sale only the original estate for arrears of revenue. (*Mookerjee and Walmsley*, JJ.) BRAJENDRA LAL DAS v. DEB NARAIN. 45 Cal. 765 = 41 I.C. 895 = 27 C.L.J. 491.

———*Resumption of.*

The question whether certain resumed *chakran* lands are the *chaukidari chakran* lands of one *mouza* or of another is a question of parcel or no parcel, and it is purely a question of fact. (*Holmwood and Imam*, JJ.) SARAT CHANDRA ROY v. THE SECY. OF STATE. 32 I.C. 545 = 21 C.W.N. 238.

CHRISTIAN MARRIAGE ACT (XV of 1872).

———Ss. 41 and 46—*Jewess—Divorce—Intended marriage with a Christian.*

A Jewess after marrying and divorcing her husband according to Jewish Law desired to marry a Christian who applied to the Senior Marriage Registrar of Calcutta to marry them but the Registrar refused to do so without an order of the High Court. The High Court directed the Registrar to take the necessary steps to solemnize the marriage. (*Chitty*, J.) *In re* HAROLD TUCKER. 15 I C. 398 = 16 C.W.N. 417.

———Ss. 68 and 3—*Christian marrying according to Hindu rites.*

The Act is not applicable to cases which do not come within the reasonable meaning of its terms and within the spirit and scope of the enactment. The word "means" in S. 3 is an inclusive term; therefore no one except a person who professes the Christian religion comes under S. 68 of the Act. The mere fact that a person was baptised as an infant or that he is attending a Christian School or he is dressing as a Christian is not sufficient to treat him "a person professing the Christian religion." One who performs '*Devi ka pusa*,' at the time of his marriage cannot be said to profess the Christian religion. There is no express prohibition preventing a person professing Christianity from

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doing violence to his faith and marrying a Non-Christian, by a Non-Christian ceremony. S. 68 does not make it penal for a professing Christian to marry by a ceremony which is void under S. 4 of the Act. (*Knox and Walsh*, JJ.) MAHA RAM v. EMPEROR. 40 A. 393 = 45 I.C. 519 = 16 A.L.J. 414 = 19 Cr. L J. 615.

———Ss. 68, 4 and 5—*Marriage between Hindu and Christian, performed by Hindu—Offence.*

A Hindu by religion performing a marriage according to the Hindu mode, between two persons one of whom is a Christian, commits an offence under S. 68. 17 Mad. 39; 20 Mad. 12, foll. (*Wallis*, C.J. *Oldfield and Kumaraswami Sastri*, JJ.) KOLANDAI VELU v. DEQUIDT. 40 Mad. 1030 = 33 M.L.J. 113 = 6 L.W. 126 = 22 M.L.T. 163 = 41 I.C. 664 = 18 Cr.L.J. 840 = (1917) M.W.N. 589.

CHUKAIN RIGHTS IN RANGPORE.

———*Value of.*

Chukain rights in Rangpore have a permanent element in them which may develop into occupancy rights and they are transferable even before they so develop. (*Holmwood and Chapman*, JJ.) JOGENDRA NATH v. CHANDRA KUMAR. 24 I.C. 193 = 42 Cal. 28.

CHUR.

See also (1) ALLUVION AND DILUVION.
(2) BENGAL ALLUVION AND DILUVION REGN. (XI OF 1825).
(3) FISHERY.
(4) LANDLORD AND TENANT.

———*Formation in rivers—Title to—When rests in Government.*

Title to formation of churs in rivers rests in Government only when it is proved that the bed of river is not the property of any individual. (*Mookerjee*, A.C.J. *and Fletcher*, J.) SURENDRA NATH MITTER v. SECRETARY OF STATE FOR INDIA. 35 C.L.J. 196.

CHUR LANDS.

See (1) ALLUVION AND DILUVION.
(2) LANDLORD AND TENANT.

CIRCUMSTANTIAL EVIDENCE.

See EVIDENCE.

CITATION.

See PRACTICE—PRECEDENTS.

CIVIL COURT.

See (1) C. P. CODE, S. 9.
(2) JURISDICTION.

CIVIL AND REVENUE COURTS.

See (1) AGRA TENANCY ACT.
(2) JURISDICTION.
(3) MADRAS ESTATES LANDS ACTS.

COMPARATIVE TABLE OF THE SECTIONS OF THE CIVIL PROCEDURE CODES OF 1882 AND 1908.

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1 ...	S 1	49 ...	*Cf* S 137	99A ...	O 9, r 5
2 ...	S 2	50 ...	O 7, rr 1, 2, 4, 5, 6	100 ...	O 9, r 6
3 ...	Ss. 154, 156, 157, 158	51 ...	O 6, rr 14,15 (1).	101 ...	O 9, r 7
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4 ...	S 4	53 ...	O 6, r 17; *cf* O 7, r 11	103 ...	O 9, r 9
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6, last para.	S 6	55 ...	O 7, r 12	108 ...	O 9, r 13
7 ...	*Cf* S 4	56 ...	O 7, r 13	109 ...	O 9, r 14
8 ...	S 8	57 ...	O 7, r 10	110 ...	O 8, r 1
9 ...	Omitted	58 ...	O 7, r 9	111 ...	O 8, r 6,
10 ...	Omitted	58, last para.	O 4, r 2	112 ...	O 8, r 9
11 ...	S 9	59 ...	O 7, r 14	113 ...	O 8, r 10
12 ...	S 10	60 ...	O 7, r 15	114 ...	*Cf* O 6 r 2
13 ...	S 11	61 ...	O 7, r 16	115 ...	*Cf* O 6 rr 14,15
Expln. VI	S 14	62 ...	O 7, r 17	116 ...	*Cf* O 6 rr 16, 17
14 ...	S 13	63 ...	O 7, r 18	117 ...	O 10 r 1
15 ...	S 15	64 ...	S 27; O 5, r 1	118 ...	O 10 r 2
16 ...	S 16	65 ...	O 5, r 2	119 ...	O 10 r 3
16A ...	S 18	66 ...	O 5, r 3	120 ...	O 10 r 4
17 ...	S 20	67 ...	O 5, r 4	121 ...	O 11 r 1
18 ...	S 19	68 ...	O 5, r 5	122 ...	*Cf* O 48, r 2
19 ...	S 17	69 ...	O 5, r 6	123 ...	O 11, r 3
20 ...	Omitted	70 ...	O 5, r 7	124 ...	O 11, r 5
21 ...	Omitted	71 ...	O 5, r 8	125 ...	O 11, r 6
22 ...	Ss. 22, 23 (1)	72 ...	O 5, r 9	126 ...	O 11, r 8
23 ...	Ss. 22, 23 (2)	73 ...	O 5, r 10	127 ...	O 11, r 11
24, paras. 1 & 3	Ss. 22, 23 (3)	74 ...	O 5, r 11	128 ...	O 12, r 2
		75 ...	O 5, r 12	129 ...	O 11, rr 12, 13
24, para. 2.	Omitted	76 ...	O 5, r 13	130 ...	O 11, r 14
25 ...	S 24	77 ...	O 5, r 14	131 ...	O 11, r 15
26 ...	O 1, rr 1, 4 (*a*)	78 ...	O 5, r 15	132 ...	O 11, r 17
27 ...	O 1, r 10 (1)	79 ...	O 5, r 16	133 ...	O 11, r 18 (1)
28 ...	O 1, rr 3, 4 (*b*)	80 ...	O 5, r 17	134 ...	O 11, r 18 (2)
29 ...	O 1, r 6	81 ...	O 5, r 18	135 ...	O 11, r 20
30 ...	O 1, r 8 (1)	82 ...	O 5, rr 19, 20 (1)	136 ...	O 11, r 21
31 ...	O 1, r 9			137 ...	O 13, r 10
32 ...	O 1, rr 8 (2), 10 (2), (3), (5), 11	83 ...	O 5 r 20 (2)	138 ...	O 13, r 1 (1)
		84 ...	O 5 r 20 (3)	139 ...	O 13, r 2
33 ...	O 1, r 10 (4)	85 ...	S 28; O 5, rr 21, 23	140 ...	O 13, rr 1 (2), 9
34 ...	O 1, r 18			141 ...	O 13, r 4
35 ...	O 1, r 12	86 ...	O 5, r 22	141A ...	O 13, r 5
36 ...	O 3, r 1	87 } 88 } ...	O 5, rr 24, 29	142 ...	O 13, r 6
37 ...	O 3, r 2			142A ...	O 13, r 7
38 ...	O 3, r 3	89 ...	O 5, r 25	143 ...	O 13, r 8
39 ...	O 3, r 4	90 ...	O 5, r 26	144 ...	O 13, r 9
40 ...	O 3, r 5	91 ...	O 5, r 30 (1) (2)	145 ...	O 13, r 11
41 ...	O 3, r 6	92 ...	O 5, r 30 (3)	146 ...	O 14, rr 1, 2
42 ...	O 2, r 1	93 ...	O 48, r 1	147 ...	O 14, r 3
43 ...	O 2, r 2	94 ...	S 142; O 48, r 2	148 ...	O 14, r 4
44 ...	O 2, rr 4, 5	95 ...	S 143	149 ...	O 14, r 5
45 ...	O 2, rr 3, 6	96 ...	O 9, r 1	150 ...	O 14, r 6
46 ...	*Cf* O 2, rr 6, 7	97 ...	O 9, r 2	151 ...	O 14, r 7
47 ...	*Cf* O 2, rr 6, 7	98 ...	O 9, r 3	152 ...	O 15, r 1
48 ...	S 26; O 4, r 1	99 ...	O 9, r 4	153 ...	O 15, r 2

C. P. Code, 1882.	C. P. Code, 1908.	C. P. Code, 1882.	C. P. Code, 1908.	C. P. Code, 1882.	C. P. Code, 1908.
154 ...	O 15, r 3	206, third para	S 152	247 ...	O 21, r 19
155 ...	O 15, r 4			248 ...	O 21, r 22
156 ...	O 17, r 1	207 ...	O 20, r 9	249 ...	O 21, r 23
157 ...	O 17, r 2	208 ...	O 20, r 10	250 ...	O 21, r 24 (1)
158 ...	O 17, r 3	209 ...	S 34	251 ...	O 21, rr 24 (2) (3), 25 (1)
159 ...	O 16, r 1	210 ...	O 20, r 11		
160 ...	O 16, r 2	211, 212 ...	S 2 (12); O. 20, r 12	252 ...	S 52
161 ...	O 16, r 3			253 ...	*Cf* S 145
162 ...	O 16, r 4	213 ...	O 20, r 13	254 ...	O 21, r 30
163 ...	O 16, r 5	214 ...	O 20, r 14	255 ...	O 21, r 42
164 ...	O 16, r 6	215 ...	O 20, r 15	256 ...	O 21, r 11 (1)
165 ...	O 16, r 7	215A ...	O 20, r 16	257 ...	O 21, r 1
166 ...	O 16, r 8	216 ...	O 20, r 19	257A ...	Omitted
167 ...	O 16, r 9	217 ...	O 20, r 20	258 ...	O 21, r 2
168 ...	O 16, r 10	218, 219, 220 ...	*Cf* S 35 (1) (2)	259 ...	O 21, r 31
169 ...	O 16, r 11			260 ...	O 21, r 32
170 ...	O 16, r 12			261 ...	O 21, r 34 (1) to (4)
171 ...	O 16, r 14	221 ...	O 20, r 6 (3)		
172 ...	O 16, r 15	222 ...	*Cf* S 35 (3)	262 ...	O 21, r 34 (5)
173 ...	O 16, r 16	223, first para	S 38	263 ...	O 21, r 35
174, 175 ...	O 16, rr 10 to 13, 17, 18	223, second and third paras	S 39	264 ...	O 21, r 36
				265 ...	S 54
176 ...	O 16, r 19			266 ...	S 60
177 ...	O 16, r 20	223, fourth para	S 41	267 ...	O 21, r 41
178 ...	O 16, r 21			268 ...	O 21, r 46
179 ...	O 18, rr 1, 2 (1)	223, fifth para	O 21, r 4	269 ...	O 21, r 93
180 ...	O 18, rr 2 (2), (3), 3	223, sixth para	O 21, r 5	270 ...	O 21, r 51
				271 ...	S 62
181 ...	O 18, r 4	224 ...	O 21, r 6	272 ...	O 21, r 52
182 ...	O 18, r 5	225 ...	O 21, r 7	273 ...	O 21, r 53
183 ...	O 18, r 6	226 ...	O 21, r 8	274 ...	O 21, r 54
184 ...	O 18, r 8	227 ...	O 21, r 9	275 ...	O 21, r 55
185 ...	O 18, r 9	228 ...	S 42	276 ...	S 64
185A, first and second paras	S 138	229 ...	S 43	277 ...	O 21, r 56
		229A ...	S 45	278 ...	O 21, r 58
		229B ...	S 44	279 ...	O 21, r 59
185A, third para	O 18, r 7	230, first para	O 21, r 10	280 ...	O 21, r 60
		230, second para	O 21, r 21	281 ...	O 21, r 61
186 ...	O 18, r 10			282 ...	O 21, r 62
187 ...	O 18, r 11	230, third and fourth paras	S 48	283 ...	O 21, r 63
188 ...	O 18, r 12			284 ...	O 21, r 64
189 ...	O 18, r 13	231 ...	O 21, r 15	285 ...	S 53
190 ...	O 18, r 14	232 ...	O 21, r 16	286 ...	O 21, r 65
191 ...	O 18, r 15	233 ...	S 49	287 ...	O 21, rr 66, 70
192 ...	O 18, r 16	234 ...	S 50	288 ...	Omitted
193 ...	O 18, r 17	235 ...	O 21, r 11 (2)	289 ...	O 21, r 67
194 ...	O 19, r 1	236 ...	O 21, r 12	290 ...	O 21, r 68
195 ...	O 19, r 2	237 ...	O 21, r 13	291 ...	O 21, r 69
196 ...	O 19, r 3	238 ...	O 21, r 14	292 ...	O 21, r 73
197 ...	S 139	239 ...	O 21, r 26, (1) (2)	293 ...	O 21, r 71
198 ...	S 33; O. 20, r 1			294 ...	O 21, r 72
199 ...	O 20, r 2	240 ...	O 21, r 26 (3)	295 ...	S 73
200, 201 ...	*Cf* S 137	241 ...	O 21, r 27	296 ...	O 21, r 76
		242 ...	O 21, r 28	297 ...	O 21, r 77
202 ...	O 20, r 3	243 ...	O 21, r 29	298 ...	O 21, r 78
203 ...	O 20, r 4	244 ...	S 47	299 ...	O 21, r 79 (1)
204 ...	O 20, r 5	245 ...	O 21, r 17	300 ...	O 21, r 79 (2)
205 ...	O 20, r 7	245A ...	S 56	301 ...	O 21, r 79 (3)
206, first and second paras	O 20, r 6	245B ...	O 21, r 37	302 ...	O 21, r 80
		246 ...	O 21, r 18	303 ...	O 21, r 81

C. P. Code, 1882.	C. P. Code, 1908.	C. P. Code, 1882.	C. P. Code, 1908.	C. P. Code, 1882.	C. P. Code, 1908.
304 ...	O 21, r 82	365 ...	O 22, r 3 (1)	423 ...	O 27, r 7
305 ...	O 21, r 83	366 ...	O 22, r 3 (2)	424 ...	S 80
306 ...	O 21, r 84	367 ...	O 22, r 5	425 ...	Omitted [See 55, sub-(2)]
307 ...	O 21, r 85	368 ...	O 22, r 4		
308 ...	O 21, r 86	369 ...	O 22, r 7		
309 ...	O 21, r 87	370 ...	O 22, r 8	426 ...	O 27, r 8 (1)
310 ...	O 21, r 88	371 ...	O 22, r 9 (1) (2)	427 ...	O 27, r 8 (2)
310A ...	O 21, r 89	372 ...	O 22, r 10	428 ...	S 81
311 ...	O 21, r 90	372A ...	O 22, r 9 (3)	429 ...	S 82
312 ...	O 21, r 92	373 ...	O 23, r 1	430 ...	S 83
313 ...	O 21, r 91	374 ...	O 23, r 2	431 ...	S 84
314 ...	O 21, r 92	375 ...	O 23, r 3	432 ...	S 85
315 ...	O 21, r 93	375A ...	O 23, r 4	433 ...	S 86
316 ...	S 65 ; O 21, r 94	376 ...	O 24, r 1	434 ...	S 87
317 ...	S 66	377 ...	O 24, r 2	435 ...	O 29, r 1
318 ...	O 21, r 95	378 ...	O 24, r 3	436 ...	O 29, rr 2, 3
319 ...	O 21, r 96	379 ...	O 24, r 4	437 ...	O 31, r 1
320 ...	Ss 68, 70 and 71	380 ...	O 25, r 1 (1), (3)	438 ...	O 31, r 2
321 ...	Sch III, para 1	381 ...	O 25, r 2	439 ...	O 31, r 3
322 ...	Do 2	382 ...	O 25, r 1 (2)	440 ...	O 32, rr 1, 4 (2)
322A ...	Do 3	383 ...	O 26, r 1	441 ...	O 32, r 5 (1)
322B ...	Do 4	384 ...	O 26, r 2	442 ...	O 32, r 2
322C ...	Do 5	385 ...	O 26, r 3	443 ...	O 32, rr 3 (1), 4 (2)
322D ...	Do 6	386 ...	S 76, O 25, r 4		
323 ...	Do 7	387 ...	O 26, r 5	444 ...	O 32, r 5 (2)
324 ...	Do 8	388 ...	O 26, r 6	445 ...	O 32, r 4 (1)
324A ...	Do 9	389 ...	O 26, r 7	446 ...	O 32, r 9
325 ...	Do 10	390 ...	O 26, r 8	447 ...	O 32, r 8
325A ...	Do 11	391 ...	S 78	448 ...	O 32, r 10 (1)
325B ...	Do 12	392 ...	O 26, r 9	449 ...	O 32, r 10 (2)
325C ...	Do 13	393 ...	O 26, r 10	450 ...	O 32, r 12 (1)
326 ...	S 72	394 ...	O 26, r 11	451 ...	O 32, r 12 (2), (3)
327 ...	S 67	395 ...	O 26, r 12		
328 ...	O 21, r 97	396 ...	O 26, rr 13, 14	452 ...	O 32, r 12 (4)
329 ...	O 21, r 98	397 ...	O 26, r 15	453 ...	O 32, r 12 (5)
330 ...	O 21, r 98	398 ...	O 26, r 16	454 ...	O 32, r 13
331 ...	O 21, r 99	399 ...	O 26, r 17	455 ...	O 32, r 14
332 ...	O 21, rr 100, 101, 103	400 ...	O 26, r 18	456 ...	O 32, rr 3 (2), (3), 4 (4)
		401 ...	O 33, r 1		
333 ...	O 21, r 102	402 ...	Omitted	457 ...	O 32, r 4 (1)
334 ...	O 21, rr 97, 98	403 ...	O 33, r 2	458 ...	O 32, r 11 (1)
335 ...	O 21, rr 97, 99, 108	404 ...	O 33, r 3	459 ...	O 32, r 11 (2)
		405 ...	O 33, r 5	460 ...	Omitted
336 ...	S 55	406 ...	O 33, r 4	461 ...	O 32, r 6
337 ...	O 21, r 38	407 ...	O 33, r 5	462 ...	O 32, r 7
337A ...	O 21, r 40	408 ...	O 33, r 6	463 ...	O 32, r 15
338 ...	S 57	409 ...	O 33, r 7	464 ...	O 32, r 16
339 ...	O 21, r 39 (1) to (4)	410 ...	O 33, r 8	465 ...	O 28, r 1
		411 ...	O 33, r 10	466 ...	O 28, r 2
340 ...	O 21, r 39 (5)	412 ...	O 33, r 11	467 ...	O 28, r 3
341 ...	S 68	413 ...	O 33, r 15	468 ...	O 5, rr 28, 29
342 ...		414 ...	O 33, r 9	469 ...	...
343 ...	O 21, r 25	415 ...	O 33, r 16	470 ...	S 88
344—360A ...	Repealed by the Provincial Insolvency Act, 1907	416 ...	S 79 ; O 27, r 1	471 ...	O 35, r 1
		417 ...	O 27, r 2	472 ...	O 35, r 2
		418 ...	O 27, r 3	473 ...	O 35, r 4
		419 ...	O 27, r 4	474 ...	O 35, r 5
361 ...	O 22, r 1	420 ...	O 27, r 5	475 ...	O 35, r 6
362 ...	O 22, r 2	421 ...	O 27, r 6	476 ...	O 35, r 3
363 ...	O 22, r 3 (1)	422 ...	O 5, r 27	477 ...	O 38, r 1
364 ...	...			478 ...	

C. P. Code, 1882.	C. P. Code, 1908.	C. P. Code, 1882.	C. P. Code, 1908.	C. P. Code, 1882.	C. P. Code, 1908.
479 ...	O 38, r 2	539 ...	Ss 92 and 93	598 ...	O 45, r 2
480 ...	O 38, r 3	540 ...	S 96,	599 ...	...
481 ...	O 38, r 4	541 ...	O 41, r 1	600 ...	O 45, r 3
482 ...	Omitted	542 ...	O 41, r 2	601 ...	O 45, r 6
483 } ...	O 38, r 5	543 ...	O 41, r 3	602 ...	O 45, r 7
484 } ...		544 ...	O 41, r 4	603 ...	O 45, r 8
485 ...	O 38, r 6	545 ...	O 41, r 5	604 ...	O 45, r 9
486 ...	O 38, r 7	546 ...	O 41, r 6	605 ...	O 45, r 10
487 ...	O 38, r 8	547 ...	O 41, r 7	606 ...	O 45, r 11
488 ...	O 38, r 9	548 ...	O 41, r 9	607 ...	O 45, r 12
489 ...	O 38, r 10	549 ...	O 41, r 10	608 ...	O 45, r 13
490 ...	O 38, r 11	550 ...	O 41, r 13	609 ...	O 45, r 14
491 ...	S 95	551 ...	O 41, r 11	610 ...	O 45, r 15
492 ...	O 39, r 1	552 ...	O 41, r 12	611 ...	O 45, r 16
493 ...	O 39, r 2	553 ...	O 41, r 14		
494 ...	O 39, r 3	554 ...	O 41, r 15	612 to 615 ...	Omitted
495 ...	O 39, r 5	555 ...	O 41, r 16		
496 ...	O 39, r 4	556 ...	O 41, r 17	616 ...	S 112
497 ...	S 95	557 ...	O 41, r 18	617 ...	S 113; O 46, r 1
498 ...	O 39, r 6	558 ...	O 41, r 19	618 ...	O 46, r 2
499 ...	O 39, r 7	559 ...	O 41, r 20	619 ...	O 46, r 3
500 ...	O 39, r 8	560 ...	O 41, r 21	620 ...	O 46, r 4
501 ...	O 39, r 9	561 ...	O 41, r 22	621 ...	O 46, r 5
502 ...	O 39, r 10	562 ...	O 41, r 23	622 ...	S 115
503 ...	O 40, rr 1 to 3	564 ...	Omitted	623 ...	S 114; O 47, r 1
504 ..	O 40, r 5	565 ...	O 41, r 24	624 ...	O 47, r 1
505 ...	Omitted	566 ...	O 41, r 25	625 ...	O 47, r 3
506 ...	Soh II, Para 1	567 ...	O 41, r 26	626 ...	O 47, r 4
507 ...	Do 2	568 ...	O 41, r 27	627 ...	O 47, r 5
508 ...	Do 3	569 ...	O 41, r 28	628 ...	O 47, r 6
509 ...	Do 4	570 ...	O 41, r 29	629 ...	O 47, rr 7, 9
510 ...	Do 5	571 ...	O 41, r 30	630 ...	O 47, r 8
511 ...	Do 5	572 } ...	*Cf* S 135	631 ...	S 116
512 ...	Do 6	573 }		632 ...	S 117
513 ...	Do 7	574 ...	O 41, r 31	633 ...	S 122
514 ...	Do 8	575 ...	S 98	634 ...	S 118
515 ...	Do 9	576 ...	O 41, r 34	635 ...	S 119
516 ...	Do 10	577 ...	O 41, r 32	636 ...	O 49, r 1
517 ...	Do 11	578 ...	S 99	637 ...	S 128 (2) (i)
518 ...	Do 12	579 ...	O 41, r 35	638 ...	S 120 (1); O 49 r 3
519 ...	Do 13	580 ...	O 41, r 36		
520 ...	Do 14	581 ...	O 41, r 37	639 ...	S 120 (2)
521 ...	Do 15	582 ...	S 107 (2), O 22, r 11	640 ...	S 132
522 ...	Do 16			641 ...	S 133
523 ...	Do 17	582A ...	*Cf* S 146	642 ...	S 135
524 ...	Do 19	583 ...	*Cf* S 144 (1)	643 ...	Omitted
525 ...	Do 20	584 ...	*Cf* S 100	644 ...	O 48, r 4
526 ...	Do 21	585 ...	*Cf* S 101	645 ...	S 137
527 ...	O 36, r 1	586 ...	S 102	645A ...	S 140
528 ...	O 36, r 2	587 ...	S 108; O 42, r 1	646 ...	Omitted
529 ...	O 36, r 3	588 ...	S 104; O 43, r 1	646A ...	O 46, r 6
530 ...	O 36, r 4	589 ...	S 106	646B ...	O 46, r 7
531 ...	O 36, r 5	590 ...	S 108; O 43, r 2	647 ...	S 141
532 ...	O 37, r 2	591 ...	S 105,	648 ...	S 136
533 ...	O 37, r 3	592 ...	O 44, r 1	649 ...	Ss 36, 37
534 ...	O 37, r 4	593 ...	O 44, r 2	650 ...	Omitted
535 ...	O 37, r 5	594 ...	O 45, r 1	650A ...	S 29
536 ...	O 37, r 6	595 ...	S 109	652 ...	Ss 122, 129, 130 and 131
537 ...	O 37, r 7	596 ...	S 110		
538 ...	O 37, r 1	597 ...	S 111	653 ...	S 59

C. P. CODE (XIV of 1882), S. 211.

——S. 211—*Mesne profits—Proceeding for ascertainment of, was one in execution.*

A proceeding for the ascertainment of mesne profits was a proceeding in execution and not a proceeding in the suit under the old Code of 1882. (*Das and Ross, JJ.*) KEDA NATH GOENKA *v.* TARINI PRASAD SINGH.
2 Pat. L.T. 255=61 I.C. 4=1921 Pat. 158.

——S. 257-A—*Agreement to pay decree amount by instalments—Stipulation to pay interest in default—Sanction of the Court not obtained—Validity.*

Where the decree provides no interest an agreement to pay interest on a decree debt made without the sanction of the Court is void under Section 257-A. (*Heaton and Shah, JJ.*) CHATRUABAJI PATIL *v.* KONDAJI VITHAL PATTIL. 38 Bom. 219=22 I.C. 284=16 Bom. L.R. 1129.

——S. 257-A—*Satisfaction of judgment debt—Sanction—Order of Court.*

An agreement to pay money by instalments and interest to be paid at the stipulated rate and in default of two instalments, the whole of the unpaid balance was to be recoverable at once, made between the parties in execution proceedings. The statements of the parties were taken, and the Court then passed an order stating that the parties had compromised and the judgment-debtor had paid Rs. 100 and directing release of some animals which had been attached. *Held*, that the Court had sanctioned the agreement, and there was no necessity for it to give the sanction in express terms. The agreement was binding on the appellant and the respondents were entitled to interest in accordance therewith and that it would be recovered by the respondents in execution proceedings. (*Shadi Lal and Martineau, JJ.*) RAHMAT KHAN *v.* SHIBRAM DAS.
1 Lah. L.J. 222.

——S. 257-A.—*Forbearance to execute the decree — Payment to decree-holder — Amount adjusted towards decree.*

A judgment-debtor paid a certain sum to the decree-holder for forbearance shown by the latter in not proceeding with the execution of the decree on a former occasion. No sanction was obtained from the Court for any such payment. *Held*, that the sum paid was in contravention of S. 257-A of the C. P. Code (1882), and must be applied to the satisfaction of the decree. 26 Mad. 19, ref. (*Sadasiva Aiyar and Phillipt, JJ.*) ZAMINDAR OF KARVETENAGAR *v.* SUBRAYA PILLAI. (1918) M.W.N. 146=43 I.C. 871=7 L.W. 36.

——S. 257-A—*Payment of money—Grant of time.*

Money paid to a decree-holder for giving time to a judgment-debtor, under an arrangement not sanctioned by the Court under S. 257-A must be deducted from the decretal amount (*Sadasiva Aiyar and Napier, JJ.*

C. P. CODE (XIV of 1882), S. 257.

RAJA KUMARA VENKATA PERUMAL RAJU *v.* UDDAGIRI PAPA NAIDU.
41 I.C. 208=21 M.L.T. 351.

——S. 257-A—*Scope of.*

An agreement in contravention of S. 257-A is merely unenforceable in execution proceedings or by a fresh suit. The rule is applicable only to execution proceedings and is enacted for the benefit of the judgment-debtor who is entitled to waive its benefit. (*Benson and Sundara Aiyar, JJ.*) KUMARA VENKATA PERUMAL *v.* THATHA RAMASWAMI CHETTY.
35 Mad. 75=(1911) 1 M.W.N. 290=9 I.C. 875=9 M.L.T. 487=21 M.L.J. 709.

——S. 258—*Assignment of decree—Plea of payment to transferee-decree-holder.*

Where a decree is transferred to another by the decree-holder, the property in the decree passes by the transfer even though the transfer is not formerly recognised. (*Miller and Sadasiva Aiyar, JJ.*) BALKRISHNA PILLAY *v.* MINI REDDY. 14 I.C. 702.

——S. 276—*Sale after admission of satisfaction lent before raising up of attachment—Sale during attachment rendered valid—If admission of satisfaction made.*

Sale by a judgment-debtor after the intimation of satisfaction by the decree-holder to the Collector is not illegal or void under S. 275, even though in the *Darkhast* the property is under attachment on the date of the sale and such attachment has not been formally raised for the claim in the *Darkhast* having been satisfied can no longer be enforced. The bar is removed by the admission of satisfaction in such cases against the alienation, as if it never existed and the alienation made even during the attachment is valid and the judgment debtor cannot contend afterwards that as the property was under attachment at the time of sale, the sale was invalid. (*Chandavarkar and Hayward, JJ.*) PREMRAJ *v.* SAHEBRAM.
13 Bom. L.R. 977=12 I.C. 572 (2)=35 B. 516.

——Ss. 278, 279, 280 and 281—*Claim—Question of possession.*

An objector may raise an objection to the attachment of property not only on the ground that he is in possession of property but also in the ground that he has an interest in the property attached and having regard to the language of Ss. 278, 279, 280 and 281 of the C.P.C., it has jurisdiction to do so notwithstanding the fact that it erroneously does not go into the question of possession but disallows the objection on some other ground. (*Husain and Tudball, JJ.*) BHAGWAN DAS *v.* RAJ NATH. 9 A.L.J. 475=14 I.C. 790=34 A. 385.

——Ss. 287, 293—*Statute creating liability—Procedure laid down to be strictly followed.*

Owing to errors in the proclamation of sale it could not be said that the property resold was the same as property sold in the first instance and that consequently the judgment-

C. P. CODE (XIV of 1882), S. 295.

debtor was not liable for the deficiency of price. (*Scott*, C.J. *and Batchelor*, J.) GANGADAR DAHYABHAI *v.* BAI SURAJ.
14 Bom. L.R. 250=14 I.C. 777=36 B. 329.

——S. 295—*Claim under—Another decree.*

A claim under another decree cognisable under S. 295 depends on the continuance of the attachment. (*Chandavarkar and Hayward*, JJ.) KHUSHAL CHAND PREMRAJ *v.* NAND RAM SAHEBRAM. **13 Bom. L.R. 977=12 I.C. 572 (2)=35 Bom. 516.**

——S. 320—*Reference to Collector—Second Reference.*

An existing reference of a *darkhast* to a Collector for execution after attaching the same is a bar to a second reference under S. 320 on a separate *darkhast* in execution of another money decree in respect of the same property and transferred to the Collector. Nor can the property be attached under such second decree for money, after the satisfaction of the first decree. (*Chandavarkar and Hayward*, JJ.) KHUSHAL CHAND PREMRAJ *v.* NAND RAM SAHEBRAM. **13 Bom. L.R. 977=12 I.C. 572 (2)=35 Bom. 516.**

——Ss. 322—325—*Decree—Execution of—Admission of satisfaction, effect of—Mamlatdar's position while executing a decree—A second attachment.*

Ss. 322—325 apply to a decree which has to be satisfied and which is therefore capable of execution and not to a decree which has been acknowledged by the holder, by his declaration to the Collector to have been satisfied. An acknowledgment to a *mamlatdar*, carrying on the execution on behalf of a Collector, operates as an acknowledgment to the Collector, inasmuch as the *mamlatdar* acts in such a case as an agent of the Collector. The upholding by a Collector of a *mamlatdar's* action in accepting the admission of satisfaction and disposing of the *darkhast*, relates back to the date of the order disposing of the *darkhast*. This has the effect of rendering valid a sale by a judgment-debtor of the property attached, at any time between the date of acceptance by *mamlatdar* of admission of satisfaction and the date of upholding his action by the Collector. After the admission of satisfaction of a decree has been accepted, the Collector's powers under Ss. 322—325 cease inasmuch as the decree is not alive thenceforth and capable of execution. When it is intimated to the Collector in charge of the execution of a decree, that it has been satisfied, the effect amounts to a due certification satisfying the conditions of S. 258, C.P.C. of 1882. The last portion of the first paragraph of S. 325-A renders illegal a second attachment in execution of another money decree, after the transfer of the *darkhast* to the Collector for execution and therefore a private sale by the judgment-debtor is not affected by such attachment. (*Chandavarkar and Hayward*, JJ.) KHUSHALCHAND PREMRAJ *v.* NANDRAM SAHEBRAM. **13 Bom. L.R. 977=12 I.C. 572 (2)=35 Bom. 516.**

C. P. CODE (XIV of 1882), S. 564.

——S. 335—*Execution of decree—Sale—Obstruction by person not party to decree—Order directing removal of obstruction, finality of.*

Where in execution of a decree to which the defendant was not a party his property was sold and purchased by the plaintiff and on the latter attempting to take possession was obstructed by the defendant, and the Court after notice to the defendant directed the removal of obstruction, *held*, that the order was final and binding on the defendant if he did not contest the same by means of a suit. (*Shah and Crump*, JJ.) BHIMAJI RAMCHANDRA *v.* BHIMABAI HIROJI. **23 Bom. L.R. 62=61 I.C. 764=45 Bom. 573.**

——Ss. 375 and 462—*Guardian appointed by Court of Wards—Compromise by leave of Court not obtained—Compromise, if valid.*

A guardian appointed by the Court of Wards under any local law, on behalf of infants, has power to compromise proceedings in which the infants are defendants, though he entered into it without leave of Court. Under S. 375 of the Code, the Court was bound to register the agreement that had been come to. (*Lord Buckmaster.*) NAKIMO DEWANI *v.* PEMBA DICHEN. **48 Cal. 469=48 I.A. 27=19 A.L.J. 171=40 M.L.J. 201=(1921) M.W.N. 116=29 M.L.T. 202=33 C.L.J. 211=59 I.C. 911=23 Bom. L.R. 698=25 C.W.N 797=14 L.W. 253 (P.C.).**

[On appeal from 37 I.C. 971.]

——S. 443—*Guardian*-ad-litem—*Consent—Presumption.*

Where a certificated guardian was proposed for appointment as guardian-*ad-litem*, the Court might under the Old Code unless he declines to accept it, presume his consent. (*Mookerjee and Panton*, JJ.) SARAT CHANDRA *v.* BHIBHABATI DEBI. **66 I.C. 433 (2)=34 C.L.J. 302.**

——S. 539—*Presumption—Clear and uncontradicted evidence—Existence of.*

The Court on clear and uncontradicted evidence not only is entitled to presume but ought to presume the existence of a charitable or religious trust for public purposes within the meaning of section 539 of the C.P. Code, 1882. (*Richards*, C.J. *and Banerji*, J.) PURAN ATAL *v.* DARSHAN DAS. **9 A.L.J. 709=14 I.C. 698=34 A. 468.**

——S. 564—*Repeal of—New Code.*

S. 564 of the C. P. Code, 1882, has been omitted with the object of removing the restrictions, *e.g.*, where the appellate Court allows an amendment of pleadings or adds a party, as such restrictions embarass the procedure. (*Batchelor and Rao*, JJ.) NAROTTAM RAJARAM *v.* MOHANLAL. **37 Bom. 289=17 I.C. 891=14 Bom. L.R. 1154.**

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CIVIL PROCEDURE CODE (V of 1908).

———*Interpretation—Rules as to appeals—Letters Patent Appeal.*

The Code provides generally for the mode in which the High Courts should exercise their jurisdiction, except the Original Civil Jurisdiction. The Orders and Rules apply to High Courts unless the Code contains something inconsistent with them. They apply to the powers exercisable under Letters Patent. However they do not restrict the Letters Patent Appeal. The distinction between the rules taking away the existing right of appeal and the rules which recognize the rights but prescribe the procedure of the Appellate Court has been overlocked in 25 Mad. 555 and 27 Mad. 121. (*Lord Sumner.*) SABITRI THAKURAIN *v.* SAVI. **48 Cal. 481=48 I.A. 76=40 M.L.J. 308=(1921) M.W.N. 159=19 A.L.J. 281=33 C.L.J. 307=25 C.W.N. 557=23 Bom. L.R. 681=60 I.C. 274=3 U.P.L.R. (P.C.) 57=14 L.W. 362 (P.C.).**

———*Co-defendants — Decision—when* res judicata.

If in a previous suit the parties to a subsequent suit were arrayed on the side as co-defts. and there was an issue between them which was decided, the decision operates as *res judicata* to a second suit or defence raising the same issue between them in the position of plff. and deft. (*Piggott and Walsh, JJ.*) MANNU *v.* MT. PATIA. **55 I.C. 932.**

———*Applicability of—Mortgage suit pending.*

Where at the time of coming into force of new C.P.C. a mortgage suit was pending; S. 48 does not apply to proceedings in execution of the decree in that suit. (*Fletcher and Huda, JJ.*) SHAM CHANDA MAITA *v.* BAIKUNTHA NATH MANDAL. **47 I.C. 153.**

———*Interpretation of—Sections and rules.*

Per *Woodroffe*, J.—The body of the Code creates jurisdiction and the rules indicate the

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mode in which that jurisdiction is to be exercised, and therefore the body must be read in conjunction with the rules either as existing at the date of publication of the Code or as added or altered subsequently. (*Sanderson*, C. J. *Woodroffe, Mookerjee, Chitty and Teunon*, JJ.) GHUZNAVI *v.* ALLAHABAD BANK, LTD. **44 Cal. 929=21 C.W.N. 877=41 I.C. 598=26 C.L.J. 49 (F. B.).**

———*Forms given in schedules—Effect on Code.*

The forms given in the schedule to C.P.C. cannot control the clear words, of the Code itself. (*Fletcher and Richardson, JJ.*) MUNSUR ALI *v.* ABHOY CHARAN DAS. **40 I.C. 816=21 C.W.N. 1147.**

———*Interpretation of—Body of Code and rules.*

The body of the Code is unalterable except by the legislature and is expressed in more general terms and has to be read in conjunction with the rules which are more readily alterable and which are concerned with details and machinary indicating the mode in which the jurisdiction created by the body of the Code is to be exercised. (*Jenkins, C.J. and Chatterjee, J.*) MANI MOHAN MANDAL *v.* RAMTARAN MANDAL. **33 I.C. 329=43 Cal. 148.**

———*Interpretation—Conflict between the Code and its schedule.*

When there is a conflict between the body of the Code and its schedule, the latter must yield to the former. (*Carnduff and Richardson, JJ.*) RAHIM MAJHI *v.* SHEIKH EKBAR. **22 I.C. 690.**

———*Interpretations of—Sections and rules.*

The method of construction applicable to an Act divided into sections and rules, as the new C.P.C. is, that the sections lay down general principles and the rules provide the means of applying them, and they cannot be otherwise

C. P. CODE (V of 1908).

applied. The rules restrict the sections. (*Stephen and Mullick*, JJ.) NABIN CHANDRA TRIPATI *v.* PRAN KRISHNA DEY.
41 Cal. 108=20 I.C. 39=18 C.L.J. 613.

———*Pending cases—Applicability to.*

The new Code applies so far as procedure is concerned, to all cases which were pending or about to be instituted at the time it came into force. (*Chitty and Chatterjee*, JJ.) ABDUL AZIZ *v.* MOMIN. 9 I.C. 815.

———*Applicability—Sale under administrative order of Court.*

Where a sale is held under an administrative order and not in execution of a decree, the procedure contained in the Civil Procedure Code for sales in execution of decrees does not apply. (*Martineau*, J.) FIRM OF KAHNA MAL BENARSI DAS *v.* FIRM OF KALUR MAL NATHU MAL. 69 I.C. 718=40 P.L.R. 1922.

———*Not exhaustive.*

As the provisions of the C.P. Code are not exhaustive, a Court can pass an order necessary for the justice and not expressly or impliedly forbidden even if there be no section in the Code to support his order. (*Petman*, J.) ABDUL RAHAMAN SHAH *v.* SHAHANA. 1 Lah. 339=58 I.C. 748=1 Lah. L.J. 188.

———*Bar of suit—Sale of share of a co-parcener in joint family—Auction-purchaser—Suit for partition—Decree-holder an auction-purchaser.*

Section 244, C.P. Code (1882) does not bar a suit by an auction-purchaser for the share of a co-parcener in a Hindu joint family for partition and allotment of the share to him, the decree-holder himself being auction-purchaser makes no difference. (*Broadway and Abdul Raoof*, JJ.) BRIJLAL *v.* DURGA. 1 Lah. 134=56 I.C. 254=1 Lah. L.J. 10.

———*Applicability of—Pending proceedings—Remand—Appeal.*

Where a suit was filed when the C.P.C. of 1882 was in force, the course of appeal is regulated by that Code. Therefore an appeal against the order of remand of the suit though not allowed by the present Code, will lie. 12 P.R. 1900, foll. (*Robertson and Rattigan*, JJ.) SUNDAR DAS *v.* PEOPLE'S BANK OF INDIA, LTD. 272 P.W.R. 1912=16 I.C. 884=169 P.L.R. 1912.

———*Applicability to Village Munsifs' Courts.*

The Civil Procedure Code, 1908, is inapplicable to Village Munsifs' Courts. (*Sadasiva Aiyar and Napier*, JJ.) AGUSTUS BROTHERS *v.* FERNANDEZ. 2 L.W. 890=29 M.L.J. 474=18 M.L.T. 377=31 I.C. 59=(1915) M.W.N. 765.

———*Not retrospective order under old Code—New Code—Different rule—Appellate Court, power to reverse order.*

C. P. CODE (V of 1908); S. 2.

An appellate Court could not reverse the order on the ground that a different rule has been enacted by the new Code since the date of passing of the order by the Court of first instance. (*Abdur Rahim and Spencer*, JJ.) GURUMOORTHI NAIDU *v.* VARADAPPA CHETTY. 12 I.C. 883=(1911) 2 M.W.N. 386.

———"*Hearing*"—*Meaning of.*

The word "Hearing" is not defined in the Code and is used in different rules with a view to state the different purposes for which a date for hearing is fixed. (*Jwala Prasad*, A. C. J. *and Das*, J.) ABDUL RAHMAN *v.* SAHIB LAL SAHU. 63 I.C. 570=2 Pat. L.T. 572.

———*Matters outside suit—Provision for interest not claimed in plaint.*

The agreement to pay after a specified date, a rate of interest not claimed in the suit was outside the scope of the suit, and that portion of the compromise was therefore invalid and ought not to have been included in the decree and could not be executed as part of the decree. (*Sharfuddin and Roe*, JJ.) GAURI DUTT *v.* DOHAN THAKUR. 2 Pat. L.J. 678=43 I.C. 459=4 Pat. L.W. 209.

———*Not exhaustive.*

The Civil Procedure Code is not exhaustive and where in the Code a particular point has not been specifically dealt with, it must be determined upon general principles. (*Chapman and Roe*, JJ.) RAGHUNANDAN SINGH *v.* PARMESHWAR DAYAL SINGH.
2 Pat. L.J. 306=39 I.C. 779=1 Pat. L.W. 636=(1917) Pat. 137.

———*Not exhasutive.*

The Code of C. P. is not exhaustive and when a Court has made an order which it has jurisdiction to make, it has inherent power to have it set aside. (*Mullick and Jwala Prasad*, JJ.) SUKHDEO DASS *v.* RITO SINGH.
1 Pat. L.W. 551=39 I.C. 763=2 Pat. L.J. 351.

———*Applicability of — Proceedings in Revenue Courts under the Land Revenue Acts.*

The provisions of the C. P. Code do not apply *en bloc* to proceedings in Courts constituted under the Land Revenue Act. A *bona fide* compromise on behalf of a minor who was represented in certain mutation proceedings by his elder brother without leave of the Court as required by O. 32, R. 7 of the C. P. Code, is not bad merely for want of such leave. (*Lindsay*, J.C.) HARPALSINGH *v.* SUKHARANI. 48 I.C. 119=21 O.C. 220.

———S. 1—*Finding of fact—Binding.*

A second Appellate Court can arrive at a finding of fact in case the Court below comes to no definite finding on the point of fact or even if it does, it has no evidence to support it. (*Homles*, J.M.) BECHU SINGH *v.* BENI SINGH. 30 I.C. 380=2 O.L.J. 377.

———Ss. 2 and 97—*Deccan Agriculturists Relief Act.*

A finding on an issue whether a party to a suit was an agriculturist, preliminary to the

C. P. CODE (V of 1908), S. 2.

taking of accounts under the provisions of the Deccan Agriculturists Act, is not a preliminary decree within the meaning of Ss. 2 and 97 of the C.P. Code. (*Macleod and Kanga*, JJ.) JAISHINGRAO MADHARAO RAM *v.* BHISLE. 70 I.C. 728=1922 Bom. 336 (2).

——S. 2—*Dismissal for default of appeal is not a decree.*

An order under O. 41, R. 17, C. P. C., read with section 2 of the Code is not a decree and is not appealable. (*Mookerjee and Carnduff*, JJ.) RUKMIMOYI DASI *v.* PORAN CHANDRA BHERA. 18 C.L.J. 334= 14 I.C. 823 (1)=39 Cal. 341.

——S. 2 (2)—*Order of abatement.*

An order of abatement of a suit is a decree and should not be made *ex parte* without notice to plff. (*Lord Dunedin.*) BRIJ INDAR SINGH *v.* KANSHIRAM. 45 Cal. 94= 33 M.L J. 486=22 M.L.T. 362= 6 L.W. 592=126 P.W.R. 1917= 15 A.L.J. 777=19 Bom. L R. 866= 3 Pat. L.W. 313=26 C L J. 572= 104 P.R. 1917=(1917) M W.N. 811= 22 C.W.N. 169=127 P.L R. 1917= 42 I.C. 43=44 I.A. 218 (P.C.).

——S. 2 (2)—*Order refusing leave to bid under O. 21, R. 72, C. P. Code.*

An order refusing leave to bid, to a decree-holder under O. 21, R. 72 of the C. P. Code is not a decree and is not appealable. 13 Cal. 174, foll. (*Lord Macnaghten.*) KO THA HNYIN *v.* MA HNYIN. 38 Cal. 717= 15 C.W.N. 862=11 I.C. 845= (1911) 2 M.W.N. 449=13 Bom. L.R. 694= 14 C.L.J. 241=8 A L J. 1117= 6 L.B.R. 26=4 Bur. L.T. 257 (P.C.)

——S. 2 (2) and O. 21, R. 71—*Execution sale—Non-payment of purchase money—Re-sale—Application for Recovery of deficiency—Adjudication is a decree.*

An order in proceedings taken by the judgment-debtor for recovery of the loss caused by a re-sale owing to the default of the prior purchaser in depositing the purchase money, is a decree and is appealable as such. 1 A. 181; 18 M. 439; 25 C. 99; 30 B. 329, foll.; 14 A. 201, overruled. (*Piggott, Walsh and Lindsay*, JJ.) SITA RAM *v.* JANKI RAM. 44 A. 266=65 I.C. 813= 20 A.L.J. 105=L.R. 3 A. 117=1922 All. 200.

——S. 2, cl. (2)—*Order of abatement is not a decree.*

An order declaring that an appeal has abated is not a decree and is therefore not appealable. 17 A. 172; 12 A.L.J. 1113, foll. (*Ryves and Gokul Prasad*, JJ.) MAHOMED ISMAIL *v.* MANOHAR DAS. 20 A.L.J. 214=65 I.C. 838=L.R. 3 A. 224= 1922 All. 113.

——S. 2 (2) and O. 34, R. 6—*Order refusing to pass a decree.*

C. P. CODE (V of 1908), S. 2.

An order refusing to make a decree under O. 34, R. 6 is a decree in S. 2, C. P. C. and an appeal from it must bear *ad valorem* Court-fees calculated on the subject-matter of the appeal. (*Richards*, C.J. *and Banerji*, J.) MUHAMMAD ILTIFAT HUSSAIN *v.* ALLIMUNISA. 40 All. 553=47 I.C. 561=16 A.L.J. 488.

——S. 2 (2) and O. 22, R. 1—*Order of abatement if decree and appealable.*

An order of abatement of a suit is not a decree and is not appealable. 17 A. 172; 13 A. 575 (F.B.), Foll. (*Sunderlal*, J.) WALAYAT HUSAIN *v.* RAMLAL, 25 I.C. 643= 12 A.L.J. 1113.

——Ss. 2 (2) and 148—*Order allowing—Extension of time.*

An order under S. 148 of the C. P. Code extending time is not appealable. It is neither a decree nor an order under S. 104, C.P.C. 14 A. 20, Dist. (*Richards*, C.J., *Banerjee and Tudball*, JJ.) SURANJAN SINGH *v.* RAMBABAL LAL. 35 All. 582=21 I.C. 885= 11 A.L.J. 950.

——Ss. 2 (2) and 97—*Interlocutory order—Partition suit—Appeal.*

Where after the confirmation in appeal of a preliminary decree for partition and before the final decree, the first Court directed the actual partition in a certain manner. *Held*, that the order was an interlocutory order before making the final decree and was not appealable as a preliminary decree, though it could be challenged in appeal after the final decree was made. There cannot be two preliminary decrees in the same case. (*Richards*, C.J. *and Banerjee*, J.) BHARATENDU *v.* YAQUB HUSAIN. 33 All. 159=18 I C. 701= 11 A.L J. 120.

——S. 2 (2)—*Order rejecting application under Ss. 5 and 7 of U.P. Regn. V of 1799—Not appealable.*

During the course of a proceeding under Regn. V of 1799, the appellant applied under Ss. 5 and 7 of the Regn. that the property of the deceased intestate, might be handed over to him on the ground that he was the heir. The Court dismissed the application as Bhuralal had not clearly made out his title; *held*, that the order rejecting the application was not appealable. (*Richards and Tudball*, JJ.) BHURA LAL *v.* SECRETARY OF STATE. 10 I.C. 414.

——Ss. 2 (2), 95 and 97—*Preliminary point decided first but no formal preliminary decree drawn up—No appeal lies.*

The drawing up of a decree or the omission to do so, must be taken as conclusive on the question whether the Court has in fact passed, or not passed, a preliminary decree and this is the only proper test to apply in considering whether the provisions of S. 97 are or are not applicable. 37 B. 480 and 16 Bom. L.R. 67, Ref.

C. P. CODE (V of 1908), S. 2.

Ss. 2 and 96 of the Code, upon which alone the right of appeal is based, must be construed with reference to S. 33, which distinguishes between a judgment and decree, and O. 20, R. 6, which prescribes the contents of a decree. If no such formal document has been drawn up, then, no decree has been passed from which an appeal can be brought under S. 96 or S. 97. (*Fawcett and Pratt*, JJ.). VAMANACHARYA *v.* GOVIND.

25 Bom. L.R. 826=76 I.C. 763 and 1014=1924 Bom. 33.

——Ss. 2 (2), 97—*Preliminary decree—Decision that a person is an agriculturist—Appeal lies.*

Decision that a person is an agriculturist in the preliminary decree is appealable. (*Macleod* C. J. *and Coyajee*, J.) SUNDARBAI *v.* DWARKADAS. **70 I.C. 768=1922 Bom. 336 (1).**

——S. 2 (2)—*Finding that a party is agriculturist, is not a decree.*

The finding that a party is an agriculturist is not an adjudication resulting in a decree and hence no appeal lies from such finding although the plaint may be returned for presenting to the proper Court. A Judge should not therefore entertain an application to draw up such a finding in the form of a decree. (*Macleod*, C.J. *and Fawcett*, J.) DATTATRAYA PURUSHOTTAM *v.* RADHABAI BALKRISHNA.

45 Bom. 627=60 I.C. 885=23 Bom. L.R. 92.

——Ss. 2 (2) and O. 34, R. 5—*Order absolute—T.P. Act, S. 89—Order in execution is not a decree.*

An application for an order absolute under S. 89 of the T. P. Act (O. 34, R. 5) is really an application to execute the decree passed under S. 88, T. P. Act (O. 34, R. 4) and the order will itself be an order in execution and not a decree. Decree under Rule 4 is a preliminary decree. (*Shah and Hayward*, JJ.) MURLIDAR. *v.* VISHNU DAS.

40 Bom. 321=33 I.C. 749=18 Bom. L.R. 38.

——S. 2 (2)—*Order issuing Commissioner to take accounts—Test of a decree—Determination of rights—An order appointing a Commissioner to take accounts is not a decree.*

"Rights of parties" in S. 2 of C.P.C. mean general rights, such as those relating to status, jurisdiction, limitation, framing suits, accounts etc., which if decided must have a general effect upon the proceedings in the suit. (*Scott*, C.J. *and Batchelor*, J.) NARAYAN *v.* GOPALA JIV.

38 Bom. 392=23 I.C. 889=16 Bom. L.R. 206.

——S. 2 (2)—*Suit for accounts—Preliminary decree—If there can be more than one—Appeal.*

Where in a suit for accounts, the Court after passing a preliminary decree for accounts passed a further order fixing the mode of taking accounts and the period for which it should be done the latter is also a preliminary decree and hence an appeal lies therefrom. The legislature contemplated ordinarily only one preliminary decree in a case but there is nothing illegal in passing more than one in appropriate cases. Case Law Reviewed. (*Mookerjee and Rankin*, JJ.) RAJA PEARY MOHAN MOOKERJEE *v.* MANOHAR MOOKERJEE.

27 C.W.N. 989=38 C.L.J. 255=74 I.C. 373=1924 Cal. 160.

——S. 2 (2)—*Order declaring that a party is not liable for mesne profits is a decree.*

An order of Court finally deciding that a particular defendant was not liable for mesne profits is a decree and is appealable. 35 A. 159; 20 C.L.J. 476, 480, Ref. (*Newbould*, J.) NAIMUDDIN SARKAR *v.* IMANI MONDAL.

1923 Cal. 308.

——S. 2 (2) — *'Decree' includes consent decree.*

A compromise or a consent decree is a decree within S. 2 (2) of the Code. (*Mookerjee and Buckland*, JJ.) BHARAT RAMANUJA *v.* SARAT KAMINI.

34 C.L.J. 96=66 I.C. 273 (2)=1922 Cal. 358.

——S. 2 (2)—*Order rejecting application to make preliminary mortgage decree final is a decree.*

Order rejecting application to make a preliminary mortgage decree, final, on the ground that the suit had abated owing to the death of the sole judgment-debtor, is a decree and as such is open to appeal and also a second appeal. (*Newbould and Buckland*. JJ.) BHUTNATH *v.* TARA CHAND. **33 C.L.J. 115=59 I.C. 177=25 C.W.N. 595.**

——S. 2 (2)—*Decree—Rubkari.*

Where an order granting 'with costs' a petition to set aside an *ex parte* decree was passed on 27—2—'15 and a '*rubkari*' specifying the costs was drawn up on 8—3—'15 and execution for the costs was applied for on 6—3—'18 *held*, that the '*rubkari*' was not a decree within S. 2 (2) of the Code but was only an order within S. 2 (14) of the Code which completed and rendered the order of 27th Feb. 1915 capable of execution and that limitation commenced to run from 8—3—'15 and therefore the application was in time. (*Teunon and Beachcroft*, JJ.) NOOKUR CHANDRA MULLICK *v.* RAJANI KANTA GHOSE.

39 I. C. 51 (2).

——S. 2 (2)—*Order refusing to admit time-barred appeal.*

Quaere, :—Whether an order refusing to admit an appeal presented out of time is a decree. (*Fletcher and Huda*, JJ.) ISWAR CHANDRA KAPALI *v.* ARJUN. **45 I.C. 725.**

——S. 2 (2)—*Order setting aside execution sale.*

An application to set aside a sale is proceeding leading to an adjudication referred to in

C. P. CODE (V of 1908), S. 2.

S. 2 and so it is a suit within O. 43, R. 1. (C). (*Teunon and Newbould*, JJ.) BHUBAN BEHARI NAG v. DHIRENDRA NATH.
33 I.C. 581=20 C.W.N. 1203.

——Ss. 2 (2) and 100—*Order dismissing suit for misjoinder and non-joinder.*

An order dismissing a suit for misjoinder and non-joinder is not open to second appeal but the order can be set aside in revision. (*Coxe and Chatterjee*, JJ.) GUR PRASAD SINGH v. GUR PRASAD LAL. 26 I.C. 438=19 C.L.J. 316.

——S. 2 (2)—*Interlocutory order—Order accepting security for stay of execution.*

An interlocutory order to be a decree must conclusively determine the rights of the parties. An order accepting security for stay of execution proceedings is not a decree as it does not determine conclusively rights of the parties, and is not appealable. (*Coxe and Ray*, JJ.) SARASWATI BARMONYA v. MOTI BARMONYA.
41 Cal. 160=20 I.C. 72=17 C.W.N. 1240.

——S. 2 (2) and O. 9, R. 8—*Order of dismissal for default—Appeal.*

An order of dismissal for default is not a decree and is not appealable. The fact that a decree was drawn up in the case cannot alter the nature of the order, which must depend on the circumstances under which it was made. (*Mookerjee and Beachcroft*, JJ.) PARBATI v. TOOLSI KAPRI. 18 C.L.J. 128=20 I.C. 1=18 C.W.N. 604.

——Ss. 2 (2) and 100—*Order dismissing an appeal as barred.*

An order dismissing an appeal as having been filed beyond time is a decree. (*N. R. Chatterjee and Walmsely*, JJ.) RAKHEL CHANDRA v. ASUTOSH GHOSH. 19 I.C. 931=17 C.W.N. 807.

——S. 2 (2) and O. 9, R. 8—*Decree where deft. only appears—Appealability.*

A decree under O. 9, R. 8, C.P.C. being not an order of dismissal for default within the meaning of S. 2 (2), is appealable. (*Mookerjee and Beachcroft*, JJ.) BEJOY CHAND MAHATAP v. RAKHAL CHATTORAJ. 15 I.C. 601=16 C.L.J. 559.

——S. 2 (2)—*Order directing assessment of mesne profits.*

An order directing assessment of mesne profits is an interlocutory order and does not determine the rights of the parties, and is not appealable. (*Mookerjee and Carnduff*, JJ.) UPENDRA CHANDRA SINGH v. SAKHI CHAND. 15 I.C. 573.

——S. 2 (2)—*Preliminary and final decree—Decree for accounts, if preliminary or final.*

A decree for accounts is not a mere direction to report but is one determining the rights of the party entitled to it and such a decree is a final one. (*Holmwood and Chatterjee*, JJ.) JASODA DASSI v. RAMESWARI DASSI.
18 I.C. 374=14 C.L.J. 603.

——S. 2 (2) and O. 22, R. 5—*Decision as to legal representative.*

An order under O. 22, R. 5, C.P.C. determining who the legal representative of a deceased party under is the new Code in a matter which arose under the Old Code is not a decree and so is not appealable under new Code though such an order was appealable under the Old Code. (*Mookerjee and Carnduff*, JJ.) SEETAL PRASAD v. BAJRANGI SAHAI. 13 I.C. 70.

——S. 2 (2)—*Order under S. 4 of Bengal Regulation V of 1799.*

An order under S. 4 of the Regulation V of 1799 is not a decree, (*Mookerjee and Caspersz*, JJ.) SITARA BEGAM v. FAIZ ALI KHAN.
9 I.C. 994=13 C.L.J. 677.

——S. 2 (2) and O. 23, R. 1—Order granting leave to withdraw a suit with permission to sue is not a decree and is therefore not appealable. (*Abdul Raoof and Martineau*, JJ.) SANT RAM v. MST. SAHIB KAUR.
65 I.C. 719=1922 Lah. 267.

——S. 2 (2) and O. 22, Rr. 3, 5 and 9—*Order dismissing application for bringing legal representative on record, is not a 'decree'—Order directing abatement of suit amounts to decree.*

The C. P. Code, 1908, makes no provision for an appeal from an order dismissing an application by a legal representative of a deceased plff. to be brought on the record, nor can such an order be regarded as a decree within the meaning of S. 2 (2) of the Code. An order directing the abatement of a suit in consequence of no legal representative of the deceased plff. having applied within time to be brought upon the record is a decree and hence is appealable only by a party to it. (*Broadway and Dundas*, JJ.) RAM SARUP v. MOTI RAM.
72 P.W.R. 1921=1 Lah. 493=57 I.C. 137=2 Lah. L J. 738.

——S. 2 C. (2)—*Order rejecting plaint for non-payment of Court-fee is a decree.*

An appeal memo from an order rejecting a plaint for non-payment of extra Court-fee must bear an *ad valorem* Court fee. (*Shadilal*, C.J. *and Wilberforce*, J.) SHAHU v. BAKRI.
67 I.C. 901=3 Lah. L.J. 237.

——S. 2 (2)—*Insolvency Proceedings—Order raising attachment is not a decree.*

Insolvency proceedings under the special provisions of the Punjab Laws Act do not amount to a suit and an order releasing from attachment the residential house of an insolvent in accordance with the conditions of the trust deed in respect thereof is not a decree and hence an appeal does not lie from it. (*Scott-Smith*, J.) RADHA KISHAN v. MADAN GOPAL.
67 I.C. 795=3 Lah. L. J. 338.

C. P. CODE (V of 1908), S. 2.

——S. 2 (2)—*Order of abatement.*

Order directing the abatement of a suit as no legal representative of the deceased plff, applied within the time to be brought on the record is a decree and is appealable by a person who is a party to it. But an order dismissing an application by the legal representative to be brought on record is not a decree. (*Broadway and Dundas*, JJ.) RAM SARUP *v.* MOTI RAM.
72 P.W.R. 1921 = 57 I.C. 137 = 1 Lah. 493 = 2 Lah. L.J. 738.

——Ss. 2 (2) and 47—*Execution of a decree—Order in execution proceeding whether decree.*

Every order in execution proceedings is not a decree. An order granting or refusing process for examination of a witness or determining a point of law arising incidentally and not granting or refusing any relief is not a decree. (*Shadi Lal and Broadway*, JJ.) DATAL KAUR *v.* RAMRATAN.
115 P.L.R. 1920 = 56 I.C. 173 = 2 U.P.L.R. 93 (Lah.).

——S. 2 (2) and O. 20, R. 6—*Omission or delay in drawing up—Decree—Appeal.*

It is imperative that a decree should follow the judgment and it is the duty of the Court to have one drawn up. But an omission or neglect by the Court in the performance of its duties in this respect cannot deprive an appellant of his right of appeal, (*Wilberforce and Martineau*, JJ.) MANOHAR LAL *v.* NANAK CHAND. 52 I.C. 479 = 66 P.R. 1919.

——S. 2 (2), O. 23, R. 1 and O. 43, R. 1.—*Order allowing withdrawal of suit—Not appealable.*

An order under O. 23, R. 1 of the C. P. Code allowing plff. to withdraw his suit with liberty to sue again does not come under the definition of decree in S. 2 (2) of the C. P. Code nor is it appealable under O. 43, R. 1. (*Broadway and A. Raoof*, JJ.) DINDI DAYAL *v.* KISHUN KUNWAR.
51 I.C. 766 = 57 P.W.R. 1919.

——S. 2 (2)—*Order of—Abatement—Appeal.*

The new code does not take away the appeal provided for by Cl. (18) of S. 588 of the Code of 1882 against an order of abatement under S. 368. (*Johnstone*, J.) BRIJ INDRA SINGH *v.* LALA KASHI RAM.
129 P.L.R. 1917.

——S. 2 (2)—*Set off—Disposal of—Claim, if a decree and as such appealable.*

The order of the Subordinate Judge disposing of the deft's. claim to a legal set-off did not amount to a decree and therefore was not appealable, as the decision could be attacked in an appeal against the final order in the case. (*Shadi Lal and Broadway*, JJ.) FIRM SHEO PRASAD RADHA KISHEN *v.* INDORE MALWA UNITED MILLS. 68 P.W.R. 1917 = 39 I.C. 508 = 62 P.R. 1917.

——S. 2 (2)—*Order recognising abatement not a decree.*

C. P. CODE (V of 1908), S. 2.

Where a Court passes a purely formal order recognising the abatement, which is a *fait accompli*, such an order though virtually disposing of the suit does not adjudicate upon any rights and should not be treated as a decree. But an order of abatement which is the result of an adjudication upon the rights of the parties with respect to a matter in controversy and not passed upon an application for the revival of the suit, made under O. 22, R. 9, C. P. C. amounts to a decree and is appealable. (*Johnstone*, C.J., *Chevis and Shadi Lal*, JJ.) NIRANJAN NATH *v.* AFZAL HUSAIN.
111 and 176 P.W.R 1916 = 146 P.L.R. 1916 = 34 I.C. 822 = 128 P.R. 1916 (F.B.).

——Ss. 2 (2) and 104—*Award without the intervention of the Court—Invalid in part—Application to file—Order on—Second appeal.*

The decision of a Court on an application to file a private award, part of it being on a matter outside the scope of the arbitration, is an "order" and is not open to second appeal. (*Shadi Lal and Le-Rossignol*, JJ.) AHMAD DIN *v.* ATLAS TRADING CO. OF DELHI.
66 P.R. 1915 = 31 I.C. 80 = 146 P.W.R. 1915.

——S. 2 (2)—*Decree — Definition of—Rights of parties—Meaning of.*

The words "rights of parties" in the definition of 'decree' in S. 2 (2) mean rights of the parties *interse* in the subject-matter of the suit. (*Reid*, C.J. *and Kensington*, J.) UMAR ALI *v.* NASIBUNNISSA, 13 I.C. 800 = 82 P.R. 1911.

——Ss. 2 (2), 96 and O. 23, R. 1—*Order permitting withdrawal of suit—Appeal.*

An order permitting the withdrawal of a suit is not a "decree" either preliminary or final and is not, therefore, appealable. (*Johnstone*, J.) SANT SINGH *v.* H. W. M. IVES.
160 P.W.R. 1911 = 11 I.C. 830 = 248 P.L.R. 1911.

——S. 2 (2)—*Order returning plaint whether appealable—Revision.*

An order returning plaint for amendment is not a decree within the meaning of Sec. 2 (2), C.P.C. and is not appealable. (*Rattigan and Shah Din*, JJ.) GURDAS *v.* BHAG.
93 P.R. 1911 = 143 P.W.R. 1911 = 11 I.C. 231 = 216 P.L.R. 1911.

——S. 2 (2)—*Interlocutory order—Decree—Preliminary.*

"Decree" does not include interlocutory decision in ordinary suits on every controversial point though such a decision is embodied in a separate order during the pendency of proceedings. An order is not a decree unless it is drawn as such or could be drawn as such. A preliminary decree is passed when the Court after adjudication of rights of the parties has to stay for a time to pass a final order thereon. (*Ratligan*, J.) KASHINATH *v.* NATHU RAM.
41 P.R. 1911 = 115 P.L.R. 1911 = 9 I.C. 1019 = 179 P.W.R. 1911.

C. P. CODE (V of 1908), S. 2.

———S. 2 (2)—*Order over-ruling objections to award.*

An order over-ruling objections to an award is not a decree. (*Johnstone*, J.) NARPAT RAI *v.* DEBI DAS. 1 P.L.R. 1911 = 9 I.C. 385 = 12 P.W.R. 1911.

———S. 2 (2)—*Partnership suit—Order referring suit to Commissioner for determining shares, is not a decree.*

The order of the Judge referring the whole suit to the Official Referee was neither a decree within the meaning of section 2, C.P.C. nor a 'judgment' within the meaning of clause 15 of the Letters Patent and was therefore not appealable. (*Kumaraswami Sastri*, J.) ABDUL WAHAB *v.* ROKIA BIBI. 78 I.C. 903 (2).

———S. 2 (2)—*Order refusing to implead a person as legal representative—Abatement.*

Where an application to bring on record a person as the legal representative of a deceased plff. is refused, the order is a decree as it negatives the right of the applicant to the relief which the original plff. had sought in the suit and is an adjudication of the applicant's claims. The order is therefore appealable. 42 Mad. 219, appl; 39 Mad. 488, dist. (*Oldfield and Seshagiri Aiyar*, JJ.) AYYA MUDALI VELAN *v.* VEERAYEE. 39 M.L.J. 218 = 58 I.C. 498 = 12 L.W. 188 = (1920) M.W.N. 467 = 43 M. 812.

———Ss. 2 (2) and 100—*Dismissal of suit or appeal on the ground that Court below had no jurisdiction—Decision, if appealable.*

The decision of a District Court on appeal holding that the Revenue Court had no jurisdiction to decide the validity of the resumption claimed by the plff. in a suit for rent is a decree within S. 2 (2). S. 100, C.P. Code gives a right of 2nd appeal to the High Court against such a decree passed on appeal. 41 Mad. 556, dist. (*Spencer and Krishnan*, JJ.) VENKATTAPATHI NARAYANI VARU *v.* GADDAM CHOWDHENNA. 54 I.C. 749 = 11 L.W. 3.

———S. 2 (2) and O. 22, R. 3—*Order of abatement—Decree.*

An order of abatement is a judgment and should be followed up by a decree and is appealable as such. If the legal representative of the deceased plff. does not seek to set aside the abatement, the order of abatement is conclusive of the defts.' rights to the property. 45 Cal. 94; 30 M.L.J. 486, foll.; 6 Bom. L.R. 638, dist. (*Seshagiri Aiyar and Moore*, JJ.) RAHIM-UNNISSA BEGAM *v.* SRINIVASA AIYANGAR.
38 M.L.J. 266 = 54 I.C. 565 = 11 L.W. 139.

———S. 2 (2) and O. 1, R. 10—*Order striking out the name of a defendant and dismissing suit as against—Decree—Applicability.*

An order striking out the name of one of the defts., and dismissing the suit as against him on the ground that the plaint disclosed no cause of action though purporting to be made

C. P. CODE (V of 1908), S. 2.

under O. 1. R. 10 of the C.P. Code is a decree and is appealable as such. (*Wallis*, C.J. *and Seshagiri Aiyar*, J.) SRI RAJAH RAO VENKATA MAHIPATI GANGHADHARA RAMA RAO *v.* VENKATA KUMARA MAHIPATHI.
42 Mad. 219 = 49 I.C. 835 = 36 M.L.J. 169 = 25 M.L.T. 184 = 9 L.W. 329.

———Ss. 2 (2) and 96—*Order dismissing an application for final decree—Dismissal of.*

An order dismiseing an application for final decree for sale in a mortgage suit is a decree and is appealable as such. (*Spencer and Krishnan*, JJ.) SUBBALAKSHMI AMMAL *v.* RAMALINGA CHETTY. 42 Mad. 82 = (1918) M.W.N. 792 = 35 M.L.J. 552 = 48 I.C. 298 = 8 L.W. 526 = 24 M.L.T. 486.

———S. 2 (2) and O. 9, Rr. 8 and 9—*Decree on admission for a portion of the claim—Dismissal of rest of the claim.*

Where part of claim being admitted a decree is passed for it and the rest of the claim is dismissed for default of the party, the order is entirely a decree and must be so treated, because the same adjudication on the same bond cannot be partly a decree and partly something else. (*Coutts-Trotter and Seshagiri Aiyar*, JJ.) MUNISWAMI GOUDA *v.* JAUNJADU.
35 I.C. 65.

———S. 2 (2)—*Decree—Appeal.*

The decree in appeal is decree in the suit, for an appeal is a continuation of the suit. (*Ayling and (Kumaraswami Sastry*, JJ.) CHENGALWALA GURRAJU *v.* MADAPATHY VENKATESHWAR ROW. (1916) 1 M.W.N. 223 = 30 M.L.J. 379 = 38 I.C. 9 = 19 M.L.T. 268.

———Ss. 2 (2) and 47—*Order extending time for payment.*

An order extending time for payment of mortgage money under a decree is not a decree under S. 2 nor does it determine any question within S. 47, C.P.C. and is not appealable. (*Sadasiva Aiyar and Napier*, JJ.) DHARMA RAJA AIYAR *v.* SREENIVASA MUDALIAR.
39 Mad 876 = 2 L.W. 1074 = 29 M.L.J. 708 = 31 I.C. 240 = 18 M.L.T. 486.

———S. 2 (2) and O. 22, R. 1—*Order of abatement.*

An order of a Court declaring that a suit abates owing to the cause of action not surviving, is a decree since it declares that the right of the plff, dies with him. (*Sadasiva Aiyar and Napier*, JJ.) SUBRAMANIA AIYAR *v.* VENKATARAMIER. 31 I.C. 4.

———Ss. 2 (2), 36 and 47—*Order dismissing application to sue* in forma pauperis, *if decree and as such appealable.*

The expression "matters in controversy" in S. 2 (2) must not be understood as relating solely to the merits of a case. It would cover

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any question relating to the character and status of a party suing, to the jurisdiction of the Court, to the maintainability of a suit and to other preliminary matters which necessitate an adjudication before a suit is enquired into in a pending suit. It does not include proceedings preliminary to institution of suit (*e*, *g*,) an application for leave to sue as a pauper and proceedings passed in execution in regard to such orders as well as orders granting day costs. The latter are not appealable as a decree as they do not come within the scope of S. 47 although they can be executed under S. 36. (*Seshagiri Aiyar and Napier*, JJ.) ANKALA VENKATA REDDY *v.* MANCHALA VENKATA REDDY.
2 L.W. 519=22 I.C. 393=17 M.L.T. 447.

———S 2 (2) and O. 7, R. 11—*Order rejecting plaint if a decree—Appeal.*

An order rejecting a plaint is appealable but not as a decree. (*Wallis and Seshagiri Aiyer*, JJ.) LAXMANAN CHETTY *v*, LAXMAN CHETTIAR. 22 I.C. 738=1 L.W. 875.

———Ss. 2 (2) and 96—"*Decree*"—*Appeal.*

Record of some findings in a suit and a remark by the Judge that he should not pass a final decree, does not amount to a "decree" and hence no appeal lies. To constitute a decree there must be final adjudication. No particular form is necessary. (*Abdur Rahim and Sadasiva Aiyer*, JJ.) AYAPPA *v.* GOPALSWAMI. 12 M.L.T. 309=16 I.C. 45=(1912) M.W.N. 1122.

———S. 2 (2) and O. 41, R. 17—*Dismissal for default—Order of dismissal whether appealable as a decree.*

An order of dismissal of an appeal for default under O. 41, R. 17 is not appealable as it is not a decree, nor, is it an order specified in the Code as an appealable order. (*Sundara Aiyar and Spencer*, JJ.) MURUGA CHETTY *v.* RAJAH SWAMI. (1912) M.W.N. 382=11 M.L.T. 280=14 I.C. 828=22 M.L.J. 284.

———S. 2 (2) and O. 23, R. 1—*Order allowing withdrawal of suit—After preliminary decree—Appeal against order.*

An order by a Court allowing a party to withdraw a partition suit after a preliminary decree affects the rights of parties and hence an appeal lies from such an order as a decree. (*Sankaran Nair and Sadasiva Aiyar*, JJ.) UNNI MOYAN *v.* KATTIYAMMA. (1912) M.W.N. 494=14 I.C. 259=11 M.L.T. 390.

———S. 2 (2)—*Order dismissing appeal for deficiency of court-fee is appealable.*

An order in effect dismissing an appeal for deficiency in Court-fee should be treated as on the same footing with the rejection of a plaint for the purposes of determining whether it amounts to a decree or not and hence an appeal

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lies against the appellate order. (*Drake Brockman*, J.C.) GABBA *v.* KANCHHEDILAL.
18 N.L.R. 15=67 I.C. 225=(1922) Nag. 62.

———S. 2 (2)—*Finding is not a decree.*

A finding is not a decree, merely because the Judge chooses to make use of a form entirely inapplicable to that finding, unless the finding is a decree in the eye-law, and *vice versa*. (*Mittra*, O. A. J. C.) PANDURANG *v.* GAYABAI.
62 I.C. 467=17 N.L.R. 66.

———S. 2 (2)—*Order rejecting husband's claim to be legal representative is not a decree.*

An order rejecting a husband's claim to be legal representative of his wife is not a decree, and so does not bar a suit for declaration, that he is the legal representative of the deceased. (*Kotwal*, A. J. C.) LAXMI *v.* GANPAT.
62 I. C. 303=17 N.L.R. 45.

———S. 2 (2) and O. 9, R. 8—*Decree on admission—Appeal.*

The word "decree" in O. 9, R. 8 is governed by the definition given in S. 2 (2). Therefore a decree passed on the admission of the deft. is appealable by a person aggrieved thereby, (*Findlay*, A.J.C.) RAM KRISHNA *v.* NARAIN.
56 I.C. 845.

———S. 2 (2)—*Order as to legal representative of deceased—Meaning.*

No appeal lies against an order deciding that a person is not the legal representative of a deceased party as it is not a decree. (*Mittra*, O. A. J. C.) TARACHAND *v.* JANKI.
38 I.C. 833=13 N.L.R. 32.

———S. 2 (2)—*Orders appealable under O. 43, R. 1.*

Orders appealable under O. 43, R. 1 are not decrees, though coming under S. 47 or the definition of decree in S. 2. (*Stanyan*, A.J.C). VASUDEO *v.* HIRALAL. 17 I.C. 884=8 N.L.R. 177.

———S. 2 (2)—*Decree—Drawing up of—Essential—Appeal—Execution.*

A judgment under the Code is only the basis of a decree or order. The decree itself is the formal expression of the judgment and the order may not be appealable; but no right of appeal is obtained from a judgment. Drawing up of a decree being the conscious and formal act, notifying the Court's disposal of the case according to its adjudication of the matter in dispute, no right of appeal accrues until it is drawn up. Though the passing of a preliminary decree is imperative in certain cases, yet in the rest the Court has a discretion. But a right of appeal does not arise till it is finally expressed in a decree or is followed by an appealable order. In a redemption suit by a Hindu's sons after a foreclosure decree was obtained against their father, the mortgagee deft, pleaded that he had no notice of the plff's rights at the time of foreclosure suit, and that the decree was

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binding on them as their father was the managing member of their family. Preliminary issues were framed and decided by the Court against the deft. without drawing a formal decree. *Held* that the decision was not a preliminary decree and hence unappealable. *Obiter*:—A person ought to apply for a decree following upon a judgment: if he is refused, the decree in terms of the judgment, he should move the High Court in revision. Because unless and until a decree is drawn up in terms of the judgment, there can be neither appeal nor execution. (*Stanyon*, A.J.C.) MAHU v. KISHAN. 15 I.C. 935 = 8 N.L.R. 22.

——S. 2 (2)—*Mortgage—Order absolute.*

An absolute decree for redemption sale or foreclosure is a final decree within S. 2 (2). (*Stanyon and Skinner*, A.J.Cs.) DADNOO v. SOMNATH. 10 I.C. 736 = 7 N.L.R. 41.

——Ss. 2 (2) and 96—*Direction after Preliminary decree—Interlocutory order—Partition suit—Appeal.*

There can be only one preliminary decree in a suit for partition and where after the passing of such a decree, the Court directs the Commissioner to take a valuation of certain property, the order is an interlocutory order from which there is no appeal. (*Daniels*, J.C. *and Dalal*, A.J.C.) JAGMOHAN DAS v. INDAR PRASAD. 68 I.C. 983 = 24 O.C. 366.

——Ss. 2 (2) and 96, 100—*Dismissal of suit for deficient Court-fee—Appeal.*

If a suit is dismissed for deficient Court fees, an appeal lies from the decision of the Court below. A second appeal also lies on a question of law such as the interpretation of the Court Fees Act. (*Ashworth*, J.) MUSSAMAT GUMANI v. BANWARI. 54 I.C. 733 = 22 O.C. 289.

——S. 2 (2) and O. 23, R. 1—*Order allowing—Leave to withdraw suit—Not a decree—Appeal.*

An order under O. 23, R. 1, C. P. Code, is not a decree and is not appealable although a portion of the order may require the plaintiff to pay costs. (*Daniels*, A.J.C.) SITA RAM DAS v. MAHENDRA PARTAB SINGH. 51 I.C. 69 = 6 O.L.J. 151.

——S. 2 (2) and O. 9, R. 8—*Dismissal for default—Not a decree.*

An order dismissing an appeal for default is not a decree. Limitation for execution under S. 48, C.P.C. runs from the original decree. (*Lindsay*, J.C.) RAMDIN v. RAMLOT. 47 I.C. 125 = 5 O.L.J. 252.

——Ss. 2 (2) and 96—*Order dismissing suit on default of payment—Appeal.*

Where a decree declared that on default of payment of the amount specified therein within a particular time the suit shall stand dismissed with costs; it is a decree for dismissal in such event and is at once appealable. (*Kanhaiya Lal*, A.J.C.) BHARATH SINGH v. DARAM SINGH. 21 I.C. 193 = 17 O.C. 14.

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——Ss. 2 (2) and 47—"*Parties*"—"*Matters in controversy in the suit*".

The word 'parties' in S.2 (2) means the same thing as the expression 'parties to the suit' in S. 47 and includes only those that are joined on either side as plffs. or defts. The expression "matters in controversy in the suit" in S. 2 (2) does not include matters forming the subject of dispute between a surviving plff. and a third person as to who is the legal representative of deceased plff. (*Lindsay*, J.C.) BRIJ MOHAN v. RAM MILAN. 20 I.C. 898 = 16 O.C. 350.

——S. 2 (2)—*Order of dismissal for default—Not a decree.*

An order of dismissal of an appeal for default does not amount to a decree. (*Das and Kulwant Sahay*, JJ.) SURAJDEO NARAIN SINGH v. PARTAP RAI. 4 Pat. L.T. 406 = 2 Pat. 739 = 75 I.C. 284 = (1923) Pat. 213 = 1923 P. 514.

——Ss. 2 (2) and 47—*Mortgage decree—Execution—Payment of Court-Fees—Appeal if lies.*

Where on a mortgage decree being put in execution, an objection was raised that execution could proceed only after payment of an additional amount of court fee, but was negatived, *Held* an appeal lay as it was a matter relating to execution. (*Coutts and Ross*, JJ.) RAM BUJHAVAN PD. SINGH v. NATHO RAM. 70 I.C. 483 = 3 Pat. L.T. 146 = 1922 P. 89.

——S. 2 (2) and O. 34, R. 6—*Hindu Law—Mortgage decree against father and personal decree against son's shares in the ancestral property not proper.*

Where in a mortgage suit against the father and sons of a Mitakshara joint family the decree gave a mortgage decree against the father and a money decree against the son's shares in the ancestral property a decree under O. 34, R. 6 is necessary only for execution against the father's other properties and no personal decree under O. 34, R. 6 was required to proceed against the son's shares in the ancestral properties. (*Das and Ross*, JJ.) KRISHNA PRASAD v. RAM PRASAD. 64 I.C. 629 = 2 Pat. L.T. 715.

——S. 2 (2)—*Order rejecting appeal for insufficient stamp is a decree.*

Where an appeal is presented with insufficient stamp and the deficit is not made good within the time prescribed and extended by Court, the Court should reject the appeal and should not order dismissal for default. Even if it so orders the order is one rejecting an appeal and thus is a decree within S. 2 (2). (*Miller*, C.J. *and Coutts*, J.) SURAJPAL PANDEY v. UTIM PANDEY. 63 I.C. 99 = 1921 Pat. 337.

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——S. 2 (2)—*Order under O. 21, R. 66 is not a decree.*

An order under O. 21, R. 66 is not a decree within S. 2 (2) and is not therefore appealable. (*Jwala Prasad and Adami*, JJ.) BRAJA SUNDER DEB *v.* SIVARANJAN DEI.
59 I.C. 282=1 Pat. L.T. 647.

——S. 2 (2) and O. 21, R. 66—*Appeal—Order on question as to valuation to be inserted in sale proclamation.*

A decision under S. 47, C.P.C. is not a decree within S. 2 (2) unless it in some way determines the rights of the parties with regard to all or any of the matters in controversy. A decision on a question of the valuation to be inserted in a sale proclamation is merely an interlocutory order and although the court, acts judicially in coming to its conclusion that does not in itself make the decision a decree, and therefore, it is not appealable. 30 Cal. 617: 27 Mad. 259 appr. (*Miller*, C.J. *and Coutts*, J.) SURENDRANATH MITTRA *v.* MRITUNJAY BANERJI. 5 Pat. L J. 270=
56 I.C. 452=1 Pat. L.T. 645=1920 Pat. 227.

——Ss. 2 (2) and 73—'*Suit*'—*Meaning of.*

The term "suit" in S. 2 (2) does not include an application under S. 73, C.P.C. and an order under the section is not a decree. (*Coutts and Adami*, JJ.) HURMOOJI BEGAM *v.* AYSHA.
1 Pat. L.T. 296=
37 I.C. 421=5 Pat. L.J. 415.

——Ss. 2 (2) and 35—*Order as to costs—Appeal.*

A right to costs is not a vested right and there is a very limited right of appeal. An order for costs is not a decree; it has to be included in decree or may be part of a decree. It is only appealable, if the original decree or order is appealable; and in that event an appeal on the question of costs alone will lie, if any question of principle is involved. There can be no second appeal for costs, except on a ground of law. (*Mullick*, J.) SHEIK GULAB *v.* JANKI. 1 Pat. L.T. 408=
57 I.C. 236=5 Pat. L.J. 472.

——S. 2 (2)—*Order rejecting memorandum of appeal—Court-fee.*

Appellate Court's order rejecting a memo of appeal for non-payment of deficit court-fees is appealable to High Court if the order proceeds on a wrong calculation of court fees payable. (*Rœ and Jwala Prasad*, JJ.) MOHAMAD ABDUL KARIM *v.* MOHAMAD YUSUF. 51 I.C. 114.

——S. 2 (2)—*Order declaring liability to account—Decree.*

The determination of the right of one party to an account for certain years and dismissing the claim for certain other years is a "decree" within the meaning of S. 2 Cl. (2) and as such is appealable. 23 All. 152 (P.C.) Fol. (*Chapman and Ra*, JJ.) NAND KUMAR SINGH *v.* BILAS RAM MARWARI. 1 Pat. L.W. 781=
40 I.C. 579=3 Pat. L.J. 67.

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——Ss. 2 (2) and 145—*Order directing surety to pay.*

An order directing a surety to pay the debt of a judgment-debtor is not a decree except for purposes of an appeal under S. 145. (*Chapman and Roe*, JJ.) GANGA DEO NARAIN SINGH *v.* JOTI LAL SAHU. 2 Pat. L.J. 197=
39 I.C. 648=3 Pat. L.W. 414.

—— S 2 (2)—*Preliminary and final—Distinction.*

The preliminary decree is not dependent on the final one but the latter is really dependent and subordinate to the former, which is not extinguished by the passing of the final decree but on the contrary is given effect to, by the final one. (*Chamier, Sharfuddin, Atkinson and Kingsford*, JJ.) WAHITUNNISSA *v.* DIP NARAYAN PERSHAD.
21 C.W.N. 1174=1 Pat. L J. 406=
35 I.C. 873=1 Pat. L.W. 13 (F.B.).

——Ss. 2 (2) and 24—*Order as to costs in application for transfer.*

An order passed under S. 24 of the C.P. Code read with S. 15 of the Upper Burma Civil Court Regulation, is not a decree and is not appealable. No appeal therefore, lies from an order as to costs forming part of such order. (*Saunders*, J.C.) MA TU *v.* KUMAR GANGADHAR BAGLA. 44 I.C. 690=
(1917) 3 U.B.R. 61.

——S. 2 (2)—*Preliminary objection overruled—Order overruling not a "decree"—No appeal.*

An order overruling a plea against the maintainability of a suit is not a "decree" within S. 2 (2), C.P.C. (*Ormond and Twomey*, JJ.) MA GUN *v.* MONIANDY SURVEY.
8 L.B.R. 213=33 I.C. 665=
9 Bur. L.T. 195.

——Ss. 2 (2) and 105—*Interlocutory order.*

A party adversely affected by the disallowance of interrogatories has a right to appeal from the original decree; and hence he cannot prefer an appeal from an order disallowing interrogatories which is not a decree, nor can apply for revision. (*Kincaid*, J.C. *and Raymond*, A.J.C.) FIRM OF YUSAFIALLY ALIBHOY KARUMJI *v.* FIRM OF HAJI MOHAMMED HAJI ABDULLA.
58 I.C. 721=14 S.L.R. 28.

——Ss. 2 (2), Expln. and 97—*Preliminary decree—What is—Order dissolving partnership as from a certain date—Absence of appeal—Final.*

The C.P. Code makes no provision for something which is neither a decree nor an order, nor anything which is both; nor does it provide that one adjudication by the Court can be resolved into diverse elements, some of which are decrees and some orders. The question is one of substance, whether an adjudication is a decree or order. In a suit for taking accounts of a partnership, the trial Judge made an order

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declaring the partnership as dissolved from a particular date and ordered that an enquiry be made by the referee as to who were the partners and as to the dealings of the partners with the assets of the partnership. No appeal was preferred against this adjudication. The inquiry was made, accounts were taken and a final decree was passed. In an appeal against the final decree, the appellant contended *inter alia*, that the trial Judge had no jurisdiction to refer the question as to who were the partners. *Held*, that the former adjudication of the trial Judge was a "decree" in so far as it declared the rights of the parties. The appellants were precluded from disputing its correctness by reason of their omission to appeal against it. The adjudication did not cease to be a decree, because a subordinate part of it, if correctly made, might have been separately made as an order. (*Lord Sumner*, J.) AHMED MUSAJI *v.* HASIM EBRAHIM.
42 Cal. 914=42 I A. 91=19 C.W.N. 449=
17 M.L.T. 312=3 L.W. 377=
21 C.L.J. 419=13 A L.J. 540=
17 Bom. L R. 432=29 M.L.J. 70=
28 I.C. 710=(1915) M.W.N. 485 (P.C.).

———S. 2 (2) Expln.—*Second preliminary decree.*

It is not in itself an impossibility that there should be a second preliminary decree passed in a suit for partition, if such second decree is based upon facts or circumstances alleged to have come into existence after the passing of the first preliminary decree. If a second preliminary is passed, such decree is open to appeal. (*Piggott*, J.) YAKUB HUSAIN *v.* BHARAT INDO. 16 I.C. 872=11 A.L.J. 120.

———S. 2 (2) Expln.—*Decision on issue of* res judicata.

The decree on a preliminary issue based on the point of *res judicata* is not a preliminary one and hence is unappealable. (*Richards*, C.J. *and Banerji*, J.) PARSOTAM RAO TANTIA *v.* RADHA BAI. 15 I.C. 566=10 A.L.J. 78.

———Ss. 2 (2), Explns. 96 and 97—*Preliminary decree—Finding of the factum of being an agriculturist—Appeal.*

An order that a Court will proceed to hear a suit on the merits is not an order which should be immediately followed by a decree. A finding that a party is or is not an agriculturist is not a judgment. A decree based upon such a finding, is not a legal decree. But if the finding necessarily involves a direction that an account be taken between the parties in the manner provided by S. 13 of the Dekkan Agriculturists Relief Act, it amounts to a preliminary decree and is appealable. (*Heaton and Shah*, JJ.) MUNICIPAL COMMITTEE OF NASIK *v.* COLLECTOR OF NASIK.
39 Bom. 422=28 I.C. 589=
17 Bom. L.R. 324.

———S. 2 (2) Expln.—*Preliminary decree—Decision on issue as to* res judicata.

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A decision that a matter is not *res judicata* and that therefore the trial can proceed, is not a preliminary decree from which an appeal will not lie. (*Scott*, C.J. *and Beaman*, J.) BHARMA SHIDAPPA PUJARI *v.* BHAMAGAVDA SHIVAGAVDA. 39 Bom. 421=28 I.C. 461=
17 Bom. L.R. 271.

———Ss. 2 (2) Expln. and 97—*Preliminary decree—When can be passed—Specific performance.*

A decree in a suit for specific performance of a contract, though conditional in form, is not a preliminary decree A preliminary decree can only be drawn up in those cases which have been expressly provided for in the Civil Procedure Code. (*Fletcher and Walmsley*, JJ.) MOHENDRA CHANDRA GHOSHAL *v.* RAM RATAN TEWARY. 51 I.C. 442.

———S. 2 (2), Expln.—*Preliminary and final decree—Supplemental final decree—Duty of Court to pass a decree as regards all items involved—Suit pending.*

Where pending, an appeal from a preliminary decree subsequent proceedings were stayed by the appellate Court in respect of a portion of the joint property, and the lower Court passed a final decree with regard to the rest of the property, and after the disposal of the appeal, one of the parties applied for a final decree in respect of the portion omitted but the Court refused. *Held* that the trial Court had refused to exercise jurisdiction vested in it, inasmuch as it was quite competent to deal with as much of the suit as had not been already dealt with in the final decree and to make a supplementary final decree in regard to the joint business. (*Richardson and Walmsley*, JJ.) JASHODA DASEE *v.* UPENDRA NATH.
44 I.C. 671.

———S. 2 (2), Expln. 97 and O. 20, Rr. 12 to 18—*Preliminary decree—What is—Decision on issue—Appeal.*

The "matter in controversy in suit" in S. 2 (2) refers to the subject-matter of the litigation and should not be understood in its wider sense so as to include a decision in plaintiff's favour on the issue of his *locus standi* to sue. Such a decision is not a preliminary decree and is not appealable. Mere omission to style an order a preliminary decree or to embody it as such does not negative the party's right to appeal. There should be only one preliminary decree in a suit, to be followed by one final decree. A preliminary decree ascertains what is to be done while the final decree states the result achieved by means of the preliminary decree. The cases where the Legislature contemplates a preliminary decree are specified in O. 20, Rr. 12 to 18. (*Mookerjee and Beachcroft*, JJ.) KAMINI DEBI *v.* PROMOTHO NATH MUKERJEE. 20 C.L.J. 476=27 I.C. 317=
19 C.W.N. 755.

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———S. 2 (2), Expln. and O. 20, R. 12 (2) —*Preliminary decree—Suit for possession and mesne profits.*

The decision as to possession in a suit for possession and mesne profits is a preliminary decree within S. 2, C.P.C. having regard to O. 20, R. 12 (2), C.P.C. (*Cox and Roy*, JJ.) KUMUD LAL ROY *v.* RAMANI MOHAN ROY.
25 I.C. 436=19 C.L.J. 346.

———S. 2 (2), Expln.—*Preliminary issues of limitation—Not a decree.*

The decision in plaintiff's favour upon preliminary issues of limitation and *res judicata* is not a decree and so not appealable. (*Chitty and Teunon*, JJ.) SAIL SHARAN SHA *v.* JANAKI NATH DEY.
21 I.C. 387=18 C.L.J. 78.

———S. 2 (2), Expln.—*Preliminary decree —Meaning.*

The wording of the definition of "decree" in S. 2, C.P.C. (1908) is very wide, but it cannot be said that it was ever intended to allow a separate appeal against each and every decision on each and every issue in a case. A finding by the first Court on the issue as to limitation in favour of the plaintiff when there is another issue to be decided, does not amount to a "decree." It is not a preliminary decree in the ordinarily accepted technical sense and as such does not debar an appeal against the decree in the suit because the deft. did not appeal against it. (*Johnstone*, C.J.) KHUSI RAM *v.* TULSA RAM. 39 I.C. 100=7 P.R. 1917.

———S. 2 (2), Expln.—*Preliminary decree —Decision on issue of* res judicata.

A decision of a Civil Court passed on a preliminary issue of *res judicata* not being a preliminary decree is not appealable. (*Shah Din and Smith*, JJ.) GEHNA *v.* KHUDA BAKSH.
191 P.L.R. 1912=218 P.W.R. 1912=
15 I.C. 563=16 P.R. 1913.

———S. 2 (2), Expln.—*Decree for possession and remand for inquiry into mesne profits.*

Plff's. suit for possession and mesne profits was dismissed but the lower appellate Court held that the plff. was entitled to possession and sent the case back to the trial Court for ascertainment of mesne profits and passing a decree. *Held*, the order of the lower appellate Court must be considered a decree and the appeal to the High Court must be construed not as an appeal against the order of remand but as an appeal against an appellate decree and proper Court-fees must be paid. (*Chamier*, C. J. *and Roe*, J.) RAGHUNATH DASS *v.* THARI SINGH. 45 I.C. 100=
3 Pat. L.J. 99.

———S. 2 (2), Expln.—*Preliminary decree —Rejection of plaint in time.*

Where a plaint is rejected by the Court to which it is presented as being void and that no proceedings could be had on it as the decree on the plaint was set aside for fraud the decision amounts to a preliminary decree and a second appeal would lie against the order of the Lower Appellate Court setting aside the preliminary decree. (*Chapman and Roe*, JJ.) CHANDI PRASAD MISRI *v.* GOBIND SAHAY.
39 I.C. 791=1 Pat. L.W. 499.

———S. 2 (2), Expln. and O. 20, R. 12— *Decision on—Preliminary issue.*

A decision on a preliminary issue merely enabling the plff. to go on with the suit, is not a preliminary decree as defined in S. 2 (2) as it does not decide any of the matters in controversy, in the suit. (*Twomey and Ormond*, JJ.) MADARI *v.* MISSER.
36 I.C. 431=9 Bur. L.T. 119.

———S. 2 (3)—*Decree-holder—Specific performance—Decree for—Defendant can also execute.*

A decree for specific performance is capable of being executed by the defendants as well as by the plaintiff. If this were not so, it will follow that if a plaintiff who has obtained a decree for specific performance, refuses to take the sale-deed and pay the consideration money, the deft. is left with no remedy whatever, while, owing to the decree passed against him he would still be debarred in any way from dealing with the suit property. (*Macleod*, C.J. *and Coyajee*, J.) BAI KARIMABIBI DAUDBHAI *v.* ABDERAHMAN SAYAD BANU.
24 Bom. L.R. 496=67 I.C. 667=
46 Bom. 990=1923 Bom. 26.

———S. 2 (10)—*Judgment-debtor—Assignee.*

The definition of judgment-debtor does not include the assignee of the judgment-debtor. (*Benson ond Abdur Rahim*, JJ.) TIRUVENGADAM PILLAI *v.* DORIDLA SUBBAIYYA.
11 M.L.T. 144=13 I.C. 659=
(1912) M.W.N. 176.

———S. 2 (11)—*Hindu reversioner.*

In a suit for a declaration of the invalidity of an adoption or alienation by a Hindu widow instituted by the presumptive reversioner, if the plff. dies, the next presumptive reversioner has a right to continue the suit as legal representative. (*Mr. Ameer Ali.*) VENKANARAYAN PILLAI *v.* SUBBAMMAL.
38 Mad. 406=29 I.C. 298=
42 I.A. 125=17 M.L.T. 435=
28 M.L.J. 535=17 Bom. L.R. 468=
19 C.W.N. 641=2 L.W. 596=
(1915) M.W.N. 555=21 C.L.J. 515. (P.C.)

———S. 2 (11)—*Suit against legal representative—Necessity of assets.*

A suit against the legal representatives of a deceased debtor should not be dismissed on the mere ground that no assets of the deceased came or are likely to come into the hands of the legal representatives. 2 N.W.P.H.C.R. 449. foll. (*Knox*, J.) SHANKAR LAL *v.* ABDUL RAHIMAN. 40 I.C. 407.

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———S. 2 (11)—*Heir—Liability of—Possession of deceased's estate.*

An heir in possession of the deceased's property is liable to the extent of the assets of the deceased in his hands. (*Ràfique and Piggott*, JJ.) AMINA BIBI *v.* BANARASI PRASAD.
36 All. 439=24 I.C. 200=12 A.L.J. 785.

———Ss. 2 (11) and 53—*Decree for injunction against father—Joint Hindu family—If sons legal representatives for the purpose of execution against them.*

Where an injunction obtained against a person without impleading his sons who formed a joint Hindu family with him, was sought to be executed, after the death of the person against the sons, *held*, that it could not be executed against them inasmuch as they were neither parties to the suits nor legal representatives of the judgment-debtor. (*Beaman and Heaton*, JJ.) CHUNNILAL HARILAL *v.* BAIMANI.
42 Bom. 504=46 I.C. 745=
20 Bom. L.R. 660.

———S. 2 (11)—*Legal representative—Suit against deceased's estate—Real heir not impleaded—Effect.*

If a creditor in a suit against deceased's estate does not implead the real heir as a party, the decree and the sale in execution thereunder are null and void as against him. The estate of a deceased person cannot properly be represented unless the real heir is a party. (*Batchelor and Roe*, JJ.) PREMRAJA *v.* JAVARMAL. 18 I.C. 381=16 Bom. L.R. 41.

———S. 2 (11)—*Legal representative—Decree against wrong person—When binding upon estate.*

The properties in suit belonged absolutely to the testatrix who by her will dated 23-3-1872, appointed her sons J and N as trustees and directed them to maintain the relations of the testatrix and gave them during their life-time the income from the estate after meeting all the charges. On the death of J and N, their sons were to be equally entitled to, and divide the properties with no power of sale etc. They had power however if the income of to mortgage the estate for necessary purposes, the estate was insufficient J having died issueless probate of the will was granted to N who in 1889 mortgaged the estate for necessity. N died intestate in 1891 and letters of administration of the estate were granted to his daughter. The mortgagee instituted a suit on his mortgage and obtained a decree, in 1892 impleading the daughter of N as representing the estate. In execution of the decree the property was sold and purchased by the defendants. In a suit by the daughter's son of the testatrix *held* that J and N having taken only a life estate in the properties of the testatrix, there was an intestacy on their death without male issue. Consequently on the death of N the plaintiff became the heir to the properties and decree passed against the daughter of N did not bind the estate in his hands. (*Teunon*

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and Greaves, JJ.) GURUDAS KUNDU CHOWDHURY *v.* KAMAL KUMAR DUTT.
70 I.C. 886=37 C.L.J. 90.

———S. 2 (11)—*Person in possession of estate—Execution against.*

Where a person is in possession of the estate of a deceased person after the latter's death, he is the legal representative within S. 2 (11), C.P. Code, and execution taken against him is quite legal. (*Ghose*, J.) KUSUM BANDHU CHAKRAVARTHY *v.* RAMDAYAL BHATTACHARJEE.
69 I.C. 179.

———S. 2 (11)—*Legal representative—Wrong person—Decree—Sale in execution.*

A decree was obtained against an infant alone as adopted son of the debtor represented by his alleged adoptive mother as guardian *ad litem*. The adoption was subsequently declared invalid, *held* execution could not be taken against the estate of the deceased adoptive father: and the adoptive mother though she was the guardian could not be proceeded against nor could she be substituted in the minor's place. (*Mookerjee and Beachcroft*, JJ.) ASHI BHUSHAN DASI *v.* PELARAM MANDAL.
18 C.L.J. 362=21 I.C. 519=18 C.W.N. 173.

———Ss. 2 (11), O. 21 R. 102—*Decree for possession and mesne profits—Transfer pendente lite—Transferees not made parties—Liability of transferees for mesne profits.*

A transferee *pendente lite* of immoveable property decreed to be delivered to plaintiff with mesne profits, is liable to pay the mesne profits, as such transferees are, in law, in wrongful possession of land. (*Casperss and Shamsuddin*, JJ.) MIDNAPORE ZEMINDARI CO., LTD *v.* KUMAR NARESH NARAIN.
39 Cal. 220=11 I.C. 939=16 C.W.N. 109.

———S. 2 (11)—*Hindu joint family—Surviving members not legal representatives.*

There is no 'succession' in an undivided Hindu family and therefore, the surviving members after the death of a member of a Hindu family are not his 'legal representatives' within the meaning of S. 2 (11) of the Code. (*Chevis and Scott Smith*, JJ.) DWARKA DAS *v.* KRISHAN KISHORE. 2 Lah. 114=
61 I.C. 628=3 Lah. L.J. 349.

———S. 2 (11)—*Scope of the definition.*

"Legal representative" as defined in section 2 (11) of the C. P. Code includes any person who intermeddles with even a part of the estate of a deceased person; and an intermeddling with a part of the estate makes the intermeddler liable to the extent of the property taken possession of, by him. (*Reid*, C. J. *and Beadon*, J.) MUSSAMMAT DAROPDI *v.* MUSSAMMAT SADA KAUR.
116 P.R. 1913=22 I.C. 242=39 P.L.R. 1914.

———Ss. 2 (11) and 52—*Decree against wrong legal representative—Effect of.*

Where a creditor in good faith obtains a decree against a person who though in possession is not the heir of the deceased debtor's estate,

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the decree and the proceedings in execution bind the interest of the real heir. Such a case is an exception to the general rule that proceedings in execution of a decree do not bind the interest of any person who was never brough on the record asparty to the proceedings in the suit. 29 M. L. J. 698, expl. (*Sadasiva Aiyar and Spencer*, JJ.) BACHU SOORAYYA *v.* TOOMULOORI CHINNA ANJANEYALU.

52 I.C. 509=36 M.L.J. 106.

———S. 2 (11) and O. 1, Rr. 18 and 10—*Hindu reversioner—Suit by—Death of plff.—Next reversioner—Right to continue.*

A Hindu reversioner seeking to continue a suit instituted by a nearer reversioner since deceased is not his legal representative within S. 2, clause 11 but he can be added as a party in a representative action under O. 1, Rr. 1, 8 and 10 of the Code. (*Sadasiva Aiyar and Spencer*, JJ.) KRISHNASWAMI AIYAR *v.* SEETALAKSHMI AMMAL.

25 M L.T. 116=9 L W. 166=49 I.C. 268=(1918) M.W.N. 888.

———S. 2 (11)—*Legal representative—Beneficial owner.*

The expression "legal representative" means a person who in law represents the estate of a deceased person and not necessarily the beneficial owner of that estate. (*Ayling and Krishnan*, JJ.) PARAMASWAMI AIYANGAR *v.* ALAMU NACHIAR AMMAL. **42 Mad. 76=35 M L.J. 632=49 I.C. 11.=9 L.W. 26=(1918) M.W.N. 107.**

———S. 2 (11)—*Person in possession—Representation of estate.*

A person who is in possession of the estate belonging to the deceased can validly represent the deceased deft. under the C.P. Code of 1908. (*Ayling and Seshagiri Aiyar*, JJ.) MUDDALA MADHAYARA YUDU *v.* TANKALA SUBBAMMA. **31 M.L.J. 222=35 I.C. 124=(1916) 2 M.W.N. 233.**

———S. 2 (11)—*Legal representative—Right of decree-holder to implead.*

A decree-holder has the right to select from among the claimants of the estate of the deceased, persons whom he *bona fide* believes to have *prima facie* the best title as legal representatives and he is sufficiently protected if he is not guilty of fraud or collusion in exercising that right. 20 C.W.N. 58; 33 Mad. 75, dist. Under the old Code too, the right was the same though the definition was not as it is now. (*Sadasiva Aiyar and Napier*, JJ.) GNANAMBAL AMMAL *v.* VEERASAMI CHETTY.

31 I.C. 920=29 M.L J. 698.

———Ss. 2 (11) and 32—*Wrong representative brought in as party—Effect.*

Where a mortgagee brought the widowed daughter-in-law of the mortgagor on his death as his legal representative while his widow was still alive and purchased the mortgaged properties in execution sale, *held*, that the daughter-in-law not being the proper legal representative, the sale was not binding on the reversioners. 32 Cal. 296 (P.C.), ref. (*Ayling and Tyabji*, JJ.) VUPPALAPATI VENKATAPPA *v.* THOVAGUNTA VIRARAGHAVAYYA. **29 I.C. 6.**

———S. 2 (11)—*Legal representatives—Suit by—Hindu widow—Reversioner.*

A suit for possession brought by a Hindu widow in a representative capacity as representing the estate does not abate on her death. The right to sue survives to the reversioners of the last male owner who are her legal representatives under S. 2 (11), C.P.C., 1908 and as such are entitled to be brought on record. Cases discussed. (*Ayling and Hannay*, JJ.) GANDI RAMASWAMI *v.* PURANSETTI PEDAMUNAYYA. **39 Mad. 382=27 I.C. 1001=17 M.L.J. 186.**

———S. 2 (11)—*Trespasser—Decree against—Effect on rightful holder.*

A decision obtained on contest on the merits against a person afterwards found to be a trespasser binds the rightful holder in the absence of anything to show that the decision was obtained by collusion or fraud. (*Stuart and Kanhaiya Lal*, A. J. Cs.) MATA PRASAD *v.* MUHAMMAD ABDUL HASAN KHAN. **42 I.C. 57=4 O.L.J. 463.**

———S. 2 (11)—*Legal representative—Tenant dying without heirs—Land and house escheating to Zemindar.*

A Zamindar, to whom, by village custom, the house and grove in the possession of his tenants, escheat on the latter's dying without heirs, is not his legal representative. 3 I.C. 519 and 8 M.I.A. 500, dist. (*Sabonadiere*, A.J.C.) CHIRANJI LAL *v.* BISHWANATH. **23 I.C. 969=1 O.L.J. 86.**

———S. 2 (11)—*Legal representative—Question relating to execution—Power of Court to decide objection.*

Where on an application to substitute the brother of the deceased judgment-debtor as his legal representative, he pleads that he is not liable to satisfy the decree as being an undivided co-parcener of the deceased, the objection must be decided by the executing Court before an order substituting him as legal representative is made. If the Court leaves the point whether the brother was liable for the decree open and undecided and makes an order of substitution it would be acting illegally. (*Jwala Prasad and Ross*, JJ.) PATAIT DINANATH SAHI *v.* PATAIT MALHIJI BAID. **3 Pat .L.T. 105=1923 P. 159.**

———S. 2 (11)—*Trespasser—Execution of a decree.*

The right of a trespasser to execute a decree depends on the nature of the decree. A decree in favour of an estate can be executed by a person recognised as proprietor, though he may be found to have no title to the estate ultimately. (*Ross and Jwala Prasad*, JJ.) CHANDRIKA PRASAD SINGH *v.* KESHO PRASAD SINGH. **48 I.C. 705.**

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———S. 2 (11) and 50—*Executor de son tort—Liabilities of.*

An intermeddler with the property of the deceased is liable to the extent of the property taken by him. The onus is on the plff. primarily to show that assets have come into the hands of the defendant. (*Chamier*, C.J. *and Sharfuddin*, J.) SHIV SARAN LAL *v.* KESHO PRASAD SINGH. 3 Pat. L.W. 302 = 42 I.C. 122 = (1918) Pat. 86.

———S. 2 (12)—*See also* MESNE PROFITS.

———S. 2 (12)—*Mesne profits— Compensation for improvements—Set off.*

The person dispossessed is entitled to compensation for improvements effected and such compensation is put against mesne profits. (*Lord Buckmaster*) BHAGWAL DAYAL SINGH *v.* RAM RATAN SAHU. 26 C.W.N. 257 = 35 C.L.J. 121 = 42 M.L.J. 243 = 3 Pat. L.T. 229 = 20 A.L.J. 26 = 65 I.C. 69 = 15 L.W. 481 = 24 Bom. L.R. 336 = (1922) M.W.N. 102 = 4 U.P.L.R. (P.C.) 7 = 1922 P.C. 91 (P.C.).

———S. 2 (12)—*Mesne profits—Interest—Decree silent as to—Execution.*

Where a decree awarding mesne profits is silent as to interest, it must be deemed to carry interest at the Court rate of 6 per cent on the mesne profits and executed accordingly. 27 C. 951; 25 A. 275, foll; 22 A. 262, diss. (*Walsh and Stuart*, JJ.) LALITA PRASAD *v.* SRI GANESHJI. 20 A.L.J. 348 = L.R. 3 A. 245 = 4 U.P.L.R. (A) 144 = 67 I.C. 219 = 44 All. 379 = (1922) All. 117.

———S. 2 (12)—*Interest on mesne profits.*

The decree-holder can in execution of decree for mesne profits, claim interest on such profits, as mesne profits include interest. (*Griffin*, J.) BANWARILAL *v.* RAMA. 17 I.C. 915 = 10 A.L.J. 533.

———S. 2 (12)—*Mesne profits—Assessment of.*

The determining factor in ascertaining mesne profits is ordinarily the nature of the plff.'s possession before he was dispossessed or before the unlawful possession of the deft. began. The use which the deft. while in possession as trespasser actually made of the land does not derermine the mesne profits. The question is what the plff. would have made out of it but for the deft's. unlawful trespass and not what the deft. has done. (*Piggott*, J.) MAHARAJAH OF VIZIANAGARAM *v.* ALAM SHAH KHAN. 16 I.C. 126 = 9 A.L.J. 774.

———S. 2 (12)—*Mesne profits—Trespasser—Interest on mesne profits.*

All trespassers, whether *bona fide* or *mala fide*, are liable for mesne profits. The *bona fide* trespasser may be allowed to deduct collection charges, while no such concession is made in favour of the *mala fide* trespasser. 10 W. R. 486; 8 W. R. 479; 1 All. 518; 21 Cal. 142, ref. The annual income, the period of

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time and the rate of interest are the elements which should be determined before the actual amount of mesne profits can be ascertained. Interest should ordinarily be allowed on mesne profits, though the interest as well as the mesne profits are in the discretion of the Court. 27 Cal. 951, rel. (*Mookerjee and Panton*, JJ.) RAJAH SASHIKANTA *v.* RAJA SARAT CHANDRA. 70 I.C. 6 = 34 C.L.J. 415.

———S. 2 (12)—*Liability for mesne profits—Claim exceeding jurisdiction of trial Court—Transfer to higher Court.*

If a person sues for possession he can in the same suit recover mesne profits accrued before the suit and accruing pending litigation. The fact that owing to prosecution of appeal in higher Courts by the deft., the mesne profits swelled up beyond the limits of the pecuniary jurisdiction of the Court which tried the suit originally, thereby necessitating the transfer of the proceedings in the suit to a Court of higher jurisdiction, is not an interruption so as to make the subsequent proceeding in the higher Court a different suit. (*Newbould and Huda*, JJ.) BAIKUNTA NATH KUNDA *v.* MOHANANDA BORAT MODUK. 58 I.C. 170 = 24 C.W.N. 342.

———S. 2 (12)—*Mesne profits—Interests on—Discretionary—Decree—Construction of.*

It is not obligatory upon the Court to allow interest on mesne profits; it is a matter of judicial discretion to be exercised according to the circumstances of the case. A decree-holder cannot claim interest when the decree for mesne profits is silent as to interest. 27 Cal. 951 foll. *Held*, on the construction of the decree that interest on the mesne profits was not granted. (*N.R. Chatterjee and Duval*, JJ.) RAJA NARENDRA LAL KHAN *v.* BYOMKESH MITTER. 53 I.C. 227 = 30 C.L.J. 205.

———S. 2 (12)—*Mesne profits—Liability for.*

Where a plff. succeeds in establishing that he has been kept out of possession, he is entitled to mesne profits for that period subject to the Law of Limitation. (*Newbould*, J.) JOGESH CHANDRA ROY *v.* THE SECRETARY OF STATE. 53 I.C. 124.

———S. 2 (12)—*Mesne profits—Liability of purchaser of non-transferable holding—Basis.*

The purchaser of a non-transferable holding is liable to the landlord for mesne profits on the basis of the rents received by him during the period of his possession and not on the basis of the rent which the landlord used to get from the tenant of the holding prior to its sale. (*Chatterjea and Newbould*, JJ). PURANANDA DUTTA *v.* ABINASH CHANDRA. 46 I.C. 624.

———S. 2 (12)— *Mesne profits—Deft. not actually in possession—Liability.*

After a trespasser died while in possession of certain land, two persons claiming to be executors under a will took possession. The probate

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was revoked on an application by the heir who then took possession. The rightful owner got a decree for possession and mesne profits. *Held* that the rightful heir of the original trespasser as representing the estate, is not liable for mesne profits during the time the so-called executors were in possession as he could not be said to be in possession in fact or in law either personally or by agent or by tenant. (*Sanderson*, C.J. *and Mookerjee*, J.) KALICHARAN SINHA *v.* ASHUTOSH SINHA. 38 I.C. 660 = 25 C.L.J. 140.

———S. 2 (12)—*Mesne profits—Assessment of.*

Mesne profits mean those profits which the person in wrongful possession of such property actually receives or might with ordinary diligence receive and not what the plaintiff has lost. When the purchaser issued notice to a *mokararidar*, to deliver possession within a certain time the purchaser is not entitled to mesne profits for the period prior to that date but can get damages for use and occupation on the basis of *mokarari* rent. (*Chatterjee and Mullick*, JJ.) DARSAN SINGH *v.* BHAWANI KOER. 19 I.C. 974 = 17 C.W.N. 984.

———S. 2 (12)—*Mesne profits—Assessment—Principle of.*

In assessing mesne profits the Court should take into consideration what the deft. gained by the cultivation of the land and not merely what the plaintiff lost by being deprived of possession. "Mesne profits" in S. 2 (12) includes also interest on mesne profits. (*Stephen and Richardson*, JJ.) ANUKUL CHANDRA CHAKRABARTI *v.* NABIN CHANDRA BOSE. 15 I.C. 1.

———S. 2 (12)—*Mesne profits—How determined.*

Mesne profits should be determined in the suit itself by inquiries but not by way of execution for a fixed sum of money. (*Casperss and Sharfuddin*, JJ.) MIDNAPORE ZEMINDARI CO., LTD. *v.* KUMAR NARESH NARAIN. 39 Cal. 220 = 11 I.C. 939 = 16 C.W.M. 109.

———S. 2 (12)—*Mesne profits—Principle of assessment—Liability of joint wrong-doers.*

Mesne profits should be assessed on the basis of what the persons in wrongful possession received or might with ordinary prudence have received; but not on what the owner was actually receiving before his eviction. The liability of joint wrong-doers is joint and several. (*Mitra and Geidt*, JJ.) BIRESSHUR DUTT *v.* BARODA PROSAD RAY. 11 I.C. 504 = 15 C.W.N. 823.

———S. 2 (12)—*Principle of assessment—Mesne profits.*

The correct principle for the assessment of mesne profits is that the letting value of the property should be determined. The value of the use of the property is the mesne profits and not what the deft. actually gained. (*Mookerjee and Coxe*, JJ.) KAMINI KUMAR RAI *v.* KRISHNA CHANDRA SAHA. 10 I.C. 312 = 15 C.L.J. 93.

———S. 2 (12)—*Mesne profits—Who can claim.*

A plff. may recover mesne profits even when he is out of possession but he must at least show that he has a right to immediate possession. If he fails to prove such a right and it is found that the deft. is in possession, the suit will be dismissed with cost. (*Chitty and Chatterjee*, JJ.) ELAHI BAKHSH MANDAL *v.* RAM NARAYAN GHOSE. 10 I.C. 117 = 16 C.W.N. 288.

———S. 2 (12)—*Mesne profits—Liability to pay interest—Rate of interest.*

The very definition of mesne profits includes not merely the profits of immoveable property but also interest on such profits. Where the lower Court for proper reasons awards 12 per cent interest on mesne profits the appellate Court will not disturb it. (*Shadi Lal*, C.J.) CHHABER SINGH *v.* RADHU RAM. 68 I.C. 807 = 4 Lah. L.J. 333.

———S. 2 (12)—*Mesne profits—Ascertainment of—Deduction of Government Revenue.*

The Government assessment paid by the judgment-debtor ought to be credited in his favour on ascertaining mesne profits due to decree-holder. (*Sadasiva Aiyar and Moore*, JJ.) RAMU SHETTITHI *v.* MANIAPPA SHETTITHI. 33 I.C. 520.

———S. 2 (12)—*Mesne profits—Interest on.*

In a decree for possession with mesne profits the judgment-debtor should surrender possession sufficiently early to enable the decree-holder to cultivate the land and raise the crops thereon in order to avoid liability for mesne profits. The Court has a discretion whether to allow interest on mesne profits after three years or not. 27 Cal. 951 (P.C.): 33 Cal. 329: 12 C.W.N. 285, foll. (*Abdur Rahim and Spencer*, JJ.) NAINA PILLAI MARACAYAR *v.* ARUMUGA MUDALY. 31 I.C. 387 = 2 L.W. 1129.

———S. 2 (12)—*Mesne profits—Basis of claim.*

The essence of a claim for mesne profits is that it rests upon an agreement implied in law that when one person occupies property of another, he must be deemed to have tacitly assented to the condition that he is liable for an occupation rent in respect of that occupation. (*Spencer and Coutts-Trotter*, JJ.) MANIYAM KUPPANA *v.* KUPPANA GOUNDEN. 29 I.C. 193 = (1915) M.W.N. 319.

———S. 2 (12)—*Mesne profits—Calculation of.*

A trespasser is liable to compensate the real owner in respect of all losses sustained by the latter by reason of the tortious act of the former, whether in the shape of damages or

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profits, such damages naturally being the profits which the owner could have derived from the lands had they not been wrongfully detained from him. It is no defence to the trespasser to say that he left the lands waste immediately after the date of the decree in a possessory suit under S. 9 of the Sp. Rel. Act and he received no profits himself and so is not liable for mesne profits for period intervening between the decree in the possessory suit and the date of delivery of lands through the Court to the real owner. (*Sadasiva Aiyar and Hannay*, JJ.) THAVASI *v.* ARUMUGAM.
30 M.L J. 326=2 L.W. 157=
28 I.C. 1=(1913) M.W N. 170.

———S. 2 (12) and 57—*Mesne profits—Decree—Appeal.*

There was a decree awarding mesne profits without fixing a period for calculation of mesne profits; the Court rightly construed the period to be three years; an application for mesne profits beyond three years was converted into a suit and an order was passed thereon, *held*, it was a decree and so appealable. (*Bakewell and Spencer*, JJ.) VENKATA KUMARA MAHIPATHI SURYA RAO *v.* SUBBAYAMA RAO.
24 I.C. 484=1 L.W. 443.

———S. 2 (12)—*Mesne profits — Deduction of cultivation expenses and costs of collecting rent.*

In calculating mesne profits, cultivating expenses incurred by the trespasser should be deducted but not the costs for collecting the rent due from persons in occupation. (*Benson and Sundara Aiyar*, JJ.) SANKARA RAYAMMA *v.* ANDUSMALLI VENKATARATNAM.
(1913) M.W.N. 803=18 I.C 615=
24 M.L.J. 30.

———S. 2 (12)—*Mesne profits—Mode of ascertaining—Expenses of litigation when deducted.*

A person in wrongful possession when accounting for mesne profits to the true owner is entitled to compensations for all sums spent by him in managing the property but not for infructuous proceedings in Court taken by him by mistake though *bona fide*, e.g., distraint proceedings. (*Abdur Rahim and Spencer*, JJ.) LAKSHMI VENKAYAMMA *v* GOBISETTI NARAYANASWAMI NAIDU. 11 M.L T. 90=
22 M.L.J. 253=14 I C. 390=
(1912) M.W.N. 101.

———S. 2, Cl. 12—Mesne profits—*Measure of.*

In calculating mesne profits the real question is what is the loss sustained by the plaintiff on account of the infringement of his right by the defendant for which he is to be compensated. In other words what is the benefit which the plaintiff would have derived from the possession of his land during the period of his dispossession by the defendant. This benefit may be according to the circumstances either the letting in value or the cultivation profits of the land. If it is a case where cultivation profits are to be awarded they have to be ascertained according to the definition in the Code. The principle upon which the question whether letting value or cultivation profits are to be awarded depends is as follows:—The loss of the party wrongfully kept out of possession must generally be measured by the actual usufruct of the land during that time on occupation of the same character as that of the party wrongfully kept out of possession at the date of his ouster or of the last legal occupant whom the plaintiff claims to succeed to, if the plaintiff himself never entered into possession. (*Kotwal*, A. J. C.) CHHAGANLAL *v* SARDAR.
69 I.C. 860=1923 Nag. 64 (1).

———S. 2 (12)—*Mesne profits—Possession, lawful—Mesne profits cannot be claimed.*

Possession under deed, which is liable to be set aside on payment of a certain money, is lawful possession and the person in such a possession is not liable for mesne profits prior to the date of a decree setting aside the deed. (*Macnair*, A.J.C.) MAROTI *v.* ABHIMAN.
61 I.C. 543.

———S. 2 (12)—*Mesne profits—Liability of abettor.*

Mesne profits can only be recovered for the time the possession was actually retained by the deft, but if deft. is himself out of possession he is not liable for the profits which he has not received unless he has abetted the trespass by the person in actual possession. (*Mittra*, A.J C.) SONI *v.* MAGHASHIRAM. 55 I C. 48.

———S. 2 (12)—*Mesne profits—Mode of calculation.*

Where the person dispossessed by a trespasser is himself ordinarily a cultivator of the land in dispute the profits to which he is entitled are those that the wrongful holder might have obtained by actual cultivation with due diligence. It is not open to a trespasser to dispossess an actual cultivator and then to sublet the land trespassed upon, to some third person, and then claim to compensate the rightful occupant only to the extent of what he may have obtained by sub-letting. (*Stanyon*, A.J.C.) GOVIND MADHO *v.* DHASU. 43 I.C. 58.

———S. 2 (12)—*Mesne profits—Measure of.*

As against a wrong doer possession relates back to the time when the right to enter accrued. 34 Mad. 269, foll.; 5 Cal. 148, ref. (*Mittra*, A.J.C.) AMRITRAO *v* GOVIND.
21 I.C. 590=9 N.L.R. 155.

———S. 2 (12)—*Mesne profits—Calculation of—Cost of collection.*

A person is accountable not merely for what he received actually but for what he might have received with due diligence. The costs of collection may be fixed at 10 per cent. on the gross rental, regard also being had to the nett rental. 27 Cal. 951 (P.C.), foll. (*Kanhaiya Lal*, A.J.C.) KISHUN LAL *v.* SURAJ NARAIN.
16 I.C. 866.

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———S. 2 (12)—*Mesne profits — Period for which allowable—Bengal Tenancy Act, S. 120.*

Mesne profits against a trespasser can be awarded from the date of his actual trespass on the land and the same principle applies where the person against whom mesne profits are awarded is an assignee from a trespasser. Such a person is not liable for the period in which he was not in possession at all. Where the land from which a person is dispossessed is his private land within S. 120 of the Bengal Tenancy Act mesne profits should be calculated on the basis of the actual price of the produce less the costs of cultivation. (*Das and Ross*, JJ.) DAMODAR NARAYAN *v.* S. A. MILLER. 2 Pat. L.T. 563 = 6 Pat. L.J. 166 = 61 I.C. 754 = (1921) Pat. 294.

———S. 2 (12) — *Mesne profits must be calculated on actual outturn.*

Mesne profits must be calculated on the actual outturn in the years in suit and where the defendants have been in possession of separate plots of land within those years mesne profits ought to be calculated as against each defendant on the basis of his possession. (*Sultan Ahmed*, J.) RAM BILAS SINGH *v.* AMIR SINGH. 61 I.C. 428 = 1 Pat. L.T. 235.

———S. 2 (12)—*Mesne profits—Deduction of costs of cultivation and reaping.*

Where mesne profits are claimed from a trespasser the costs of cultivation and reaping shall be allowed to him. (*Roe and Jwala Prasad*, J.) BALDEO RAI *v.* RAM EKBAL SINGH. 51 I.C. 747 = 4 Pat L. J. 301.

——— S. 2 (12)—*Mesne profits—Rules for ascertainment of.*

The principles which would ordinarily guide a Court in determining the mesne profits are (1) Wrongful trespasser should not profit by it; (2) Restoration of status before dispossession financially; and (3) Use to which decree-holder would have put land if he was himself in possession, 9 W. R. 445, ref. (*Chapman and Roe*, JJ.) DALGLEISH *v.* BASU NANDE MISSER. 1 Pat. L.W. 421 = 39 I.C. 516 = (1917) Pat. 146.

———S. 2 (14)—*Order under Guardian and Wards Act* (VIII *of* 1890), *S.* 34 (*e*).

An order passed by the District Judge, under the section directing the guardian of a minor step-mother to pay a certain sum of money to the guardian of a step-daughter for the expense of her marriage, is not one contemplated by S. 2 (14), C. P. C. and could not be executed under the Code, against the ward who in the meanwhile attained majority. The proper remedy is a suit. (*Spencer and Srinivasa Aiyangar*, JJ.) PARVATHI AMMAL *v.* CHOKALINGA CHETTY. 41 Mad. 241 = (1917) M.W.N 602 = 41 I.C. 341 = 6 L.W. 526.

C. P. CODE (V of 1908), S. 3.

———Ss. 2 (17) and 80—*Receiver under the Provincial Insolvency Act* (III *of* 1907), *S.* 20.

A Receiver appointed under the Provincial Insolvency Act, is a public servant within S. 2 (17) of C. P. Code and hence must be served with a notice under S. 80 of the Code before any action is taken against him. (*Macleod*, C. J. *and Heaton*, J.) ANNA LATICIA DE SILVA *v.* GOVIND BALVANT. 22 Bom. L.R. 987 = 58 I.C. 411 = 44 B. 895.

———Ss. 2 (17) and 80—*Public Officer—British Officer of Indian army.*

A British Officer in Indian army is "public officer" within S. 2 (17), C.P.C. and is liable to have half his pay attached under S. 60 (1) (i), C. P. C. (*Martin*, J.) KERING RUPCHAND & CO. *v.* MURRAY. 50 I.C. 683 = 21 Bom. L.R. 142.

———Ss. 2 (17) and 80—*Manager of Court of Wards—Not a public servant—Notice of suit.*

The Manager of Court of Wards is not a public servant within S. 2, clause (17), C.P. Code, and is therefore not entitled to a notice under S. 80 of the Code. (*Walmsley*, J.) NANDA LAL BOSE *v.* ASHUTOSH GHOSE. 55 I.C 515.

———S. 2 (17)—*Village headman is a public officer.*

A village headman is a public officer within the meaning of S. 2 (*Heald*, J.) MAUNG SAN YA *v.* MAUNG NGWE. 2 Bur. L J. 29 = 1923 Rang. 250.

———S. 2 (17) (c) and (h)—*Public Officer—Definition — Officer in Indian Subordinate Medical Service.*

"Service under Government" means serving actively under the Govt. whether in the Civil or Military employ of the Govt. Officers holding commissioned rank in the Indian Subordinate Medical Service are Public Officers under S. 2, cl. (17) (*c*). (*Lindsay and Kanhaiya Lal*, A.J.Cs.) PRINS *v.* MURRAY & CO. 1 O.L.J. 127 = 23 I.C. 935 = 17 O.C. 99.

———S. 2 (17), Cl. (d)—*Common manager—T.P. Act, S.* 95—*Public Officer.*

A common manager appointed under S. 95 of the T.P. Act is a Public Officer within S. 2 (17) (*d*) of the C.P. Code and notice under S. 80, C.P. Code, is necessary for a suit for accounts against him. (*Mookerjee and Panton*, JJ.) BENI MADHAB *v.* UPENDRA CHANDRA SINGHA. 24 C.W.N. 138 = 33 I C. 747 = 30 C.L.J. 279.

———S. 3—*Not exhaustive.*

The list of Subordinate Courts in S. 3 is not exhaustive and does not exclude all other Courts from being subordinate to the High Court. (*Scott*, C.J. *and Chandavarkar*, J.) PURUSHOTTAM JANARDHAN *v.* MAHADU PANDU TURMALKAR. 37 Bom. 115 = 17 I.C. 676 = 14 Bom. L.R. 947.

C. P. CODE (V of 1908), S. 4.

———S. 4—Generatia specialibus non derogant—*Army Act, S.* 145.

In view of S. 4, C.P.C. the law applicable to soldiers as defined in S. 90 of Army Act (1881), is the Army Act and it overrides S. 60 of the C.P. Code. (*Scott*, C.J. *and Macleod*, J.) DUCKWORTH *v.* DUCKWORTH.
43 Bom. 368=50 I.C. 427=
21 Bom L.R. 137.

———S. 7—*Small Cause Court—Execution by sale of decree on mortgage.*

A Small Cause Court can attach and sell a preliminary decree for foreclosure for immoveable property. (*Mitra*, A.J.C.) KRISHNAJI *v.* BALIRAM. 44 I C. 252.

———S. 7 (a)—*Small Cause Court—Mortgage debt—Attachment of.*

A debt obtained on a hypothecation bond is not immoveable property for purposes of attachment and Small Cause Court can attach it. 22 M.L.J. 105, foll. (*Abdur Rahim and Sundara Aiyar*, JJ.) SUBRAMANIA AIYAR *v.* SUBBA AIYAR. 16 I.C. 816.

———S. 7 (a)—*Small Cause Court—Attachment of part of joint family property consisting of immoveables.*

A Small Cause Court cannot attach a half share of joint family property, part of which at least is immoveable property. (*Mitra*, O.A.J.C.) UMRAO SINGH *v.* SUGANCHAND. 23 I.C. 156=
10 N.L R. 17.

———Ss. 7 (b) 94, O. 38, R. 5 and O. 50—*Small Cause Court—Power to attach moveables before judgment.*

The only orders excluded from the jurisdiction of a Sm. C. Court are those specifically mentioned in S. 94 as injunctions or interlocutory orders, that is to say orders under Cl (*c*) of S. 94. An attachment before judgment is not one of the orders. A Prov. Small Cause Court has the power to attach moveables before judgment. (*Newbould and Panton*, JJ.) KUMUD BEHARY PAL *v.* HARI CHARAN SARDAR.
46 Cal. 717=33 I.C. 814=
31 C.L.J. 179.

———Ss. 7 (b) and 104—'*Injunctions and interlocutory orders*'—*Meaning of.*

The words 'Injunctions and interlocutory orders' in S. 7 refer only to the orders under O. 39 and these two read together can mean only applications for injunctions and interlocutory orders on such applications. (*Kumaraswami Sastri*, J,) KARUMURU VENKATASWAMI *v.* LANKA TRIPURIAH. 26 I.C. 359.

———S. 9, (O. S. 11).

ACT OF STATE.
BIRT JAJMANI.
CASTE QUESTION.
CIVIL COURT.
CIVIL RIGHT.
CUSTODY OF MINOR.

C. P. CODE (V of 1908), S. 9—Birt jajmani.

FOREIGN SUBJECTS.
HONOUR.
JURISDICTION.
RELIGIOUS DISPUTE.
RELIGIOUS OFFICE.
RELIGIOUS QUESTION.
RIGHT TO OFFICE.
RIGHT TO WORSHIP.
SMALL CAUSE SUIT.
SPECIAL JURISDICTION.
SPECIAL TRIBUNAL.
STATUTORY BODY.
VOLUNTARY OFFERINGS.

Act of State.

———S. 9—*Act of State—Non-feudatory—Zemindars—British subjects—Withdrawal of police—Excise functions by Government—Abolition of cattle pounds—Suit for their restoration, if competent.*

In 1864 the British Govt. declared that the status of feudatory chief in the Central Provinces, whose territory had become British by conquest, cession or lapse, was that of ordinary British subjects to whom certain judicial and administrative powers had been entrusted as a matter of convenience or for economy of administration. Sanads recognising their property and rights were granted in 1874. The Govt. gradually withdrew from them the administration of police, excise and cattle pounds giving compensation for the consequent loss of revenue. In the settlement of 1903 the Govt. obtained the execution under protest of *wajib-ul-arzes* from the Zemindars consenting to the resumption of these functions by Govt. The Zemindars sued for annulment of these provisions and for the restoration of the rights which they alleged had been theirs from time immemorial of which they had been wrongfully deprived. *Held*, that the rights alleged had existed only by sufferance or delegation and the resumption of these functions by Govt. was a thing legitimately done in the exercise of its sovereign powers. Consequently an action was maintainable in a Civil Court with regard to such resumption. (*Lord Macnaghten.*) BIR BIKRAM DEO *v.* SECRETARY OF STATE. 39 Cal. 615=16 C W.N. 362=
15 C L J. 633=(1912) M.W N. 657=
13 I.C. 965=14 Bom. L R. 812=
39 I.A. 31=9 A.L.J. 385 (P.C.).

———S. 9—*Act of State—Resumption of inam by Government.*

A resumption by the Sovereign of an *inam* is an Act of State which cannot be questioned by the Municipal Courts. 7 M. I. A. 555, ref. (*Sadasiva Aiyar and Napier*, JJ.) MAHOMED KADIR *v.* GHULAM MAHOMED ALI.
28 I.C. 934.

Birt Jajmani.

———S. 9—*Birt Jajmani—Pragwal—Flag—Cause of action.*

A pragwal used a particular kind of flag to attract the notice of pilgrims. The deft. who

C. P. CODE (V of 1908), S. 9—Caste Question.

acted as his agent, put up a similar flag so as to mislead pilgrims into the belief that he has the pragwal. *Held*, that the action of the deft. was unlawful and the plff. had a right to maintain a suit to restrain the deft. from making use of the emblem or flag. (*Piggott and Kanhaiya Lal*, JJ.) BENI MADHO PRAGWAL *v.* HIRA LAL. 59 I.C 873 = 18 A L.J. 679.

Caste Question.

——S. 9—*Caste—Panchayat—Refusal to subscribe to a declaration of faith—Issuing leaflet bringing panchayat to contempt—Whether social question—Temporary exclusion from social intercourse—Whether contrary to natural justice.*

Where some members of a caste refused to subscribe to a declaration of faith issued by the panchayat and instead, issued a leaflet calculated to bring the panchayat into contempt; there were social questions giving the panchayat jurisdiction to interfere and their temporary exclusion from social intercourse with other families is not contrary to natural justice. The matter is not one for the Civil Court. (*Tudball and Rafique*, JJ.) BISHAMBAR DAS *v.* GOBINDAS. 23 I C. 801 = 12 A.L.J. 552.

——S. 9—*Caste question—Religious office.*

No right of property is conferred where a caste has appointed a man to a mere priestly office. His continuance or removal is exclusively in the power of the caste and it is a caste question. But it is different where the office of hereditary priest is created in certain families, for the performance of religious ceremonies. According to Hindu Law either the caste or the families have power to create such an office and give it the character of immoveable property. (*Chandavarkar and Hayward*, JJ.) GHELABHAI GAURISHANKAR *v.* HARGOWAN RAMJI; 36 Bom 94 = 12 I.C. 928 = 13 Bom. L.R. 1171.

——S. 9—*Caste question—Exemption of Christian community.*

The recognition by Courts of Hindu Castes as distinct corporations with exclusive legal rights for certain purposes ought not to be extended to Christian communities as it would lead to complications and anomalies of a far reaching character. (*Sadasiva Aiyar and Napier*, JJ.) KATHALAI MICHAEL PILLAI *v.* J. M BARTHE. 39 Mad. 1086 = 19 M.L T. 249 = 30 M L J. 423 = 34 I.C. 857 = 3 L.W. 318 = (1916) 1 M.W.N. 307.

——S. 9—*Caste question.*

Civil Courts may discuss and deal even with a caste question where the membership and character of a member have been unjustly injured. 11 Bom. 534, foll. (*Sadasiva Aiyar and Hannay*, JJ.) VENGALA VENKAYYA *v.* THALLAM VENKATARAMIAH. 28 M L J. 58 = 26 I.C. 460 = 17 M.L.T. 369 = 2 L.W. 446.

C. P. CODE (V of 1908), S. 9—Civil Right.

——S. 9—*Caste question—Refusal to invite plff.*

Refusal to invite the plff. on auspicious occasions does not give him a cause of action unless his rights as a member of the caste are violated. An allegation that defts. insisted on plff.'s undergoing expiatory ceremonies to be performed by the caste members after pollution before he could be invited to certain functions in the deft's house does not give the plff. a cause of action (*Benson*, O.C.J. *and Sankaran Nair*, J.) KUPPUSWAMI CHETTY *v.* DURAISWAMY CHETTY. 17 I.C. 527 = (1912) M.W.N. 1220.

Civil Court.

——S. 9—*Civil Court—Order of Collector—Sea Customs Act*, S. 188.

The plaintiffs having sued in the Civil Court to recover the value of the silver confiscated under the Sea Customs Act and the amount of the fine, the trial Court threw out the claim on the preliminary ground that the Collector's decision was final under S. 188 of the Act. *Held*, reversing the decree that if there had been no legal adjudication of the matter by the Collector of Customs in accordance with the provisions of the Sea Customs Act, the jurisdiction of the Civil Court to take cognizance of the suit was not ousted. (*Heaton and Hayward*, JJ.) GANESH MAHADEV *v.* SECRETARY OF STATE FOR INDIA. 43 Bom. 221 = 49 I.C 427 = 21 Bom. L.R. 27.

——S. 9—*Civil Court—Trust Committee—Officer of—Whether trustee or servant—Dismissal of officer—If Court can interfere.*

A Court will interfere in a case of dismissal of an officer of a Trust Corporation where the relationship between the Corporation and the officer is one of Trustee and *cestui-que-trust*, but will not, where the relationship is a contractual one as that of master and servant and the quetion whether the relationship is of the former or the latter kind, depends upon the statute or deed creating the foundation. (*Chatterjee and Walmsley*, JJ) RAM CHANDRA BAJPYE *v.* RAKHALDAS MUKERJEE. 41 Cal. 19 = 20. I. C. 157 = 17 C.W.N. 1085.

Civil Right.

——S. 9—*Civil right—Right to share in temple offerings is such.*

Where the property in suit consists of a share in the offering at a certain temple, a suit by the plaintiff with regard to the share of the offering that she should be allowed to take a turn at the worship in the temple so that her full share in the offerings might be secured to her is cognizable by the Civil Court. (*Mears*, C.J. *and Banerjee*, J.) KUNJ BEHARI LAL *v.* MT. NARAINI. 45 All. 537 = 71 I.C. 1026 = 1923 All. 525.

——S. 9—*Civil right—Municipality—Refusal of license.*

C. P. CODE (V of 1908), S. 9—Civil Right.

A Municipal Board will not be justified in refusing to grant a license properly applied for, under the bye-laws relating to dangerous and offensive trades, in order to secure an advantage to itself in a dispute about a question of title with another person. The Civil Court can interfere in a suit in such a case. (*Piggott*, J.) MANNUA *v.* EMPEROR.
20 Cr. L J 703 = 17 A.L J. 976 = 52 I.C. 785 = 1 U P.L.R. (H.C.) 126.

——S. 9—*Civil right—Municipal Election—Election contrary to law—Civil Court—Jurisdiction.*

A suit by one of two rival candidates for an election, to have an election of the other declared void as being contrary to law is one of a civil nature and maintainable in a Civil Court. (*Griffin and Chamier*, JJ.) RAGUNANDAN PRASAD *v.* SHEO PRASAD
35 All. 308 = 20 I.C. 490 = 11 A.L.J. 319.

——S. 9—*Civil right.*

A suit for recovery of carcases of dead animals by Mahars is not maintainable in a Civil Court. (*Shah and Crump*, JJ.) MADHU KASHIBA *v.* KRISHNA TATYA.
24 Bom. L.R 917 = 47 Bom. 95 = 68 I.C. 746 = 1922 Bom. 410.

——S. 9—*Civil right—Forum.*

S. 9 of the Code deals with the Courts, not with the rights of parties in order to find what is the jurisdiction of the Court and what civil suit the Court may try. (*Fletcher*, J.) BHUPENDRA NATH BASU *v.* RANAJIT SINGH BAHADUR. 20 I.C. 676 = 41 Cal. 384.

——S. 9—*Civil right—Right to set aside award.*

Though it is open to a party dissatisfied with a private award to wait till his adversary seeks to enforce it by the summary process prescribed by the Arbitration Act (IX of 1899) and then contest it by filing such objection as are allowed by the law, that is not his sole remedy and does not take away the remedy open to him of bringing a suit to set aside the award on the ground that no contract providing for a reference to arbitration was made or that the contract, if made, was not enforceable by reason of fraud or misrepresentation. (*Shadi Lal*, C.J. *and Campbell*, J.) JAI NARAIN BABU LAL *v.* NARAIN DAS JAINI MAL. 3 Lah. 296 = 69 I.C. 583 = 1922 Lah. 369.

——S. 9—*Civil right—Highway—Right to go in procession.*

The right to go in procession in a highway or public street is a civil right of every citizen, the infringement of which is actionable in Civil Court. Special damage to the individual citizen is unnecessary. (*Seshagiri Aiyar and Kumaraswamy Sastri*, JJ.) ANDI MOOPAN *v.* MUTHUVIRAMMA REDDY. 29 M.L J. 91 = 29 I.C. 248 = 17 M.L.T. 453.

——S. 9—*Civil right—Election disputes.*

C. P. CODE (V of 1908), S. 9—Honour.

A Civil Court cannot interfere with the order of the Collector passed in substantial conformity with the rules for Municipal Councillor's election. A suit will probably lie to set aside an order as *ultra vires*, if passed by the Collector without inquiry or on grounds other than those set forth in Rule 35 of the Election Rules. No fresh inquiry can be made by the Civil Court to nullify an order of the Collector passed against a candidate. (*Ayling and Spencer*, JJ.) NATARAJA *v.* MUNICIPAL COUNCIL, MAYAVARAM. 12 I.C. 311.

——S. 9—*Civil right—Cattle sacrifice—Mahomedans—Common Law right.*

A Mahomedan's right to slaughter cattle is a Common Law right which he enjoys in accordance with the principle *sic utere tuo at alienum non laedas*. (*Lindsay*, J.C.) ORI LAL *v.* MUHAMMAD YAKUB. 17 O C 354 = 25 I.C. 908 = 1 O.L J. 469.

——S. 9—*Civil right—Religious dispute—Suit between monk and layman, whether cognizable by Civil Courts.*

A suit between a layman and a Buddhist monk in regard to land on which a monastery stands can be heard by Civil Courts. U.B.R. (1892-96) 2, 59, U.B.R. (1897-01) 2, 42, dist. (*Mc Coll*, A.J.C.) NGA PO THIN *v.* U THI HLA. (1913) U.B.R. 183 = 23 I.C. 157 = 7 Bur. L.T. 27.

Custody of Minor.

——S. 9—*Custody of minor—Suit for.*

A civil suit for the custody of a minor will not lie in the ordinary Civil Courts; to obtain such custody, proceedings under the Guardian and Wards Act are the only remedy. (*Wallis*, C.J. *Ayling and Sadasiva Aiyar*, JJ.) SATHI *v.* RAMANDI PANDARAM, 42 Mad. 647 = 37 M.L.J. 93 = 26 M.L.T. 61 = 9 L.W. 600 = 53 I.C. 399 = (1919) M.W.N. 487 (F.B.).

Foreign Subjects.

——Ss. 9 and 20—*Foreign Subjects—Trust in British India.*

British Indian Courts have jurisdiction to determine the question whether a plaintiff is the sole trustee of a temple and so solely entitled to sue in French territory though the parties may happen to be French subjects when the land in respect of which the suit is brought is situate in British India. The nationality of the party has nothing to do with the jurisdiction of the Court. (*Wallis*, C.J. *and Hannay*, J.) AGNIHOTRAM VENKATA APPALACHARLU *v.* KUMBUM PAKIRU. 26 I C 367 = 1 L.W. 725.

Honour.

——S. 9—*Honour or dignity.*

A suit does not lie for a mere honour, or dignity unconnected with fees, profits or emoluments. 2 Bom. 476 foll., (1901) A.C. 450 expl.

C. P. CODE (V of 1908), S. 9—Honour.

(*Shadi Lal and Dundas*, JJ.) GURKHA ASSOCIATION, SIMLA *v.* MAHOMED UMAR.
51 I.C. 905.

———S. 9 — *Honour — Right to temple honours.*

A claim merely to establish the plff's. right to certain temple honours as the *Gurikar* of a caste is not cognizable by Civil Court. 7 Mad. 91; 2 Bom. 476; 10 Bom. 233; 19 Mad. 62, Ref. (*Spencer and Ramesam*, JJ.) BAPU PUJARI *v.* THUKRA GURIKARA.
41 M.L.J. 287=63 I.C. 115=(1921) M.W.N. 395.

———S. 9—*Honours—Right to—Determination by civil suit.*

Courts are not bound to enter into detailed considerations and decide the rights of *Sanyasis* to receive honours in temples unless they are mixed up with matters of a civil nature in civil suits. (*Sadasiva Aiyar and Odgers*, JJ.) PONNAPPA AIYANGAR *v.* SRI VANAMAMALAI.
10 L.W. 480=53 I.C. 483=20 Cr. L.J. 755=(1919) M.W.N. 872.

——— S. 9—*Honour—Right to.*

A right to religious honour is not cognizable, unless it is an emolument attached to an office. The existence of the office and the connection between the office and the honour must be established. (*Wallis*, C.J *and Krishnan*, J) VATHIAR VENKATACHARIAR *v.* PONNAPPA AYYANGAR. **45 I.C. 959=7 L.W. 614.**

———S. 9—*Honours—Suit for exclusive conduct of festival—Claim to honours and perquisites—Right to worship in a particular manner—Civil nature.*

A right to worship in a particular manner and with particular incidents attached to it, is a civil right and the Civil Court must adjudicate upon incidents connected with the exercise of such right. The right of a person to exclusively conduct a *mandagappadi* on the first day of a festival in a temple paying all the expenses himself, and receiving all the honours and emoluments of that right, is a civil right. A suit to establish such right is cognizable by Civil Courts as also a suit to enforce the claim for honours and perquisites where they have to be given as a matter of right to the *mandapamdar*. Per *Krishnan*, J:—The question whether an exclusive right to perform any festival in a temple is valid should be decreed on the facts of the case and the usage of the temple. They will be upheld subject to the right of the trustees to perform the festival, if the man claiming the exclusive right fails and the interests of the temple do not suffer. Trustees of a temple may make such arrangements as they think fit for the performance of any recognized ceremony therein and, if, in the *bona fide* and honest exercise of that discretion they give a permanent and exclusive right to any worshipper to perform any particular ceremony, the arrangement is perfectly valid if it is not injurious to the temple. *Per Spencer*, J.—The maintainability of a suit depends on the nature of the right asserted and the relief claimed. (*Spencer and Krishnan*, JJ.) THIRUMALAI ALWAR AIYANGAR *v.* LAKSHMI SADAGOPA AIYANGAR.
31 M.L.J. 758=(1916) 2 M.W.N. 327=36 I.C. 568=4 L.W. 562.

C. P. CODE (V of 1908), S. 9—Jurisdiction.

———S. 9—*Honours—Temple—Emolument attached to office.*

S. 9 empowers Civil Courts to try only suits of a civil nature and the explanation shows that they cannot try questions as to religious rites or ceremonies (and religious honours, by parity of reasoning) but a suit would lie for the honours if they are attached to an office as emoluments. Courts should require strong evidence before attaching mere honours to a temple office. If the honours are shown to persons only as marks of pure grace of the Deity, they cannot be legally claimed by anybody as receivable by him in a temple. (*Miller and Sadasiva Iyer*, JJ.) ATHAN SADAGOPA CHARIAR SWAMIGAL *v.* ELIAVALLI SRINIVASA CHARIAR. **13 M.L.T. 340=19 I.C. 287=(1913) M.W.N. 289.**

———S. 9 — *Honours—Dignity—Temple—Precedence.*

Civil Courts can determine the order of precedence in the distribution of honours in a temple and can grant an injunction to persons having a right to the first honours to protect such right from being infringed upon by others who are entitled to the same honours subsequently. 32 Mad. 291 foll. Where a long established usage in a temple has determined the rights of particular persons to receive the first *thirthams*, such usage will be followed by Civil Courts, even though it may be an innovation on any prescribed rule of the Hindu Shastras, unless the text of the latter is of such coercive authority that it cannot be disobeyed. (*Sundara Aiyar and Ayling*, JJ.) SOMA BALLACHARIAR *v.* THIRUVENKATACHARIAR. **15 I.C. 509.**

———S. 9—*Dignity*—Stanom.

A suit for a declaration that the plff. has a right to a *stanom* when there is no mention of property, is a suit for mere dignity and is not maintainable. (*Benson and Sundara Aiyar*, JJ.) MUNDANCHERI KOMAN *v.* MUNDANCHERI PUVAYIL. **10 I.C. 110=(1911) 1 M.W.N. 358.**

Jurisdiction.

———S. 9—*Jurisdiction—Special Act.*

In a suit for foreclosure, the deft. pleaded that he came under a special Act and that the Civil Court cannot take cognizance of the case. When the case was referred by the Court to the Collector, the latter held that the parties did not come under the special Act and returned the record. *Held*, that the Civil Court must continue the proceedings and pass a decree for foreclosure. (*Rafiqus and Piggott*, JJ.) GOBIND RAO *v.* KAMTA PRASAD. **36 All. 376=25 I.C. 400=12 A.L.J. 503.**

C. P. CODE (V of 1908), S. 9—Jurisdiction.

——S. 9—*Jurisdiction — Civil Court — Presumption in favour of.*

Every presumption should be made in favour of the jurisdiction of a Civil Court, which can be taken away only by express words or necessary implication. 33 Mad. 208, foll. (*Mookerjee and Holmwood*, JJ.) RAM NARAIN SINGH *v.* KRISHNA CHANDRA GHOSE.
17 C.W.N. 408=17 I.C. 490=17 C.L.J. 239.

——S. 9—*Jurisdiction — Spiritual and temporal matters—Enquiry.*

Courts have power in any matter of spiritual and temporal character to enquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury. It is an open question whether Courts have power to give declarations as between different classes of His Majesty's subjects on matters such as the existence of caste distinctions among Roman Catholic converts and whether any action can be founded on a disregard of such rights save as they arise out of trusts. (*Sadasiva Aiyar and Napier*, JJ.) KATHALAI MICHAEL PILLAI *v.* J. M. BARTHE. 39 Mad. 1056=19 M.L.T. 249=30 Mad. L.J. 423=3 L.W. 348=34 I.C. 587=(1916) 1 M.W.N. 307.

——S. 9—*Jurisdiction—Allegations in the plaint—To be taken as correct until trial on the merits.*

The jurisdiction of Courts depends upon the allegations made in the plaint and not upon those which may ultimately be found true. The allegations may, after the trial of the suit, be held to be unfounded and in that case, the suit would be dismissed, not because the Court had no jurisdiction, but because the allegation on which it was based were found to be untrue. At the same time the Court would have no jurisdiction merely because there was an assertion in the plaint that the act objected to was *ultra vires*. The plaint must make distinct allegations of fact or of law, how the act was *ultra vires*. (*Dhobley*, A.J.C.) MUNICIPAL COMMITTEE, MALKAPUR *v.* AMRIT WAMAN DALAL. (1922) Nag. 10=18 N.L.R. 121=65 I.C. 532=5 N.L.J. 214.

——S. 9 — *Jurisdiction — Tax, illegal imposition of—Recording of findings.*

If a Court has no jurisdiction in case of an illegal imposition of taxes, the Court has no power to record findings regarding legality of the same. (*Stanyon*, A.J.C.) G.I.P. Ry. COMPANY *v.* AMRAOTI MUNICIPALITY.
16 I.C. 449=8 N.L.R. 107.

Religious Dispute.

——S. 9—*Religious dispute—Suits of ecclesiastical nature—Lower Burma.*

The Government has not recognized the authority of the *Kathanabaing* in Lower Burma as they have done in Upper Burma. A suit between two Buddhist priests to recover possession of certain lands and religious manuscripts is one of a civil nature and within

C. P. CODE (V of 1908), S. 9—Religious Question.

the jurisdiction of the Civil Courts. (*Fox*, C.J. *and Hartnoll*, J.) U. WISAYA *v.* U ZAW TA.
8 Bur. L.T. 62=27 I.C. 112=8 L.B.R. 145.

Religious Office.

——S. 9—*Religious office—Maha brahmin family.*

Where a donor makes a gift personally to the deft. Maha brahmin on a day which belonged to the turn of the plff. *Held*, the plff. could not recover the gift made to the deft. as it was distinctly made to the latter in his individual capacity. Per *Richards*, C.J.—If the offering was of the nature which was included in the agreement between the parties, the deft, was bound to makeover the gift made on plff.'s day even against the donor's wish. (*Richards*, C.J. *Banerji and Lyle*, JJ.) SOND DEI *v.* FAKIR CHAND. 38 All. 412=19 I.C. 990=11 A.L.J. 563.

——S. 9 — *Religious office—Hereditary family priest—Civil Court.*

A Civil Court is competent to entertain a claim for the hereditary office of a family priest. (*Chandavarkar and Hayward*, JJ.) GHELABAI GAURISHANKER *v.* HARGOWAN RAMJI. 36 Bom. 94=12 I.C. 928=13 Bom. L.R. 1171.

——S. 9—*Religious office—Mahomedan Law—Jurisdiction of Civil Court.*

The existence of an office involves the existence of some duties to be performed by the holder of the office. A suit for possession of a hereditary office, the functions of which are digging up and burying a pot, distributing *sherbet*, collecting money, and distributing a small portion of the collections and reciting portions of the Koran is not maintainable, as it is not for a religious office, the duties of which are recognized by the Mahomedan Law, and a suit will not lie in a Civil Court. (*Ayling and Tyabji*, JJ.) MAHOMED SAHIB *v.* SYED SAHIB. 28 I.C. 459=17 M.L.T. 256.

——S. 9—*Religious office—Gayawal priest—Suit for declaration and possession.*

Whether a Gayawal gaddi is an office or a business, the person entitled to it can sue for possession of the gaddi and its books and for a declaration that he is the lawful holder of the gaddi. (*Chamier and Mullick*, JJ.) LACHMAN LAL PATHAK *v.* BALDEO THATWARI.
3 Pat. L.W. 136=42 I.C. 478=2 Pat. L.J. 705=(1918) Pat. 80.

Religious Question.

——S. 9—*Religious Question — Court cannot decide.*

The protection of the law in religious mattert is confined to the protection of religious property or religious office. The Court will not decide mere question of religious rites or ceremonies nor will it pronounce on any religious

C. P. CODE (V of 1908), S. 9—Religious Question.

doctrine if it is not necessary to do so in determining rights to property. 5 B. 80, foll. (*Marten*, J.) THE ADVOCATE-GENERAL OF BOMBAY *v.* YUSUFALLI EBRAHIM.
24 Bom. L.R. 1060.

——S. 9—*Religious question—Right to be carried in palanquin—Jagadguru.*

Plff 's suit for a declaration that he, as a Jagadguru has a right to be carried in palanquin on certain days through public streets and for injunction restraining the deft. from obstructing him in the exercise of his right, is not maintainable. Civil Court will not decide disputes as to precedence or privileges between purely religious functionaries. (*Macleod*, C.J. *and Fawcett*, J.) ANDANISWAMI *v.* TOTADSWAMI. **45 Bom. 590=60 I.C. 907=23 Bom. L.R. 75.**

——S. 9—*Religious question—Question of orthodoxy—Civil Court's jurisdiction to try.*

The determination of question of orthodoxy is not within the province of Civil Courts (*Ormond and Twomey*, JJ.) MAUNG CHITY MAUNG *v.* MA YAIT. **37 I.C. 780=10 Bur. L.T. 194.**

Right to office.

——S. 9—*Right to office—Honorary office—Suit for declaration—Maintainability.*

A plaintiff suing for a declaration that he is the Honorary Secretary to an Association and that a resolution dismissing him from that post is null and void, is bound to satisfy the Court that the suit is one concerning the right to an office within S. 9, C.P. Code and also that what he seeks to enforce by the suit is his right to a certain "legal character" within S. 42, Specific Relief Act. Where the plaintiff's services are voluntary and gratuitous and where there is no question of any contract between him and the Association, the Civil Court has no jurisdiction to entertain that suit. (*Chamier and Piggott*, JJ.) MAHARAJ NARAYAN SHEOPURI *v.* SHASHI SHEKARESHWAR ROY.
37 All. 313=29 I.C. 83=13 A.L.J. 455.

——S. 9—*Religious office*—Upadhyaya *of casts*—Vritti—*Interference—Injunction.*

The right to officiate in a *vritti* as *Upadhyaya* of a caste and to receive the perquisites of the *vritti* is immoveable property and the holder of the office is entitled to restrain intermeddlers by an injunction from interfering with the office. Acquiescence for ten years in the interference would disentitle the plaintiff to the injunction. (*Macleod*, C J. *and Fawcett*, J.) GIR-JASHANKAR *v* MURLIDHAR.
22 Bom. L.R. 1202=39 I C. 271=45 Bom. 231.

——S. 9—*Right to office—Barber—Right to officiate and to fees.*

The payments made to a vatandar barber for officiating at some ceremonies are not gratuities but are customary fees well recognised and

C. P. CODE (V of 1908), S. 9—Right to office.

therefore he can recover customary fees from another barber who, without any right, performs them. (*Shah and Crump*, JJ.) BHAGOJI GANU RAUT *v.* BABU BALU KADEM.
22 Bom. L.R. 410=37 I.C. 135=44 B. 733.

——S. 9—*Right to office—Lecturership in University—Rights of.*

An honorary lecturership in a University is undoubtedly an office of consequence but the fact that no arrangements are being made by the University for the delivery of such lectures cannot be said to be an injury to the personal right of the lecturer. The fact of the lecturer having lectured during a part of a term does not establish a continuing right to lecture. (*Choudhary*, J.) *In the matter of* A RASUL.
18 C.W.N. 830=24 I.C. 405=41 Cal. 518.

——S. 9—*Right to office — Ghatwal—Appointment of—Jurisdiction of Civil Courts.*

(Per *Fletcher*, J.) Appointment to the office of Ghatwal or Digwar is a matter for Government, *i.e.*, executive authorities, so that Civil Courts cannot interfere to reinstate a *ghatwal* dismissed by police authorities nor in favour of one who has never been appointed as such. (*Fletcher and Chatterjee*, JJ.) HEMENDRA NATH ROY *v.* UPENDRA NARAIN ROY.
23 I.C. 849=18 C.W.N. 1036.

——S. 9—*Right of office*—Chamars—*Right to skins—Service—Right to sue.*

The Civil Court cannot entertain a suit by a *chamar* that he is entitled to the skins of animals dying in a private institution known as *goshala* but he can bring pressure on the manager through the proprietors to reinstate him or to get a fresh manager appointed. (*Kensington*, J.) KANHIYA *v.* SEWA.
4 P.L.R. 1912=15 I C. 108=226 P.W.R. 1912.

——S. 9—*Right to office—'Dharmakarta'—Meaning—Declaration as to performance of duties of office—Power of Civil Court.*

In the ordinary legal phraseology of religious institutions, the word 'Dharmakarta' means nothing more than a trustee; but it is sometimes used in a limited sense and the designation is, by force of immemorial custom, given to a particular functionary entrusted with certain rights and duties. Civil Courts are competent to give a declaration that a certain person is competent to perform the duties of an office. Power of Dharmakarta to fine an inferior spiritual dignitary should be strictly made out and proved and not merely presumed from his position and Civil Courts are competent to call in question the propriety of any such fine and to direct refund of the same. (*White*, C.J. *and Ayling*, J.) PEDDA JIYANGAR VARU *v.* MAHANT OF TIRUPATHI.
21 M.L.J. 730=10 M.L.T. 133=11 I.C. 175=(1911) 2 M.W.N. 202.

——S. 9—*Right to office—Suit for.*

The right to hold a certain office in a certain place at a certain season of the year confers

C. P. CODE (V of 1908), S. 9—Right to office.

upon the holder of that right, a legal character so as to enable him to bring a suit to maintain such a right under S. 9, C.P. Code. But the right to enter a disciple's house when called by him is not a right to enter upon it as of right though not called and does not create any legal character to maintain a suit for a declaration of such a right. (*Roe and Jwala Prasad, JJ.*) HERA PANDEY *v.* BACHU PANDE.
1 Pat. L.J. 381=35 I.C. 345=
2 Pat. L.W. 390.

——Right to worship.

——S. 9—*Right to worship—Right to carry processions through public streets.*

A suit to establish the right to worship in a temple according to the worshipper's belief is a suit of civil nature within S. 9. The right to conduct religious processions in public streets is a right inherent in every person provided he does not invade the rights of property enjoyed by others or cause a public nuisance or interfere with the ordinary use of the streets by the public and subject to such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace. (*Shah and Hayward, JJ.*) WAMAN BALVANT KASHIKAR *v.* BABU HARSHAT SHETE. 44 Bom. 410=
36 I.C. 419=22 Bom. L.R. 307.

——S. 9—*Right to worship or perform festival.*

A right to worship is a civil right with some emoluments to the worshipper and can be enforced in a Civil Court. The amount of emoluments is insignificant. A person who has acquired or exercised a right to perform certain festivals hereditarily, can ask for a declaration of his right, if it is negatived by anybody. A *dharmakarta* cannot however, ask such a person to contribute for a festival on a grander scale than what that person is able to do. (*Seshagiri Aiyar, J.*) KADIRVELU CHETTI *v.* NANJUNDAIYER. 35 I.C. 88=3 L.W. 512.

Small Cause Suit.

——S. 9—*Small Cause Suit—Jurisdiction of District Court.*

The section bars the jurisdiction of the District Court in all cases of a nature cognizable by the Small Cause Court. As regards such cases, the District Court is not the principal Court of original jurisdiction and therefore also for the purposes of S. 195, Cr.P. Code. (*Roe, J.*) SAKHDEO SINGH *v.* DISTRICT MAGISTRATE OF MUZAFFARPUR. 38 I.C. 754=
18 Cr. L.J. 370=2 Pat. L.J. 1.

Special Jurisdiction.

——S. 9—*Special jurisdiction—Statutes—Jurisdiction of Civil Courts—Ouster.*

The jurisdiction of the ordinary Courts is not ousted when a new duty or cause of action is created by statute prescribing a special jurisdiction out of the course of Common Law.

C. P. CODE (V of 1908), S. 9—Statutory Body.

(*Ayling and Spencer, JJ.*) RAMA AIYAR *v.* VENKATARAMA AIYAR. 12 I.C. 310=
(1911) 2 M.W.N. 241.

Special Tribunal.

——S. 9—*Special tribunal—Jurisdiction of Civil Courts when barred.*

Where the duty of deciding disputes between subjects and the Crown is cast upon a special tribunal by the Legislature, the tribunal so constituted must act in good faith. The decision must come to, in the spirit and with the sense of responsibility of tribunals, whose duty it is to mete out justice. If the tribunal comes to a conclusion after due inquiry, then the jurisdiction of the ordinary Civil Courts is barred and its decision is final. But if the conclusion is come to without any sort of enquiry and without an opportunity being given to the parties to be heard, the jurisdiction of the ordinary Civil Courts is not to be taken away. 2 Bom. 314. (1911) A.C. 179, (1915) A.C. 120, ref. (*Heaton and Hayward, JJ.*) GANESH MAHADEO *v.* SECRETARY OF STATE. 43 Bom. 221=40 I.C. 427=
21 Bom. L.R. 27.

Statutory Body.

——S. 9—*Statutory body—Land acquisition case.*

Where powers are given to a public body of acquiring property for purposes of an Act, misuse of the powers by attempting to acquire land not in furtherance of the objects of the statute but for the purposes of exacting exemption fee from owners is actionable in a Civil Court. (*Lord Parmoor.*) TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA *v.* CHANDRA KANTA GHOSE. 47 Cal. 500=47 I.A. 45=
24 C.W.N. 881=31 C.L.J. 65=
2 U.P.L.R. 98 (P.C.)=
36 I.C. 32=18 A.L.J. 821=
22 Bom. L.R. 886=38 M.L.J. 511=
11 L.W. 866. (P.C.)
[Affirming 44 Cal. 219=21 C.W.N. 8=
36 I.C. 749=24 C.L.J. 246.

——S. 9—*Statutory body—Jurisdiction of—Civil Court—Acquisition of land by Municipality—Calcutta Municipal Act* (II *of* 1899).

Where the Corporation of Calcutta refuses to admit the owner's right to compensation on the ground that the building was erected after 1863 and proceeds to demolish it, the Civil Court has jurisdiction to entertain a suit for a declaration that the owner is entitled to compensation. (*Lord Chancellor.*) JOSEPH *v.* CORPORATION OF CALCUTTA. 44 Cal. 87=43 I.A. 243=
20 M.L.T. 383=18 Bom. L.R. 878=
24 C.L.J. 498=(1916) 2 M.W.N. 344=
36 I.C. 912=21 C.W.N. 194=
8 L.W. 199=32 M.L.J. 631 (P.C.).

——S. 9—*Statutory body—Discretion given by statute—Arbitrary exercise—Court's power to interfere.*

The discretion given by S. 4 of the Public Service Superannuation Act of 1903 (New South

C. P. CODE (V of 1908), S. 9—Statutory Body.

Wales) to fix the gratuities of retiring public servants is not an arbitrary discretion but a discretion to be exercised reasonably, fairly and justly; and where it is plain that the award of gratuity was intended to be unreal and unsubstantial, though made under the guise of exercising discretion, in that the Board threw in only a farthing for each year of service after a certain period, in the calculation of the gratuity, *Held*, that it was, at best a colorable performance and tantamount to a refusal by the Board to exercise the discretion entrusted to them by Parliament. The award was set aside and the claim decreed. (*Lord Macnaghten.*) LESLIE WILLIAMS *v.* HAINS THOMAS GIDDY.
15 C.W.N. 669=21 M.L.J. 641=11 I.C. 509=10 M.L.T. 288 (P.C.).

——S. 9—*Statutory body—Chairman of Municipality.*

A suit for injunction by a voter against the Chairman of Municipality for his refusal to insert his name in the register of voters on a technical ground is maintainable under C.P. Code, S. 9, Sp. Rel. Act, S. 42 and Bengal Municipal Act., S. 15, pro. 2. (*Teunon and Newbould*, JJ.) MOLLA ATAUL HUG *v.* CHAIRMAN OF MANIKOTTALLA MUNICIPALITY.
24 C.W.N. 969=57 I.C. 960=48 Cal. 378.

——S. 9—*Statutory body—Appointment of trustee by Temple Committee—Power to question.*

The Civil Court can question the appointment of a trustee by the Devastanam Committee, if it is not made reasonably and in good faith. 38 Mad. 1176, (1915) M. W. N. 280; 29 Mad. 534; 21 Mad. 179, rel. (*Abdur Rahim and Spencer*, JJ.) SUBRAMANIA PILLAI *v.* KRISHNASWAMI SOMOYAJIAR.
42 Mad. 668=26 M.L.T. 143=53 I.C. 609=(1919) M.W.N. 522.

——S. 9—*Statutory body—Suit against President of Madras Corporation—Order President to demolish building—Suit for injunction—Maintainability—Mandamus—Madras City Municipal Act, S. 287.*

The Civil Courts have power to entertain a suit against the President of the Madras Corporation for an injunction restraining him from demolishing a building under S. 287, cl. (2) of the Madras City Municipal Act. When a right and an infringement thereof are alleged, a cause of action is disclosed, and unless there is a bar to the entertainment of such a suit the ordinary Civil Courts are bound to entertain the claim. The Standing Committee of the Madras Corporation is not an independent body authorised to settle finally disputes between the tax-payers or house owners and the Corporation whose members they are, and of which they form part and they cannot be treated as a special tribunal constituted to decide claims between the house owners and the

C. P. CODE (V of 1908), S. 10.

Corporation under S. 28 of the Madras Municipal Act so as to oust the jurisdiction of the ordinary Civil Courts. (*Benson*, O. C. J. *and Sankaran Nair*, J.) VALLI AMMAL *v.* CORPORATION OF MADRAS,
38 Mad. 41=23 M.L.J. 531=12 M.L.T. 469=16 I.C. 971=(1912) M.W.N. 1162.

Voluntary Offerings.

——S. 9—*Voluntary offerings—Dignity—Suit in respect of—When cognizable.*

The Civil Courts have no jurisdiction to entertain suits for mere dignity, without any civil right or any office in the nature of property. Suits to claim the profits arising out of voluntary offerings made to the chief priest of a community by the worshippers of saints or by votaries, partake of the nature of those for mere dignity. (*Chandavarkar and Batchelor*, JJ.) NARIDDIN SAHEB *v.* ABAS BAVA SAHEB ZARI.
16 I.C. 338=14 Bom. L.R. 573.

——S. 9—*Voluntary offerings—Suit by co-sharer for share of offerings of a temple—Maintainability of.*

A suit for definite amount due to plaintiff as a co-sharer of the offering of a temple (birt) realised by the deft. is maintainable in the Civil Court. 26 Cal. 356 and 15 W.R. 531, dist. (*Scott-Smith and Broadway*, JJ.) GANGA PERSHAD *v.* MEGH RAJ.
26 P.R. 1919=51 I.C. 236=70 P.L.R. 1919.

——S. 9—*Voluntary offerings—Suit for.*

Unless there is an express contract to make a refund, no suit lies for the recovery of a voluntary offering if that suit is based on mere custom. 2 W.R. 69, foll. and 20 All. 234, ref. to. (*Roe and Jwala Prasad*, JJ.) HIRA PANDEY *v.* BACHU PANDEY.
1 Pat. L.J. 381=35 I.C. 345=2 Pat. L.W. 390.

——S. 10—*Same plea—Deft. sued as heir in former suit—Subsequent suit by former defendant as creditor—Stay.*

Where a decree is obtained against a defendant as heir of the deceased and there is an appeal pending against it during which the deft. sues plff. as creditor of the deceased for dower debt and raised the same plea as was raised in the previous suit, the Court can stay the later suit. (*Piggott and Walsh*, J.) WAHIDUNNISSA BIBI *v.* ZAMIN ALI SHAH.
42 All. 290=55 I.C. 89=18 A.L.J. 145.

——S. 10—*Execution proceedings—Fresh suit—Bar.*

In a suit by the plff. for redemption, plff. got a decree and obtained possession of plots A and B. On deft.'s objections in execution it was found and held that plff. was only entitled to the plot A and not to B. Plff. brought a fresh suit for the recovery of plot B. *Held*, that the matter was *res judicata*. (*Griffin*, J.) BOHRA GAJADHER SINGH, *v.* GIRDHARILAL.
10 I.C. 452.

C. P. CODE (V of 1908), S. 10.

———S. 10—*Interlocutory orders can be passed notwithstanding stay of suit.*

Notwithstanding an order staying suit under S. 10 interlocutory orders such as orders for receiver for an injunction or attachment before judgment could be passed. (*Macleod*, C.J. *and Shah*, J.) SENAJI *v.* PANNAJI.
23 Bom. L.R. 1228=46 Bom. 431=64 I.C. 880=1922 Bom. 276.

———S. 10—*Jurisdiction of High Court—Ordering party not to proceed with a suit in another Court.*

Before an order staying a suit can be made, there must be substantial identity between the matter in dispute and in the matter of parties in the earlier and later suits. The High Court on its original side has power to issue an injunction restraining deft. in a suit before the High Court from proceeding with a suit instituted by him in a moffusal Court in such a way as to delay or embarrass the trial of the suit in the High Court. (*Heaton and Martin*, JJ.) MULCHAND *v.* GILL & CO.
21 Bom. L.R. 963=53 I.C. 518=44 Bom. 283.

———S. 10—*Matters in issue—Parties—difference in.*

S. 10 cannot be applied, if the matter in issue is not the same in the two suits and the parties do not fill the same legal position in two suits. (*Batchelor and Roe*, JJ.) NARSINGJI *v.* RANCHOD BHAI.
9 I.C. 929=13 Bom. L.R. 109.

———S. 10—*Stay of suits—Connected suits—Appeal.*

S. 10 of the C.P. Code does not apply unless the previous suit is before a Court which is competent to grant the relief claimed in the subsequent suit. A landlord instituted two suits for cesses against the tenants and obtained a decree which was appealed against by the tenants. Pending the appeal, the landlord brought a suit for rent against the tenants for a subsequent period and the tenants applied for stay of the suit pending the decision of the appeals. *Held* that this was not a case to which S. 10 of the C.P. Code applied. (*Rankin*, J.) CHOWDHURY JAMINI NATH MULLICK *v.* MIDNAPORE ZEMINDARI CO. 27 C.W.N. 772=75 I.C. 231=1923 Cal. 716.

———S. 10—*Appeal—Pendency of.*

S. 10 is no bar to the trial of a suit for rent for a period between the present and previously instituted rent suits. The expression "matter in issue" in S. 10 refers to the entire subject in controversy between the parties. S. 10 prevents Courts of concurrent jurisdiction simultaneously trying two similar suits in respect of the same matter in issue. Appellate stage of a suit is for many purposes deemed only a continuation of the suit below. 18. M.L.T. 400, ref. (*Mookerjee and Cuming*, JJ.) BEPIN BEHARI MOZUMDAR *v.* JOGENDER CHANDRA GHOSH.
36 I.C. 641=24 C.L.J. 514.

C. P. CODE (V of 1908), S. 10.

———S. 10—*Duty of Court to stay trial—Inquiry into merits*

Under S. 10 a Court has no jurisdiction to decide the question of *res judicata*. The only jurisdiction is to stop the new suit if it finds circumstances warranting such procedure. (*D. Chatterjee and Chapman*, JJ.) SIVAPRASAD RAM *v.* TRICOMDAS. 27 I.C. 917=42 Cal. 926.

———S. 10 and O. 23, R. 1—*Suit withdrawn with liberty on payment of costs—When withdrawal becomes operative*

When leave is given to withdraw on payment of costs, they should be paid at once, for until they are paid there is not withdrawal. (*Jenkins*, C.J. *and Woodroffe*, J.) SADHU CHARAN TEWARI *v.* BAIKUNTHANATH MADAK. 23 I.C. 210=19 C.L.J. 529.

———S. 10—*Partnership suit—Deposit by one partner—Suit for dissolution—Suit between partners when maintainable.*

Pending a suit for dissolution of a partnership, plff., a partner sued for recovery of his deposit from the firm, less his share of the liabilities. *Held*, that the suit was barred by S. 10 as the matter in issue in the suit was directly and substantially in issue in the previous suit. (*Carndaff and Chapman*, JJ.) MOHADEO PRASAD *v.* GAJADHAR PRASAD.
16 I.C. 459=16 C.W.N. 897.

———S. 10—*Order refusing stay—No revision.*

An order under Sec. 10 for stay passed is not a decision of a case within the scope of S. 115, C. P. Code. (*Martineau*, J.) THE FIRM OF ISHAR DAS DHARAM CHAND *v.* THE FIRM OF BUTA MAL DURGA DAS.
67 I.C. 870=4 Lah. L.J. 425=1922 L. 54.

———S. 10—*Applicability.*

S. 10 of the Code does not apply unless every matter in dispute is directly and substantially in issue in the two suits and the parties are the same. (*Martineau*, J.) BISHEN DEVI *v.* BISHENCHAND. 61 I.C. 830.

———S. 10—*Concurrent jurisdiction—Necessity for.*

To attract the operation of S. 10, C.P. Code the suits must be pending in the Courts of concurrent jurisdiction in the sense that the suit to be stayed could be tried in the Court in which the first suit was instituted, 37 I.C. 510, ref. (*Broadway*, J.) PAIRA MAL & SONS *v.* RAJ NARAIN & CO.
53 I.C. 467=114 P.R. 1919.

———S. 10—*Trial in contravention of—Not a nullity.*

C. P. CODE (V of 1908), S. 10.

A decree passed contrary to the provisions of S. 10 is not a nullity and cannot be disregarded in execution proceedings. (*Scott-Smith*, J.) SHEOPAT RAI *v.* WARAK CHAND.
22 P.R. 1919 = 46 I.C. 419 =
42 P L.R. 1918 = 93 P.W.R. 1918.

——S. 10—*Applicability of.*

S. 10 does not apply where the previously instituted suit is pending in a Court having no jurisdiction to try the same. (*Rattigan*, J.) JAHANGIR SINGH *v.* HIRA.
157 P.W.R. 1914 = 26 I.C. 282 =
283 P.L.R. 1914.

—— S. 10—*Stay of suit—Suit not between the same parties—Common questions.*

S. 10, C.P. Code does not authorise the stay of a subsequently instituted suit where the prior and the subsequent suits are not between the same parties or between parties under whom they or any of them claim, litigating under the same title, even though the two suits involve some common questions. 42 A. 290; 42 C. 926, Ref. (*Odgers*, J.) RAMAKRISHNA PILLAI *v.* KRISHNASWAMI PILLAI. 15 L W. 667 =
68 I.C. 167 = (1922) M W.N. 521 =
1922 Mad. 321.

—— S. 10—*Stay of suit—Common issues—Same parties.*

An applicant under S. 10, C.P. Code, for stay of a suit is bound to show that the "matter in issue" in the suit is directly and substantially in issue in the previously instituted suit. It is not sufficient that there are some issues common to the two suits. The matters in issue in the two suits must be identical. The Court cannot apply S. 10 where the determination of the two suits depends not merely upon the decision of the common issue but also of other and entirely different issues. 24 C.L.J. 514 foll. (*Venkatasubba Rao*, J.) KOTA SREERAMULU *v.* KOTA SREERAMULU.
15 L W. 646 = 70 I C. 682 =
31 M.L.T. 360 H.C. = 1922 Mad. 304.

——S. 10—*Scope of.*

S. 10, does not make the trial of the later suit without jurisdiction unless it is between parties under whom the parties in the earlier suit claim litigating under the same title. (*Oldfield and Sadasiva Aiyar*, JJ.) SADAGOPACHARIAR *v.* RAMA TIRUMALA CHARIAR.
31 I C. 25.

—— S. 10 and O. 41, R. 32—*Appeal—Previously instituted suit pending—Subsequent suit to be stayed.*

When an appeal has been preferred from a decree in a previous suit, the Court shall stay proceedings in a subsequent suit dealing with the same subject-matter till the appeal is decided. (*Seshagiri Aiyar*, J.) CHINNAKARUPPAN CHETTY *v.* MEYAPPA CHETTY.
18 M.L.T. 400 = 30 I C. 753 =
(1915) M.W.N. 814.

C. P. CODE (V of 1908), S. 10.

——S. 10—*Scope of.*

S. 10 bars only the *trial* of suits and in this there is no difference between the old and new Codes. (*Seshagiri Aiyar*, J.) VENKATESWARA AIYAR *v.* CHERRSERI MADATHIL RAVUNNI NAIR.
27 M.L.J. 405 = 25 I C. 597 =
(1914) M.W N. 740.

——S. 10—*Concurrent jurisdiction—Stay order.*

Concurrent jurisdiction of both Courts is an essential requisite for a stay order under S. 10; 11 All. 148, foll, 4 C.L.R. 282; dist. (*Mitra*, A. J. C.) GOPIKISHAN *v.* PADMARAJ.
37 I.C. 510 = 12 N.L.R. 175.

——S. 10—*Appeal—Pending before Privy Council.*

For the validity of an order for stay of a subsequent suit, on account of pendency of an appeal before His Majesty in Council, some matter must be common in substance and directly in issue in both the suits or the appeal and the subsequent suit, without any reference to the nature of the relief claimed. Plaintiff got a decree for joint possession with the defendants who appealed to the Privy Council. Plffs. then sued them for profits in the Revenue Court, where also question of title was raised. *Held*, that the subsequent suit could be stayed under S. 10. (*Lindsay*, J. C.) WAHID ALI *v.* NASRAT ALI. 23 O.C. 214 = 7 O.L J. 520 =
38 I.C. 629 = 2 U P.L.R. (J. C.) 165.

—— S. 10—*Parallel suits—Stay.*

The fact that the result in the subsequent suit, will be largely affected by the decision in the previous suit, still pending, is not sufficient for the application of S 10, C.P.C. (*Stuart*, J.C. *and Daniels*, A.J.C.) SITAL SINGH *v.* SITLA BAKHSH SINGH. 30 I.C. 212 =
6 O L J. 96.

——S. 10—*Appeal—Disputes to be indentical.*

To attract S. 10, C. P. Code, every matter in dispute should be directly and substantially in issue in the two suits. A suit for arrears of pension for a subsequent period was not stayed pending a Privy Council appeal between the parties against the decision in a former suit for pension for an earlier period. 11 All. 148; dist. 24 C.L.J. 514. rel. (*Mullick and Jwala Prasad*, JJ.) KESHO PRASAD SINGH *v.* SHIVA SARAN LAL. 4 Pat. L.J. 557 = 31 I C. 36 =
1919 Pat. 284.

——S. 10—*Burden of proof.*

The onus is on the deft. to produce such documents as will satisfy the Court that the case comes under S. 10 of C. P. Code. (*Chamier*, C. J. *and Roe*, J.) AKBAR ZAMANKHAN *v.* SHEO PARASHANLAL. 39 I C. 903 =
3 Pat. L.W. 327.

——S. 10—*'Having jurisdiction to grant the relief claimed'—Meaning of.*

C. P. CODE (V of 1908), S. 10.

The words "Court having jurisdiction to grant the relief claimed" in S. 10, C. P. Code, have no reference to territorial jurisdiction. The rule as to stay of suit, though based on principles similar to those underlying the rule of *res judicata* is not part of the rule of *res judicata*. It is further intended to save inconvenience to parties of litigating over the same matter in two places especially when the two places are far apart. (*Twomey*, C.J. *and Robinson*, J.) KHEMCA *v.* BOGLA. 13 Bur. L.T. 19 = 37 I.C. 904 = 10 L.B.R. 154.

———S. 10—*Stay of suit—Court having jurisdiction to grant relief.*

For a stay of a suit under S. 10, C. P. Code, identity of the relief is no longer essential. If the matter in issue in the two suits is the same, the latter suit must be stayed without regard to the relief sought. The words "jurisdiction to grant the relief claimed" do not mean territorial jurisdiction and the latter suit must be stayed, if the matter in issue is the same as in the first suit, although the Court in which the first suit was instituted, has no territorial jurisdiction over the subject-matter of the latter suit. (*Twomey*, C.J. *and Robinson*, J.) M. BOGLA *v.* M. KHEMCA. 55 I.C. 254 = 12 Bur. L.T. 203.

———Ss. 10 and 11—*Applicability of—Miscellaneous proceedings—Law of procedure.*

The word "suit" in S. 10, C.P. Code, includes appeals and miscellaneous proceedings also. S. 141, C.P. Code, is wide enough to make the provisions of S. 10, C.P. Code, apply to arbitration proceedings One of the essential conditions to attract the applicability of S. 10, C.P. Code, is, that the same party must be concerned in both the proceedings or the parties under whom any of them claim, litigating under the same title. (*Raymond*, A.J.C.) *In the matter of* FIRM OF JAINARAYAN BALU LAL. 66 I.C. 796 = 1922 Sind 6.

———S. 10—*Suits—Application to file award.*

Applications to file awards, though not suits are governed by the same principles of general law, as S. 10. 29 Cal. 167; 6 All. 267, Con. (*Waley Cohen*, A.J.C.) MAC DONALD & CO. *v.* GEORGE D'EMDEN. 9 I.C. 707 = 4 S.L.R. 187.

———S. 11.

ADVERSE FINDING.
APPEALABILITY.
APPLICABILITY AND SCOPE.
CAUSE OF ACTION.
CO DEFENDANTS.
COMPETENT COURT.
COMPROMISE OR CONSENT DECREE.
CONNECTED OR CROSS APPEALS AND SUITS.
CO-PLAINTFFS.
DIRECTLY AND SUBSTANTIALLY IN ISSUE.
EXECUTION PROCEEDINGS.

C. P. CODE (V of 1908), S. 11—Adverse Finding.

Ex parte DECREE.
FRAUD.
HEARD AND FINALLY DECIDED.
ISSUE OF FACT.
ISSUE OF LAW.
JUDGMENT *In Personam*.
JUDGMENT *In Rem*.
LEAVE TO WITHDRAW SUIT.
LITIGATING UNDER THE SAME TITLE.
MIGHT AND OUGHT.
MINOR.
MISCELLANEOUS PROCEEDINGS.
PARTIES AND REPRESENTATIVES.
PLEA OF.
PRIOR DECISION.
REPRESENTATIVE SUIT.

———S. 11 (Old Section 12).

See also C. P. CODE, O. 2, R. 2.

Adverse Finding.

———S. 11—*Adverse finding*—Res judicata.

An adverse finding against the defendants in whose favour a decree is passed will not sustain a plea of *res judicata* but will lay *onus* on them of displacing the finding. (*Lord Dunedin.*) MIDNAPUR ZEMINDARY CO., LTD. *v.* NARAYAN ROY. 48 Cal. 460 = 14 L.W 265 = 30 M.L.T. 279 = 64 I.C. 231 = 48 I.A. 49 = 1922 P.C. 241 (P.C.)

———S. 11—*Adverse finding—Decision in spite of finding.*

The bar of *res judicata* is not applicable, for though no doubt the issue as to the custom of exclusion of females from inheritance was heard and decided, it was not finally decided, because it was not necessary for the decision which the Court came to, *i.e.*, dismissal of the suit, and the plaintiff, had no opportunity of appealing against the Court's finding on that issue. (*Macleod*, C.J. *and Heaton*, J.) BAI NATHI *v.* NARSHI DULLABH. 44 Bom. 321 = 38 I.C. 322 = 22 Bom. L.R. 64.

———S. 11—*Adverse finding—Collateral issue—Decision not* res judicata.

Where in a suit for ejectment and arrears of rent, the suit was dismissed on the ground that the defendant was a tenant from year to year and no notice to quit was served on him, the decision on the nature of the tenancy is not *res judicata* in a subsequent suit where defendant sets up a permanent tenancy. *Per Heaton*, J.—Where a finding is followed by a result which would equally follow from something essentially different, then it cannot be supposed that finding is a final decision. It is merely an expression of opinion and nothing more. *Per Pratt*, J.—The question whether an issue was subsequently raised and decided is one of fact. Although no rule of general application can be laid down, yet when a decree of the Court is not based upon a finding but was made in spite of it, that finding cannot be *res judicata*. (*Heaton and Pratt*, JJ.) DADUBHAI *v.* DAYARAMA. 43 Bom. 368 = 51 I.C. 109 = 21 Bom. L.R. 363.

C. P. CODE (V of 1908), S. 11—Adverse Finding.

———S. 11—*Adverse finding—Decision not embodied in decree—Issue not material.*

The plff. sued in 1910, to eject the deft. from certain lands, praying that the *mulgeni* lease executed by a predecessor-in-title of his was invalid and not binding on him, and that the plff. was entitled to evict that deft. as a yearly tenant. The Court decided the first point in the plff.'s favour ; but held that for want of notice the plff. was not entitled at that stage to evict the deft. After due notice was given, the plff. again sued the deft. in ejectment. The deft. cannot plead once more the *mulgeni* lease in his favour, as the defence was barred by *res judicata*. (*Beaman and Heaton*, JJ.) MOTA HOLIAPPA *v.* VITHAL GOPAL HABBU.
40 Bom. 662=36 I.C. 74=18 Bom. L.R. 712.

———S. 11—*Adverse finding—Decree in favour of party—Effect.*

Where a decree is one of dismissal in favour of the defendant, but thereis an adverse finding against him on one point, he cannot appeal and there is no question of *res judicata*. Cases where a decree is based on two grounds either of which is sufficient to support the decree, stand on a different footing. (*Chatterjee and Pearson*, JJ.) RAJENDRA KISHORE CHOUDHURY *v.* KUMUD BAN MAHATA. 67 I.C. 271=1923 Cal. 297.

———S. 11—*Adverse finding—Finding unnecessary for decision—No right to appeal.*

A judgment-debtor cannot appeal from an order dismissing an application for the execution of a decree by reason of the decree-holder having failed to fulfil a condition as to the execution and registration of a lease in favour of the judgment-debtor. In order to give the judgment-debtor a right of appeal, the finding must be one that would operate as *res judicata*, (*Fletcher and Cuming*, JJ.) HAZARI LAL *v.* ALAP SUNDARI DASI. 53 I.C. 558.

———S. 11—*Adverse finding—Decision in spite of—Not* res judicata.

The findings in favour of the plff.'s title in prior rent suits could not operate as *res judicata* on the question of the plff.'s title as the decrees in rent suits were not based on those findings but were passed in spite of those findings. 13 Cal. 17 ; 18 Cal. 647 ; 11 Cal. 301, rel. (*Newbould and Panton*, JJ.) MANINDRA CHANDRA NANDY *v.* PANCHANAN BANDHOO.
49 I.C. 248.

———S. 11—*Adverse finding—Finding not incorporated in the decree and not the basis of the decree.*

The finding upon a stray point not forming basis of a decree and not entered in the decree so as to admit of an appeal by the party aggrieved, cannot be held as finally decided and to operate as *res judicata*. (*Chatterjee and Beachcroft*, JJ.) FAZIL *v.* HARI KISHORE CHAKKRAVARTHI. 33 I.C. 620.

———S. 11—*Adverse finding—Dismissal of suit.*

C. P. CODE (V of 1908), S. 11—Adverse Finding.

The plff. brought an enhancement suit against the deft.—his tenant. The decision was that the plff. had the right to sue for enhancement, but the rent being equal to that paid by the adjoining tenants could not be raised. The plff. again sued for enhancement of rent. *Held*, the decision was not *res judicata* and did not debar the deft. from objecting to the decision in the first suit as regards the plff.'s right to bring the suit. (*Harrington and Mookerjee*, JJ.) PARBATTY DEBYA *v.* MATHURA NATH BANERJEE. 40 Cal. 29=16 C.W.N. 877=15 I.C. 453=16 C.L.J. 9.

———S. 11—*Adverse finding—Appeal—Co-defendant.*

A decision in a former suit is not *res judicata* unless it was necessary for the decree in that suit. A decision as to the rights and liabilities of the defts, *inter se* operates as *res judicata* and bars further litigation. But if the decree in the former suit had been simply one dismissing the suit, without any decision on the merits, the decision would not be *res judicata*. (*Chevis*, A.C.J.) ABHE SINGH *v.* BINODE LAL.
2 Lah. L J. 605.

———S. 11—*Adverse finding—Decision in spite of—Not* res judicata.

Where a finding has been arrived at on a matter which is not necessary for the disposal of the suit and it is not made the basis of the decree, which is given in spite of it, the matter cannot be said to have been substantially in issue between the parties and consequently the finding cannot operate as *res judicata* in a subsequent suit. 11. Cal. 301 ; 18 Cal. 647 ; 40 Cal. 29 ; 17 M.L.T. 85 ; 2 Pat. L.J. 159, *Ref.* For a matter to be in issue under S. 11, it is not necessary that an express issue should be framed on it but is sufficient if a decision about it is necessary for the decree. A finding on a question in an appealable suit when the decree is in favour of the party against whom that finding is given, is not final so as to constitute *res judicata* under S. 11. (*Ayling and Krishnan*, JJ) MEETHALA VEETIL KAITHERI KERU NAMBIAR *v.* NARIKOTT CHATHU NAMBIAR.
23 M.L.T. 66=9 L.W. 84=52 I.C. 258=(1919) M.W.N. 34.

———S. 11—*Adverse finding—Not appealable—Effect of.*

The fact that a party against whom an issue is found has no right of appeal does not affect the rule of *res judicata*. Where a decree is not based on a finding on an issue but in spite of it there can be no *res-judicata*. Where the finding on an issue is unnecessary but still it is embodied in the decree itself it operates as *res-judicata*. Where a judgment is based on findings on more than one issue but it is doubtful as to on which issue the final conclusion is based, then the decision on all issues is *res judicata*. Where the decision of an issue is necessary but the party against whom the finding is made, could not appeal, as the final decree is in his favour, the decision on that issue

C. P. CODE (V of 1908), S. 11—Adverse Finding.

is *res judicata*. (*Seshagiri Aiyar and Bakewell*, JJ.) MUTHAYA CHETTI *v.* KANTHAPPA CHETTI. **34 M.L.J. 431=7 L.W. 482=28 M.L.T. 291=45 I.C. 975 (1918) M.W.N. 384.**

——— **S. 11—*Adverse finding—Appealability.***

A party aggrieved by a finding in the decree favourable to him has no right of appeal, unless the finding is necessarily implied in the decree and has prejudiced the party wishing to appeal. Such a finding would not operate as *res judicata*, when the decree is based on independent grounds and was not implied in the decree. (*Ayling and Spencer*, JJ.) SECY. OF STATE *v.* SWAMINADA GOUNDEN. **37 Mad. 25=21 M.L.J. 947=10 M.L.T. 291=12 I.C. 157=(1911) 2 M.W.N. 303.**

——— **S. 11—*Adverse findings—Unnecessary findings.***

If a finding arrived at on a certain issue is sufficient to completely dispose of the case, other findings on other issues are not a final decision of the matter covered by them, and do not operate as *res judicata*. (*Stuart and Kanhaiya Lal*, A.J.Cs.) IZZAT-UN-NISSA BEGAM *v.* KANIZ FATIMA BEGUM. **19 O C. 69=36 I.C. 643=3 O.L.J. 677.**

———**S. 11—*Adverse finding—Not* res judicata, *if decree favourable.***

Where a point is incidentally decided against a party, but the case is ultimately decided in his favour, he is not entitled to appeal against that decision and the finding on that point does not operate as *res judicata* in a subsequent suit. (*Tweedy, S.M. and Holms*, J.M.) JAGANNATH *v.* SURAJ BAKSH SINGH. **80 I.C. 502=2 O.L.J. 386.**

———**S. 11—*Adverse finding—Decree in favour of parties—Appeal.***

Where the decree is in favour of a party an adverse finding in the judgment would not operate as *res judicata*, for such a finding would not be open to appeal. (*Roe and Ali Imam*, JJ.) SHARFUNNESSA *v.* NAZNI KHANUM. **44 I.C. 723=3 Pat. L.J. 178.**

———**S. 11—*Adverse finding—Appealability.***

An unfavourable finding on a necessary point may be appealed against though the decree is favourable and may constitute *res judicata*. (*Mullick*, J.) RAGHUNATH *v.* DEO NARAIN RAI. **40 I.C 771.**

———**S. 11—*Adverse finding—Mere expression of opinion in a judgment—Judgments and pleadings, if to be examined.***

However definite a finding may be, it will not operate as *res judicata* when it is not the basis of the decision. A finding in a suit will operate as *res-judicata* in a subsequent suit against a party, when he has a right of appeal. The words in S. 11 "has been heard and finally decided by such Court" apply to what has been decided by the decree which cannot by a bare wording of the decree be ascertained. *Res judicata* is a matter of substance and not of form. In order to ascertain what matter directly and substantially in issue was heard and finally decided, the pleadings and the judgment should be examined. 16 Cal. 173; 11 Cal. 301. ref. (*Chamier*, C.J. *and Sharfuddin*, J.) MITTAN PODDAR *v.* JADAB CHANDRA CHATTOPADHYA **2 Pat. L.J. 189=38 I C. 211=1 Pat. L.W. 221.**

C. P. CODE (V of 1908), S. 11—Applicability and Scope.

Appealability.

———**S. 11—*Appealability—Unappealable finding.***

Unappealable finding is even *res judicata*. 24 Cal. 900 foll. (*Rattigan*, J.) JHANDA *v.* BUDHA. **99 P.W.R. 1913=19 I.C. 399=156 P.L.R. 1913.**

———**S. 11, Expl. II—*Appealability—Not the test—Suit under old Code in which no second appeal lay.***

S. 11, Expl. II does not bar a suit brought under C.P.C. (1908) when a previous suit on the same was brought and decided under the old Code which permitted no second appeal. (*Spencer and Coutts-Trotter*, JJ.) RAJAH OF KALAHASTI *v.* SWARNAM KAMAKSHAMMA. **31 I C. 214=29 M.L.J. 535.**

Applicability and Scope.

———**S 11—*Applicability and scope—Section is not exhaustive.***

A question at issue between the parties once heard and finally decided, binds the parties at subsequent stages of the same suit, under general principles of law though not under S. 11. But for such a principle, there would be no end to litigation. 6 All. 269 (P.C.), foll. (*Lord Buckmaster.*) GEORGE HENRY HOOK *v.* ADMINISTRATOR-GENERAL OF BENGAL. **48 Cal. 499=48 I.A. 187=19 A.L.J. 366=40 M.L.J. 423=29 M.L T. 336=(1921) M.W.N. 313=38 C.L.J. 405=3 U.P.L.R. (P.C.) 17=23 Bom. L.R. 648=25 C.W.N. 915=60 I.C. 681 14 L.W. 221 (P.C.).**

———**S 11—*Applicability and Scope of.***

The pre-emptor impleaded in his suit only one out of the four brothers, alienees out of the property purchased, due to a mistake of fact. His suit was decreed, and the entire consideration having been realised by the alienee who was impleaded, he was given formal possession. His application for mutation was resisted by the three brothers of the alienees who were not impleaded and their objection was allowed except for ¼ share. In a suit for the possession of the property released in favour of the three brothers or in the alternative for a proportionate refund of the pre-emption money, it was found that the four brothers were separate. *Held*, S. 11 had obviously no application. (*Kanhaiya Lal*, J.) RAM BALI SINGH *v.* SHIAM SUNDER MISIR. **1922 All. 475.**

———**S. 11—*Applicability and scope*—Res judicata—*Estoppel—Difference between.***

C. P. CODE (V of 1908), S. 11—Applicabilty and Scope.

Estoppel is not the same as *res judicata*. Estoppel does not allow a man to make a statement contrary to one already made while *res judicata* does not allow a man to raise the same point again. (*Beaman*, J.) PEERBHOY *v.* EBRAHIM. **13 Bom. L R. 717=12 I C. 225=36 B. 214.**

——S. 11—*Applicability and scope—Rent suit—Decision when* res judicata.

The decision in a rent suit is conclusive upon one point and one point alone, namely, that the defendants were not the tenants of the plaintiff during the years for which rent was then claimed. (*Mookerjee and Chotzner*, JJ.) SYAM LALL NASUA *v.* BRINDABAN CHANDRA. **72 I.C. 655.**

——S. 11—*Applicability.*

S. 11, C.P.C. has obviously no application in a suit for declaration that the rent decree and the sale consequent thereon were fraudulent. (*Mookerjee and Walmsley*, JJ.) GIRIBALA DASI *v.* NITYA LAL SINHA. **41 I.C. 905.**

——S. 11, Ex. (1)—*Applicability of—All stages of the suit.*

The rule of *res judicata* is applicable to all the stages of a suit and is not confined to Courts of first instance. 11 All. 148, foll; 16 Cal. 233, not foll. If the same question is in controversy, the final decision in the latter suit if given earlier, operates as *res judicata* in the earlier suit whose final stage is reached, later. (*Mookerjee and Beachcroft*, JJ.) MIDNAPORE ZEMINDARY CO, LTD. v. NITYA KALI DASI. **24 I.C. 243.**

——S. 11—*Applicability—Doctrine one of substance—Liberal interpretation.*

The doctrine of *res judicata* should not be unduly conditioned and qualified by all sorts of ingenious attempts at evasion, where there has been in fact a fair contest on a question in dispute between the parties and the Court intended to give and has given a final decision on that question. 36 M.L.J. 541, foll. (*Abdul Raoof*, J.) KALU *v.* NUPU. **67 I.C. 755.**

——S. 11—*Applicability—Decree for sale on mortgage—Purchase—Dicision of suit after mortgage but before purchase, not* res judicata.

A purchase in auction sale in execution of a mortgage decree for sale as also the proceedings in which the decree was obtained are part of the working out of the rights of the mortgagee under his mortgage. The rights of the purchser are not therefore affected by *res judicata* by the decision in a suit subsequent to the mortgage though previous to the purchase. (*Oldfield and Venkatasubba Rao*, JJ.) RAYABHARAN SARAMMA *v.* DEVAPURAJALA GANGAYYA. **1922 Mad. 390 (1)**

——S. 11—*Scope of—Not exhaustive.*

The section does not cover all cases of estoppel by judgment. (*Sundara Aiyar and Phillips*, JJ.) SAYAM RAMA MURTHI DHORA *v.* SECRETARY OF STATE. **46 Mad. 131=19 I C. 656=24 M.L.J. 469. See also 29 M.L J 558=38 M.L.J. 108=38 M L.J 266=40 All. 593 (P.C)**

C. P. CODE (V of 1908), S 11—Applicability and Scope.

——S. 11—*Scope of.*

The law of *res judicata* does not compel the Court trying the later suit to hold the previous decision to be correct. It merely estops the parties from proving that it is incorrect. (*Miller and Munro*, JJ.) VALESWARA AIYAR *v.* MUTHUKRISHNA AIYAR. **21 M.L.J. 87=9 I.C. 686=9 M.L.T. 288.**

——S. 11—*Applicability and scope.*

S. 11 of the Code of Civil Procedure takes no note of the fact whether the cause of action is the same or different. The only matter for investigation is whether the matter directly and sustantially in issue, has been directly in issue in a former suit between the same parties or between parties under whom they or any of them claim; and it is upon this investigation that the question of *res judicata* must, in each case be decided. (*Das and Kulwant Sahay*, JJ.) RAM LALL MALICK *v.* DEODHARI RAI. **2 Pat. 772=74 I C. 781=5 Pat L.T. 7.**

——S. 11—*Applicability — Persons who hold under a party to suit—Transaction prior to suit.*

S. 11, C.P.C. does not apply to persons who hold under a party to a suit in virtue of a transaction made prior to the decision of that suit, (*Pipon*, J.C.) GHULAM HAIDAR *v.* MANAGER, COMMITTEE SAMADH BABA PHULA SINGH. **73 I.C. 711.**

S. 11—*Applicability and scope*—Res judicata *and Estoppal—Distinction.*

The doctrine of *res judicata* is sometimes treated as a branch of the doctrine of estoppel and is referred to as estoppel by judgment. The doctrine of estoppel properly so called is dealt with in S. 115 of the Evidence Act. There is a difference in the principle upon which the two doctrines are based. *Res judicata* in this country is founded on the principle that there should be an end to litigation as to as any issue has been directly determined between them by a Court of competent jurisdiction; and it affects not only the original parties but all others afterwards claiming under them and litigating under the same title. It bars fresh litigation at the outset. Estoppel is a rule of evidence based on the principle that a man who by his acts or statement has induced another to believe a thing to be true should not afterwards be heard to deny the truth of that thing to the prejudice of the other who acted upon the belief so induced. (*Dawson Miller*, C.J. *and Coutts*, J.) KALI DAYAL *v.* UMESH PRASAD, **3 Pat. L.T. 506=1 Pat. 174=(1922) Pat 63=67 I.C. 256=1922 Pat. 33.**

C. P. CODE (V of 1908), S. 11—Cause of Action.

Cause of Action.

———S. 11—*Cause of action—Unnecessary party is not bound.*

A Hindu daughter with limited estate joining her minor son who was an unnecessary party : to the suit against her cannot bind her son's interest by compromise in the suit so as to create a bar of *res judicata*. (*Ryves and Gokul Prasad*, JJ.) NARAIN SINGH *v.* RAJ KUMAR SINGH. 55 A. 928=L.R. 3 A. 229=66 I.C. 62=20 A.L.J. 251=1922 All. 217.

———S. 11—*Cause of action—Decree—Effect suit for claim against agent or principal—Decree.*

Where a person sued claiming a sum from the agent or the principal and his claim was decreed against the agent, *held* his remedy was exhausted and he could not get any decree against the principal. (*Sunder Lal*, J.) MANGI PRASAD SINGH *v.* RAKHPAT SAHAI. 25 I.C. 132.

———S. 11—*Cause of action—Suit on possession—Suit on title.*

A lady inherited part of the property of her husband on his death and took possession of the rest as in lieu of dower. Her heirs brought a suit against her for possession. It was decreed. The defts. (plffs.) in subsequent suit brought a suit to recover possession of ¾th of the widow's husband's property. *Held*, the present suit was not excluded by *res judicata* by reason of the former one by defts. against the plffs. The decision in a suit based on a possessory right is no bar to a subsequent suit on title. (*Banerjee*, J.) JAMADAR *v.* IMAM BAKHSH. 16 I.C. 431.

———S. 11—*Cause of action—Different—No bar to suit against person in possession on basis of sale certificate.*

J and his two minor sons purchased a certain property at an auction sale. K, subsequently brought a suit against J alone for possession of a portion of the property and won that suit. Afterwards D, one of the sons of J, brought the present suit against K, to recover possession of the property on the basis of the sale certificate. *Held*, that the suit was not barred by *res judicata*. (*Piggott*, J.) DEO DAYAL *v.* KALICHARAN. 14 I.C. 745.

———S. 11—*Cause of action—Different—Fresh suit.*

Dismissal of a previous suit for declaration of title by adverse possession is no bar to a subsequent suit for declaration of title on the same ground provided, adverse possession for more than 12 years before suit, but after the date of institution of the first suit, is proved. (*Stanley*, C.J. *and Griffin*, J.) GAJADIP NARAIN SINGH *v.* BILLER SINGH. 33 All. 463=9 I.C. 572=8 A.L.J. 324.

———S. 11 and O. 2, R. 2.—*Cause of action—Different mortgages.*

C. P. CODE (V of 1908), S. 11—Cause of Action.

Dismissal of a suit for redemption of an oral mortgage on the ground that no such mortgage existed is no bar to a subsequent suit for redemption of another mortgage found to be subsisting during the course of the previous suit. 22 M. 259, dist.; 29 M. 153, foll. (*Stanley*, C.J. *and Banerjee*, J.) KAM SAHAI *v.* AHMADI BEGAM. 33 All. 302=9 I.C. 63=8 A.L.J. 47.

———S. 11—*Cause of action—Partition suit—Prior suit for partition under a will and partition deed—Dismissal.*

A prior suit for partition by metes and bounds and possession of property on the strength of a partition effected by the father of a joint Hindu family and a will made by him was dismissed on the ground that the partition was unfair and the plaintiff was refused leave to amend the plaint by claiming a general partition of joint family properties. Subseqently, the plaintiff sued for partition as a member of a joint Hindu family. *Held* that the subsequent suit was not barred by *res judicata*. The first suit was founded on a distinct and separate cause of action, *viz.*, the partition deed and the plaintiff was under no obligation to sue in the alternative for partition as joint family property. (*Macleod*, C.J. *and Crump*, J.) MAHADEVAPPA *v.* KASHI RAO. 25 Bom. L.R. 797=1923 Bom. 467.

———S. 11—*Causes of action—Difference in—Essentials for the application of the principle.*

In order that a judgment may operate as *res judicata* in a subsequent suit, the cause of action in the latter must be precisely the same as in the former suit. A fresh assignment in respect of a tort subsequent to that originally sued upon will not come within the scope of the first judgment so as to bar a second suit. (*Scott*, C. J. *and Batchelor*, J.) GOVIND *v.* JIJIBAI SAHEB. 36 Bom. 189=13 I.C. 849=14 Bom. L.R. 9.

———S. 11—*Cause of action — Suit for arrears of rent—Subsequent suit for ejectment.*

Where a suit for arrears of rent, was dismissed on the ground that no relationship of tenancy existed, a subsequent suit on title for ejectment is not barred by *res judicata*, by reason of the decision in the former suit. (*Mookerjee*, C.J. *and Fletcher*, J.) MRIGENDRA NATH SAHA *v.* KRISHNA CHANDRA SAHA. 61 I.C. 201=33 C.L.J. 334.

———S. 11—*Cause of action—Two mortgages of the same property in favour of the same person.*

Where two successive mortgages are created on the same property by the same debtor, in favour of the same creditor, the creditor, may either sue on the first, including the claim as to the second or sue separately on each claim and he is not debarred from adopting the latter procedure either by S. 11, Expl. IV or O. 2, R. 2. (*Asutosh Mukerji*, A.C.J. *and Flecther*, J.) NILU ROY *v.* ASIRABAD MANDAL. 33 C.L.J. 232=60 I.C. 809=25 C.W.N. 139.

C. P. CODE (V of 1908), S. 11—Cause of Action.

——S. 11—*Cause of action—Award not in terms of reference—Decree in terms of.*

A decree on an award which is not strictly in accordance with the terms of reference, will nevertheless operate as *res judicata* in a subsequent suit on the same cause of action. (*Newbould*, J.) SIBNATH SAHA *v.* MOHESH CHANDRA SAHA. **59 I.C. 89 (2).**

——S. 11—*Causes of action—Different—No bar.*

Dismissal of suit for declaration of title for survivorship is not *res judicata* on plff.'s claim in a subsequent suit for declaration that certain alienations shall bind reversion. (*Fletcher and Huda*, JJ.) HARA NARAIN BERA *v.* SHRIDHAR PANDE. **47 I.C. 2.**

——S. 11—*Causes of action—Difference in.*

A previous suit in which plffs. denounced the mortgagor's alienations in the capacity of reversioners is no bar to a subsequent redemption suit by the plffs. as representatives of the mortgagors. The two suits are based on different causes of action. (*Johnstone*, C. J.) SHAM SINGH *v.* GAMAN. **172 P.W.R. 1916= 37 I.C. 447=52 P.L.R. 1917.**

——S. 11—*Causes of action—Previous suit for declaration that a certain land was Shamilat Deh—Subsequent suit for declaration of title—Not barred.*

Where the only issue in a previous suit between the parties was whether a certain land was *Shamilat Deh*, a subsequent suit for possession on the ground that the defts. had no right, the *Shamilat Deh* is not barred by *res judicata* as the plff. in the previous suit need not have urged that the defts. had no right. (*Johnstone and Rattigan*, JJ.) JANKHAN *v.* AHMAD. **24 P.W.R. 1912= 13 I.C. 445=134 P.L.R. 1912.**

——S. 11—*Cause of action—Second suit on the same cause of action.*

Under a compromise A and B were bound to pay maintenance to C every year. A paid the whole amount for two years and sued B for contribution. The appellate Court rejected the plaint as disclosing no cause of action because the compromise did not contain any clause as to compromise. A then sued again on the same cause of action and the same subject-matter. *Held*, the suit was barred. (*Sadasiva Aiyar and Napier*, JJ.) SANTHA NATH AMMAL *v.* ISSAKI SUPPAN ASSARAN. **(1920) M.W.N. 616=60 I.C. 894= 12 L.W. 457.**

——S. 11—*Cause of action—Mortgage suit—Questions as to rent or set-off.*

Where a mortgage has ripened, all claims relating to the mortgage between parties thereto, must be determined in one suit, whether for sale, foreclosure or redemption. Where in a mortgage suit, the deft. omits to put forward a counter claim due to him by the mortgagee, arising out of the mortgage trans-

C. P. CODE (V of 1908), S. 11—Cause of Action.

action, a separate suit for such recovery is barred. (*Sadasiva Aiyar and Spencer*, JJ.) AMSENAMMAL *v.* MEENAKSHI. **60 I.C. 226=12 L.W. 173.**

——S. 11—*Cause of action—C.P. Code, O. 9, R. 9—A suit for declaration—Dismissal for default—Subsequent suit for possession.*

A suit for declaration that an alienation in favour of the deft. is invalid, was dismissed for default. The plff. subsequently sued for partition and possession of a share. *Held*, the cause of action being different, the suit is not barred. R. 9 bars a suit where the cause of action is the same. (*Ayling and Krishnan*, JJ.) ASIA BIVI *v.* SEHU MOHAMMAD ROWTHER. **39 M.L.J. 412= 60 I.C. 201=12 L.W. 431.**

——S. 11—*Cause of action—Decree—Decree for ejectment of tenant on payment of compensation—Fresh suit for ejectment.*

A landlord obtained a decree for ejectment against a tenant on payment of statutory compensation but allowed execution of the decree to become barred by limitation. *Held*, he cannot institute a fresh suit for ejectment. 23 Mad. 629, diss; 25 Mad. 300, ref. Per *Wallis*, C.J. Ordinarily when a person has a cause of action and brings a suit upon that cause of action, it is merged in the decree and is *transit in red judicatum* and then his remedy is in execution, and if he does not enforce his remedy and allows it to become barred his rights are gone. (*Wallis*, C.J. *and Sadasiva Aiyar*, J.) NYNAM VEETIL MAYAN KUTTI *v.* VALAPPILAKATH KUNHAMMAD. **41 Mad. 641= 34 M.L.J. 167 = =23 M.L.T. 156= 44 I.C. 110 = (1918) M.W.N. 205= 7 L.W. 143.**

——S. 11—*Cause of action — Difference in —Former suit on title—Subsequent suit to accept* karar—Res judicata.

A former suit establishing plff's right as *poojari* but that her right to sue for a share in the offerings without offering a *karar* to the deft. does not exist, is no bar to a second suit to compel the deft. to accept a *karar* and thus give a share in the offerings. 31 M. 385, 17 I.C. 445, dist. (*Sadasiva Aiyar and Spencer*, JJ.) SRI SHUKRETENDRA SWAMULAVARU *v.* POOJARI RINDIMMA, **21 I.C. 984.**

——S. 11, Expl. IV—*Cause of action—Not put forth in prior suit—Subsequent suit—Bar.*

In a suit for possession, plff. must establish his title in that very suit by urging and proving all that would go to establish his title. He cannot reserve one or more of such grounds for a future suit. If plff. sues for property on a false claim when he has a true claim and a cause of action for the same property of which he is aware, he must be taken to have abandoned his true claim and cause of action. 26 Mad. 760; 13 M.L.J. 448, foll. (*Findlay*, A. J. C.) MUSSAMAT UMRAO BI, *v.* HIMMAT BI. **54 I.C. 200.**

Co-defendants.

——S. 11—*Co-defendants—Partition suit*—Res judicata.

Unless it is necessary to decide an issue between the defts, themselves to grant relief to the plaintiff decision in a prior suit does not operate as *res judicata* between co-defendants. Where in a prior suit for partition certain parties were arranged as co-defendants and the decision in that suit did not decide any question of partition amongst them *inter se*, that decision does not operate as *res judicata* as between the co-defendants in a subsequent suit for partition. (*Mears, C. J. and Banerji, J.*) MAHOMED AHMAD *v.* ZAHUR AHMAD. **44 All. 334 : 4 U. P. L. R. (A.) 55 : 67 I. C. 523 : 20 A. L. J. 193 : 1922 All. 19.**

——S. 11—*Co-defendants—Suit by puisne mortgagee—Prior mortgagee a defendant—Claim for redemption—Mortgage denied by mortgagor—Subsequent suit.*

In a suit for sale on a puisne mortgage, prior mortgagees were impleaded as parties to the suit. The prior mortgage was alleged to have been discharged and in the alternative redemption was also claimed. The mortgagor pleaded that the prior mortgages were fictitious and were not subsisting mortgages. An issue was framed by the Court and decided in favour of the prior mortgagees. In a suit by the prior mortgagees for foreclosure, *Held*, that in order to give relief to the plaintiff in the former suit it was necessary to decide the question raised by the mortgagor and the question having been finally decided could not be raised in the present suit. (*Mears, C. J. and Banerjee, J.*) HARBANS *v.* RAM KUMAR NAIK. **2 U. P. L. R. (H. C.) 46 : 54 I. C. 974 : 18 A. L. J. 126.**

——S. 11—*Co-defendants—Appropriate relief to plaintiffs.*

In a suit by a puisne mortgagee impleading the mortgagors and the prior mortgagees as co-defts. the mortgagor denied the validity of the prior mortgages and an issue was raised and decided in favour of the mortgagees. In a subsequent suit by the mortgagors for a declaration that the mortgages were not binding. *Held*, that the issue as to the validity of the mortgages having been raised distinctly in the former suit and decided as between the defendants and the decision being necessary to give the appropriate relief to the plaintiff in that suit the decision operated as *res judicata*. (*Piggott and Walsh, JJ.*) JESSA *v.* RANGI LAL. **49 I. C 808 : 17 A. L. J. 225**

——S. 11—*Co-defendants—Mortgagor and second mortgagee.*

The fact that in a previous suit by a first mortgagee against the mortgagor and the second mortgagee, the mortgagor did not plead that the second mortgage was not executed for any necessity does not preclude him from pleading it in a subsequent suit, by the mortgagee on his mortgage. (*Richards, C. J. and Banerjee, J.*) CHITTARMAL *v.* RAM NARAIN. **24 I. C. 84 : 12 A. L. J. 603.**

——S. 11—*Co-defendants*—Res judicata.

The decision in a suit for redemption by one of three mortgagors against the mortgagee impleading the other two mortgagors as *pro forma* defendants, will operate as a bar by *res judicata* to a subsequent suit by the latter for redemption of the same mortgage. 29 All. 481. rel. on. (*Rafique, J.*) NATHE *v.* KHACHERA. **20 I. C. 372 : 11 A. L. J. 844.**

——S. 11—*Co-defendants.*

Where it is necessary to determine certain issues, for the purpose of granting relief to the plaintiff, between co-defendants, and the issue is decided it acts as *res judicata* between the co-defendants. (*Banerji, J.*) GOLAB SINGH *v.* NET SINGH. **10 I. C. 324.**

——S. 11—*Co defendants* —Res judicata—*Partition suit.*

Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity, a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* among them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group. The test is whether there was a necessity to decide the point, whether as a matter of fact it was ever raised between co-defendants and whether it was decided. 11 Bom. 210 followed. Where in a partition suit none of the parties claimed or resisted partition except the plaintiff, any questions regarding partition which might thereafter arise between the defendants in that suit remains open to be decided. (*Macleod, C. J. and Crump, J.*) GANGARAM *v.* VASUDEO. **47 Bom. 534 : 73 I. C. 912 : 25 Bom. L. R. 268 : 1923 Bom. 203.**

——S. 11—*Co-defendants—Conflict of interest.*

The principles of *res judicata* will be applicable between co defendants only where there was a conflict of interest between them and a judgment defining their rights and obligations *inter se*. (*Batchelor and Hayward, JJ.*) FAKIRCHAND LALLUBHAI *v.* NAGEN CHAND KALIDAS. **40 Bom. 210 : 33 I C 423 : 17 Bom. L. R. 1106.**

——S. 11—*Co-defendants—What must be proved to constitute.*

A decision between co-defendants may operate as *res judicata* in any subsequent suit between them, if there was a conflict of interests among them and the judgment defined the real rights and obligations of the defendants *inter se*. (*Heaton and Shah, JJ.*) HARI ANNAJI *v.* VASUDEV JANARDHAN. **38 Bom. 438 : 23 I. C. 944 : 16 Bom. L. R. 283.**

——S. 11—*Co-defendants—Decision when operative as* res-judicata.

A decree could not operate as *res judicata* as between co-defendants if there was no conflict of interest and no decision as between the defendants themselves. It will be an *a fortiori* case where a decision as between the defendants was not necessary to give the appropriate relief to the plaintiff

in the suit. 31 C. 95 : 25 C. L J. 322 Ref. (*Chatterjee and Panton, JJ.*) RAJENDRA KUMAR BOSE *v.* BISWARUP DEY. **64 I. C. 603 : 35 C. L. J. 173**

——S. 11—*Co-defendants*—Ex parte *decree.*

An *ex parte* decree on a bond against two joint debtors is not *res judicata* between those two debtors, when the question of their respective liability is raised in a suit for contribution by one against the other. (*Newbould, J.*) PRASANNA KUMAR CHANDA *v.* KULADHAR RAKSHIT.
57 I. C. 252.

——S. 11—*Co-defendants—Decision if* res judicata—*Rent suits.*

In a suit for rent by plffs. co-sharer landlords, judgment in a previous rent suit between other co-sharer landlords and in which the plffs. in this suit were *pro forma* defts. can neither be binding on the present plffs. nor operate as *res judicata* against them on matters which were not and could not be in issue in that suit between them as *pro forma* defts. and the principal defts. (*Newbould, J.*) APARNA CHARAN CHABRI *v.* GOPI NATH.
53 I. C. 567.

——S. 11—*Co-defendants—Unnecessary decision.*

A decision, not necessary for the due disposal of suit is not *res judicata* between co-defts. (*Chatterjee and Panton, JJ.*) TRADAS *v.* JANANENDRA NATH. **50 I. C. 802.**

——S. 11, Expl. IV —*Co-defendants—Partition suit.*

In a previous partition suit against the present plff.'s vendor and the present defts., an issue was raised whether the share of the vendor was subject to the *mokurari* interest of the other defts., but was expunged by the order of the Court But at the time of partition, the present defts. were allotted possession not only of their proprietary share but also the *mokurari* interest. In a subsequent partition suit by the vendees from vendor against the defts for a declaration that vendor's share was not subject to any *mokurari* and for allotting to the plffs. a separate *takhta* out of the *takhta* which was allotted to the defts in the previous suit. *Held*, that the question was not expressly decided in the previous suit and it was impossible to hold that a decision might and ought to have been obtained in the previous partition suit by the vendor or the present plffs. and the defts. failed to make out that the plffs. were barred by *res judicata.* (*Chapman and Atkinson, JJ.*) SYED LATIF HUSSAIN *v.* BASDEO SINGH.
39 I. C. 259 : 20 C. W. N. 1177.

——S. 11—*Co-defendants — Essentials—No contest* inter se.

In order that a finding in a case should be *res judicata* between co defendants, three factors are necessary ; (1) a conflict of interest between the co-defendants ; (2) a necessity to decide on that conflict in order to give to the plaintiff the relief appropriate to his suit ; and (3) a discussion in the judgment of the question raised as between the co-defendants. Where in a suit for money, a decree was passed against some only of the defendants, that decision could not operate as *res judicata* in a subsequent suit between the defendants against whom the decree was passed and those against whom the suit was dismissed. Courts are generally unwilling to extend the doctrine of *res judicata* to co-defendants and where it has been applied, it has been applied with great caution. (*Chatterjee and Newbould, JJ.*) JADAV CHANDRA SARKAR *v.* KAILASH CHANDRA SINGH.
25 C. L. J. 322 : 34 I. C. 929 : 21 C W.N. 693.

——S 11—*Co-defendants—Active contest.*

Res judicata operates against a person who took an active part in the litigation in contesting, though unsuccessfully, the claim of the then plaintiff, notwithstanding the fact that he was merely described as a *pro forma* defendant. 14 Bom. 176; 14 B. 408 dist. (*Mookerjee and Beachcroft, JJ.*) MOHENDRA NATH BISWAS *v.* SHAMSUNNESSA KHATUN. **21 C. L. J. 157 : 27 I. C. 954 : 19 C W. N. 1280.**

——S. 11—*Co-defendants—Decision when* res judicata.

A suit wherein there was no conflict of interest between the co-defendants on a matter raised by the defence will not bar a subsequent suit between the latter on the same matter (*Stephen and Chatterjee, JJ.*) SARODA PRASAD ROY *v.* KAILASH BASHINI GUHA. **18 I. C. 117 : 17 C. W. N. 128.**

——S. 11—*Co-defendants—Decision between when* res judicata.

As regards parties arrayed on the same side *e. g.*, as co-defendants, an adjudication between them which is necessary to give the appropriate relief to the plaintiff is *res judicata* as between them, as well as between the plaintiff and the defendants, provided there is a conflict of interests between the defendants giving rise to a distinct issue between them and a judgment defining the real rights and obligations of the defendants. In order that a finding in a case be *res judicata* between the co-defendans three things are necessary, (1) there should be a conflict of interest between co defendants, (2) that it should be necessary to adjudicate upon the conflict in order to give appropriate relief to the plaintiff, and (3) that the judgment should in fact determine the rights and liabilities of the defendants *inter se.* (*Abdul Roof and Moti Sagar, JJ.*) SUKH DIAL *v.* MT. BHOPI. **71 I. C. 481 : 1923 Lah. 186.**

——S. 11—*Co-defendants— Conflict of interest.*

The mortgagor and the mortgagee are not bound by a decision in a suit by the reversioner for a declaration that the mortgage is not valid, though they may be parties to the suit as there is no conflict of interest between them. 103 P. R. 1912 dist. (*Broadway and Wilberforce, JJ.*) DEWA SINGH *v.* GOKAL. **67 I. C. 881 : 3 Lah. L J. 395.**

——S. 11—*Co-defendants—Suit by reversioner contesting alienation—If* res judicata *against alienor.*

There cannot be *res judicata* between co-defendants, unless there is a conflict of interest between them, a necessity for a decision between them and there is a decision *inter se.* A decision therefore in a suit by a reversioner to contest a

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mortgage, is not *res judicata* as against the mortgagor. (*Wilberforce and Abdul Quadir, JJ.*) GANGU *v.* HARI SINGH. 63 I. C. 735.

——S. 11—*Co-defendants — Suit by third party against all the defts.*

A decision would operate as *res judicata* between defts. *inter se* if there was an active controversy between them and a judgment was given defining their rights and obligations *inter se*. Moreover if a judgment can operate as *res judicata* among defts, one deft. must have had a right of appeal against the other. A suit, however by a third party against all the defts. in a prior suit is not affected by the rule of *res judicata*. (*Shadi Lal, J.*) MUHAMMAD HUSSAIN *v.* QAMAR-UL-ZAMAN. 143 P L. R. 1915 : 28 I. C. 238 : 57 P. W. R. 1915.

——S. 11—*Co-defendant.*

The decision in a previous suit, wherein the plffs. were *pro forma* defts. is not *res judicata* in the present suit, where the plffs. in the prior suit together with the other defts. in the prior suit joined as *pro forma* defts. in this suit. (*Reid, C. J. and Beadon, J.*) MIR KHAN *v.* RAHMAN. 17 P. W. R. 1914 : 23 I. C. 381 : 35 P. L. R. 1914

——S. 11—*Co-defendants — Pre-emption — Sale held unauthorised — Subsequent suit by vendee against vendor.*

In a suit for pre-emption against B the female vendor and C, the purchaser, C admitted the rights of the pre-emptor but pleaded that full consideration had passed, B pleaded that the alleged sale was invalid as her husband A, who had sold the land as his wife's attorney has no authority to effect it. Her plea was successful and pre-emptor's suit was dismissed on the ground that A was not authorised to effect the sale. C subsequently sued B for possession of the land sold to him or in the alternative to recover the consideration-money paid to A. *Held*, that the question whether A had authority from B to effect the sale in dispute was not *res judicata* on the ground of the finding in the previous pre-emption suit. 3 A. 152, 9 C. W. N. 584, rel. (*Johnstone and Rattigan, JJ.*) DHIAN SINGH *v.* BELAS KAUR. 154 P. L R. 1912 : 42 P. R. 1912 : 16 I. C. 127 : 123 P. W. R. 1912.

——S. 11—*Co-defendants—Conflict of interest in prior litigation.*

Where a widow alienatad certain occupancy rights and the reversioners brought a suit against the vendees and the widow and one issue in that suit was whether consideration passed, which the widow did not plead, but on being examined as a party denied the sale as well as the receipt of consideration, and the issue was decided against the vendees who sued the widow for possession of the property alleged to have been sold to them. *Held*, that as the interests of the widow and vendees were conflicting in the previous suit the question of the payment of the consideration decided in the previous suit was *res judicata* and the lower court correctly decided it. 140 P. R. 1890, 25 B. 74; 11 B. 216; 31 C. 95; 11 M. 204 Ref. (*Reid, C. J.*) DHANNA SINGH *v.* BUDHI. 103 P. R. 1912 : 188 P. L. R. 1912 : 16 I. C. 80 : 157 P. W. R. 1912.

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——S. 11—*Co-defendants—Absence of conflict in previous suit—No adjudication—Effect of on subsequent suit.*

Where in a previous suit, there was no contest between the two sets of defendants and no question was necessary to be decided, and there was no adjudication in fact, the mere fact that the same point is at issue between them as plff. and deft. in the present as in the former case does not make the decision in the former suit *res judicata* between the present parties. (*Shah Din and Smith, JJ.*) NAZIR KHAN *v.* MANGLI. 231 P L. R. 1912 : 14 I. C. 535 : 220 P. W. R. 1912.

——S. 11—*Co-defendants—Liability* inter se.

The liability between two defts. *inter se* was left undetermined in a suit. One of the defts. then sued the other defts. for contribution. *Held*, that the question that was left undecided was not *res judicata*. (*Johnstone, J.*) TAJA KHAN *v.* MUHAMMAD KHAN. 71 P. L. R. 1911: 10 I. C. 839 : 66 P W. R. 1911.

——S. 11—*Co-defendants* —Res judicata—*Decision when operates as.*

Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity the judgment will not be *res judicata* amongst the defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have collectively been defeated in resisting a claim made against them as a group. *Cottingham* v. *Earl of Shrewsbury*, 3 Hare 627 ; 11 B. 216 foll. Subsequent to the execution of a mortgage in favour of the plff. by a Hindu father on behalf of himself and his two sons, a third son was born. In a suit for partition by the two sons against the father, the afterborn son, the mortgagee and many other defendants the trial judge held that the mortgage was not binding on the afterborn son as well as the plaintiffs in the suit and decreed a share to each of the sons. On appeal by the mortgagee impleading the father and the sons as respondents it was held that the mortgage was not binding on them. In a suit by the mortgagee against the father and sons, *Held* that the suit was barred on account of the decree in the prior suit. (*Schwabe, C. J., Oldfield and Coutts Trotter, JJ.*) KONGA RAMASWAMI IYER *v.* PONNUSWAMI. (1922) M W. N. 526: 31 M. L. T. 370: (H. C.) : 16 L. W. 981: 70 I. C. 769: 1922 Mad. 452.

——S. 11—*Co-defendants—Previous suit for ejectment—No contest between defendants—Validity of partition not questioned—Decision whether* res judicata.

The decision in a previous suit for ejecting the defendants on the ground of trespass does not operate as *res judicata* on the question of the validity of the partition deed, where there was no contest between the defendants and where it was

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not necessary for one of them to raise to the question of the validity of the partition. (*Kumaraswami Sastri and Devadoss, JJ.*) POTHARI ILLATH MADHAVAN NAIR *v.* CHALIKADAVATH PAKKI ISSAN THOTIYAL ABDURRAHIMAN. **1922 Mad. 404 (2).**

———**S. 11** - *Co-defendants—Active contest inter se necessary.*

To constitute *res judicata* between co-defendants there must have been a conflict of interests between the defendants *inter se* and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity a judgment will not be *res judicata* among the defendants. (*Oldfield and Sadasiva Iyer, JJ.*) MOHOYADOON ALI SAHIB *v.* BACHA SAHIB. **(1918) M. W. N. 580: 49 I. C. 369: 8 L. W. 473.**

———**S. 11**—*Co-defendants.—Findings when* res judicata.

The first requisite for a finding or decision to operate as *res judicata* as between defts. *inter se* is that there should be an active controversy as against each other between them. The second is that the adjudication *inter se* between the co-defts. should be necessary to give the appropriate relief to the plff. *Quaere.*—Whether the adjudication should be express and not one which may be inferred or deemed to have been granted or refused. (*Spencer and Seshagiri Aiyar, JJ.*) SANKARA MAHALINGAM CHETTY *v.* MUTHULAKSHMI.
43 I. C. 860: 33 M. L. J. 740.

———**S. 11**—*Co-defendants — Decision when* res judicata *—Right of appeal.*

The decision in a previous suit on a matter raised and actively contested between co-defendants will operate as *res judicata* in a subsequent suit in which such co-defendants are arranged as plaintiff and defendant. The fact that the defendant in a previous suit had no right of appeal against the decision will not affect the operation and bar of *res judicata*, when he having the right to be joined as plaintiff chose to contest the suit as co-defendant. (*White, C. J. and Oldfield, J.*) RANGANATHAM CHETTY *v.* LAKSHMI AMMAL.
14 M. L. T. 189: (1913) M. W. N. 690: 21 I. C. 15: 25 M. L. J. 379.

———**S. 11**—*Co-defendants—Actual controversy —Finding as to title.*

As between co-defendants a finding as to a question of title after active controversy is *res judicata* in a subsequent suit in which they are arranged on different sides. (*Sundara Iyer and Ayling, JJ.*) RAMASWAMY REDDI *v.* ABBOY CHETTI.
(1911) 2 M. W. N. 306: 11 I C. 17: 11 M. L. T. 71.

———**S. 11**—*Co-defendants—Conflicting interest.*

A judgment can operate as *res judicata* between co-defts. whose interests are conflicting (*Kanhaiya Lal, A. J. C.*) HAIDARI KHANAM *v.* AUSNANA BEGUM. **57 I. C. 594.**

———**S. 11** — *Co-defendants. — Partition—Decree—Form of.*

Where in a suit for partition the decree declare the shares of every one of the parties interested in the property, the declaration as to the extent of the shares of the defts. is as binding between the co-defts. themselves as between the defts. and the plff. (*Lyle and Ashworth, A. J. Cs.*) THAKUR GANDHARP SINGH *v.* NIRMAL SINGH.
22 O. C. 300 54 I. C. 325: 6 O. L J. 529.

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———**S. 11** — *Co-defendants. — Decision on contest.*

There can be no *res judicata* between co-defts. unless there is decision on necessary points which were actively contested between them. (*Mullick and Jwala Prasad, JJ.*) NAND KAL PAL *v.* NAKUL CHANDRA DEB. **41 I. C. 468: 2 Pat. L. W. 108.**

———**S. 11**—*Co-defendants—Conflict of interest.*

Where there is a conflict of interest between defts. and there is an adjudication defining the rights between the defts. *inter se* in order to give proper relief to the plff. such adjudication is *res judicata* between the co-defts. and also between the defts. and the plff. (*Hartnoll, J.*) SHWE THA *v.* HLA KHI. **30 I. C. 604: 8 Bur. L. T. 160.**

———**S. 11**—*Co-defendants.—Might and ought —Suit against different defts. on alternative causes of action—Commission to claim relief against added defts.—Effect of.*

The rule of constructive *res judicata* in practice depends upon the particular facts of each case. 20 Cal. 79 (P. C.) ref. The plff. filed a suit against the deft. for breach of a contract entered into through brokers, and on the deft.'s denial of the contract joined the brokers as co-defts. under O. 1, R. 4, C.P. Code, but claimed no relief against them, and the suit against the principal deft. was dismissed, and plff. filed a second suit against the brokers for damages under S. 235 of the Contract Act. *Held, Per Pratt, J. C.*—That the second suit against the brokers was barred under Expln. IV to S. 11 of the C. P. Code because the plff. failed to seek this relief in the first suit. *Per Crouch, A.J. C., contra.*—To hold that, where a person is joined under O. 1, R. 4, C.P. Code, the plff. not only can, but must include all grounds of attack against him under penalty of being debarred from ever obtaining relief to which he may prove entitled, is an extension of law which is not authorised by the terms of the C. P. Code, or by practice or by any reported decision. (*Pratt, J. C. and Crouch, A. J. C.*) SHAMYMAL TEUMAL *v.* RAJHUMAL BHOJUMAL. **36 I. C. 92: 10 S. L. R. 29:**

Competent Court.

———**S. 11**—*Competent Court—Administration proceedings.*

Directions given in an administration suit, bind all parties, determine the construction to which the will gives effect and is final and conclusive. (*Lord Buckmaster*) GOPAL LALL SUTT *v.* PURNA CHANDRA BASAK. **20 A. L. J. 625: 43 M. L. J. 116: 36 C. L. J. 57: 24 Bom. L R. 937: 16 L. W. 963: 49 I. A. 100: 49 Cal. 459: 67 I. C. 561: 27 C. W. N. 174: 1922 P.C. 253 (P. C.)**

———**S. 11**—*Competent Court—Land Acquisition proceedings—Decision as to title between rival claimants—Subsequent suit between parties* —Res judicata—*Plea of.*

Where in certain land acquisition proceedings a dispute arose as to apportionment of compen

sation between two rival claimants and the dispute is decided by the court on the construction of the terms of a gift deed in which the land acquired was included, that decision operates as *res judicata* as between those parties or their representatives not only with reference to the extent of the money but with reference to other property covered under such title in a subsequent suit between parties though not by reason of S. 11, C. P. Code, but by reason of the general principles of *res judicata*. (1909) A. C. 623; 48 C. 42 foll; 23 C. 526; 17 C. W. N. 935 overruled. The importance of a judicial decision is not to be measured by the pecuniary value of the particular item in dispute and a plea of *res judicata* is not made unsustainable by the mere fact that the value of the subject-matter in the former litigation was so trifling that the parties did not think it worth their while to appeal from the decision in the former proceedings. (*Lord Buckmaster.*) RAMACHANDRA ROW *v.* RAMACHANDRA RAO.
45 Mad. 320 : 43 M. L. J. 78 : 24 Bom. L. R. 963 : 16 L W. 1 : (1922) M. W. N. 359 : 20 A. L. J. 684 : 35 C. L. J. 545 : L. R. 3 P. C. 158 : 30 M. L. T. (P. C.) 154 : 67 I. C. 408 : 26 C. W. N. 713 : 49 I. A. 129: 1922 P. C. 80 (P.C.).

———S. 11—*Competent Court — Settlement Court—Decision binding on parties.*

When the Settlement Courts in Oudh investigate all rival claims and decide all the points raised no party can deny in subsequent proceeding the status of the other as found by the Court or claim more than what is given by that Court. (*Mr. Ameer Ali.*) RANI INDAR KUAR *v.* THAKUR BALDEO BAKHSH SINGH. 28 M. L. T. 334: 25 C. W. N. 170 : 39 M. L. J. 115 : 7 O. L. J. 439 : 23 O. C. 291 : 57 I. C. 397 : 18 A. L. J. 1057 (P. C.).

———Ss. 11 and 13—*Competent Court—Judgment of Court of British India if operates as* res judicata *in Court of Native State.*

A Court in British India is not competent to try a suit in respect of property which is situated in the Native State, and the judgment of the Court in British India could not operate as *res judicata* in the Court of the Native State. (*Lord Atkinson.*) MAGBUL FATIMA *v.* AMIR HASAN KHAN.
20 C. W. N. 1213 : 36 I. C. 710 : (1916) 2 M. W. N. 153 (P. C.).

———S. 11—*Competent Court—Judgment* in rem—*Probate Court—Decision of.*

The decision of a probate court as to the genuineness of a will in binding on courts exercising other than testamentary jurisdiction in the country. (*Sir Lawrence Jenkins*) SHEOPARSAN SINGH *v.* RAMNANDHAN PRASHAD SINGH.
43 Cal. 694 : 43 I. A. 91 : 14 A. L. J. 466 : 20 C. W. N 738 : 18 Bom. L. R, 397 : 23 C. L. J. 621 : (1916) 1 M. W. N 419 : 20 M. L. T. 1 : 3 L. W. 544 : 33 I. C. 914 : 31 M. L. J. 77 (P. C.)

———S. 11—*Competent Court—Rent Court—Question of tenancy.*

A Rent Court passing a decision on a question of tenancy in a previous suit for rent is not *res judicata* in a subsequent suit, in the Civil Courts for a declaration of title. (*Lindsay and Sulaiman, JJ.*) TOTA *v.* JAGGU. 21 A. L. J. 476 : L. R. 4 A. 428 : L. R. 5 A. 47 (Rev.) : 1924 All. 163.

———S 11—*Competent Court — Decision of Revenue Court—Subject matter different—Adjudication on title*—Res judicata.

In a prior suit between the parties as regards a particular plot of land the Revenue Court had decided against the plaintiff. In subsequent suit in the Civil Court brought by the plaintiff for recovery not only of that plot of land but also of other plots to which the title was indentical, *held* that the decision of the Revenue Court was *res judicata*. (*Mears, C. J. and Banerji, J.*) BARU MAL *v.* SUNDER LAL. L. R. 4 A. 165 (Rev.) : 72 I. C. 15 : 21 A L. J. 330 : 1924 All. 10.

———S. 11—*Competent Court.*

Under ordinary circumstances, the decision of an Assistant Collector of the Second Class in the United Provinces would not be *res judicata* in a suit triable only by an Assistant Collector, First Class. (*Daniels, J.*) AMIN-UD-DIN *v.* ABDUL SHAKOOR. 73 I. C. 460 : 1923 All. 556.

——— S. 11—*Competent Court — Civil and Revenue Courts.*

If after a decision of a suit by a Revenue Court the losing party comes to the Civil Court for the same relief which would have the effect of setting aside the decree of the Revenue Court, the civil suit would not be maintainable and would stand barred by principles of *res judicata*. 20 A. L. J. 606; 18 A. L. J. 1030; 17 A L J. 60; 16 A. L. J. 933. *Ref.* (*Rafique, J.*) MT. CHITTO *v.* GANGA SAHAI. 77 I. C. 638 : 1923 All. 527.

———S. 11—*Competent Court.*

An Assistant Collector, Second Class, who had no power to try an ejectment suit passed a decree for rent in favour of A; but later on an Assistant Collector, First Class, who had power to try an ejectment suit dismissed A's suit for ejectment—*held* that the decision of the Assistant Collector, Second Class, was no bar to the decision of the Assistant Collector, First Class. 32 All. 1 Dist. (*Stuart, J.*) RAM DIN *v.* HAR DAYAL. 1923 A. 368.

———S. 11—"*Competent Court*"—*Meaning of.*

The "Competent Court" to which reference is made in S. 11 is the Trial Court and it does not affect the question whether the decision is a decision of an appellate court or whichever the appellate court may be. 9 I. A. 197 followed. (*Stuart and Sulaiman, JJ.*) KAMMOO *v.* MUSAMMAT FATHIMAN. 44 A. 712 : 76 I. C. 932 : 1922 All. 445.

———S. 11—*Competent Court—Civil and Revenue Courts—Ejectment—Sub-tenancy—Decision of Revenue Court*—Res judicata.

The Revenue Court in a suit to eject the defendant as a sub-tenant held that he was a tenant-in-chief and dismissed the suit. In a subsequent suit in the civil court for ejectment, *held* that the decision of the Revenue Court operated as *res judicata*. 17 A L. J. 60 foll. (*Mears, C. J. and Gokul Prasad, J.*) RAM DAS *v.* DUBRI KOERI.
20 A. L. J. 606 : 44 A. 724 : 1922 All. 336.

C. P. CODE (V OF 1908), S. 11—Competent Court.

——S. 11—*Competent Court—Revenue Court—Decision on question of proprietary title.*

The decision on a question of proprietary title by a Revenue Court under Ss. 199 and 201 of the Agra Ten. Act operates as *res judicata* and bars the trial of the same issue in a subsequent suit in the Civil Court (*Lindsay and Stuart, JJ.*) THAKUR HANWANT SINGH *v.* MT. JHAMOLA.

20 A. L. J. 340 : 1922 All. 95 : 66 I. C. 915.

——S. 11—*Competent Court—Suit for rent.*

The earlier finding does not become final in a case where the court that tried the prior suit for rent has no power over the claim in a subsequent suit for rent. (*Gokul Prasad, J.*) RAM DAS *v.* MAHANT PERMANAND GIR. **L R. 3 A. 156 (Rev.).**

——S. 11—*Competent Court—Decision of Revenue Court.*

A decision of Rev. Court, in a case which it has jurisdiction to decide, *e.g.*, a decision on title in a suit for profits can be interfered with by a Civil Court if the Rev. Court proceeds upon an entry of a certain person's name in the Rev. papers as conclusive on the question of title. (*Ryves and Gokul Prasad, JJ.*) SAIYAD MURTAZA HUSSAIN *v.* ZIAUL HASAN.

19 A. L. J. 279 : 62 I. C. 684 : 3 U. P. L. R. (All.) 47.

——S. 11—*Competent Court—Meaning of—Court trying former suit must have had jurisdiction to try latter suit and not merely the issue.*

To establish the plea of *res judicata*, the Court which decided the former suit, must have been such a court as would have been competent to try and decide not only the particular matter in issue in the latter suit but also the latter suit itself in which the issue is subsequently raised. (*Macleod, C. J. and Shah, J.*) VYANKAT AWACHIT PATIL *v.* ONLAR NATHU. **45 Bom, 805: 61 I. C. 276: 23 Bom. L. R. 250.**

——S. 11—*Competent Court—Revenue Court—Status of tenant.*

A Revenue Court's decision in a rent suit declaring a tenant's status operates as *res judicata* to bar a declaratory suit in the Civil Court declaring the tenant as an occupancy tenant. (*Tudball, Ryves and Gokul Prasad, JJ.*) MOOLO *v.* RAM LAL. **42 All. 191: 58 I. C. 772: 18 A. L. J. 1030.**

——S. 11—*Competency of Court—Test of.*

The test of determining the operation of a decree as *res judicata* in a subsequent suit is whether the Court that passed the decree in the previous suit could try the subsequent one or not. If he had not such a power, the decree would not operate as *res judicata* to bar the latter suit. (*Piggott and Walsh, JJ.*) MATA PRASAD SHUKUL *v.* DEVI SHUKUL AIN. **58 I. C, 576 : 2 U.P.L.R. (All.) 59.**

——S. 11—*Competent Court—Civil and Revenue Court—Ejectment.*

A suit for ejectment which is maintainable in a Civil Court is not barred merely because the plff. had previously sued in a Revenue Court, treating the defendant as a tenant. (*Richards, C. J., and Banerjee, J.*) MUKHRAM *v.* CHAJJU.

17 A.L.J. 646 : 50 I.C. 734 : 1 U.P.L.R. (H.C.) 74.

C. P. CODE (V OF 1908), S. 11—Competent Court.

——S. 11—*Competent Court—Revenue Court—Decision of—Subsequent suit in Civil Court for declaration.*

In a suit brought by a tenant under S. 142 of the Agra Tenancy Act to challenge the validity of distraint against the landlord, it was held that the mortgage by the tenant in favour of the landlord had been satisfied. Thereupon the mortgagee brought a suit in the Civil Court for a declaration that the mortgage still continued. *Held*, that the subsequent suit was not barred by *res judicata*. (*Richards, C. J. and Banerji, J.*) SURAJ KUAR *v.* CHET RAM. **41 All. 369: 49 I. C, 591: 17 A. L. J. 352.**

——S. 11—*Competent Court—Insolvency Court—Decision on ownership of property—Subsequent suit for declaration of title.*

Plaintiff objected to the attachment by a receiver of certain property under S. 22 of the Prov. Ins. Act on the ground that the property belonged to him. The objection was dismissed and the order was upheld in appeal. Plaintiff then brought a suit for a declaration that the attached property belonged to him. *Held*, that the suit was barred by *res judicata*. (*Richards, C. J and Banerji, J.*) IRSHAD HUSAIN *v.* GOHINATH.

41 All. 378 : 49 I. C. 590: 17 A. L. J. 374.

——S. 11—*Competent Court—Small Cause suit in Munsiff's Court—Suit for damages in Small Causes Court.*

A Munsif is competent to try a suit for damages cognizable by a Small Cause Court within the meaning of S. 11 even if there is a Small Cause Court that can take cognizance of it. 27 Mad. 63: 28 Bom, 338 Foll. (*Piggott, J.*) BODLU BHONJA *v.* MOHAN SINGH. **39 All. 717 : 42 I. C. 862: 15 A. L. J. 789.**

——S. 11—*Competent Court—Revenue Court—Decision of Rev. Court.*

A decision of a Revenue Court deciding, that the plaintiff, as co-sharer, could not sue for ejectment, cannot operate as a bar to the question whether the plaintiff as a *lambardar* can maintain such suit. (*Sundar Lal, J.*) JAI RAM *v.* GULZARI MAL. **35 I. C. 612.**

——S. 11—*Competent Court—Revenue Court—Order of.*

An order of Revenue Court determining relations of landlords and persons as tenants is *res judicata* between them, but the question can be re-settled if events have changed the position terminating the tenancy. (*Piggott and Lindsay, JJ.*) BHAGWAN *v.* MADAN MOHAN. **38 All. 533: 35 I. C. 41: 14 A. L. J. 734.**

——S. 11—*Competent Court—Revenue Court.*

The decision of the Revenue Court in respect of the holding does not operate as *res judicata* in the Civil suit relating to the grove as the Revenue Court could not have decided the suit brought in respect of the grove. (*Banerji and Piggott, JJ.*) MIZAJI LAL v. HORI LAL. **34 I. C. 162.**

——S. 11—*Competent Court—Revenue Court—Ejectment—Finding of rent—Free grants—Proprietary title—Subsequent suit for declaration.*

C. P. CODE (V OF 1908), S. 11—Competent Court.

In a suit for ejectment in a Revenue Court, defendants set up that they were rent free grantees of the land and not the tenants of the plaintiff and the plea was found by the Court and affirmed on appeal by the Revenue Court. Subsequently the plaintiff sued to declare that the defendants were not free grantees. *Held*, that a question of proprietary title was raised by the defendants and decided in their favour by the Revenue Court and that by not appealing to the D.. Judge the plaintiff allowed it to become final. The subsequent suit in a Civil Court was barred by the rule of *res judicata*. (*Richards, C. J. and Banerji, J.*) SUNDARA KUNWAR *v.* DINA NATH. 37 All 280. 28 I.C. 432 : 13 A. L. J. 326.

———S. 11—*Competent Court—Revenue Court—Decision on title.*

A decision of Revenue Court in a previous suit that the plaintiff was the sub-tenant of the defendant in respect of the holding does not operate as *res judicata* in a suit in the Civil Court to establish his claim to the holding. (*Richards, C. J. and Banerji. J.*) KANHIRAM *v* DURGA PRASAD. 37 All. 223: 27 I. C. 913: 16 A L. J 278.

———Ss. 11 and 24 (4)—*Competent Court—Small Cause.*

A small cause suit transferred to a munsiff retains its character as such a d no appeal lies against his decision and it could not operate as *res judicata* for other suits not cognizable by the Small Cause Court. (*Sundarlal, J.*) DULARE LAL *v.* HAZARI LAL. 26 I. C. 56: 12 A. L. J. 853.

———Ss. 11 and 13—*Competent Court—British Court*—Res judicata *in the Court of the Native State,*

A Court in British India is not competent to try a suit in respect of property situated in the Native States and its judgment could not operate as *res judicaia* in the Court of a Native State. A foreign judgment may give a cause of action for a suit in a Court of British India but has no force or authority as such in such Court. (*Richards, and Tudball. JJ.*) MAQBAL FATIMA *v.* AMIR HASAN KHAN. 37 All. 1: 25 I. C. 193 : 12 A L. J. 1074

———S. 11—*Competent Court—Revenue Court—Authority of an agent to grant lease—Suit for declaration—Not* res judicata.

A Revenue Court has no jurisdiction to go into a question of the authority of an agent to grant a lease on behalf of his principal and so an incidental expression on that point by that court is not *res judicata* in a suit for declaration that the lease was void for want of authority. (*Rafique and Piggott, JJ.*) RAM SINGH *v.* RAO GIRAJ SINGH. 23 I. C. 705

———S. 11—*Competent Court—Revenue Court—Decision of—Binding on parties in matter within its jurisdiction.*

A subsequent suit for declaration in a Civil Court is not maintainable where there is a decree of the Revenue Court binding on the parties for ejectment of the mortgagee of any occupancy holding. (*Benerji and Rafique, JJ.*) SHEO PRAKASH *v.* KARNA. 35 All. 464: 21 I. C. 2: 11 A. L. J. 671.

C. P. CODE (V OF 1908), S. 11—Competent Court.

———S. 11—*Competent Court—Revenue Court—Assistant Collector.*

A decision of an Assistant Collector of the Second Class cannot operate as *res judicata* in a subsequent suit not cognisable by him even though the plaintiff had omitted a portion of the claim in the first suit in order to bring the case before the officer. (*Chamier, J.*) RAM GOVIND *v.* SRI THAKURJI MAHARAJ. 19 I. C. 126: 11 A. L. J. 231.

———S. 11—*Competent Court—Small Causes Court—Decision on question of title—Subsequent suit on title.*

A suit to recover damages an account of the misappropriation of the fruit of a grove was dismissed on the ground that the plaintiff had failed to prove his title to the grove. There was no second appeal as the suit was one of a Court of Small Cause nature. *Held*, that a subsequent suit between the same parties for the recovery of possession of the grove and damages was precluded by *res judicata*. 4 A. L. J. 517. Dist. (*Chamier, J.*) MUSADDI LAL *v.* JWALA PRASAD. 16 I. C.496. 10 A. L. J. 106.

———S. 11—*Competent Court—Revenue Court—Decision as to rent.*

The decision by a revenue court fixing the rent at a particular fixed sum operates as *res judicata* between the parties and precludes the plaintiff from claiming at a higher rate. (*Piggott, J.*) SANWAL KUNWAR *v.* MURLI. 16 I. C. 339: 10 A. L. J. 52.

———S. 11—*Competent Court — Revenue Court.*

The decision of a Revenue Court can be *res judicata* against a party in a subsequent Civil suit, if the matter decided by the Revenue Court could have been heard in appeal by a District Judge who could have sent the case for trial to the Court of the same jurisdiction as the Civil Court in the subsequent suit. (*Knox, Banerji and Karamat Hussain, JJ.*) BED SARAN KUAR *v.* BHAGAT DEO. 33 All. 453: 10 I. C. 924: 8 A. L. J. 341.

———S. 11—*Competent Court—Court not competent to try issues—No bar.*

The judgment of a Court on issues which it is not competent to try could not operate as *res judicata* in a subsequent suit involving the same issue. (*Scott, C. J. and Shah, J.*) ABDUL KADAR *v.* DULLANBIBI. 37 Bom. 563: 20 I. C. 530: 15 Bom. L. R. 672.

———S. 11— *Competent Court—Decision of Revenue Court—Existence of relationship between landlord and tenant.*

The present suit was brought by the plaintiffs to eject the defendant from the holding in suit, the plaintiffs' case being that the tenants who held the land under them had no transferable interest in the same and had abandoned the holding after selling it to the defendant and that the latter, therefore had acquired under his purchase no right to the holding but was merely a trespasser. The defence was that the defendant was a tenant and could not be ejected as a trespasser. Another thing was the defendant relied upon a decision in a proceeding under S. 106 of the B.T. Act in his favour. The defendant was entered

in the Record of Rights as tenant of the lands after purchasing the holding. Plaintiffs thereupon brought a suit under S. 106 of the B. T. Act for the correction of the entry, on the ground that the defendant was not a tenant. The Revenue Officer, under S. 106, decided that the defendant was a tenant and that the entry in the Record of Rights was correct, *Held* that the question whether the defendant was tenant or not was directly raised and decided in the proceedings under S. 106 of the B. T. Act and that it was *res judicata* in the present case. (*Chatterjee and Panton, J.*) ROY JATINDRA NATH CHOUDHURY *v.* AZIZAR RAHMAN SHANA. **71 I. C. 307 : 50 C. 79 : 1923 C. 433.**

———S. 11—*Competent Court—First Munsif having no powers—Subsequent suit—Munsif with power up to Rs.* 2,000.

Where the prior suit was decided by a Munsif who had jurisdiction to try suits up to the value of Rs. 1,000 only and the later suit was laid at Rs. 1,100 and was tried by a Munsif who had jurisdiction to try suits up to the value of Rs. 2,000; *Held*, the Munsif who tried the previous rent suits had no jurisdiction to try the later suit. 28 Cal. 78 distinguished. Where therefore the plaintiff's suit for recovery of possession and mesne profits is a *bona fide* suit because according to defendant's own case the plaintiff had good title to recover possession he therefore had good title to recover mesne profits also and the decision in the previous rent suits does not operate as *res judicata*. (*Chatterji and Pearson, JJ.*) ASAN ALI *v.* SARADA CHARAN KASTAGIR. **1922 Cal. 138.**

———S. 11—*Competent Court—Pecuniary jurisdiction—Decision of Lower Court not* res judicata.

The decision on a question in the Court of a munsif is no bar to a subsequent suit between the same parties brought in the Court of a Subordinate Judge. (*Chatterjee and Panton, JJ.*) PROMOTHA BHUSAN DEB ROY BAHADUR *v.* NARENDRA BHUSAN ROY. **56 I. C. 932.**

———S. 11—*Competent Court—Consent of parties.*

When a Court has no jurisdiction over the subject-matter of a suit in which an order is made such order as made is wholly void and does not operate as *res judicata*. Jurisdiction cannot be conferred by consent of parties, and no waiver or acquiescence on their part can be made up, for the lack or defect of jurisdiction. (*Mookerjee and Fletcher, JJ.*) KRISHNA KISHORE DE *v.* AMARNATH KSHETTRY. **24 C. W. N. 633: 56 I. C. 532: 31 C. L. J. 272.**

———S. 11—*Competent Court—Meaning of—Court trying former suit must have had jurisdiction to try latter suit and not merely the issue.*

To establish the plea of *res judicata*, the Court which decided the former suit, must have been such a Court as would have been competent to try and decide not only the particular matter in issue in the latter suit but also the latter suit itself in which the issue is subsequently raised. 35 Cal. 553: 29 Cal. 707 ; 25 A. 138 Rel. (*Mookerjee and Beachcroft, JJ.*) BEHARY LAL *v.* NARAIN MISRA. **51 I. C. 127: 29 C. L. J. 237.**

———S. 11—*Competent Court—Test of.*

In determining the jurisdiction of the Court which decided the former suit, to try the subsequent suit in order to apply the rule of *res judicata*, regard should be had to the jurisdiction of that Court at the date, not of the subsequent suit, but of the former suit (*Mookerjee and Beachcroft, JJ.*) MAHENDRANATH BISWAS *v.* SHAMSUNNESHA KHATAN. **19 C. W. N. 1280: 27 I. C. 964 : 21 C. L. J. 157.**

———S. 11—*Competent Court—Revenue Court—Ejectment.*

Decision of Revenue Court in a rent suit does not bar a subsequent suit for recovery of possession. (*Mookerjee and Beachcroft, JJ.*) MUKUNDA LAL CHAKRAVARTHI *v.* KALIPRASANNA CHATTERJEE. **23 I. C. 592: 19 C. L. J. 244.**

———S. 11—*Competent Court—Probate Court—Title.*

A Probate Court is not competent to try an ordinary suit for title and its decision is no bar to a suit in the Civil Court. (*Mookerjee and Caspersy, JJ.*) LALIT MOHAN DAS *v.* RADHA RAMAN SAHA. **15 C. W. N. 1021: 10 I. C 434: 13 C. L. J. 547.**

———S. 11—*Competent Court—Jurisdiction, want of, in former case.*

The original mortgagors from whom plaintiff purchased the property subject to mortgage had sued the original mortgagees for redemption in 1896. That case had been tried by a Munsif, second class, who holding that the interest was a charge on the property decreed redemption on payment of Rs. 873. This decree had been varied on appeal by the Divisional Court, but the Trial Court's decree was restored by the Chief Court. Plaintiff in appeal against the decree of the Trial Court contended that the decision of the former suit by the Munsif who had power up to Rs. 500 could not be *res judicata* or estop him from urging that according to the terms of the mortgage deed itself, the interest was not a charge on the property as held by the Trial Court. *Held*, the Munsif of the second class in the former case had no jurisdiction in law to try the case. Therefore the former suit does not operate as a bar to the consideration of the question relating to interest. 6 C. L. J. 621 : 14 C. L. J. 220 and 7 I. C. 781 Dist. 54 P. R. 1912 Foll. (*Broadway and Abdul Qadir, JJ.*) MAYA DAS *v.* JINDA RAM. **73 I. C. 874 1923 Lah: 141.**

———S. 11—*Competent Court—Decision under Punjab Land Revenue Act, S.* 117 *by a Revenue Court*—Res judicata.

A decision as to title under S. 117 of the Act by a Revenue Court is *res judicata* in a Civil Court. (*A. Raoof and Hamson, JJ.*) MANAK CHAND *v.* SHAHAB DIN. **63 I. C. 781.**

———S. 11—*Competent Court—Litigating under the same title—Representative Capacity.*

Where the Court which tried the previous suit was by reason of the pecuniary limits of its jurisdiction incompetent to try the subsequent suit and the judgment in the former suit was binding on the deft. only in a representative capacity there would be no question of *res judicata*. (*Ratligan, C. J. and Martineau, J.*) ANAND BAHADUR *v.* HARDIAL AZIZ. **52 I. C. 545 : 87 P. R. 1919.**

C. P. CODE (V OF 1908), S. 11—Competent Court.

———S. 11—*Competent Court—Arbitrator—Award—Effect of—Property not the subject of.*

Where the arbitrators neither gave any adjudication nor made any inquiry about the existence of joint property other than that mentioned in the reference to arbitration their award does not operate as a bar to a suit for partition of the rest of properties. (*Wilberforce and Martineau, JJ.*) MANOHAR LAL *v.* NANAK CHAND.
52 I. C. 503 . 38 P. R, 1919.

———S. 11—*Competent Court — Company—Liquidation*

Where a suit by the liquidator of a company on a promissory note executed by a person for money due on shares is dismissed on the merits, the same matter cannot be re-agitated in the liquidation Court, as the acceptance of the pro-note in lieu of the shares amounted to a novation of the contract to pay the premium and thus the suit on the pro-note was dismissed on the merits by a competent Court (*Shadi Lal, J.*) MATHRA DAS *v.* OFFICIAL LIQUIDATOR, POPULAR BANK, LTD. 87 P. W. R. 1918 : 46 I. C. 586 : 86 P. L. R. 1918.

———S. 11—*Competent Court—Revenue Court—Decision on title.*

The decision by a Revenue Court on a question of title is no bar to the same question being litigated in a Civil Court. (*Shah Din, J.*) BILA *v.* SULTAN ALI. 45 P. R 1918 : 77 P. W. R, 1918 : 46 I. C. 13 : 84 P L. R. 1918.

———S. 11—*Competent Court—Winding up of company—Decision of Court final.*

A question once settled by a liquidating Court cannot be re-opened by a regular suit. (*Chevis and Shadi Lal, JJ.*) KISHEN DAS *v.* OFFICIAL LIQUIDATOR, DOABA BANK, LTD. 40 P. R. 1918 : 45 I. C. 84 : 60 P. W. R. 1918

———S. 11—*Competent Court—Test of—Appellate Court.*

The Court referred to in S. 11 of the C.P.C, is the original Court subject to the proviso that, that Court's judgment is not final until the time of appeal has elapsed or till the appeal has been decided. 24 I. C. 243 diss. (*Chevis and LeRossignol, JJ.*) DALIP *v.* SURAJ KUAR. 48 P. R 1916 : 34 I. C, 581 : 142 P. W. R. 1916

———S. 11—*Competent Court—Arbitrator—Private award.*

A valid and enforcible award made out of court bars a suit on the original cause of action. (*Shadi Lal and Jones, JJ.*) FIRM OF SHAMSUDDIN CHIRAGH DIN *v.* FIRM OF MUHAMMAD HUSSAIN MUHAMMAD SADIQ. 33 I. C. 494 : 68 P. W. R. 1916.

———S. 11—*Competent Court—Pecuniary jurisdiction.*

The findings in the prrvious suit between the same parties are not *res judicata* in a subsequent suit not triable by the previous Court though the judgment is admissible in evidence. (*Rattigan and Shadi Lal, JJ.*) HAR PRASAD *v.* SAHU.
32 I C. 504 : 31 P. W. R. 1916

———S. 11—*Competent Court—Company in liquidation—Settlement of list of contributaries.*

An order settling the list of contributaries unappealed, becomes final and cannot be challenged and the question of liability of such person under the list cannot be agitated. (*Shadi Lal, J.*) KANSHI RAM *v.* PESHAWAR BANK, LTD
41 P. L. R 1915 : 28 I C. 95 : 227 P. W. R. 1915.

C. P. CODE (V OF 1908), S 11—Competent Court.

———S. 11—*Competent Court - Revenue officer—Partition Proceedings.*

A revenue officer's dealing with an application for partition under S. 117 of Punjab Act XVII of 1887 is an administrative adjustment to which the principle of *res judicata* does not apply. But it does not mean that the orders passed by a revenue officer have no legal finality. (*Maynard, F. C.*) MATHU *v.* BISHNA. 5 P. R. 1914 Rev. : 27 I. C. 417 : 229 P. L R. 1915.

———S. 11—*Competent Court—Revenue judgment.*

A Revenue judgment *inter parties* is relevant in a civil suit but not *res judicata*. (*Robertson, J.*) MADDU MAL *v,* BAGGU. 160 P W R. 1913 : 20 I C. 831 : 280 P. L. R. 1913.

———S. 11—*Competent Court—Revenue Court—Improvements—Subsquent civil suit.*

The fact that the tenants sued in a Revenue Court and got a decree for improvements against the landlord will not estop them from setting up an independent title of ownership. The decision of the Revenue Court though it cannot be treated as *res judicata* will carry greatest possible weight with the Civil Court in matters covered by it. (*Kensington and Shah Din, JJ.*) ABDULLAH KHAN *v.* GHULAM JAN. 155 P. W. R. 1912 : 16 I. C. 886 : 186 P L. R. 1912.

———S. 11—*Competent Court—Revenue Court—Decision of—Civil Courts—Estate.*

The Revenue Court, is not the final competent authority, to decide whether particular lands constitute an estate or not and a decision passed by it on that question, will not be *res judicata* in a suit in a Civil Court, for a declaration that the lands do not form an estate. (*Wallis, C. J, and Oldfield, J.*) MAHANT RAMADINA DAS *v.* BOISHAMO. 69 I C. 938 : 14 L. W. 251.

———S. 11—*Competent Court—Civil and Rev. Court—Madras Estate Land Act, S.* 189 (3).

The decision of Rev. Court, in a suit exclusively triable by it does not bind the Civil Court, though the subsequent suit could not be brought in the Rev. Court. as S. 189 (3) is not more comprehensive than S 11 of the C. P. C. (*Sadasiva Iyer and Spencer, JJ.*) SOBHANADRI APPARAO *v.* DATHADU VENKATRAJU 43 Mad. 859 : (1920) M W. N. 639 : 39 M. L J 476 : 12 L. W, 512 : 60 I. C, 710 : 28 M. L. T. 359.

———S. 11—*Competent Court—Arbitrator—Award,*

An award is as binding as a decree of the Court even in respect of those matters not embodied in the decree as not being referred to arbitration. (*Seshagiri Iyer and Moore, JJ.*) KOLAVAKOLANU SEETAMMA *v.* PODDRI NARAYANA MURTHI SOMAYAJULU. 57 I. C. 982 : 38 M. L. J. 470.

———S. 11—*Competent Court—Jurisdiction taken away before pronouncing judgment—Conflicting decisions in other cases—Effect of.*

Questions that have once been settled between the parties will be deemed to be *res judicata* notwithstanding that similar questions between the same parties have been decided otherwise in

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other litigations. A Court which at the date of the institution of the first suit had jurisdiction to try the subsequent suit but was deprived of such jurisdiction before it pronounced judgment in the first suit is a "Court of jurisdiction competent to try such subsequent suit" within S. 11 of the Code. (*Phillips and Kumaraswami Sastri, JJ.*) VENKATACHALAM CHETTY *v.* AIYAM PERUMAL THEVAN. **42 Mad. 702 : 37 M. L. J. 248 : 53 I. C. 33 : (1919) M. W. N. 768.**

——S. 11— *Competent Court— Civil and Revenue Courts—Decree of Civil Court declaring landlord's right to portion of holding—Subsequent suit for recovery of rent on that portion—Liability of tenant for rent*—Res judicata.

In a suit brought in the Revenue Courts by a landlord for recovery of rent of the area of a house site included in a tenant's holding, *held*, that a prior decree of a Civil Court establishing and declaring the landlord's right to get a reasonable rate of rent on the site in question operated as *res judicata*, though mere finding in the judgment of the Civil Court on the question of the landlord's right might not operate as such. (*Sadasiva Iyer and Spencer, JJ.*) RAMASWAMY SERVAIGARAN *v.* ATHIVARAHA CHARIAR. **23 M. L. T. 183 : (1918) M. W. N. 340 : 44 I. C. 663 : 7 L. W. 471**

——S. 11—*Competent Court— Jurisdiction since taken away—Decree under Rent Recovery Act* (1865)—*Rate of rent.*

A Civil Court's decree under the repealed Rent Recovery Act deciding the rate of rent, bars a subsequent suit between the same parties, where the rate of rent is in question. (*Oldfield and Phillips, JJ.*) RADHAKRISHNA AIYAR *v.* SWAMINATHA AIYAR. **40 I. C. 587 : 6 L. W. 16.**

——S. 11—*Competent Court—Small Cause suit—Revision—Question of Jurisdiction.*

In a suit for rent in a Small Cause Court the defendant pleaded that the Court had no jurisdiction to entertain the suit as the land for which rent was claimed was part of an estate and relied upon a decision of the same Court in a suit between the same parties for rent for a prior *fasli* in respect of the same land. A revision was filed against the decision and the High Court declined to interfere. *Held*, that the decision in the earlier suit did not preclude the Court in the second suit from considering the question of its jurisdiction to entertain the suit. (*Oldfield and Krishnan, JJ.*) SUBBA RAO *v.* PERUMAL REDDI, **(1917) M. W. N. 318 : 37 I. C. 906 : 5 L. W. 467.**

——S. 11—*Competent Court—Revenue Court—Question of title—Not* res judicata,

The decision of a Revenue Court on a question of title will not operate as *res judicata* in a claim based on the same title put forward subsequently in a Civil Court. 20 Mad. 392 foll (*Sadasiva Aiyar and Moore, JJ.*) SUBHANA ACHARIAR *v.* GOPALA KRISHNA ACHARIAR. **34 I. C. 354.**

——S. 11—*Competent Court—Small cause—Claim for arrears of rent—Subject of issue in a suit on original side—Subsequent suit for the arrears.*

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The fact that a certain claim for arrears of rent falls under S. 15 of the Prov. Small Cause Courts Act does not peclude a Munsiff from adjudicating upon it when it arises incidentally in a suit on the original side. Such an adjudication acts as *res judicata* in a subsequent Small Cause suit for arrears of rent alone. 27 M. 63 foll.; 29 M. 195, dist. (*Seshagiri Iyer, J.*) SELLAM IYENGAR *v.* VEERAPPA CHETTY. **18 M. L. T. 171 : 30 I. C. 522 : (1915) M. W. N. 605.**

——S. 11—*Competent Court—Revenue Court—Title.*

Where an alleged tenant sets up in a Civil Court an independent title against his landlord the decision of a Revenue Court is no bar to the same. 9 M. 39 dist. 17 M. 106, 21 M. 482. Foll. (*Ayling and Sadasiva Iyer, JJ.*) GANGAYYA *v.* RAJA VENKATA RAMAYYA. **25 I. C. 372.**

——S. 11—*Competency of courts—Causes of action—Joinder of.*

The plaintiff is not entitled to add causes of action for raising the valuation in the subsequent suit. The court for the purpose of *res judicata*, can split up causes of action in the subsequent suit ; and if it be found that one of these causes of action is the same as in the first, and still if the specific question be within the jurisdiction of the court and determined by it, it is no answer to say that the whole suit is beyond jurisdiction. (*White, C. J. and Oldfield, J.*) RANGANATHAM CHETTY *v.* LAKSHMU AMMAL, **14 M. L. T. 189 : (1913) M. W. N. 690 : 21 I. C. 15 : 25 M. L. J. 379.**

——S. 11—*Competent Court—Test of competency.*

The words "competent jurisdiction" have reference to the Court of first instance. The competency of the Appellate Court in the previous litigation is immaterial. (*Miller and Munro, JJ.*) VALESWARA IYER *v.* MUTHU KRISHNA AIYAR. **21 M. L. J. 57 : 9 I. C. 686 : 9 M. L. T. 288.**

——S. 11— *Competent Court — Insolvency Court—Decision of—Binding nature of.*

A creditor who has unsuccessfully opposed his debtor's application to be declared an insolventon the ground that he had made fraudulent transfer of the property, cannot in a subsequent suitraise the plea that the transfers were fraudulent and void. He is barred by the previous decision which is both a judgment in *rem* under S. 41 of the Evidence Act and also a judgment *inter partes* operating as *res judicata*, (*Hallifax, A. J. C.*) NARAIN *v.* HARDATTRAI. **57 I C. 612 : 16 N. L. R. 201.**

——S. 11—*Competent Court—Subsequent suit of a small cause nature.*

An issue was decided by a Subordinate Judge not exercising the jurisdiction of a Small Cause Court. In a subsequent suit in a Small Cause Court the same issue arose and it was pleaded that the decision of the Subordinate Judge did not operate as *res judicata* as he was not exercising the jurisdiction of a Small Cause Court and was therefore imcompetent to try the subsequent suit. *Held*, the subordinate judge's decision on the same issue in a prior suit operates as *res judicata* as his inability to try the subsequent suit of a

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Small Cause nature arose not from incompetence but from the existence of another Court with a preferential jurisd ction. (*Kotval, A. J. C.*) MADHORAO *v.* AMRITRAO, **48 I. C. 268 : 14 N. L. R. 115.**

——S. 11—*Competent Court—Concurrent Jurisaiction.*

Unless the mortgagor asks for redemption, accounts in a mortgage suit cannot be granted. Where no further relief can be granted, accounts cannot be adjudicated. To constitute *res-judicata*, Courts must be of concurrent pecuniary jurisdiction. An adjudication which forms the basis of no relief is not binding on parties (*Batten and Mittra, A. J. Cs.*) MUKAND RAM SUKUL *v.* SHEO NARAIN.

47 I. C. 21.

——S. 11—*Competent Court—Arbitration—Referenoe incompetent.*

Where a reference under S. 617, C. P. C., 1882 is incompetent, any opinion expressed on such reference could not operate as *res judicata* in subsequent stage of the proceedings (*Mittra, A.J.C.*) YESHWANT RAO *v.* DATTATRAYA KRISHNA. **45 I., C. 201.**

——S. 11—*Competent Court—Joinder of causes of action.*

In determining whether the Court which tried the previous suit, had power to try the subsequent suit, Courts must look to the suit as it could have been framed but for the option given in the C, P. C. in the way ot joinder of causes of action. A plaintiff cannot therefore evade the rule by joining several causes of action against the defendants in the subsequent suit and instituting it in a Court of superior jurisdiction. (*Mittra, A. J. C.*) SUKHDEO *v.* BHULAI.

42 I. C. 657.

——S. 11—*Competent Court--Decree by Settlement Court—Right of redemption.*

Where the Settlement Court through oversight decreed that the mortgagor had no right left in him with respect to a particular property the question of the existence of the right to redeem is final and suit for redemption by the mortgagor or his successors in title is barred. (*Stuart and Kanhaiya Lal, A. J. C.*) TILAK CHAND *v.* SHAMBHU SINGH. **23 O. C. 269 : 7 O. L. J. 524 : 60 I. C. 404 : 2 U. P. L. R. (J. C.) 163.**

——S. 11—*Competent Court — Subsequent increase in value—Effect of.*

The competency of the Court to try the subsequent suit has to be judged with reference to the time when the first suit was brought, *i. e.*, as if the second suit had been instituted at the time when the first suit was filed. Thus where the suit was within the jurisdiction of a Munsif and the subsequent suit by reason of increase in the value of the property was beyond his jurisdiction and within the jurisdiction of a Subordinate Judge such subsequent suit would nevertheless be barred. 9 Cal. 439, 11 C. 301 (P. C.) dist. (*Kanhaiya Lal, J. C.*) GOPAL *v.* RAM HARAKH.

22 O. C. 331 : 54 I. C. 335 : 6 O. L. J. 547.

——S. 11—*Competent Court—Revenue Court—Decision how far binding.*

Where a Revenue Court decides a suit brought before it, holding that it has jurisdiction, and the parties accept the decree and it becomes final, one of them afterwards cannot ask a Civil Court to set aside the decree of the Revenue Court because it had wrongly decided the question of jurisdiction. If the suit had been decided wrongly, it can be remedied by an appeal. (*Daniels, A.J.C.*) BIPATI *v.* RAM BAKSH SINGH.

52 I. C. 98 : 1 U. P. L. R. (J. C.) 7.

——S. 11—*Competent Court—Revenue Court—Question of title—Decision—When binding.*

Where a rent Court has found upon evidence that the relationship of landlord and tenant obtains between two persons, that decision would often be final. But where the rent Court arrived at a decision without any evidence at all and upon a mere assumption of a question of proprietary title being involved and a tenancy not having been established, it is open to the Civil Court to arrive at a finding on the question of the proprietary title. (*Stuart, J. C.*) JALPA DIN *v.* KALAKA BUKHSH SINGH.

49 I. C. 61 : 21 O. C. 324.

——S. 11—*Competent Court—Revenue and Civil Court—Title to land.*

A sale deed provided that the lands should remain in the proprietary possession of the vendor free from liability for the payment of rent (*bila lagani*). The vendee obtained however, from the Revenue Court decrees against the vendor for arrears of revenue Subsequently the vendor sued in the Civil Court for a declaration that the land was not liable to pay the revenue or any other demand, and for damages. *Held* that as the words "*bila lagani*" implied that the vendee was to be liable to pay the revenue, if any that might be assessed on the land, the declaration could not be granted as it would trench on the jurisdiction of the Rev. Court. 12 O C. 164 Dist. Damages could not be granted as it practically meant a refund of the amounts decreed by the Revenue Court. 7 A. L. J. 1064, ref. (*Kanhaiya Lal, A. J. C.*) RAGHUNATHJI *v.* RAM RATAN.

39 I. C. 133 : 4 O. L. J. 68.

——S. 11—*Competent Court—Decision of—* Res judicata.

The decision in a previous suit by a Court not competent to try the subsequent suit does not operate as *res judicata* in a subsequent suit. 9 C. 439, Ref. (*Stuart, A. J. C.*) JIT SINGH *v.* RAM BAKHSH SINGH.

27 I. C. 537 : 2 O. L. J. 44.

——S. 11—*Competent Court—Revenue Court—Decision as to under proprietary title,*

A decision in a previous ejectment case under S. 62 of the Oudh Rent Act as to under-proprietary rights, operates as *res judicata* between the parties in a subsequent case for recovery of possession in the Revenue Court untill there is a final adjudication on the question in the Civil Court. (*Holms, J. M.*) MAHESH SHUKLA *v.* RUDRA PRATAB SINGH. **27 I. C. 525 : 2 O. L. J. 63.**

——S. 11—*Competent Court—Revenue Court—Decision of.*

Where in a suit for partition brought in a Revenue Court it was decided that the plaintiff should seek his remedy in a Civil Court and it was subsequently found that the plaintiff had then no right to sue, *held*, that the decision did not operate as

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res judicata. (*Lindsay and Kanhaiya Lal, A.J.Cs.*) BHARATH SINGH *v.* BALBHADHAR SINGH.
20 I. C. 429.

———S. 11—*Competent Court—Trial Court's jurisdiction.*

In deciding the question whether a particular decision is *res judicata* the powers of the Court in which the suit was instituted and not the powers of the Appellate Court are to be considered. (*Lindsay and Ratligan, JJ.*) RUKAIYA *v.* MUBARAK ALI.
14 I. C. 86.

——S. 11—*Competent Court—Summary procedure—Deputy Commissioner.*

The decision given by a Deputy Commissioner in summary proceeding under the Rev. Act as regards the amount of rent and cess is not *res judicata* in a subsequent suit. (*Chamier, J. C.*) RAJPAL *v.* PRATAP.
12 I. C 331.

——— S. 11—*Court of competent jurisdiction—Decision by Court having no pecuniary jurisdiction—Not* res jud cata.

Where the Court which tried the former suit could not, by reason of its limited pecuniary jurisdiction have tried the present suit the question of *res judicata* does not arise. 29 M. 65, followed. (*Simpson, A. J. C.*) UDAIRAJ SINGH *v.* RAM UDIT TEWARI. **10 O. L. J. 376 : 77 I. C. 340 : 1924 Oudh 147.**

———S. 11—*Competent Court—Evidence that prior court had no jurisdiction—Admissibility—Latent and patent defect.*

When there is no want of jurisdiction in the court to try a suit, that is to say, when the want of jurisdiction is not apparent on the face of the proceedings, but the absence of jurisdiction depends on a fact in the knowledge of the party which he had an opportunity of bringing forward in the court, then, if he does not bring that fact forward but allows the court to proceed with the judgment he ought not to be permitted to impeach the jurisdiction of the court in any collateral proceeding. (*Das and Adami, JJ.*) DWARKA PRASAD *v.* JAI BARHAM. **67 I. C 686 : 1922 P. 322**

——S. 11—*Competent Court—Revenue Court—Application under S.* 105, *B. T. Act.*

Disposal of an application under S. 105 does not bar a suit concerning rent. Plea of bar under S. 109 must be made in absence of which decision plff.'s right to rent based on Record of Rights will operate as *res judicata.* (*Das, J.*) MAHARAJ OF DARBANGA *v.* YOUNUS MOMIAN.
57 I. C. 48.

——S. 11—*Competent Court—Test of—Deliberate over-valuation of subsequent suit.*

The plaintiff in the subsequent litigation cannot get rid of the bar of *res judicata* by deliberately over-valuing the subsequent suit. (*Chamier, C. J. and Sharfuddin, J.*) BADARI SINGH *v.* LOBHI SINGH. **39 I. C. 551 : 1 Pat. L. W. 418.**

——S. 11—*Competent Court.*

In probate proceedings the question before the court is one of representation of the estate and not of distribution and therefore an adjudication as to the latter is not binding on parties in subsequent litigation. (*Pratt and Duckworth, JJ.*) MAUNG TUN YIN *v.* MA SEIN YAN.
1 Bur. L. J. 59 : 68 I. C. 671 : 11 L. B. R. 331 : 1923 Rang 9.

C. P. CODE (V OF 1908), S. 11—Compromise decree.

——Ss. 11 and 13—*Competent Court—Foreign Judgment—Rule applicable to*

The conditions of the judgment to be *res judicata* of the foreign court and of the court in British India, are the same. Such a judgment in order to be *res judicata* in a subsequent suit must be the judgment of the Court which is competent to try the subsequent suit. 6 Bom. L. R. 98 rel. (*Ormond, J.*) CHOKAPPA CHETTY *v.* RAMAN CHETTY. **9 L. B. R. 103 : 43 I. C 551 : 11 Bur. L. T. 194.**

——S. 11—*Competent Court—Arbitration—Award.*

A valid award bars a suit based on any of th claims covered by the award. (*Twomey, J.*) MA YON *v.* MAUNG KIYA GAING.
35 I. C. 710 : 9 Bur. L. T. 98.

——S. 11—*Competent Court—Revenue Officer.*

As there are no Revenue Courts in Burma there is no question of *res judicata* by reason of the orders of Revenue Officers. (*Maung Kin, J.*) MAUNG KAW LA *v.* MAUNG KE **9 Bur. L.T 183: 35 I C. 356 : 8 L. B. R. 556.**

——S. 11—*Competent Court—Arbitration—Reference.*

A suit is not barred by a reference to arbitration made before, but the award in which is delivered after the suit. *Per Kemp, A. J. C,*—The case would be different if by a reference and award before the suit the rights and liabilities of the parties had been determined at the date of the suit. (*Kemp and Raymond, A. J. Cs.*) RAMCHAND GURDASMAL *v.* GOBINDRAM.
56 I. C. 150 : 13 S. L. R. 193.

Compromise or Consent Decree.

——S. 11—*Compromise decree.*

A consent decree passed between the predecessors-in-interest of the parties touching matters now substantially and directly in issue between them, in a later suit is *res judicata.* (*Beaman, J.*) BHAISHANKAR *v.* MORARI. **36 Bom. 283 : 12 I. C. 535 : 13 Bom. L R. 950.**

——S. 11—*Compromise decree.*

A consent decree based on a compromise relating to matters outside suit does not operate as *res judicata* (*Rankin, J.*) SHASHI BHUSAN SHAW *v.* HARI NARAIN SHAW. **48 Cal 1059: 66 I. C. 705 : 25 C. W. N. 990.**

——S. 11—*Consent decree.*

In case of a consent decree an estoppel by judgment is possible only when the question was present in the minds of the parties, was intended by them to be dealt with finally by the consent decree and was actually so settled by the decree. (*Sadasiva Aiyar and Napier, JJ.*) THEVAN *v.* KRISHNA THEVAN. **27 I. C. 708.**

——S. 11—*Compromise decree.*

Quaere:—Whether a compromise decree can operate as *res judicata* upon any matter other than that relating to suit is one upon which there

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is some conflict of judicial opinion. (*N. R. Chatterjee and Greaves, JJ.*) MAHABIR MISSER *v.* NANDA KISHORE MISSER. **27 I. C. 640 : 27 C. L. J. 583.**

———S. 11—*Compromise decree.*

S 11 does not strictly apply to compromise decrees. (*Abdur Rahim and Sundara Aiyar, JJ.*) GOPALASAMI VASTAD *v* GOVINDASWAMI VASTAD. **17 I C. 434 : (1912) M. W. N. 1071.**

——S. 11—*Consent decree.*

A decree or order passed on a *razinama* would constitute the matters contained in it *res judicata* between the parties to suit (*Abdur Rahim and Ayling, JJ.*) RAVULA PARTI CHELLAMANNA *v.* RAVULA PARTI RAMA RAO. **36 Mad. 46 : 21 M. L. J. 870 : 10 M. L. T. 232 : 12 I. C. 317 : (1911) 2 M. W. N. 265.**

———S. 11—*Consent decree.*

S. 11 is not perhaps strictly applicable to consent decrees as it applies in terms only to what has been heard and finally decided by the Court. The principles applicable to judgments by consent are not the same as those applicable to judgments by default. (*Benson and Sundara Iyer, JJ.*) KUMARA VENKATA PERUMAL *v.* THATHA RAMASWAMI CHETTY **35 Mad. 75 : (1911) 1 M. W. N. 290 : 9 M. L. T. 487 : 9 I. C. 875 : 21 M. L. J. 709**

———S 11—*Compromise decree.*

The principle of *res judicata* is applicable in a compromise decree so as to prevent the parties from agitating a matter on which they agreed in a previous action. To find out what the matter is it would not be enough merely to see what was the relief granted in the previous decree, but it would be necessary also to examine the basis on which it was granted. (*Mitra, A. J. C.*) SITARAM *v.* PETIA. **43 I. C. 962: 14 N. L. R. 35.**

———S. 11—*Consent decree—Matter left open*

Judgment obtained by consent of parties is binding on all but if some matter is left open to be determined, the judgment does not operate as *res judicata* in respect of that matter when agitated afresh. (*Miller and Mullick, JJ.*) JOGDISH MISER *v.* RAMESHWAR SINGH. **57 I. C. 621 : 1920 Pat. 241.**

Connected or Cross Appeals and Suits.

——S. 11—*Cross suits.*

Where there are two decrees arising out of two suits heard together or raising the same question between the same parties and arising out of two appeals to the lower appellate Court and only one of such decrees is brought before the High Court in appeal and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred either by *res judicata* or by reason of his failure to appeal from the decree which does not prejudice him. (*Mears, C. J. Banerji. Piggott, Walsh and Ryves, JJ.*) GHANSHAM *v.* BHOLA. **45 A. 506 : 21 A. L. J. 465 : 74 I. C. 411 : L. R. 4 A. 265 : 1923 All. 490 (2.)**

C. P. CODE (V OF 1908), S. 11—Cross-appeals.

———S. 11—*Cross appeals—Second appeal against one only—Bar.*

Two appeals were filed against a decree of a Munsiff. The Lower Appellate Court dismissed both the appeals. A second appeal was filed against the decree in one only. *Held*, that the decree was final and binding between the parties and operated as *res judicata* and the appeal was not maintainable. (*Tudball and Rafique, JJ.*) BALHARI PANDE *v.* SHIR SAMPAT PANDE. **18 A. L. J. 40.**

———S 11—*Connected suits—Two decrees—One decree becoming final—Effect on appeal from the other.*

Where there are two connected suits between the same parties and the lower court dismissed both, the plaintiff is not precluded from appealing from the decree in one suit simply because he has allowed the decree in the other to become final. (*Piggott and Walsh, JJ.*) RAM FAQIR *v.* BINDESHRI SINGH. **41 All. 54 : 47 I. C. 837 : 16 A. L. J. 782.**

———S. 11—*Cross decrees—Appeal against one.*

Where only one of two decrees in the same terms is appealed against; the decree not appealed against will stand though the other one is set aside. (*Sunder Lal, J.*) RAM KISHUN *v.* BANWARI RAI. **25 I. C. 266.**

———S. 11—*Cross appeals—Abatement of one—Res judicata*

A instituted two suits for declaration that he was a mahunt of a *muth*, one against B, and the other against B and C. Both suits were disposed of by one and the same judgment but separate decrees were passed in each suit allowing A's claims. From the latter decree, only C appealed and from the other decree A appealed. Before the appeal by B was heard C died and his appeal abated and the decision of the lower Court became final. *Held*, that the said decision operated as *res judicata* for the purpose of B's appeal. 33 All 51 (F. B.) toll. (*Richards, C. J. and Banerjee., J.*) ANATH DAS *v.* UDAIBHAN PARGAS. **35 All. 187 : 19 I. C. 76 : 11 A. L. J. 214.**

———S. 11—*Connected suits—Same issue decided—Appeal in one—Bar.*

Where in two suits between the same parties the same issue is raised and decided against a party, and the latter appealed against only one decree. *Held*, that the decision on the issue had become final and could not be re-opened again. (*Banerji, J.*) LAL MAHAMMED *v*, SHAKURAN. **18 I. C. 867.**

———S. 11—*Connected appeals*—Res judicata—*Failure to appeal against a decree:*

Plff. appealed against one decree against him passed by the Appellate Court on the defendant's appeal; but he did not appeal against the appellate decree against him on his own appeal. *Held* that the Appellate decree against which no appeal was filed was *res judicata* and that it could not be questioned in the other appeal. (*Richards, J.*) CHUNI *v.* HUKKUM SINGH. **10 I. C. 238 : 8 A. L. J. 605.**

C. P. CODE (V OF 1908), S. 11—Connected suits.

——— S. 11—*Connected suits—Appeal against one—Bar by* res judicata.

The doctrine of *res judicata* applies to all the stages of a suit till it is finally terminated and the doctrine is not confined to the Court of first instance. It applies equally to the procedure on a first as well as second appeal. The expression former suit means a previously decided suit and the same rule applies to appeals. It is not the priority in the commencement of one action that renders the judgment obtained therein a bar to the recovery of a second judgment in another, but because the first judgment, when given whether in the action commenced first or last, it extinguishes the original cause of action and gives to the plaintiff in lieu thereof one of the higher nature. Where there were two suits in the primary court, decided by a common judgment and an appeal is preferred only in the first suit, while none is preferred from the decree in the second suit, the decree made in the latter becomes final and operates as *res judicata*. Cases on the point reviewed. (*Mookerjee and Chotzner, JJ.*) ISUP ALI *v.* GOUR CHANDRA DEB.

37 C. L. J. 184 : 74 I. C. 591 : 1923 Cal 496.

———S. 11—*Cross suits—Two suits for damages--Common issue—Joint trial—Separate judgments*—Res judicata.

Two suits for damages, by two persons, one against the other, were tried together, on the same issue of fact. One suit was dismissed and other decreed, in two separate judgments. There was an appeal against the judgment decreeing the suit but not against the one dismissing the suit, *Held*, the latter was *res judicata* in the other suit. (*Chatterjea and Pearson, JJ.*) GANGADHAR *v.* SAKALI TELNI. **34 C. L. J. 281 : 64 I. C 574 : 27 C. W. N. 141.**

———S. 11—*Connected suits—Decree—Appeal in one case.*

Plaintiff instituted two suits against respondents, one for a share of his deceased brother's property and the other for a share in the charity fund set apart at the time of partition between brothers which was not disposed of. Both the suits were dismissed on the ground of estoppel by virtue of a deed of relinquishment executed by the plaintiff in favour of his brothers. Plaintiff appealed only in the case in which he claimed a share in the property left by his deceased brother. It was objected that as he did not appeal from the case in which he claimed a share in the charity fund, the question of estoppel was *res judicata*. *Held* this objection is untenable, as the decision in the other case that the plaintiff was estopped by the deed of release from claiming a share in the charity fund does not affect the question whether he is estopped from claiming a share in the estate of one of his brothers, who died subsequently to the execution of that deed. (*Martineau and Campbell, JJ.*) SETH YUSAF ALI MOMOONJI *v.* SETH ALI BHOY. **1923 Lah. 8.**

———S. 11—*Connected and cross suits.*

Where two cross suits involve directly and substantially same question and were tried together an appeal against one decree only while the other decree was not the appeal is incompetent as the decree from which no appeal is made operates as *res judicata*. 35 All. 187 foll. (*Leslie Jones and Wilberforce, JJ.*) MAHOMED JAN *v.* DULI CHAND. **74 I.C. 583 : 3 Lah. L. J, 473.**

C. P. CODE (V OF 1908), S. 11—Connected suits.

———S. 11—*Connected suits--Small cause and original suit tried together—Appeals in both suits dismissed—Second Appeat in plff.'s suits.*

Where a small cause suit and an original suit were both tried together and two separate appeals filed against the decree were both dismissed and a second appeal was filed against the decree referring to the original suit : *Held* that the appeal lies even if no appeal was preferred against the decree in the other suit (*Shah Din and Chevis, JJ.*) KHAZAN CHAND *v* COMMITTEE OF THE NOTIFIED AREA, SANGLA HILL.

133 P. W. R. 1918 : 46 I. C. 545 : 62 P. L. R. 1918.

———S. 11—*Cross appeals — Appeal against judgment in one—Right to question other decree.*

Where both the parties to a suit appeal and both appeals are decided by a single judgment and one of them files a second appeal, from the decree which not only dismissed the appeal but embodied the result of the rival appeal the appellant is not precluded from impugning findings against him embodied in the rival decree though he has not filed, through a *bona fide* mistake, a copy of the rival decree. (*Shadi Lal and Jones, JJ.*) MURAD KHATUN *v.* MUHAMMAD BAKSH.

85 P. W. R. 1916 : 33 I. C. 742 : 84 P. R. 1916.

——— S. 11 — *Connected suits — Dependent judgments—Decree settling rights and liabilities —Recurring liability—Subsequent decrees based on the first decree—Appeal—Reversal of the first decree in appeal—Effect on subsequent decrees*—Res judicata.

When a decree has been passed determining the extent of recurring liability in one suit and when the decision is under appeal other decrees were passed on the authority of the first decision, they stand superseded by the decree passed in appeal and the fact that the subsequent suits were decided on the authority of the first decision and not on the ground of *res judicata*, makes no difference. (*Wallis C. J and Kumaraswami Sastri, J.*) ZEMINDAR OF PANGIDIGUDEM *v.* VENKATAPPAYA. **54 I. C. 647 : 37 M. L. J. 591.**

——— S. 11—*Connected suits—Two decrees—Appeal.*

Where two suits regarding same subject-matter are tried on the same evidence and separate decrees are drawn up though judgments follow closely each other, an appeal against one of the decrees is not barred by a failure to appeal against the other under S. 11, C. P. C. 29 Mad. 333 (F.B.) foll. (*Wallis, C. J. and Srinivasa Aiyangar, J.*) RAMASWAMY CHETTY *v.* KARUPPAN CHETTY.

31 I. C. 216 : 29 M. L. J. 551.

———S. 11—*Cross Appeals — Consolidated — Maintainability.*

A consolidated appeal against two cross-decrees is not maintainable but the appellant will have to confine himself to one decree: If he fails to elect which decree he will confine himself to, then and then alone the entire appeal can be dismissed by the rule of *res judicata*. (*Kanhaiya*

C. P. CODE (V OF 1908), S. 11—Connected suits.

Lal, A. J. C.) MAHABIR PRASAD *v.* BESHWAR PRASAD. **42 I. C. 424 : 4 O. L. J. 512.**

———**S. 11**— *Cross appeals— Second appeal against one of two decrees in cross appeals.*

If second appeal is preferred against one of two decrees made in two cross appeals decided by a single judgment and the matter at issue in the second appeal was not directly and substantially in issue in the other appeal, there was no final decision of the question which would operate as *res judicata* against the hearing of that appeal. 33 All. 51; 35 All. 187; 19 I. C. 76 Dist. (*Sabonadiere A. J. C.*) LALLU RAM *v.* RAJ BAHADUR. **21 I. C. 264.**

———**S. 11**—*Connected suits—Involving same issue—Appeal against one alone*—Res judicata.

Where two suits involving the same issue are tried together but the decree in one of them is not appealed against, then in an appeal, against the decree which is appealable the decision in the other decree; not appealable is *res judicata*. 5 O C. 384 ; 7 I C. 156: 33 A. 151 foll. (*Piggott, J. C.*) LALTA PRASAD *v.* BAHORUN NISSA. **14 I. C. 321.**

———**S. 11**—*Connected suits—Two decrees to be set aside—Appeal against one only if other becomes* res judicata

Where there are two decrees to be set aside before the dissatisfied party can get the relief he asks for, and an appeal is filed against one only, the other operates as *res judicata* in the appeal against the former. (*Piggott, J. C.*) WALIULLAH *v.* EJAZALI. **13 I. C. 984 : 15 O. C. 22.**

———**S. 11**—*Cross suits—Decision in prior suit.*

The main object of the doctrine of *res judicata* is to prevent multiplicity of suits between litigants. S. 11 refers not to the date of commencement of the litigation but to the time when the Judge decides the issue. Where there are two cross suits having a certain issue common to both and no appeal is brought against the one suit the finding on the issue cannot be attacked in an appeal from the decision in the other suit. (*Fox, C. J and Hartnoll, J.*) RAMAN CHETTY *v.* MUTHU VEERAPPA CHETTY. **5 Bur. L T. 199 : 17 I. C. 860 : 6 L B. R. 93.**

Co-plaintiffs.

———**S. 11**—*Co-plaintiffs—Decision when* res judicata.

In a suit by a firm against a debtor a joint decree was obtained against the debtor in favour of the plffs. who were declared to be co-partners. *Held* that such adjudication of the co partnership was arrived at only for the purpose of the deft who was sued in that litigation and did not operate as *res judicata* in a suit between the co partners so as to bar a finding that one of the co-partners has no title to any share in the partnership business. (*Chandavarkar, A, C. J. and Batchelor, J.*) SHANKAR VISHNU GOKHALE *v.* RAGHUNATH HARI DHARAP. **17 I C. 205 : 14 Bom. L. R. 854.**

———**S. 11**—*Co-plaintiffs—Test of.*

A point is not *res judicata* unless it is clear from the pleadings and the findings in the previous suit. A finding to become *res judicata* as between co-plffs. must have been essential for giving relief against the deft. Where in the previous suit it was an insignificant matter for the deft. therein for the relief to be given against him whether the one plff. succeeded or the other, plea of *res judicata* ought to be disallowed. (*Russell and Chandavarkar, JJ.*) RAKHMINI *v.* DHONDO. **36 Bom. 207 : 14 I. C 466 : 14 Bom. L, R. 128.**

C. P. CODE (V OF 1908), S. 11—Directly and Substantially in issue.

———**S. 11**—*Co-plaintiffs.*

No decision on points not actively contested between co plaintiffs. is *res judicata* between them. (*Oldfield and Phillips, JJ.*) MOOKKAN *v.* NAGA PILLAI. **38 I C 213 : (1917) M. W. N. 14.**

———**S. 11**—*Co-plaintiffs—Decision when* res judicata.

In the absence of a conflict of interest between persons ranged as co-plaintiffs in a suit the suit have made in the alternative, the claim which he made in the present suit and that by reason of decision in the suit would not bind their successors as *res judicata*. (*Miller, C. J. and Jwala Prasad, J.*) MAHARAJA PRATAB UDAI NATH SAHI DEO *v.* GANESH NARAIN SAHI. **70 I. C. 232 : 1921 Pat. 369.**

Directly and Substantially in issue.

———**S. 11**—*Directly and sustantially in issue—Genuineness of document.*

Where the suit was brought to enforce a document which was held in a former suit to have no effectual binding power over the estate in question and not to affect it in any way as between the parties, *held* that the suit was barred by the rule of *res judicata* (*Lord Macnaughten.*) DURGA PRASAD *v.* SHASIBALA DEBI (1912) M. W. N. 73 : 11 M. L. T 73 : 9 A. L. J 165 : 15 C. L. J. 180 : 14 Bom. L. R. 177 : 14 I. C 463 : 16 C. W. N. 603 (P. C.).

———**S. 11**— *Directly and substantially in issue—Decision on validity of sale deed.*

Where the question whether a particular sale deed was a valid document arose directly and substantialy in the previous suit and the prior suit could not be determined without a decision of the issue the decision operates as *res judicata* in a subsequent suit even though the property involved in the subsequent suit is different from the one which was the subject of the prior suit. 13 B. 25 : 7 I. C. 388 Ref. (*Banerji and Gokul Prasad, JJ.*) KEDAR NATH SINGH *v.* SHEO SHANKER. **45 A. 515 : 21 A. L. J. 421 : L. R. 4 A. 512 : 76 I. C 3?0 : 1923 All. 613 (2).**

———**S. 11**— *Directly and substantially in issue—Obiter dictum not necessary for the decision of the case.*

Where in a prior suit the court had merely to decide the factum of a person's death at the date of suit having regard to the presumption under S. 108 of the Evidence Act but it went further and expressed an opinion that the person was dead at a particular date relying erroneously on the supposed presumption to that effect found in S. 108,

C. P. CODE (V OF 1908), S. 11—Directly and substantially in issue.

Evidence Act, the decision as to the date of death is not passed on an issue directly and substantially in question and does not constitute *res judicata*. (*Walsh and Ryves, JJ.*) REKHAB DAS *v.* MT. SHEOBAI. **45 A. 466 : 21 A. L. J. 393 : L. R. 4 A. 532 : 74 I. C. 656 : 1923 All. 495**

——S. 11—*Directly and substantially in issue — Suit by son to avoid execution sale of joint family property — Prior suit—Dismissal of—Effect of.*

A suit by a Hindu son to avoid a sale in execution of a decree against his father on the ground that the debt was tainted with immorality is barred by a similar previous suit on the ground that the property was joint family property. (*Gokul Prasad and Stuart, JJ.*) BADRI PRASAD *v* MOHAN SINGH. **4 U.P.L.R. (A.) 15 : 65 I C 511 : 1923 All. 231.**

——S. 11—*Directly and substantially in issue—Decision depending on one issue—Other issues not* res judicata.

Plaintiffs sued defendants for an injunction restraining them from building on the disputed land alleging it to be the common property of the parties. The plea of the defendants was that the land was exclusively their own. A subsequent suit was instituted by defendants against plaintiff, in which defendants, *inter alia* claimed an injunction against plaintiffs restraining them from allowing water to flow on the disputed land to which the plaintiffs answered that they were joint owners of the land with plaintiffs and that they had a right of easement. The plaintiffs' suit was dismissed on the finding that the defendants were sole owners of the land in dispute. In the suit filed by defendants the court found in favour of the easement alleged by the plaintiffs, and dismissed that suit. Plaintiffs appealed against the decree dismissing their suit and there was no appeal from the decree in the other suit. *Held* that the consideration of the issue as to ownership of the land was not barred by *res judicata*, since that question ceased to be substantially in issue in the second suit by reason of the finding on the question of the easement right. 33 A. 51 Dist. (*Mears, C. J. and Piggott, J.*) PEARY LAL *v.* JADO RAI. **20 A. L. J 784 : 76 I. C. 618 : L. R 3 A. 450 : 1923 All. 15.**

——S. 11—*Directly and substantially in issue—Suit for possession—Previous suit for declaration.*

The dismissal of a suit of the reversioner for a declaration that he was the next reversioner during the lifetime of the widow on the occasion of transfer by her by way of gift is no bar to a subsequent suit for possession of the property. (*Gokul Prasad, J.*) RAMJAS *v.* MR SARTAJI. **70 I. C 635 : 20 A. L. J. 672 : 1922 All. 401.**

——S. 11—*Directly in issue—Partition proceedings—Question of title.*

Where the parties were arrayed on the same side in partition proceeding and the court allowed partition and formed a separate Mahal in the names of each of the parties, a subsequent suit by plaintiff for a declaration that he alone was the owner of the entire Mahal to the exclusion of the defendant is barred by the rule of *res judicata*. (*Knox and Banerjee, JJ.*) LAL BEHARI *v.* PARKAL KEOR. **42 All. 309 : 18 A. L J 110 : 55 I. C. 22 : 2 U. P. L. R. (All.) 50.**

C. P CODE (V OF 1908), S. 11—Directly and Substantially in issue.

——S. 11—*Directly and substantially in issue—Co-heir's suit for possession—Mahomedan widow—Dower—Conditional decree—Subsequent suit.*

In a suit by Mahomedan heirs for possession against a widow in possession of the deceased's estate for her dower, a conditional decree was passed on non-fulfilment of which the suit was to stand dismissed. A subsequent suit was brought by the heirs for possession from a donee of the properties from the widow. *Held* that the dismissal of the prior suit did not bar the suit. (*Rafique and Lindsay, JJ.*) MAINA BIBI *v.* WASI AHMAD. **41 All. 533 : 17 A.L.J 629 : 51 I. C. 242 : 1 U. P. L. R. (H C) 103.**

——S. 11—*Directly or substantially in issue.*

In order to see what was in issue in a suit, or what has been heard or decided, the judgment must be looked at. The decree is only to state the relief granted or other determination of the suit. The determination may be on various grounds but the decree does not show on what ground, and does not afford any information as to the matters which were in issue or have been decided. (*Walsh and Sundar Lal, JJ.*) TEJ BEGAM *v*, SARVI BEGAM. **37 I. C. 674 : 14 A. L. J. 1171.**

——S 11—*Directly in issue—Rent suit—Incidental determination of title.*

An incidental determination of an issue of title in a suit for rent is not a bar to any issue of title being raised subsequently. (*Banerji, J.*) BALDEO PERSHAD *v.* NARAIN HALWAI. **34 I. C. 123.**

——S. 11—*Directly in issue—Rent Suit—Suit dismissed for want of proof of title—Subsequent suit for rent.*

On dismissal of a suit for rent on the ground that the plaintiff had failed to prove the title on which he relied a subsequent suit for rent for the subsequent period is not barred. (*Banerji, J.*) MUNNA LAL *v*, BUCHCHU LAL. **22 I. C. 7.**

——S. 11—*Directly in issue—Alternative findings—Redemption suit.*

Where plaintiff, the vendee of the mortgagor's share sued for redemption and the dispute was as regards the extent of the plaintiff's vendor's share. *Held*, that the decision in a prior suit for pre-emption brought by the defendants, in which the extent of the share was neither in issue nor determined is not *res judicata* in a subsequent suit for redmption. (*Richards, C. J. and Banerjee, J.*) HARPAL SINGH *v.* SHEO MANGAL SINGH, **14 I. C. 161.**

——S. 11—*Directly and substantially in issue—Parties ranged on the same side in former suit.*

The decision on a point of fact not directly and substantially at issue in a former suit cannot operate as *res judicata* in a subsequent suit as between parties arranged on the same side in the former suit with no difference whatever between them. (*Tudball, J.*) HUB ALI *v.* HAMMUN. **11 I. C. 936 : 8 A. L. J. 807.**

C. P. CODE (V OF 1908), S. 11—Directly and substantially in issue.

——— **S. 11—*Directly in issue—Two findings in former suit—Second not necessary for disposal of suit whether* res judicata *in a subsequent suit.***

A finding in a former suit on a point not necessary for the disposal of the same is not *res judicata* in a subsequent suit (*Piggott, J.*) MISRI LAL *v.* MOHAMMAD FIDA HUSAIN. **11 I. C. 89.**

——— **S. 11—*"Directly and substantially in issue"—Two findings.***

Where in a case there are two findings either of which would in law be sufficient to dispose of the case, that one which in the logical sequence of necessary issues should have been first found rendering the determination of the other issue unnecessary is the finding which operates as *res judicata*. 17 A. L. J. 174 Cons. (*Stanley, C J. and Banerji, J.*) JIVA RAM *v.* KALYAN.

9 I. C 983 : 8 A. L. J. 409.

——— **S. 11—*Directly in issue — First suit under general law -Second suit under special law.***

The Dekhan Agri. Rel. Act, 1879, is in relief of a certain class of His Majesty's subjects and, therefore, the finding in the first suit by the mortgagee could not affect and be *res judicata* in the second suit under the Act which is of a different character given to it by a special law, unless the previous suit also could fall within the class of suits to which that law applied. (*Chandavarkar and Batchelor, JJ.*) VITHAL RAMACHANDRA *v.* SITABAI SITARAM. **36 Bom. 548 : 16 I. C. 442 : 14 Bom. L. R. 579.**

——— **S. 11—*Directly and substantially in issue—Partition suit—Items.***

A, a Hindu widow sued her husband's brother's heir for possession of her husband's share after partition by metes and bounds forming part of the joint family property. She also alleged that there had been an actual partition of the house property also. The Court held that the family land was undivided. A's suit was dismissed but there was no question about the partition of the house property in issue in that suit. Subsequent to A's death, her husband's reversionary heirs sued for possession of the house in which A resided during her lifetime. It was alleged by the plaintiff that there had been a partition of the house and that the house in suit fell to the share of A's husband and had become his exclusive property. The suit was not barred as the question about the partition of house property was not directly and substantially in issue in the previous suit and was not necessary to be decided nor had been decided in that suit. (*Beaman and Hayward, JJ.*) MULJI BHAI *v.* LAKMI DAS. **36 Bom. 127 : 12 I. C. 711 : 13 Bom. L. R. 1034.**

——— **S. 11—*Directly and substantially in issue—First suit for title—Second for fixing boundaries.***

A prior suit determining a question of title regarding a certain land does not bar a subsequent suit between the same parties involving a question as to its boundaries. (*Walmsley and Ghose, JJ.*) ANANTRAM BHATTACHARJEE *v.* HEMCHANDRA KAR. **50 Cal. 475 : 72 I.C. 1041 : 1923 Cal. 379.**

——— **S. 11—*Directly and substantially in issue—Decision as to rate of rent in one year—Effect of.***

C. P. CODE (V OF 1908), S. 11—Directly in issue.

If in a case under S. 105, B. T. Act, the only point decided was the amount of additional rent to be allowed for the excess area, it does not constitute *res judicata* as to the rate of rent. A rent decree in a prior suit may not be *res judicata* in the sense that it finally decided the rate of rent between the parties, but it is *res judicata* that for the years for which that suit was brought the rent was the amount then found. (*Newbould, J.*) BROJENDRA KISHORE ROY CHOWDHURY *v.* SHEIKH SOMAR ALI. **68 I.C. 298 : 1923 Cal. 282 (2).**

——— **S. 11—*Directly and substantially in issue—Adjudication.***

Where both parties in a dispute about land set forward certain measurements and they came to an arrangement by which the length of the rod was taken as of more than the Naikarsha rod and the plaintiffs got more than they were entitled.

Held, as the question of the length of rod was not a point in issue and there was no adjudication thereon, the principle underlying S. 11, C. P. C., does not apply. (*Walmsley and Suhrawardy, JJ.*) SURADHANI DUTTA *v.* SITTO SHEIK.

27 C. W. N. 280 : 71 I. C. 378 : 38 C. L. J. 17 : 1922 Cal. 311.

——— **S. 11— *Directly in issue— Incidental finding on title is not* res judicata *—Rent suit.***

Where in a suit for rent, the question of title is decided incidentally, that decision is not *res judicata* in a subsequent suit for declaration of title for possession. (*Chatterjea and Panton, JJ.*) DURGAPADA *v* MANINDRA. **63 I C. 762.**

——— **S. 11—*Directly and substantially in issue—Rate of rent decision as to, if* res judicata *in a subsequent suit for rent.***

The question of the rate of rent is a necessary issue that must be decided by the Court in a suit for enhancement of rent and the Court's decision thereon is *res judicata* in a subsequent suit for rent in which the same question is at issue. (*Newbould, J.*) KIRAN CHANDRA *v.* BONO BEHARI DATTA. **59 I. C. 752.**

——— **S. 11— *Directly and substantially in issue—Prior rent suit—Subsequent suit for possession.***

A decision in a rent suit as to the length of the deft.'s occupation, the main issue being whether the relationship of landlord and tenant existed is not *res judicata* in a subsequent suit between the parties to recover possession by ejectment where the main issue is, whether plff.'s possession is within 12 years of the date of suit. (*Sanderson, C. J. and Woodroffe, J.*) DINESH CHANDRA BANERJEE *v.* ROMESH CHANDRA DAS. **59 I. C. 316.**

——— **S. 11— *Directly and substantially in issue—Ejectment suit—Status of tenant—Question of.***

Where an ejectment suit by a *rayat* alleging that the defendant was an *under rayat* failed because of the finding that the defendant had a "protected interest" under the Bengal Tenancy Act, it was held, in a subsequent suit that the determination of which depended on the precise ascertainment of status of both, that the judgment in the previous suit did not operate as *res judicata* as there the question of status was not directly and

substantially in issue. (*Mookerjee, C. J. and Fletcher, J.*) INDUBALA DEBI *v.* ATUL CHANDRA GHOSE, **57 I. C. 344 : 31 C. L. J. 507.**

——S. 11—*Directly and substantially in issue—Rent decree.*

A rent decree though only *ex parte* is *res judicata* on the question of the existence of the relationship of landlord and tenant between the parties. (*Huda, J.*) BASANTA KUMAR SIRCAR *v.* SUKHOMOY MONDAL. **54 I. C. 763.**

——S. 11—*Directly and substantially in issue—Rent suit—Decision as to title.*

Where a suit for rent in which the relationship of landlord and tenant is denied by the defendant who sets up the title of a third person who is not made a party to the suit, is dismissed and an adverse finding is given against the plaintiff's title, the decision cannot operate as *res judicata*, on the question of title in a subsequent suit between the parties. (*N. R. Chatterjee and Panton, JJ.*) GOBER SHEIKH *v.* ALIPUDDIN SHEIKH. **51 I. C. 356 : 30 C. L. J. 13.**

——S. 11—*Directly and substantially in issue—Title—Successors in interest.*

If there is no real contest with regard to title of a party, the finding in a suit is not *res judicata* as regards the successor in title of the party. (*Teunon and Greaves, JJ.*) ASHUTOSH ROY *v.* ANANT RAM. **50 I. C. 727.**

——S. 11—*Directly and substantially in issue—Rent suit—Title—Incidental decision.*

The question of title incidentally gone through in a rent suit, does not operate as *res judicata*. (*Fletcher and Walmsley, JJ.*) SONAULLAH SARKAR *v.* DURGA KANTA. **50 I. C. 598.**

——S. 11—*Directly and substantially in issue—Unnecessary finding—Not* res judicata.

A finding by an Appellate Court on a point not necessary for the decision of the suit and on which no issue was raised in the primary Court cannot operate as *res judicata* in a subsequent suit between the parties. (*Fletcher and Walmsley, JJ.*) KUSALYA SUNDARI *v.* NABIN CHANDRAKAR. **49 I. C. 513.**

——S. 11—*Directly and substantially in issue—Rent suit—Subsequent suit on title.*

Plaintiffs sued for rent on the basis of certain *Kabuliyats* said to have been executed by the defendants, as well as on certain *kobalas* and the defendants denied the relationship of landlord and tenant. The Court dismissed the suit holding that the documents relied on by plaintiffs had not been proved and that the plaintiffs were not landlords. In a subsequent suit by the plaintiff for declaration of their title and for recovery of possession, *Held*, that the suit was barred by *res judicata* because the documents found to have been not proved in the previous rent suit could not be set up in the subsequent suit. (*Fletcher and Walmsley, JJ.*) ALOK MAINUS BE'ARI *v.* BACHHANI BIBI. **49 I. C. 477.**

——S. 11—*Directly in issue—Prior suit dismissed for want of cause of action—Subsequent suit—No bar.*

In a suit by the plaintiff for the declaration of a public right of way, alleging special damage, it

appeared that a previous suit for a similar declaration had been dismissed on the ground that the plaint did not disclose any cause of action (there being no allegation that plaintiff had suffered special damage.) *Held*. that the second suit was not barred by *res judicata*. (*Fletcher and Huda, JJ.*) HARIHAR DAS *v.* CHANDRA KUMAR GUHA. **49 I. C. 79 : 23 C. W. N. 91.**

——S. 11—*Directly and substantially in issue—Rent suit—Decision as to rate of annual rent if* res judicata—*Evidence.*

A judgment in a suit for rent deciding the annual *jamma* payable on a holding even though it does not operate as *res judicata* on the same question in a subsequent suit for rent, is good evidence as to the rate of rent. (*Chitty and Walmsley, JJ.*) HAR KUMAR SEN *v.* RAJ KUMAR HALDAR. **47 I. C. 173.**

——S. 11—*Directly and substantially in issue—Rent suit—Finding as to validity of kabuliyat.*

The question whether the decision in a rent suit can operate as *res judicata* on matters other than the relationship of landlord and tenant, depends upon the issues raised and decided between the parties in the rent suit. If in a rent-suit, a kabuliat has been held, on a judicial determination, to be valid and effective as against the tenant and to have been properly executed, a subsequent suit by the tenant for the declaration that the kabuliyat is null and void is barred. (*Fletcher and Smither, JJ.*) BENI MADHAB CHAKRABARTY *v.* BHOLA NATH MAJILA. **47 I. C. 8.**

——S. 11—*Directly and substantially in sisue—Rent suit—Rate of rent*—EX parte *decree.*

An *ex parte* decree in a rent suit decreeing the claim as prayed for, does not operate as *res judicata* as regards the rate of annual rent unless there was a prayer in the plaint for a declaration as to the rate of rent as part of the substantive relief claimed. (*Teunon and Newbould, JJ.*) BRAJENDRA KUMAR ROY *v.* SARFJENDRA NATH. **45 I. C. 416.**

——S. 11—*Directly and substantially in issue—Rent suit—Rent in kind.*

A suit for rent wherein the amount of rent annually payable is put in issue and finally decided, will operate as bar by *res judicata* in a subsequent suit for rent of the same holding for a different period. (*Teunon and Huda, JJ.*) AMZAD ALI SIKDAR *v.* NAIMUDDIN. **42 I. C. 583.**

——S. 11—*Directly in issue—Rent suit—Decision as to rent payable.*

The case of *res judicata* may arise in a rent suit just as much as in any other suit and a decision as to the rate is *res judicata*. (*Fletcher and Newbould, JJ.*) MIDNAPUR ZEMINDARI CO., LTD. *v.* JAGENDRA KUMAR. **41 I. C. 584.**

——S. 11—*Directly and substantially in issue—Rent suit—Decision as to relationship of landlord and tenant—Suit for Khas possession by landlord.*

A subsequent suit for khas possession is barred where in a previous suit for rent plff.'s title as landlord was distinctly negatived by the Court. (*Fletcher and Newbould, JJ.*) JATINDRA NATH BOSE *v.* MAHOMED MALLIK. **40 I. C. 659.**

——S. 11—*Directly in issue—Rent suit—Decision about annual rent payable, if bar.*

C. P. CODE (V OF 1908), S. 11—Directly in issue.

Where in a suit for rent the question as to what rent is annually payable for the holding is directly raised and decided by the court the decision operates as *res judicata* unless the rent has been subsequently changed. (*Chatterjee and Smither, JJ.*) JOGESH CHANDRA ROY *v.* RAM KEBAL NATH, **40 I. C. 460.**

———S. 11—*Directly in issue—Mortgage—Redemption—Suit for—Bar.*

A previous suit by mortgagee to remain in possession till his debt is satisfied out of the usufruct (by right of *ijara*) against the mortgagor does not bar a subsequent suit for redemption. (*Jenkins, C. J. and Chatterjee, J.*) PEARY MOHUN MOOKERJEE *v.* CHANDRA SEKHAR SARKAR. **33 I. C. 59 : 19 C. W. N. 1132.**

———S. 11 — *Directly and substantially in issue—Incidental finding.*

An incidental finding as regards boundary of a plot in a previous suit is not *res judicata* as regards the question of title of that strip. (*Holmwood and Imam, JJ.*) MAHAMMAD ABDUL KADIR *v.* JUAN CHANDRA PAL. **32 I. C. 738.**

———S. 11—*Directly and subsiantially in issue—Title by survivorship--Finding of division—Dismissal of suit—Subsequent suit for partition.*

A brought a suit against the mother and widow of B for recovery of possession of the estate left by the latter claiming by survivorship. One of the issues was whether A and B were joint or divided and another issue was as to whether a village has been divided between A and B. The suit was dismissed, both issues being found against A. Subsequently the heirs of A brought a suit against B's heirs for a declaration that the village was their own exclusive property. *Held*, that the suit was not barred by *res judicata*. The finding that A and B were divided in status was enough to dispose of the plff.'s case n the prior suit and it is only that issue that could operate as *res judicata*. The right to the village in question was not substantially and directly in issue in the previous suit and therefore the finding thereon does not operate as *res judicata*. (*Mookerjee and Beachcroft, JJ.*) ANAND KISHORE CHOWDHURY *v.* DARJE THAKURAIN. **28 I. C. 580 : 21 C. L. J. 296.**

———S. 11—*Directly in issue—Rent suit—Question of title—Ejectment.*

In a previous suit for rent brought by plaintiff against defendant, defendant pleaded that he had always paid his rent to the plaintiff for the benefit of the landlord and that the plaintiff was nothing more than a *gomastah*, and that he was a *raiyat* holding directly under the landlord. The rent suit was decided in favcur of defendant. The plaintiff then sued for establishment of his title as *raiyat* and to eject the defendant as a trespasser. *Held*, that the decision in the rent suit did not operate as *res judicata* on the question of the title of the plaintiff. (*Holmwood and Chapman, JJ.*) KALA GAZI *v.* MAHESWAR CHAUDHURI. **27 I. C. 273.**

———S. 11— *Directly and substantially in issue—Rent suit—Decision as to amount of rent.*

A decision as to the amount claimed in a rent suit operates as *res judicata* as an admission of the relationship of landlord and tenant. (*Holmwood and Chapman, JJ.*) PRANHARI GUHA *v.* CHANDRA KUMAR GUHA. **25 I. C. 204.**

———S. 11—*Directly in issue—Landlord and tenant—Title to land.*

Where the question of title raised in the subsequent suit was not directly and substantially in issue in a former suit. *Held*, that the former suit could not operate as a bar by *res judicata* to the subsequent suit. (*Mullick, J.*) JAGATLARA DEBYA *v.* NARMADA KANTA BANERJEE. **24 I. C. 801.**

———S. 11—*Directly and substantially in issue—Several issues.*

As regards questions raised and decided against a party, however numerous they might be, the estoppel of the judgment will apply to each point so decided as if it were the sole issue in the case. (*Mookerjee and Beachcroft, JJ.*) RASH BEHARI *v.* MAHENDRA NATH GHOSE. **21 I.C. 979 : 19 C. L. J. 34.**

———S. 11--*Directly and substantially in issue—Rent suit—Express issue as to title not raised—Evidence taken.*

The question of *res judicata* is one of substance and not of form : where the issue raised in the subsequent suit is substantially the same as that in the previous suit though not formally raised, the subsequent suit will be hardly *res judicata*. Where the Lakhiraj title set up by a person was negatived in a prior rent suit which was decreed, he cannot sue again for declaration of that title. (*Richardson and Newbould, JJ.*) SHRINATH MANDAL *v.* CHHABILAL MITRA. **20 I. C. 700.**

———S. 11—*Directly and substantially in issue*—Pro forma *deft.*

Where in a previous suit by A against B. it was held that B was a tenant of A, a sebsequent suit by B against A and C, a *pro forma* deft. for a declaration that B is not a tenant of A but of C is barred by *res judicata*. 26 Cal. 242, Dist, (*Jenkins, C. J. and Mookerjee J.*) SREENATH DUTT *v.* KESAR SEIKH. **20 I.C. 344 : 18 C. W. N. 116.**

———S. 11—*Directly in issue—Rent suit—Decree at certain rate.*

In a previous rent suit, the issue was " At what rate is the plff. entitled to get rent" The first Court gave a decree at a rate between the rates alleged by the parties. The Appellate Court gave a decree at the rate admitted by the deft. *Held*, that there having been no change of the conditions of the tenancy alleged, the rate at which the rent was decided to have been payable in the former suit was *res judicata* in the subsequent suit. (*Chitty and Teunon, JJ.*) KASIMADDI MUHAMMED *v.* SHIB PROSAD DAS CHOUDHURY. **16 I. C. 590.**

———S. 11—*Directly and substantially in issue—Rent suit—Test of.*

The question whether or not the decision in a suit for rent operates as *res judicata* upon the question of the amount of rent annually payable is dependent upon the scope of the issues raised and decided. If the question raised and decided relates to the amount recoverable for the particular years in dispute the decision has not the effect of *res judicata*. On the other hand if the

C. P. CODE (V OF 1908), S. 11—Directly in issue.

question raised is as to the amount of rent annually payable, the decision clearly constitutes *res judicata*. 6 I. C. 860 foll.; I. C. L. J. 248 ref. The tests are, whether the party who seeks to re-open the matter in controversy could with reasonable diligence have raised the matter, whether he had a fair opportunity to obtain an adjudication upon the matter, and, whether the question formed the proper subject of litigation in the previous suit. Whether a party ought to have challenged the decree in a previous suit on the ground of fraud is a question which depends on the circumstances of each case. 16 C. 682, 20 C. 79, rel. (*Mookerjee and Carnduff, JJ.*) PRABHU NANAIN SINGH *v.* SUNDAR PANDEY.
16 I. C. 447 : 16 C. L. J. 41.

———S. 11— *Directly and substantially in issue—Rent suit—Previous decision when bar.*

In considering whether a previous decision in the previous suit as to the rate of rent payable is *res judicata* in a subsequent suit, it must be seen whether the decision in the former rent suit was given on an incidental or material point. 20 C. 505, 19 C, 656, 21 C. 236, 26 C. 428, 34 C. 1020. rel. (*Sharfuddin and Coxe, JJ.*) MANE MUHAMMED *v.* DHANI MUHAMMED.
17 C. W. N. 76 : 16 I. C. 22 : 17 C. L. J. 71.

———S. 11 — *Directly and substantially in issue—Rent suit—Decision as to rate in subsequent suit.*

The controversy in a previous suit between landlord and the tenant was not the amount of rent payable for the particular years for which rent had been claimed, but the amount of *jama* annually payable by the tenant to the landlord. The Court expressly found that the plff. had failed to prove. his allegation while the tenants (defts.) had established by affirmative evidence that the jamas were as stated by them. *Held*, that there was an express adjudication by the Court upon the question of the amount of rent annully payable and the decision in the previous suit must be deemed conclusive: 1 C. L. J. 248 : 13 C. L. J. 38 : 4 C.L.J. 220 rel. 5 C. L. J. 92 ; 13 C. L. J. 653 : 1 C. W. N. 711 dist (*Mookerjee and Carnduff, JJ.*) SARJUG PROSAD NARAIN SINGH *v.* AJODHYA RAI. 15 I. C. 863.

———S. 11—*Directly and substantially in issue—Rent suit—Scope of—Incidents of tenancy—Decision that* Raikumat *payable.*

The decision in a rent suit may operate as *res judicata*, where it is upon a question as to the incidents of tenancy, not merely in relation to the claim for the particular year but from a wider point of view, 16 C. L. J. 89, 9 C. W. N. 469 rel. 10 W. R. 257, 28 C. 17. ref, 17 C. 726, expl. *Raikumat* is legally recoverable if it is payable under a custom. 24 W. R. 4, rel. A decision that *raikumat* was payable in a previous rent suit, involved by implication a decision that the *raikumat* claimed was payable under a custom, and the decision being upon a mixed question of fact and law, operates as *res judicata*. (*Mookerjee and Carnduff, JJ.*) BECHRAM SAHU *v.* CHAMBU URAON. 15 I. C. 837.

———S. 11—*Directly and substantially in issue—Rent suit—Enhancement.*

C. P. CODE (V OF 1908), S. 11—Directly in issue.

The owner of a share of a tenure sued for enhancement against the deft. tenant, holding under a lease the plff's share of the property. It was held in that suit that the plff. had the right to enhance the rent of the deft. ; but the suit was dismissed on the ground that the rent paid by the deft. was not lower than that paid by tenants of adjoining land. In a later suit for enhancement of the deft.'s rent: *held*, that there was no *res judicata* and the deft. was not debarred from questioning the soundness of the decision in the first suit that the plff. was entitled to bring the suit. (*Harrington and Mookerjee, JJ*) PARBATTY DEBYA *v.* MATHRA NATH BANERJEE. 40 Cal. 29 : 16 C. W. N. 877 : 15 I. C. 453 : 16 C. L. J 9.

———S. 11—*Directly and substantially in issue—Rent suit—Previous certificate cancelled—No adjudication on merits—Public Demand Recovery Act, Ss. 7 (1) (c), and 8.*

Where a previous certificate for arrears of rent was cancelled on the ground that a *bona fide* claim was involved but without entering into the merits a subsequent suit for rent is not barred by *res judicata*, (*Mookerjee and Carnduff, JJ.*) JANKI KOERI *v.* BASUDEO OJHA. 13 I. C. 351.

———S. 11—*Directly in issue—Rent suit—Title.*

A tenant in a rent suit set up his ownership to the lands denying that of the landlord and the Court decided the question of title, *Held*, it will operate as *res judicata* if the decision of title was necessary to decide the rent suit. (*Mookerjee, J.*) PANCHU *v.* CHANDRA KANTA.
12 I.C. 9 : 14 C. L. J. 220.

———S. 11 Expl. II—*Directly and substantially in issue—Final adjudication in prior suit of matter in dispute, if necessary.*

For the application of the doctrine of *res judicata*. it is not necessary that the matter of the subsequent suit should have been heard or finally decided by a competent Court in the former suit when the case is one to which explanation II applies. 6 C. W, N, 889 foll. (*Coxe J.*) SHERJAN GAZI *v.* ASMUTTULLAH GAZI. 11 I. C. 127.

———S. 11—*Directly in issue—Rent suit.*

When an issue has been raised on a disputed point in a suit for rent and has been heard and finally decided the decision operates as *res judicata* in a subsequent suit. (*Mookerjee and Teunon, JJ.*) KALU KUMAR *v.* BIDHU BHUSAN.
16 C. L. J. 89 : 10 I. C. 382.

———S. 11—*Directly in issue—Decree for rent—Effect of, on title.*

A decree for rent operates as *res judicata* upon the question of existence of the relationship of landlord and tenant between the parties. (*Mookerjee and Coxe, JJ.*) JOY KALI ROY *v.* HEMANJINI DEBI. 10 I. C. 363.

———S. 11 — *Directly and substantially in issue—Landlord and tenant.*

Previous decision as to the existence of the relation of landlord and tenant is no bar to a defence in a subsequent suit that a particular plot is not included in the tenancy, 3 C. W. N. 266 ref. (*Caspersz, J.*) DINA NATH DAS *v.* GANESH CHANDRA SAHA. 9 I. C. 2.

C. P. CODE (V OF 1908), S. 11—Directly in issue.

——S. 11 — *Directly and substantially in issue.*

The real point at issue in a previous suit was whether the mortgage was for necessity or not. It was found as a fact that the mortgage was for necessity and therefore, there was no necessity to arrive at any decision upon the question whether M was the lawfully adopted son of A. *Held*, it is doubtful whether it can be said that the question of adoption was directly and substantially in issue in that suit within the meaning of S. 11, C. P. C. (*Scott Smith and Fforde, JJ.*) MEHAN SINGH *v.* KEHAR SINGH. 75 I. C. 317 : 1923 Lah. 523.

——S. 11 — *Directly and substantially in issue—Unnecessary finding.*

A finding not necessary to the determination of the suit is not one against which a party could have appealed and thus the question is not a matter directly and substantially in issue which was heard and finally decided. (*Campbell, J.*) SOHAN SINGH *v.* JAWALA SINGH.
73 I. C. 854 : 1923 Lah. 248.

——S. 11—*Directly and subtantially in issue —Pro-note—Set off.*

Where a pro-note was the subject-matter of the former suit and no set off was formally claimed in the previous suit and the defendants' liability for the sums now in suit could only have been asserted and tried if there had been a formal set off. *Held*, since the pleas in the first suit were not explicitly recorded, it cannot be said with certainty that liability for the particular sums now in dispute was directly in issue in the other suit. (*Campbell, J.*) BAIJ NATH *v.* THE FIRM RADHA RAM SHAM LAL. 1923 Lah. 146.

——S. 11 — *Directly and substantially in issue—Incidental observation—Not* res judicata.

Where the decree could be sustained independently of the findings on a particular point and there is no decision against a party in a former litigation the finding cannot become *res judicata*. (*Leslie Jones and Wilberforce, JJ.*) AHMAD DIN *v.* MOHAMMAD TUFFAEL. 4 Lah. L. J. 376.

——S. 11—*Directly and substantially in issue—Incidents of* res judicata.

In order that an adjudication be *res judicata* between plffs. and defts. or the latter *inter se*, there must be a conflict of interest between the defts. and a judgment defining their rights *inter se*; without necessity a judgment will not be *res judicata* nor will it be *res judicata* by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group. (*Leslie Jones and Broadway, JJ.*) MEHARA *v.* DEVI DITTA MAL.
2 Lah. 88 : 62 I. C. 665 : 3 Lah. L. J. 223.

——S. 11—*Directly in issue—Previous judgment contesting the right of* granthi *—Findings regarding the nature of the property.*

Where in a suit contesting the right of the then *granthi* of the Darbar sahib (golden temple at Amritsar) to alienate a certain shop, it was held that the properties were waqf and attached to the *granthi* and could not be alienated by the *granthi* the judgment only proves that at the time also the right of the *granthi* to alienate certain property was called in question. The finding of the Court that the property was waqf and was attached to the *granthi* is not relevant in a subsequent suit by the successor to the office challenging the alienation by his predecessor in title. (*Scott-Smith and A. Raoof, JJ.*) INDAR SINGH *v.* FATEH SINGH.
214 P. W. R. 1920 : 59 I. C. 734 : 1 Lah. 540.

——S. 11 — *Directly and substantially in issue—Mortgage and rent suit.*

Though a mortgage suit is dismissed as time-barred a subsequent rent suit by mortgagee against mortgagor is not barred on that account. (*Rattigan, C.J.*) SOLAKHAN MAL *v.* ALI BAKSH.
50 I. C. 765.

——S. 11 — *Directly and substantially in issue—Finding unnecessary—Effect.*

Where a suit is dismissed on a preliminary point that the suit as framed is not maintainable, but a finding was recorded also on the merits, the decision would not operate as *res-judicata* so far as the finding on the merits was concerned because it was a decision on an unnecessary issue. (*Leslie Jones, J.*) RAMJI SHAH *v.* GHULAM.
22 P. W. R. 1918 : 44 I. C. 983.

——S. 11—*Directly in issue — Finding on unnecessary issue.*

The decision in a previous case on an issue which did not arise at all, cannot operate as *res judicata* in any subsequent suit. (*Shah Din, C. J.*) KIRPA RAM *v.* MAWAB.
43 I. C. 754 : 141 P. L. R. 1917.

——S. 11—*Directly and substantially in issue Decision on two or more grounds.*

The matters that were in dispute between the parties, can be found by reference to the decree or the pleadings and the judgment. If a question was directly and substantially in issue in the previous case it will operate as *res judicata* though decided on other grounds as well. 64 P. R. 1882; 56 P. R. 1904; 57 P. R. 1907 dist. (*Shah Din, C.J. and Broadway, J.*) BABU LAL *v.* HARI BUKSH.
13 P. R. 1918 : 41 I. C. 479 : 122 P. W. R. 1917.

——S. 11—*Directly in issue—Casual remark.*

A chance remark in a previous judgment does not operate as *res judicata* as the matter was not in issue and no proper finding was given. (*Shadi Lal and Jones, JJ.*) DEBI DITTA *v.* INDAR DEBI.
56 P. R. 1916 : 35 I. C. 542 : 160 P. L. R. 1916.

——S. 11—*Directly in issue—Disposal on preliminary point—Suit dismissed as time barred.*

Where a suit is dismissed as time-barred the dismissal does not operate as *res judicata* on the merits. (*Shah Din and Chevis, JJ.*) GOKUL CHAND *v.* NIDAR MAL. 1 P. R. 1916 :
32 I. C. 485 : 206 P. W. R. 1915.

——S. 11—*Directly and substantially in issue— Rent suit—Nature of tenancy.*

The question of the determination of the deft's tenancy which was not decided nor was necessary to be determined in a previous suit would not be *res judicata* in a suit between the parties. (*Johnstone and Scott-Smith, JJ.*) ABDUR RAHMAN *v.* W. O'BRIEN. 257 P. L. R. 1914 :
25 I. C. 357 : 146 P. W. R. 1914.

C. P. CODE (V OF 1908), S. 11—Directly in issue.

———S. 11 Expl. 4—*Directly and substantially in issue—Irrelevant point in issue in former suit—Mortgage—Redemption— Defendant sub-mortgagee and purchaser of equity of redemption--Suit by mortgagee against defendant for redemption—Defendant incompetent to claim redemption of plaintiff's mortgage in suit.*

A mortgaged his property to W, who subsequently mortgaged it to R. W. sued R for redemption R. pleaded that he was not a sub-mortgagee but an assignee of W's mortgagee rights and that A had sold the equity of redemption to him. The question whether the sale of equity of redemption was genuine or not was decided in favour of R, W was however granted a decree on another ground. Subsequently R suing W for redemption on the basis of the sale of equity of redemption, it was held that the genuineness or otherwise of the sale of equity of redemption was not *res judicata* and that it was not open to R as a defendant in a suit by W to claim redemption of W's mortgage and hence S. 11, explanation 4 did not apply. (*Rattigan and Shadi Lal, JJ.*) DEWAN CHAND *v.* HARI CHAND.
102 P. R. 1914: 213 P. L. R, 1914: 24 I. C. 636: 135 P. W. R, 1914.

———S. 11— *Directly and substantially in issue—Adoption.*

Where a suit for possession by A against B, C and D had been resisted on the ground that B had been adopted by the mortgagor and the Court setting aside the objection, had decreed the claim a subsequent suit by the alleged adopted son for possession against A, C and D is barred. (*Reid, C. J.*) UTTAM SINGH *v.* HIRA. **17 I. C. 365.**

———S. 11--*Directly and substantially in issue.*

An unnecessary finding not being a decision on a matter directly and substantially in issue will not operate as *res judicata*. (*Rattigan, J.*) NUR BAKSH *v.* AHMAD BAKSH. **120 P. L. R. 1911: 9 I. C. 1030 : 101 P. W. R, 1911.**

———S. 11— *Directly in issue — Incidental finding.*

An incidental finding in one proceeding will be *res judicata* in another only where the issue in the second proceeding should have been raised and decided clearly in the first. (*Oldfield and Ramesam, JJ.*) VATTELI KANDAR *v.* VATTOLI PUTHURAN. **14 L. W. 702: 41 M. L. J. 437 : 69 I. C. 570: (1921) M. W. N. 754.**

———S. 11 — *Directly and substantially in issue—Finding not the basis of the decree.*

In the previous suit, the plaintiff sued the defendants in ejectment as trespassers and the latter pleaded that neither the plaintiffs nor the predecessor-in-title were owners of the property and the defendants were usufructuary mortgagees from some third person the real owners. Both the lower Courts found against the defendant but plaintiff's suit was dismissed on the ground that the mortgage was by plaintiff's predecessor. In the present suit for redemption the defendant pleaded that the finding in the prior suit that they were mortgagees from the plaintiff's predecessor was not *res judicata*. *Held*, that the finding was *res judicata* though it was not the basis of the decree. 18 Cal. 647, not approved. (*Sadasiva Aiyar and Spencer, JJ.*) MUTHU PILLAI *v.* VEDA VYSACHARIAR. **60 I. C. 397: 12 L. W. 277.**

———S. 11 — *Directly and substantially in issue—Findings not inconsistent with but not necessary for decree—Effect.*

It is not the law that generally there is no *res judicata* where a plaintiff's suit is dismissed, on the findings in his favour. Under C. P. Code it is not necessary that a decision should be drawn up as a decree to constitute *res judicata*. Where the Court after a consideration of all the evidence in the case gives findings on all the issues, those findings will operate as *res judicata* though the suit is itself disposed of on another point and though the findings might have been unnecessary for the disposal of the case, provided the findings are not inconsistent with the decree itself. 1 Cal. 144 and 10 Mad. 102 foll. 11 Cal. 301 expl. 13 C. 17 ; 18 C. 647 dist. (*Sadasiva Aiyar and Napier, JJ.*) RAMA KRISHNA NAIDU *v.* KRISHNASWAMI NAIDU. **36 M.L.J. 641 : 25 M. L. T. 88 : (1919) M. W. N. 7: 52 I.C. 34 : 9 L. W. 180.**

———S. 11—*Directly and substantially in issue—Obiter finding—Embodied in the decree.*

Though a finding may be unnecessary to sustain the ultimate decision of the case still if it is embodied in the decree it will operate as *res-judicata*. (*Spencer and Seshagiri Aiyar, JJ.*) SANKARAMAHALINGAM CHETTY *v.* MUTHULAKSHMI. **43 I C. 860 : 33 M. L. J. 740.**

———S. 11 — *Directly and substantially in issue*—Obiter dictum.

To constitute *res judicata* the matter must be directly and substantially in issue in a former suit. *Obiter dicta* will not constitute the matter *res judicata* in a subsequent suit. (*Sadasiva Iyer and Napier, JJ.*) SETHURAMA SAHIB *v.* CHOTTA RAJA SAHIB. **40 I. C. 820: (1917) M. W. N. 327.**

———S. 11—*Directly and substantially in issue—"Matter" in Exp. II, to S. 11 C. P. C. explained.*

The word "matter" in explanation II to S. 11, C. P. C., includes any defence or claim set up on a question of law. 5 M. 304, 30 M. 461, 33 M. 102 dist. (*Sadasiva Iyer and Napier, JJ.*) BOMMEDEVARA VENKATA *v.* ANDAVOLU VENKATARATNAM. **32 M. L. J. 63 : (1917) M.W.N. 321 : 37 I. C. 857 : 5 L. W. 682**

———S. 11—*Directly in issue—Decision on two grounds.*

If a decision is based on two grounds, both of them operate as *res judicata*. Where a grant has been construed in a suit between the parties, the construction, though erroneous binds them in a subsequent suit relating to property not involved in the original litigation. 15 C. L. J. 684. foll. (*Wallis, C. J. and Phillips, J.*) SECRETARY OF STATE *v.* MAHARAJA OF VENKATAGIRI.
31 M. L. J. 97: 20 M. L. T. 284: (1916) 2 M. W. N. 96: 35 I.C. 266 : 4 L.W. 133.

———S. 11—*Directly and substantially in issue--Test of.*

The test of *res judicata* is to see if the issue in the previous suit was one on which the judgment

C. P. CODE (V OF 1908), S. 11—Directly in issue.

was based quite apart from the question whether the decision itself would be affected by the matter being reopened in a latter suit or whether it could not logically be based on a different finding (*Sadasiva Iyer and Napier, JJ.*) RAMASWAMY AIYAR *v.* VANAMAMALAI AIYAR. 26 I. C. 873.

———S. 11 — *Directly and substantially in issue—Decision based on more than one finding —Principle applicable.*

Where in a prior suit the judgment is based on findings on two issues, one of which suffices to sustain the judgment, the decision on both the issues would be *res judicata* and the rule of logical priority is inapplicable. 2 I. A. 823 Foll. (*Benson and Sundara Iyer, JJ.*) MODUKURI VENKATARAJU *v.* MASINA RAMANAMMA.
38 Mad. 158 : 21 I.C. 258 : (1913) M.W.N. 775.

———S. 11— *Directly and substantially in issue—Issue not framed—Findings.*

The finding on an evidentiary matter directly and snbstantially in issue though not covered by the issues in the suit will be *res judicata* in a future suit relating to the same matter. (*Miller and Sadasiva Iyer, JJ.*) B. C. VENKAYYA *v.* SECRETARY OF STATE. 18 I.C. 102 : (1913) M. W. N. 858.

——— S. 11--*Directly and substantially in issue —Rent suit—Suit for rent for a certain year— Subsequent suits.*

Where in a suit for rent against a tenant for a certain year the defendant pleaded that the *Patta* tendered was not proper and that the extent of the defendant's jeroyati land had been very much overstated, and the Court found the *patta* was a proper one, the defendant was held estopped from raising the same plea that the extent of land mentioned in *patta* was wrong in a subsequent suit for rent for subsequent fasli because (1) the decision that the patta was proper was an adjudication on the point now raised, (2) and this ground should be held to have been decided adversely to defendant as it was an available ground of attack or defence in previous suit. (*Wallis, Sundara Aiyar and Sadasiva Aiyar, JJ.*) BOMMIDDI BAYYAN NAIDU *v.* BOMMIDDI SURYANARAYAN.
37 Mad, 70 : 12 M.L.T. 500 : 23 M. L. J. 543 : 17 I.C. 445 : (1913) M, W. N, 1 :
[On appeal from 35 Mad. 216 : 21 M.L.J. 344 : 10 I.C. 75 : 10 M. L. T, 533.]

———S. 11 — *Directly and substantially in issue—Unnecessary point.*

A decision on a point not material for the adjudication of the claim is not *res judicata*. (*Benson and Sundara Iyer, JJ.*) VASUDEVA MALLAYYA *v.* THATHADI NARAYANAPPA.
(1911) 1 M. W. N, 188 : 9 I. C. 787 : 9 M. L. T. 450.

———S. 11—*Directly and substantially in issue —Mortgage suit—Heard and decided.*

In a mortgage suit, if prior mortgages are simply referred to and no relief is asked, the absence of any mention thereof in the decree must not be understood as negativing them. 29 Mad. 84 foll. It would be otherwise if the plaint disputed the existence of the prior mortgages and asked for a

C. P. CODE (V OF 1908), S. 11—Directly in issue.

sale free from incumbrances. 24 All, 429 and 9 C. L. J 78 ref. (*Miller and Krishnaswami Aiyar, JJ.*) ARUNACHALA REDDI *v.* PERUMAL REDDI.
9 M. L. T. 90 : 9 I. C. 285 : 21 M.L.J. 635.

———S. 11—*Directly and substantially in issue—Unnecessary finding.*

Where the decision as to ownership was not the basis or any part of the basis of the decree and the final decision of the whole case, that is the decree, would have been exactly the same if the decision on the point had been exactly the contrary the matter was not "directly and substantially in issue" in the former proceedings and therefore the question of ownership of the property does not operate as *res judicata* in these proceedings. (*Hallifax, A. J. C.*) GOVINDA *v.* LAXMAN. 1923 Nag 139 (1).

———S. 11—*Directly and substantially in issue—Question indirectly involved.*

Where a judgment or order can have no effect on subsequent litigation apart from the reasons given for it, such judgment or order cannot be said even indirectly to involve a question respecting the subject-matter of the litigation. Where the decision as to a claim under which defendant claimed one-half of property is *res judicata* against plaintiff who could not have calculated its value in fixing the value of appeal the defendant who has no claim to that half of the property cannot include it in fixing the value of subject matter of appeal along with his own one-half share of the property. (*Ashworth and Simpson, A. J. C's.*) BHAGWATI PRASAD *v.* ACHHAIBAR SINGH. 9 O. L. J. 531 : 26 O. C. 24 : 74 I. C. 214 : 1923 Oudh 93.

———S. 11—*Directly and substantially in issue —Unnecessary finding.*

That finding only which is necessary and sufficient for the decision of the case can operate as *res judicata*, especially when the Appellate Court bas ignored the other findings. (*Lindsay, J. C.*) PARMESHAR DIN *v.* DEBI PRASAD.
48 I. C. 386 : 5 O. L. J. 647.

———S. 11—*Directly and substantially in issue—Mesne profits.*

The finding in a previous suit as to the amount of *mesne profits* will not operate as *res judicata* in a subsequent suit for mesne profits. (*Lindsay, J. C.*) BALDEO BAKSH *v.* PAHLAD SINGH.
45 I. C. 218 : 5 O. L. J. 67.

———S. 11—*Directly and substantially in issue—Co-defendants.*

The finding upon a point not directly and substantially in issue among others raised in a previous suit, does not operate as *res judicata* in a subsequent suit. In a suit for possession on the ground of survivorship it was alleged that one of the defts. had no right by reason of a custom excluding daughters from inheritance and a finding was had on the issue. The finding is not *res judicata* in a subsequent suit by one of the defts. againt another deft. as the plea of custom in the previous suit was not directly and substantially in issue. (*Lindsay, J. C.*) ILAICHA KUNWAR *v.* JANG BAHADUR SINGH. 39 I. C. 248 : 4 O. L. J. 75.

C. P. CODE (V OF 1908), S. 11—Directly in issue.

——— S. 11—*Directly and substantially in issue Disposal of suit on preliminary issue—Collateral issues, finding on, if would operate as* res judicata.

Where a Court disposes of a case on a finding on a preliminary issue, the findings on other collateral issues cannot be treated as final decisions operating as *res judicata* unless the decision on the preliminary issue involves the decision of the other issues as well. 40 C. 29 ; 24 C. 900; 32 B. 315; 17 A. 174 Ref. (*Lindsay and Kanhaiya Lal, A J. C's.*) HER SAHAI *v.* ALI MOHAMMAD KHAN.
20 I. C. 266 : 16 O. C. 178.

——— S. 11—*Directly and substantially in issue, necessary to give plff. relief—Decision on, if* res judicata.

A decision on issues, which did not arise at all and would not give the plaintiff the relief sought for, does not debar the parties from raising, in a subsequent litigation, the questions involved in those issues. (*Piggott, J. C. and Lindsay, A. J. C.*) GHAZANFAR HUSSAIN *v.* RAM RATAN LAL.
20 I. C. 17.

——— S. 11—*Directly in issue—Rent suit—Ex-proprietary tenant—Liability to pay rent fixed by a Revenue Court.*

A former suit for arrears of rent by plaintiff against deft. dismissed on the ground that the plaintiff had failed to prove the deft. to be a tenant-at-will, does not operate as *res judicata* so as to bar a subsequent suit for recovery of rent for the same period against the deft. as an ex-proprietary tenant. 22 Mad. 323 rel (*Rafique, A. J. C.*) BHAN PRATAB SAHI *v.* SHEO DAT PARTAB SINGH.
15 I. C. 189 : 15 O. C. 45.

——— S. 11 — *Directly in issue — Claim not adjudicated.*

A claim for rural police rate should not be refused because the amount of rent fixed at the revision of settlement did not include it if the revision was made before police rate was imposed. (*Chamier, J. C.*) RAJPAL *v.* PRATAP.
12 I. C. 331.

——— S. 11—*Directly and substantially in issue—Rent suit.*

A decree for rent involves the question of the right of the plaintiff to recover and of the deft's. liability to pay rent to the plaintiff. It becomes *res judicata* in subsequent suit for rent. (*Chamier, J. C.*) BAL MUKUND *v.* ABDUL BASHED.
12 I. C. 329.

——— S. 11—*Directly and substantially in issue*—Ex parte *decree—Application to set aside—Non service of summons—Finding as to service—Subsequent suit to set aside.*

When an application was put in to set aside an *ex parte* decree on the ground that summons was not served, but it was dismissed on the ground of service of summons a subsequent suit to set aside the decree on the same ground will be barred. But if some other ground of fraud apart from it is alleged, it is maintainable. (*Mullick and Bucknill, JJ.*) MAHANTH RAMRUP GOSHAIN *v.* MAHABIR SHAH.
74 I. C. 825 : 2 Pat. 833.

——— S. 11—*Directly and substantially in issue—Suit for rent—Effect.*

C. P. CODE (V OF 1908), S. 11—Directly in issue.

The decision in a suit for rent for a particular period is an absolute bar under the doctrine of *res judicata* to any suit for the rents of those years. But so far as the rents or rates of rent of subsequent years are concerned, that judgment cannot be held to be an absolute bar, so as to prevent the parties from raising the question in a subsequent suit. The prior decision may be taken to determine the rent claimed in that suit, and to give rise under S. 51 of the Bengal Tenancy Act to the presumption that the rents for subsequent years remained the same. 3 P. L. J. 372 distinguished. 6 C. W. N. 569 followed. (*Ross, J.*) MANNOO LAL CHOUDHURY *v.* LALJI CHAUBE.
1922 P. 213.

——— S. 11—*Directly in issue—Rent suit.*

A decision about the amount of rent payable in a previous suit is not *res judicata* in a suit for rent for subsequent years ; but the question of contract as to amount payable is *res judicata.* An *ex parte* rent decree does not operate as *res judicata* if deft. did never appear. (*Das, J.*) MAHARAJA OF DHARBANGA *v.* YOUNUS MOMIN.
57 I. C. 48.

——— S. 11—*Directly and substantially in issue*—Obiter dictum.

A mere expression of opinion in a judgment as to the validity of a mortgage would not be *res judicata* as between the parties if the validity of the mortgage was not a matter in issue in the previous litigation. (*Miller, C. J. and Jwala Prasad, J.*) MADHAB KOERI *v.* BAIKUNTHA KARMAKER.
4 Pat. L. J. 682 : 52 I. C. 338 : (1919) Pat. 343.

——— S. 11—*Directly and substantially in issue—Ejectment—Dismissal of prior suit—Effect.*

Where in a suit for ejectment the land belongs to the plaintiff and a previous suit for ejectment was successfully resisted by the defendants on the ground that they were not tenants of the plaintiff, the defendants are not entitled to remain upon the land and plaintiff is entitled to khas possession. (*Das, J.*) KALI PROSAD TEWARI *v.* MAHABIR TEWARI.
51 I. C. 307.

——— S. 11—*Directly and substantially in issue—Rent suit—Decision as to rate of rent—Claim based on contract.*

A decision in a previous rent suit as to the amount of rent annually payable does not operate as *res judicata* in a suit for the rent of the subsequent years although it may give rise to a presumption that the rent remains the same. If however the previous suit was based on a contract between the parties and the question of the rate of rent under the contract was a point in issue in the previous suit, the decision in the previous suit operates as *res judicata.* 1 C. L. J. 248; 2 Pat. L. W. 146 , 3 Pat. L. W. 360 Ref. (*Roe and Coutts, JJ.*) SHEO PRASAD MANDER *v.* BATESWAR MAHTON.
51 I. C. 56.

——— S. 11—*Directly and substantially in issue—Rent suit—Prior and subsequent.*

Where there is no contract fixing the rate of rent, an adjudication in a suit for rent for some years is not *res judicata* in a subsequent suit for succeeding years. (*Mullick and Atkinson, JJ.*) KISHEN DEYAL RAI, *v.* KALPATI KUER.
3 Pat. L.J. 372 : 45 I.C. 816 : (1918) Pat. 288.

C. P. CODE (V OF 1908), S. 11—Directly in issue.

———S. 11—*Directly and substantially in issue—Rent suit—Negation of title in prior suit—Subsequent suit after registering his name—B. T. Act, S. 60.*

Plff. sued defts. for rent as usufructuary mortgagee and the defts. pleaded that plff. was not entitled to sue inasmuch as his name had not been registered as mortgagee. The question of his title as mortgagee was also put in issue and was decided against him. In a suit for rent for the same period after registration of his name. *Held*, that the subsequent order was barred by *res judicata*; S. 60 of the B. T. Act had no application to the case inasmuch as the defts. denied the mortgage in favour of the plff. altogether. (*Imam, J.*) SHEO CHARAN DHOBI *v.* BANSI SINGH. 44 I. C. 129.

———S. 11—*Directly and substantially in issue—Rent suit—Construction of patta.*

Where rent is capable of variation by contract, the decision in a previous suit is *res judicata* only to that extent that it raises a presumption that it remained the same in subsequent years. Where a document creating the relationship of landlord and tenant has been once construed, that construction is *res judicata* for all time. If such a deed upon construction of which the rent for subsequent years depends, was not produced for the construction of the Court, the decision in default of that construction will be constructive *res judicata* as to the rate of rent. (*Roe and Imam, JJ.*) RAJA DAKESHWAR PRASAD NARAYAN SINGH *v.* RAM PRASAD SINGH. 4 Pat. L. W 47: 43 I.C. 753 : (1918) Pat. 218.

———S. 11—*Directly in issue—Right to* malikana *decreed—Title.*

Where plff's. title to malikana is decreed in previous suit, a denial of the title by the deft. in a subsequent suit is barred by *res judicata*. (*Atkinson and Jwala Prasad, JJ.*) SAIYIDUDDIN *v.* AVADH BEHARI SINGH. 40 I.C. 864: 2 Pat. L. W. 64.

———S. 11—*Directly in issue—Rent suit—Scope and effect—Subsequent suit for declaration of title.*

The decision in the prior suit is *res judicata* as far as the question of settlement of under tenure between plff. and deft. is concerned and not with regard to question of plff's. title which was not and had not to be decided. (*Chamier, C. J. and Mullick, J.*) PALKI PANDEY *v.* DWARAKA PANDEY. 40 I. C. 530: 1 Pat L. W. 634.

———S. 11—*Directly and substantially in issue—Rent suit—Subsequent years.*

A decree in a suit for rent obtained for a specific year does not bar a subsequent suit for rent in respect of subsequent years; but where the rent sued for, is in regard to land held under a contract, oral or written for a term of years, such a decree bars a subsequent suit. (*Atkinson, J.*) KESHAVA PERSHAD SINGH *v.* PROGAS KUAR. 39 I. C. 576

———S. 11—*Directly and substantially in issue—Family Custom—Non-contesting branches of the family.*

Where a custom in a family must be established or denied, and where every branch of the family has been carefully brought on the record, and where that custom has been the subject of contest and thoroughly threshed out in the presence of all branches of the family, the matter cannot again be raised by the descendants of those branches, though certain branches did not take an active part in the contest but were satisfied with admitting that the custom existed (*Roe and Jwala Prasad, JJ.*) MOWAR SHEWBAX SINGH *v.* MOWAR THAKUR SINGH. 1 Pat. L. J. 221: 36 I. C. 980: 2 Pat. L. W. 374.

C.P. CODE (V OF 1908), S. 11 -Execution Proceedings.

———S. 11—*Directly in issue—Finding of fact.*

A finding of fact must be material and necessary for the decision of the suit in order that it may operate as *res judicata*. (*Mullick, J.*) MILTON FODDAR *v.* JADAB CHANDAR CHATTOPADYA. 33 I. C. 159.

———S. 11—*Directly and substantially in issue—Application to set aside* ex parte *decree—Non-service of summons—Separate suit—If lies.*

Where a party seeks to set aside an *ex parte* decree on the ground that summons was not served upon him, but the Court disbelieves him and dismisses the application, a suit to set aside the decree on the same ground is barred by *res judicata*. (*Beasley, J.*) MUSTHAN *v.* BABU MOHENDRA NATH SINGH. 1 Rang. 500: 76 I.C. 794: 1924 R. 119.

———S. 11—*Directly and substantially in issue—Rent suit—Question of title—How far in issue—Suit for compensation for mere use and occupation not barred.*

If in a rent suit the deft. denied the relationship of landlord and tenant with the plff. on the ground that he himself was the owner of the property, the question as to title was directly and substantially in issue, but not where the deft. alleges title in a third person. In a suit for use and occupation all that has to be proved is that the deft. took possession of the premises from the plff. with the latter's permission and that the amount claimed is reasonable compensation for use and occupation. (*Maung Kin, J.*) MAHOMED OSMAN *v.* HYDER KHAN. 42 I. C. 785.

———S. 11—*Directly and substantially in issue*—Obiter.

A decision on a point not substantially in issue in a suit cannot operate as *res judicata* in any latter suit in which it may be substantially in issue. (*Fox, C. J. and Hartnoll, J.*) RAMAN CHETTY *v.* MUTHU VEERAPPA CHETTY. 5 Bur. L. T. 199: 17 I.C. 860 : 6 L. B. R. 93.

———S. 11—*Directly and substantially in issue—Maintenance—Varying claim—Fresh suit—No bar.*

Where maintenance for a Hindu was fixed long ago in a suit at a time when she had a residence in one of the defendant's houses her subsequent ejectment therefrom gave her a cause of action to demand that the maintenance should be supplemented by provision for her residence in the family house and a fresh suit for maintenance is not barred. (*Pratt, J. C. and Crouch, A. J. C.*) LADHIBAI *v.* ISARMAL. 29 I.C. 25 : 8 S. L. R. 306.

Execution Proceedings.

———S. 11—*Execution proceedings—Order in—Not appealed against—Finality of.*

Order passed in execution proceedings and not appealed against is final. (*Viscount Cave.*) SARJU PRASAD *v.* MAKSUDHAN. 31 M L.T 219: (P C.) : 21 A. L. J. 195: 27 C. W. N. 279: 73 I. C. 882 : (1922) M.W.N. 793 : 1922 P. C. 341 (P.C.).

C. P. CODE (V OF 1908), S. 11—Execution Proceedings.

———S. 11—*Execution proceedings—Plea of Limitation raised and decided—Same plea could not be raised in a late stage.*

Where a plea of limitation was raised by the judgment-debtor in a prior stage of an execution application, but was rejected and the decree holder allowed to excute the decree, it was not competent for the Court to admit the same plea in a subsequent stage of the execution proceedings. (*Lord Moulton.*) RAJAH OF RAMNAD *v.* VELUSAMI TEVAR. **48 I. A. 45 : 19 A. L. J. 168 : 40 M. L. J. 197 : 13 L. W. 290 : (1921) M. W. N. 51 : 33 C. L. J. 218 : 25 C. W. N. 581 : 23 Bom. L. R. 701 : 59 I. C. 880: 29 M. L. T. 345 (P.C.).**

———S. 11—*Execution proceedings--Prior decision when a bar.*

On an application to execute subsequent executable decree, the decision on a prior application to execute the decree as it originally stood, is no bar. (*Lord Mersey.*) ASHFAG HUSAIN *v.* GAURI SAHAI. **33 All. 264 : 38 I. A. 37 : 15 C. W. N. 370 : 8 A. L. J. 332 : 13 C. L. J. 351 : 9 M. L. T. 380 : 13 Bom. L.R. 367 : 9 I.C. 975 : 4 Bur. L. T. 121 : 21 M. L. J. 1140 : (1911) 2 M.W.N. 177 (P. C.).** [Affirming 29 All. 623.]

———S. 11—*Execution applications—Decision in, when* res judicata—*Successive applications against same person—Maintainability.*

There is nothing to prevent a succession of applications directed against persons who are ascertained to be, or beleived to be partners in the particular venture out of which the decree has arisen. The limitation however that is imposed on all these applications, is that if there has been a previous application in which there has been a definite decision affecting a particular piece of property or particular person, and from that decision nothing has been done by way of appeal or institution of suit, if neither of these methods were available that decision is a final decision between the parties and if in any subsequent proceedings, the point again becomes material, the parties are bound by that previous decision, and the matter cannot be re-opened. To that extent, and that extent only, is there limitation on the successive applications in execution. (*Mears, C. J. and Piggott, J.*) KAPURCHAND *v.* KANHAIYA LAL. **45 A. 735 : L. R. 4 A. 441 : 21 A. L. J. 641 : 74 I. C. 513 : 1924 All. 34.**

———S. 11—*Execution proceedings—Decision after notice—Effect of.*

A decision on an application for execution after notice to the judgment-debtor, that it was not barred by limitation operates as *res judicata*, though the judgment-debtor remained *ex parte* The failure to oppose the application precludes the judgment-debtor thereafter from contending that it is barred. It is not a question of *res judicata* ; but there is a bar by a decision in the very litigation upon the same application. (*Walsh and Ryves, JJ.*) MT. MUHAMMADI BEGAM *v.* MT. UMDA BEGAM. **66 I. C. 751 : 1922 All. 100.**

———S. 11—*Execution proceedings—Objection as regards invalidity of final mortgage decree—Costs, if can be claimed later.*

C. P. CODE (V OF 1908), S. 11—Execution Proceedings.

A preliminary decree for sale was passed on a mortgage by the court of first instance, reversed by the appellate court, but finally restored with costs throughout by the High Court. When the decree was made final, the costs awarded by the High Court were not included therein and it was in effect the decree of the court of first instance that was made final. On an application for execution being put in, part of the decree amount was paid, and time taken for paymant of the balance. As the money was not paid in time, a second execution application was put in, claiming for the first time the costs awarded by the High Court also. Two objections were raised (*i. e.*,) the final decree as passed could not be executed as the only decree that could be made final was the appellate decree of the High Court and (2) the execution court could not add the further amount claimed by way of costs.

Held, on the first point, as the objection was not raised when the first execution application was put in it was barred by *res judicata* ; and on the second point the execution court can only add execution costs, and it cannot add to or amend the final decree which had been passed in the case. (*Ryves and Gokul Prasad, JJ.*) DAMBAR SINGH *v.* KALLYAN SINGH. **20 A. L. J. 170 : L.R. 3 A. 164 : 65 I.C. 799 : 44 A. 350 : 1922 All. 27.**

———S. 11—*Execution proceedings—Constructive* Res judicata.

An omission to raise the objection to a wrong claim in execution, is not *res judicata* in a later execution application, as the principle of implied or constructive *res judicata* is not applicable to execution proceedings. (*Gokul Prasad and Sulaiman, JJ.*) SHEO MANGAL *v.* MST. HULSA. **19 A. L. J. 954 : 65 I. C 377 : 44 A. 159 : 1922 All. 413.**

———S. 11, Expl. IV—*Execution Proceedings.*

In execution of a decree against M as representing a company certain properties were attached and on an objection by P and S. brothers of M. 2/3 of the properties were released from attachment. The decree-holder thereupon applied under O. 21, R. 50 (2) for leave to execute the decree against P and S as partners of the firm.

Held, per *Wallach, J* : that as the issue whether P and S were partners had not been raised in the claim proceeding there was no bar to its being raised in this proceeding. S. 11, Expl. IV, does not extend to execution proceedings.

Per *Walsh, J* :--The previous order would operate as a bar to allow the decree-holder to enjoy a preliminary attempt to execute the decree by attachment and to reap the benefit thereof if successful and on failure thereof to fall back upon O. 21, R. 50 (2) would be contrary to the principle of the decision of the Privy Council in 6 A. 269. An examination of S. 11 of the Code is beside the question in such cases. (*Walsh and Wallach, JJ.*) PHULCHAND *v.* KANHAIYA LAL. **19 A. L. J. 923 : 65 I. C. 295 : 44 A. 130 : L. R. 3 A. 1 ; 1922 All. 247.**

———S. 11 and O. 21, r. 16—*Execution proceedings—Application to recognise assignment—Objection not raised.*

C. P. CODE (V OF 1908), S. 11—Execution Proceedings.

Where the judgment-debtor on notice of an application of a transfer of a decree under O. 21, R. 16 for permission to execute the decree as transferee did not object to the application he will not be allowed to question the assisgnee's title in subsequent proceedings. 23 I. C. 286 approved. (*Piggott and Walsh, JJ.*) TAYSINGH *v.* JAGAN LAL. **38 All. 289 : 35 I. C. 234 : 14 A. L. J. 370.**

———S. 11 and O. 21, R. 22—*Execution proceedings—Order when binding.*

The judgment-debtor is not debarred in a subsequent execution application from objecting to amount claimed in a previous application, if he had been given no opportunity to so object in the first application. (*Banerjee, J.*) RATTAN LAL *v.* BIBA KUNRIA. **34 I. C. 144.**

———S. 11—*Execution proceedings—Omission to raise objection*—Res judicata.

The provisions of the C. P. Code as to *res judicata* are not expressly made applicable to execution proceedings. Where a judgment-debtor did not take exception to the amount set forth as being due on the decree in an application for execution, he is not prevented by the rule of *res judicata* from afterwards raising the question. (*Richards, C.J. and Rafique, J.*) KALYAN SINGH *v.* JAGAN PRASAD. **37 All. 589 : 30 I.C. 523 : 13 A.L.J. 828.**

———S. 11—*Execution proceedings—Constructive* res judicata.

A judgment-debtor need not put forward all possible objections in the execution department once for all. Matters which he has omitted to put forward must not be treated as *res judicata* against him. (*Chamier, J.*) KALIAN SINGH *v.* JAGAN PRASAD. **27 I.C 950 : 13 A.L. J. 162.**

———S. 11—*Execution proceedings*—Ex parte *order—Application by alleged transferee.*

Where the transferee of a decree applied for its execution and an *ex parte* order issuing notice to show cause against arrest was passed thereon and a subsequent application for arrest was objected to by a representative of the judgment-debtor, *held* that the original order operated as *res judicata* as to transferee decree-holder's right to execute the right. (*Knox, J.*) OMAN PRASAD *v.* JANI DURLAB SANKAR. **23 I.C. 286 : 12 A. L. J. 206.**

———S. 11—*Execution proceedings*—Ex parte *order.*

An *ex parte* order against the decree-holder holding the decree to be barred by limitation is no bar to the consideration of the application for execution filed by the assignee of the decree nor is the Court hearing this application bound by the former *ex parte* finding. (*Karamat Husain, and Tudball, JJ.*) BALMUKUND *v.* ASHFAQ HUSAIN. **34 All. 518 : 16 I.C. 677 : 10 A.L.J. 140.**

———S. 11—*Execution proceedings*—Constructive res judicata.

In execution the decree-holder applied for sale of two mortgage bonds and the judgment-debtors (being the representatives of the deceased debtor) prayed for time to pay the decree amount and the Court granted time and struck off the execution application. Subsequently the decree-holder applied again for the same relief and the judgment-debtors contended that the mortgage bonds were their own property and could not be sold under the decree. *Held*, that the objection was not barred either by *resjudicata* or estoppel. 4 A. L. J. 400 foll. 31 Cal. 822, 26 W. R. 44, 28 Cal. 122, 24 All. 138 dist. (*Karamat Hussain, J.*) RAM CHANDAR SINGH *v.* PUTTU LAL. **11 I.C. 980 : 8 A. L. J. 844.**

———S. 11—*Execution proceedings.*

Plea decided against impliedly in suit cannot be raised again in execution proceedings. (*Shah, A.C.J. and Crump, J.*) MULJI PURSHOTTAM *v.* GOVERDHANDAS. **24 Bom, L.R. 1291 : 76 I.C. 148 : 1923 Bom. 36.**

———S. 11—*Execution proceedings—Decision as to limitation—Effect on subsequent application.*

A decision on an application to execute a decree that the application is barred by limitation does not operate as *res judicata* in a subsequent application to execute the decree. 21 Bom. L. R. 344, followed. (*Macleod, C. J. and Shah, J.*) RAMCHANDRA VENKATESH SHOLAPUR *v.* SHRINIVAS KRISHNA KULKARNI. **46 Bom. 467: 24 Bom. L. R. 97: 66 I. C. 940: (1922) Bom. 238.**

———S. 11—*Execution proceedings—Limitation.*

Where an intermediate execution application is ordered on notice to the judgment-debtor, it is not open to him on a subsequent execution application to plead that the intermediate application was barred by limitation and, therefore, the subsequent application was also barred. (*Macleod C. J, and Fawcett, J.*) PRABHULINGAPPA *v.* GURUNATH. **22 Bom. L. R. 1389: 59 I. C. 747: 45 B. 453.**

———S. 11—*Execution proceedings—Decision at one stage—Intermediate application for execution ordered—Subsequent application in time—Effect of—Objection as to limitation.*

Where on an application for execution which in fact was barred by time the Court ordered execution, the order erroneously made is valid unless set aside on appeal and the judgment debtor cannot object on a subsequent application for execution that the intermediate application was barred by time. 8 C. 51 foll. (*Macleod, C. J. and Heaton, J.*) DESAIAPPA KHALILAPPA DESAI *v.* DUNDAPPA MALKAPPA. **44 Bom. 227 : 55 I. C. 329: 22 Bom. L. R. 76.**

———S 11—*Execution proceedings—Constructive* res judicata.

The doctrine of constructive *res judicata* is not necessarily applicable to execution proceedings. The dismissal of an earlier execution application operates as *res judicata* only so far as the question of the maintainability of that application is concerned. Where the grounds relied upon by the decree-holder as saving limitation in respect of the subsequent application have not been adjudicated upon in the previous execution proceedings, it is not *res judicata*. 6 A. 269 P.C. ref. (*Shah, J.*) MAHADEO GOPAL BHAT *v.* TRIMBAK BHAT BALAMBHAT. **50 I. C. 972 : 21 Bom. L. R. 344.**

C. P. CODE (V OF 1908), S. 11—Execution Proceedings.

——S. 11—*Execution proceedings—Implied decision—Sale of lands in execution of a decree—Subsequent suit by a party for setting aside a sale as illegal, the lands being occupancy lands—Khoti Act (Bom. Act I of 1880), S. 9.*

Where in execution proceedings between the parties certain Khoti lands were sold and purchased by the defendant and the plaintiff sued to recover possession of the lands alleging that the lands being occupancy lands could not be sold under S. 9, Khoti Settlement Act. *Held* that as the execution sale decided inferentially between the plaintiff and the defendant against the occupancy nature of the lands, the plaintiff could not re-open and investigate the same question of fact a second time. (*Beaman and Heaton, JJ.*) KASHINATH *v.* DHONDSHET. **40 Bom 675: 37 I. C. 22: 18 Bom. L. R. 786.**

——S. 11—*Execution proceedings—Plea of limitation.*

A second application for execution was made beyond 3 years from the date of the first application but an order was made for attachment and on the default of the decree-holder the application was struck off. Subsequent applications for execution were all made within time and in the last of them the judgment debtor objected that the second application was barred by limitation. *Held* that as the matter relating to the bar of the second application was not finally heard and determined, the judgment-debtor was not debarred by *res judicata* from raising the plea. 28 Cal. 122 rel. 24 Mad. 669: 23 Bom. 35 dist. (*Scott, C. J. and Heaton, J.*) VITOBA KONDIBA KOTWAL *v.* TEJIRAM BHAVANI RAM. **14 I. C. 977: 14 Bom. L. R. 264.**

——S. 11—*Execution application—Final order—Appeal.*

A decree-holder applied for execution of his decree in 1903. The Court ordered execution upon which the judgment-debtor appealed and the appeal was dismissed on 2nd August, 1905. In the meantime the decree-holder put in a fresh application in 1904 and this was rejected by the Court as time barred. In 1906, the decree holder filed an application for the continuation of the execution proceedings of 1903 but he was asked to file a fresh application. And so in 1907 the decree-holder filed a fresh application which was rejected as *res judicata*: *Held* that the Appellate Courts' order in the decree-holder's favour was not affected by the application of 1904 and that the 1903 application was alive till 1905 (*Chandavarkar and Heaton, JJ.*) BALKRISHNA WAMNAJI *v* SHIVA CHINA MHATRA. **35 Bom. 245: 10 I. C. 811: 13 Bom. L. R. 230.**

——S. 11—*Execution proceedings—Prior order—Effect of—Judgment-debtor not a party to prior proceedings not affected.*

A judgment-debtor who was not a party to a previous application for execution of a decree or to any order made upon it is not precluded from showing that the said application was barred by limitation and therefore it was not in accordance with law. (*Cuming and Panton, JJ.*) SITANATH DAS *v.* RANI KANAK PROBHA DEBI. **67 I. C. 879: 1923 Cal. 322 (2).**

C. P. CODE (V OF 1908), S. 11—Execution Proceedings.

——S. 11—*Execution proceedings—Objection petition dismissed for non-prosecution—Effect.*

Where an objection petition in an execution proceeding is dismissed for non-prosecution, there is no adjudication on the merits and hence it cannot be *res judicata*. (*Greaves and Ghose, JJ.*) BAHIR DAS PAL *v.* GIRISH CHANDRA PAL. **67 I C. 663: 1923 Cal, 287.**

——S. 11—*Execution proceedings—Order at one stage, binding subsequently.*

Where at one stage of an execution proceeding an order is made disallowing the objections of the judgment-debtor, the order is binding in all subsequent stages of the same execution. 42 C. 440 Ref. (*N. R. Chatterjea and Panton, JJ.*) KSHITINDRA MOHAN ROY *v.* NAWAB KHAJEE HABIBULLA BAHADUR. **64 I. C. 724.**

——S. 11—*Execution proceedings—Notice—* Res judicata.

An order passed in execution of decree, against a party without notice, is not binding on that party. (*Mookerjee and Panton, JJ.*) ILIM MOLLA *v.* MANINDRA MOHAN. **56 I.C. 801 : 31 C.L.J. 382.**

——S. 11—*Execution proceedings—Consent order.*

A decision in the course of execution proceedings of a question which arises for consideration is final and binding between the parties, though as to the some of the parties it was based on agreement and as to the others on an adjudication by the Court. (*Mookerjee and Panton, JJ.*) KALI DAS CHAUDHURY *v.* PRASANNA KUMAR DAS. **47 Cal. 446 : 30 C. L, J, 496 : 55 I.C. 189: 24 C. W. N. 269.**

——S. 11—*Execution proceedings—Decision as to mesne profits at one stage.*

Where the question of the liability of the defendants to pay mesne profits and the amount of the mesne profits payable was directly and substantially in issue between the parties and decided by the Court, the decision is conclusive between them at all subsequent stages of the execution proceedings. 8 Cal. 51 : 6 All. 269 and 7 All. 102 Ref. (*Mookerjee and Beachcroft, JJ.*) MAKUND SINGH *v.* SARASWATI. **51 I.C. 98 : 29 C. L. J. 245.**

——S. 11—*Execution proceedings*—Res judicata.

A judgment-debtor is barred by *res judicata* from contending in the course of execution proceedings, that a particular person is not the legal-representative of a deceased plff. while at his instance the particular legal representative was recorded as such and final decree passed. (*Teunon and Newbould, JJ.*) MAKUNDA LAL KUNDU *v.* PRIYA NATH MOITRA. **45 I C. 657.**

——S. 11—*Execution proceedings—Objection not decided—Subsequent application—Constructive* res judicata.

Where an objection to the maintainability of an application for execution on the ground of limitation was raised but not decided, it is competent to the judgment-debtor to raise the same objection in a later application for execution. (*Richardson and Beachcroft, JJ*) ISHAN CHANDRA SAMUI *v.* DULAL CHANDRA DE. **44 I. C. 220**

C. P. CODE (V OF 1908), S. 11—Execution Proceedings

———S. 11—*Execution proceedings—Scope of the rule.*

On an application for execution by sale of properties, the Court in spite of the judgment-debtor's objections to such execution ordered issue of sale proclamation in his presence but did not in express terms pass any order for sale or decide that execution could be so enforced. *Held*, that the orders of the Court would not operate as *res judicata*, and the judgment-debtor could raise the question of deft's. right to sell on a subsequent application for their sale. (*Beachcroft and Walmsley, JJ.*) GOBINDA CHANDRA PAL *v.* KAILASH CHANDRA PAL. **41 I C. 73: 45 Cal. 530.**

———S. 11 and O. 21, R. 90—*Execution sale—Setting aside—Executing Court's decision—Finality.*

Once a judgment-debtor's application to set aside a sale on the ground of fraud is rejected by the executing Court, the decision bars the plea of fraud in subsequent proceedings between the parties. (*Chatterjee and Walmsley, JJ.*) JHARA BISWAS *v* AMRITAMOYI DASI. **38 I. C. 47.**

———S 11—*Execution proceedings—Order for attachment after service of notice.*

As long as there exists an order for attachment made after service of notice to the judgment-debtor the execution of the decree cannot be barred and entry of service of notice in the order sheet throws on judgment-debtor the burden of showing non-service. An order made at an earlier stage of the execution proceedings cannot be questioned at a later stage unless the party to be bound has had no notice of the proceedings, 8 Cal.51 P.C. ref to. (*Mookerjee and Cuming, JJ.*) BINDU BASHINI DASYA *v.* KESHAB LAL BASU. **21 C. W. N. 945: 37 I.C. 66: 26 C L. J. 109.**

———S. 11—*Execution proceedings—Order without notice.*

A judgment debtor not having any notice of the order of the court admitting a previous application for execution as not time barred is entitled to show that the decree has become barred by limitation. (*Fletcher and Richardson, JJ.*) JUGOL KISHORE *v.* CHINTAMONY, **27 I.C. 225: 18 C. W. N. 1288.**

———S. 11—*Execution proceedings Order when* res judicata.

An order, passed in the course of an execution proceeding, which is not appealed from, is final between the parties upon general principles of law, as an interlocutory order in the suit, 6 A. 269 foll. (*Sharfuddin and Coxe, JJ.*) MASIRUNISSA KHATIN *v.* JOY CHAND LAL BOYED. **16 I. C. 238.**

———S. 11—*Execution proceedings—Effect of previous order of dismissal for default.*

An order in an execution proceeding which implies that the decree is capable of execution and is passed after due notice to the judgment-debtor is binding and the same question cannot be again agitated in a new application for execution, even if the first execution was subsequently dismissed for default, 14 C. W. N. 357. foll. (*Mookerjee and Teunon, JJ.*) MURLIDHAR SERPAL *v.* NARSINGH DAS. **15 C. L. J. 453: 10 I. C. 359: 17 C. W. N. 113.**

C. P. CODE (V OF 1908), S. 11—Execution Proceedings.

———S. 11—*Execution proceedings—Applicability.*

In order that the principle of *res judicata* may be applied to execution proceedings, it is necessary that the judgment-debtor should have had an opportunity to challenge the validity of the execution proceedings and in spite of such opportunity, failed to avail himself of it. 8 Cal. 51 Cons. (*Mookerjee and Carnduff, JJ.*) MOCHI MANDAL *v.* MESERUDDIN. **9 I.C. 213 : 13 C. L. J. 26.**

———S. 11—*Execution proceedings—Appeal—Costs.*

An order for costs was passed by the Privy Council against a certain person. On an application being made for the execution of that order a decree was drawn by the High Court giving the different items of costs. After the decree, embodying the order of the Privy Council, had been drawn, the Subordinate Judge had decided on another application for execution by the same decree-holder that he was not liable to pay one item of the costs. *Held*, as the Subordinate judge's order was passed after the decree embodying the order of the Privy Council had been drawn up by the High Court and as no appeal was preferred from it, the order became final and operated as *resjudicata*, (*Martineau, J.*) GOPI CHAND *v.* LALA BENARSI DAS. **12 P. W. R 1923 : 1922 Lah. 361.**

———S. 11—*Execution proceedings—Decision as to question of limitation.*

Where a prior application for execution had been put in and after notice to the judgment debtors execution had been ordered, the objection that it was barred by limitation cannot be raised on a subsequent application. (*Chevis, J.*) KIDAR NATH *v.* RADHA KISHEN. **67 I. C. 56.**

———S. 11—*Execution proceedings—Decision between same parties if a bar to a suit on same subject-matter—Widow in possession of husband's house when trespasser—Maintenance when allowed.*

The executors of a deceased Hindu sued his widow and others to recover various parts of his estate and the parties agreed to a compromise under which a decree was passed. In execution of it the widow objected to the attachment of the house she was residing in. The objection was overruled and execution was allowed to proceed. The Chief Court held that the widow had no right to live in the house and confirmed the execution proceedings. On a suit by the widow for declaration of her right to live during her lifetime in the house and for maintenance. *Held*, that the decision in the previous execution proceedings between the same parties was *res judicata*, that the widow was in possession of the house as a trespasser and that she was not entitled to claim maintenance unless and until she had given possession of the house and accounted for the mesne profits. (*Kensington and Rattigan, JJ.*) BHAGWAN KUAR, HARNAM KUAR. **69 P.L R, 1915 : 26 I.C. 430 : 17 P.W.R. 1915.**

———S. 11—*Execution proceedings.*

The principle of *res judicata* applies to execution proceedings. (*Shah Din and Scott-Smith, JJ.*) FATEH CHAND *v.* MUSSAMMAT MENGHI BAI. **108 P. W. R. 1913: 181 P. L. R. 1913: 19 I. C. 481 : 109 P. R. 1913.**

C. P. CODE (V OF 1908), S. 11—Execution Proceedings.

——S, 11 and O. 21, R. 2—*Execution proceedings—Matter decided in—Fresh suit barred.*

In execution of a decree the payment of a debt was alleged and brought to the notice of the Court by the judgment-debtor within 90 days of the alleged payment. The Court going into the objection found against the judgment-debtor *Held*: that a suit by the judgment-debtor for a declaration that he had paid the amount was barred by *res judicata*. (*Chevis, J.*) ABDULLAH KHAN *v.* KANHAYA. **91 P. R. 1912: 141 P. L. R. 1912: 14 I. C. 751: 92 P. W. R. 1912.**

——S. 11—*Execution proceedings—Earlier order not deciding.*

There is no *res judicata* where an order is passed in a prior execution proceeding which does not decide the point raised in a later application. (*Spencer and Devadoss, J.*) KANDASWAMY CHETTIAR *v*, MARUDA PILLAY. **18 L. W. 652: 33 M. L. T. (H.C.) 64 : (1923) M. W, N. 835 : 76 I.C. 761 : 1924 Mad. 145.**

——S. 11—*Execution proceedings—Constructive* res judicata—*Omission to object in prior execution proceedings—Effect of.*

Where in a previous execution application the judgment-debtor did not take objection to executability of the decree and execution was ordered it is not open to him to object that the decree is inexecutable when a subsequent application for execution is made. The fact that the subsequent application for execution relates to different items of property does not take the case out of the operation of the rule *res judicata*. (*Spencer and Venkatasubba Rao, JJ.*) PALANCHERI GOVINDA MENON *v.* KRISHNA MANNADIAR. **45 M. L. J. 71 : 17 L. W. 566 : (1923) M, W. N. 299 : 72 I, C. 397 (2) : 1923 Mad, 649.**

——S. 11—*Execution proceedings—Recognition of assignment and transmission of decree—Omission to object to execution—Effect of.*

Where a decree was assigned and an application was made to the Court to recognise the assignment and transmit the decree for execution to another Court, the omission of judgment-debtor to object at that stage does not preclude him from objecting to the execution of the decree in the manner proposed by the decree-holder at a later stage of the execution proceedings. (*Spencer and Venkatasubba Rao, JJ.*) NATESA CHETTIAR *v.* ANNAMALAI CHETTIAR. **17 L. W. 319 : 32 M.L T. (H,C.) 157: 73 I.C. 213: 1923 Mad. 487 (1).**

——S. 11—*Execution proceedings—Order made on an application.*

An order made in execution proceedings whether right or wrong bars a subsequent application when the validity of the first order is directly in question to determine whether the latter application is maintainable. (*Sadasiva Aiyar and Napier, JJ.*) DOORVASI SESHADRI AIYAR *v.* GOVINDASWAMI PILLAI. **40 M.L J. 556: 13 L.W. 529: 29 M.L.T. 284 : 63 I.C. 189 : (1921) M.W.N. 344**

——S. 11—*Execution proceedings—Order without notice.*

An order in execution passed without notice to the parties does not operate as *res judicata*. (*Krishnan, J.*) RAMUDU CHETTY *v.* VARADARAJA CHARIAR. **62 I. C. 480 : 13 L. W. 289.**

C. P. CODE (V OF 1908), S. 11—Execution Proceedings.

——S. 11—*Execution proceedings—Construction of decree—Executability.*

Where on an application for execution it was decided that the decree as it stood was not executable the order is binding on the decree-holder as *res judicata* and no further application for execution would lie unless the decree had been made absolute and executable. (*Oldfield and Seshagiri Aiyar, JJ.*) RAMALINGA ROWTHAN *v.* SHEIK IBRAHIM SAHIB. **59 I. C 161 : 12 L. W. 34**

——S, 11—*Execution proceedings—Constructive* res judicata.

Assuming that the principle of constructive *res judicata* is applicable to execution proceedings it cannot be said that an applicant for execution ought to have pleaded the fraud or force which prevented his applying in time. (*Seshagiri Aiyar and Burn, JJ.*) MYDEEN ROWTHER *v.* MD. ABDUL GAFFER. **53 I. C. 862 : 10 L. W. 566.**

——S. 11—*Execution proceedings—Order at one stage* res judicata.

An order made at one stage of the execution proceedings on an application to which the judgment-debtor is a party is binding on all the subsequent stages. (*Spencer and Krishnan, JJ.*) THANGI SHETTITHI *v.* DUJA SHETTI. **(1918) M. W. N. 748. 8 L. W. 519 : 35 M. L. J. 575 : 48 I. C. 226 : 24 M. L. T. 483.**

——S. 11—*Execution proceedings—Decision at one stage of the proceedings—Binding.*

Where an order of attachment is made after the notice to the judgment debtor it is conclusive. If the order is intended to be attacked on the ground that certain pleas were not taken originally the propriety of the order can be questioned only in subsequent proceedings other than those in which it was passed. Otherwise the decision reached at any particular stage of the execution proceedings would be deprived of finality. 8 Cal. 51 foll. (*Oldfield and Bakewell, JJ.*) MADLIDI DORAYYA *v.* SATTI VEERAYYA. **35 M. L. J. 312 : 44 I. C. 4 : (1918) M. W. N. 143.**

——S. 11—*Execution proceedings—Decision as to executability of a decree.*

An order holding that a mortgage decree is executable as it stands without the necessity of an application under O. 34, R. 6, C. P. C. is *res judicata* in subsequent applications for execution. (*Abdur Rahim and Kumaraswami, Sastri. JJ.*) NARAYANA AIYAR *v.* SINGARAVELU VANNIAN. **33 M. L. J. 543 : (1917) M. W. N. 845 : 42 I. C. 282 : 6 L. W. 675.**

——S. 11 and O. 2, R 2—*Execution proceedings—Constructive* res judicata.

The principle of constructive *res judicata* should not be applied to execution proceedings unless the decision of the question subsequently sought to be agitated was given expressly, or by necessary implication must be deemed to have been implied in the previous decision. O. 2, R. 2 does not apply to restitution proceedings. An application for interest on the money paid to the decree-holder under a decree subsequently reversed, and of which restitution was claimed in a prior application is not barred as *res judicata*. (*Ayling and Seshagiri Aiyar, JJ.*) SOMASUNDARAM PILLAI *v.* CHOKKALINGA PILLAI. **40 Mad. 780 : 38 I. C. 806 : 5 L. W. 267.**

C. P. CODE (V OF 1908), S. 11—Execution Proceedings.

——S. 11—*Execution proceedings—Constructive* res judicata.

Doctrine of constructive *res judicata* should be carefully applied to execution proceedings. A party who is sought to be barred by *res judicata* should have notice of the point. If after notice a decision is passed on an execution petition, the parties cannot object to that decision in a subsequent application. But decision in one stage of application is not *res judicata* in another stage of the same application. (*Ayling and Seshagiri Aiyar JJ.*) SUBRAMANI AIYAR *v.* RAJESHWARA SETHUPATHI. 38 I. C. 627 : 40 Mad. 1016.

——S. 11—*Execution proceedings—Order in claim proceedings no bar to subsequent suit to vacate the order.*

An order having been made in certain claim proceedings a subsequent suit for the order being vacated is not barred under S. 11. C. P. Code. (*Ayling and Seshagiri Aiyar, JJ.*) PARTHASARATHY CHETTY *v.* YETCHOORI NARAYANA CHETTY. 37 I. C. 401 : 5 L. W. 161.

——S. 11—*Execution proceedings—Rule of* res judicata.

The question at issue in a prior execution petition and appeal to High Court being only about the re-opening of a partition and not as to whether there was or was not a division of particular items of property, a subsequent execution petition for division of the same items is not barred by the rule of *res judicata*. (*Abdur Rahim, O. C. J. and Seshagiri Aiyar, J.*) PODURU LAKSHMI NARAYANA *v.* PONNADA PALLAMRAJU. 4 L. W. 101 : 37 I. C. 354 : (1916) 2 M. W. N, 118.

——S. 11—*Execution proceedings—Dismissal for default.*

The conclusive character of the adjudication in a former execution proceeding as to a party's right to execute the decree cannot be affected by the subsequent dismissal of that application for default. (*Sadasiva Iyer and Mooee, JJ.*) PERIAKARUPPAN CHETTY *v.* CHIDAMBARA TAMBIRAN. 3 L. W. 339 : 33 I. C. 443 : (1916) 2 M. W. N. 64.

——S. 11 and O. 21 Rr, 23 and 57—*Execution proceedings — Prior order for execution not* res judicata.

A prior order under O. 21, R. 23 for execution is not *res judicata* but is vacated by a subsequent order of dismissal of execution application under R. 57: To be a bar, the previous order must be in force. 8 Cal. 51 (P. C.) ref, 24 Mad. 669, 24 All. 282 diss. (*Napier, J.*) PERIAKARUPPAN CHETTIAR *v.* MANIKA VECHAGA DESIKA. 31 I.C. 293:2 L W.1055

——S. 11—*Execution proceedings—Decision of substantive rights—Change of law.*

Where substantive rights are decided in an order passed in execution proceedings such decision is *res judicata* in subsequent execution applications. But when the decision on the prior application was one on a question of procedure as it then stood, it does not operate as *res judicata* when that procedure itself is changed by the statute law. 26 M. 760 ; 39 C. 848 ; 32 C. 749 Ref. (*Sadasiva Iyer and Napier, JJ.*) VARADARAJA MUDALI *v.* MURUGESAM PILLAI. 39 Mad. 923 : 30 M.L.J. 460 : 18 M.L.T. 313 : 30 I. C. 707 : (1915) M. W. N. 769.

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——S. 11—*Execution proceedings—Construction of decree.*

A particular construction of a decree may oprate as *res judicata* in subsequent proceedings between the same parties. (*Sadasiva Aiyar and Napier, JJ.*) VENKATTAMMA *v.* MANIKKAM NAYTNI VARU. 26 I. C. 244 : 16 M. L. T. 399.

——S. 11—*Execution proceedings—Relief not granted by decree—Courts order granting such relief in execution proceedings is* res judicata *if not set aside in due course.*

Though a relief may not have been granted by a decree, yet if in the execution proceedings the court passes order granting the relief, such order will become *res judicata* if it is not set aside in due course of law. (*Sankaran Nair and Ayling, JJ.*) EPOOR RAMASWAMI REDDI *v.* KANDADAI RANGAMANNAR IYENGAR. 26 M. L. J, 255 15 M. L, T. 246 : 23 I. C. 390 : (1914) M, W. N. 622.

——S. 11—*Execution proceedings—Notice—* Res judicata.

An order passed by the court *ex parte* after holding that the notice was duly served binds the defendant on general principle of *res judicata* as much as a contested order. (*Ayling and Sadasiva Aiyar, JJ.*) SUBHIAH NAICKER *v.* RAMANATHAN CHETTIAR. 37 Mad 462 : 26 M. L. J. 189 : (1914) M. W. N. 205 : 22 I. C 899 : 1 L. W. 251.

——S. 11—*Execution proceedings*—Ex parte *order—Notice.*

Where on the date fixed for the appearance of the judgment-debtor, for settlement of the terms of a sale proclamation, the judgment-debtor did not appear, but appeared subsequently and applied by a review petition for setting aside the sale and the petition was dismissed, the order of dismissal operates as *res judicata* in subsequent proceedings and is not appealable. (*Sadasiva Iyer and Spencer, JJ.*) SUBBARAYA ROWTHER MINDA NAINAR *v.* MUTHAMMAL. 22 I. C. 780.

——S. 11—*Execution proceedings—Order in —Notice.*

An order in execution proceedings cannot operate as *res judicata* unless it is shown that it was passed after notice to the opposite side and allowing him an opportunity to be heard, 30 M. 255 rel. (*Sadasiva Aiyar and Spencer, JJ.*) VARADIAH *v.* KUMARA VENKATA PERUMAL. 14 M. L. T. 530 : 26 M. L. J. 83 : 21 I. C. 782 : (1914) M. W. N. 157.

——S. 11—*Execution proceedings—Notice to the other party — Order without— Appeal—Failure to prefer*—Res judicata.

An order, passed without notice to the judgment-debtor, returning an execution application to the decree-holder for amendment as it adopted a wrong method of calculation of the amount due is appealable. The decree-holder who fails to appeal against such an order is barred from adopting the same method of calculation in any subsequent application, as the order is similar to the dismissal of a suit as time barred without notice to defendant. The bar of *res judicata* cannot be avoided by a party who had an opportunity to make his defence though the other side

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was not served with notice. (*Benson and Sundara Aiyar, JJ.*) VYAPURIKOUNDAN *v.* CHIDAMBARA MUDALIAR. **37 Mad. 314 : 18 I. C. 607 : 24 M. L. J. 26.**

——S. 11—*Execution proceedings—Order on claim petition.*

Order on a claim put in by a person in respect of a property attached under a decree adversely to the claimant does not bar him from defending his claim in a suit against him for recovery of possession by a third party. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) THIYGARAYA MUDALIAR *v.* SABAPATHY MUDALIAR.
16 I. C. 529 (1) : (1913) M. W.N. 54.

——S. 11—*Execution proceedings— Order that application is not time barred*—Res judicata

Where an execution application was rejected on the ground that it was not in accordance with law and the decree-holder acquiesced in this order and did not appeal, *held* that the order was final and could not be questioned in further proceedings. Though orders in execution proceedings do not come directly within the language of what is now S. 11 of the Civil Procedure Code yet such orders if not appealed from, are binding on the parties in subsequent proceedings on principles analogous to those of *res judicata* strictly so called. When a competent Court has decided, even though wrongly, that an execution application was not time barred, that order could not be questioned in subsequent execution proceedings. (*Batten, J. C.*) JAGANNATH *v.* BEHARI LAL. **72 I.C. 473 : 1923 Nag. 236.**

——S. 11—*Execution proceedings—Order in when* res judicata—*Case struck off—Effect of.*

Where an order has been made on an application for execution expressly or by implication determining the rights of the parties to the proceeding, the fact that the decree holder does not choose to proceed with the execution and the case is struck off does not entitle any party to re-open the question which previously has been adjudicated. 17 C. W. N. 113 foll. 6 A. 269 ; 8 C. 5 Ref (*Batten, J. C.*) MUSSAMMAT PURA *v.* BEHARILAL.
68 I. C. 239 : 1923 Nag. 1.

——S. 11—*Execution proceedings—Order on prior application.*

An order delivering possession of property on an execution application is an adjudication that the application is in time and it is not open to the judgment-debtor to question the legality of that order in proceedings started on a subsequent application for execution. (*Mitra, A. J. C.*) AMIR ALI *v.* GOPAL DAS. **54 I. C. 924.**

——S. 11—*Execution proceedings--Erroneous decision.*

An erroneous decision in prior execution proceedings is not *res judicata* in subsequent proceedings in execution. (*Mittra, A. J. C.*) YESWANT RAO *v.* DATTATRAYA KRISHNA.
45 I. C. 201.

——S. 11 and O. 21, Rr. 62 and 63—*Execution proceedings—Claim order*—Res judicata.

The subsequent mortgagee obtained a decree for sale against the mortgagor alone. Later on, the prior mortgagee obtained a decree against

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both the mortgagor and the subsequent mortgagee. On execution of the former decree, the prior mortgagee applied under O. 21, R. 62 for a declaration of his mortgage encumbrance. The Court dismissed the application. The point is not *res-judicata* between the prior and subsequent mortgagees, as under O. 21, R.63, the point could not be decided. (*Lindsay, J. C. and Stuart, A, J. C.*) SARAFRAR HUSAIN *v.* AMAR CHAND PAL. **37 I. C. 78 : 3 O. L. J. 529.**

——S. 11—*Execution proceedings—Decision as to limitation—Necessary elements.*

To bar as *res judicata*, the question of bar of limitation for execution of a decree, must be proved that (1) notice requiring the judgment debtor to show cause why the decree should not be executed against him has been served on him and (2) he has thus been in a position to raise that plea of limitation, and (3) that a Court has expressly or impliedly decided by its order the question of limitation in favour of the decree-holder applicant and that this has been an effective order of adjudication. (*Stuart, A. J, C.*) GAURI SHANKAR *v.* LACHHMIN KUNWAR.
33 I. C. 663 : 18 O. C. 374.

——S. 11—*Execution proceedings—Constructive* res judicata.

Though the judgment debtor in execution omits certain objections which are therefore never decided, they cannot operate as *res judicata*. (*Kanhaiya Lal, A. J. C.*) DELHI AND LONDON BANK *v.* RAMRATAN. **32 I. C. 754 : 2 O. L. J. 611.**

——S 11—*Execution proceedings—Order in —When* res judicata—*Notice to parties.*

Where an order for execution of a decree is passed after due notice to the judgment-debtor but eventually the application is dismissed for default of the decree-holder, it is not open to the judgment-debtor in a subsequent application for execution to plead that the former execution was time barred. (*Jwala Prasad and Bucknill, JJ.*) GOURCHANDRA ROY *v.* JANARDHAN PRASAD THAKUR. **4 Pat. L. T. 204 : 68 I. C. 337 : 1923 P. 180.**

——S. 11—*Execution proceedings.*

S. 11 of the C. P. Code applies to suits and an execution case is not a suit; but it is firmly established that the principle of law underlying S. 11 applies to proceedings in execution of decree. (*Das and Kulwant Sahay, JJ.*) RAM LAL MALIK *v.* DEODHARI RAI. **2 Pat. 772 : 74 I. C. 781 : 5 Pat. L. T. 7.**

——S. 11—*Execution proceedings — Order made at one stage—Binding on parties.*

Where a court executing a decree passes an order after notice to the parties, that decision is unless set aside on appeal, binding upon the parties. (*Miller, C. J. and Jwala Prasad, J.*) MAHADEO PRASAD SAHU *v.* GAJADHAR SAHAI.
73 I. C. 359 : 1 Pat. L. R. 145.

——S 11 Expls. IV and V—*Execution proceedings—Doctrine, not to be applied generally to.*

Although the doctrine laid down in S. 11 C. P. Code may be applied to certain proceedings in execution arising out of the same judgment so as to put an end to the litigation and may possibly

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be applied in certain cases when separate suits have been brought raising points which have already been decided in execution cases brought between the same parties, the special rules laid down in the explanation to S. 11, which go beyond the ordinary doctrine of *res judicata* ought not to be applied generally to execution cases. 37 All 589 ; 24 Mad. 681 foll. (*Miller, C. J. and Adami, J.*) PIRTHI MAHTON *v.* JAMSHED KHAN. 3 Pat, L T. 403 : 67 I. C. 656 : 1922 P. 289.

——S. 11—*Execution proceedings—Order in, When res-judicata—Notice to parties.*

Where an order for execution of a decree is passed after due notice to the judgment-debtor, but eventually the application is dismissed for default of the decree-holder it is not open to the judgment-debtor in a subsequent application for execution to plead that the former execution was time barred. (*Jwala Prasad and Bucknill, JJ.*) GOWRICHANDRA ROY *v.* JANARDHAN PRASAD THAKUR. 4 Pat. L. T. 204 : 68 I.C. 337 : 1923 P. 180.

——S. 11—*Execution proceedings—Order on prior application.*

Where the judgment debtor does not object to the first application for execution of a decree on the ground of illegalities in relation to the execution proceedings *e. g*, non-service of notice on the transferor under O. 21, R, 16 of the C. P. Code, he cannot raise such an objection when a subsequent application for execution is made. (*Coutts and Sultan Ahmad, JJ.*) BRAJILAL MARWARI *v.* ATKINSON. 5 Pat. L. J. 639 : 57 I C. 707 : 1 P L. T. 504.

——S. 11—*Execution proceedings*—Ex parte *order*

An order made in execution proceedings without notice to the judgment debtor does not estop the latter from subsequently contending that the application on which the order was made was barred by time. (*Adami, J.*) SOBRAN MAHTON *v.* SABILAS KUER. 54 I.C. 933.

——S. 11—*Execution proceedings— Limitation—Plea of bar by.*

So long as an application for execution is pending, the judgment-debtor can at any time show that it is barred and the Court has to dismiss it under S. 3 of the Lim. Act. It is only when the point of limitation is concluded by proceedings in a previous execution that the judgment-debtor is not allowed to take objection on the score of limitation in a subsequent execution of the decree. (*Jwala Prasad and Adami, JJ.*) MAHARAJA KESHO PRASAD SINGH BAHADUR *v.* HARNBANS LAL. 53 I C. 85 : 1920 Pat. 109.

——S. 11—*Execution proceedings—Constructive* res judicata—*Objection to decree.*

Where sucessive applications for execution are admitted and ordered without any objection to the executability of the decree, the judgment debtor is barred from raising the objection at a subsequent execution. (*Jwala Prasad and Coutts, JJ.*) KESHA WESARIND SATPI *v* DEBUNDRA BALA DASSI. 4 Pat L. J. 213 : 48 I. C, 245 : 1919 Pat. 121.

C. P. CODE (V OF 1908), S. 11—Execution Proceedings.

——S. 11—*Execution proceedings—Constructive* res judicata.

If a tenant judgment-debtor omits to raise an objection to the non-transferability of a holding in execution proceeding in which the holding is attached, he is estopped from raising it in a subsequent execution proceeding in execution of the same decree. (*Imam and Thornhill, JJ.*) RAMESHWAR SINGH BAHA DUR *v.* KESHWAR KAI. 47 I. C. 790.

——S. 11—*Execution proceedings—Executability of decree.*

An order in execution to the effect that the decree is not executable, is *res judicata* in subsequent execution proceedings. (*Mullick and Thornhill, JJ.*) RITU KUER *v.* ALAKHDEO NARAIN SINGH. 4 Pat. L. J. 330 : 5 Pat. L. W. 208: 47 I, C. 154 : 1918 Pat 265.

——S. 11—*Execution proceedings—Constructive* res judicata.

The plea that a certain execution petition is barred by limitation cannot be allowed to be raised at a subsequent stage of the application if it had not been raised at the earlier stage. Failure to raise an objection on the ground of limitation operates as *res judicata*. (*Sharfuddin and Roe, JJ.*) JANKI KUER *v.* BANWAMALA RAMANAUJEAR. 3 Pat. L. W. 218 : 45 I C. 404.

——S, 11—*Execution proceedings—Objection raised and decided—Decision binding.*

Where in execution an objection is raised and gone into the same objection cannot be considered on any subsequent application in execution and the decision is binding on all parties. Where a decision of the executing Court is that no property of the judgment-debtor can be attached, that decision is final. (*Roe and Imam, JJ.*) JABURANS PANDAY *v.* EKRAM KAI. 44 I. C. 654 : 4 Pat. L. W 279.

——S. 11—*Execution proceedings—Whether judgment-debtor can raise the same question in subsequent proceedings.*

An order of a Court directing execution of a barred decree to proceed after due notice to the judgment-debtor precludes the judgment-debtor from raising the same objection in a subsequent execution of that decree. (*Atkinson and Jwala Prasad, JJ.*) BESHESWAR DAYAL *v.* RUP KISHORE LAL. 41 I. C, 675 : 3 Pat. L. W. 13.

——S. 11 (Exp. IV)—*Execution proceedings—Failure to attend at the settlement of sale proclamation—Effect—Liability of properly to attachment—if can be agitated.*

Where in spite of notice to the judgment-debtor he did not attend at the settlement of a sale proclamation under O 21, R. 66 he cannot by reason by such non-attendance be considered to be estopped by the principle of *res judicata* from contending thereafter that the property was not liable to attachment. (*Schwabe, C. J., Oldfield and Ramesam, JJ.*) 46 M. 768 : 45 M. L. J. 346 : 1923 M.W. N. 571 : 74 I.C. 155 : 18 L.W. 757 : 1924 Mad. 1 (F.B.).

C. P. CODE (V OF 1908), S. 11—Ex parte decree.

——S. 11—*Execution proceedings.*

The provisions of S. 11 do not apply to execution proceedings. (*Brown, A. J. C.*) MAUNG SO DEVIGYAN.

70 I.C. 530: 4 U.B.R. 132: 1923 Rang. 119 (2).

——Ss. 11 47—*Execution proceedings—Decision*—Res judicata.

If a matter is decided on an application under S. 47, C. P. C. the deision is final and operates as *res judicata* in a subsequent suit (*Shaw, J. C.*) NGA PO TUN *v.* MI THON PON.

(1910) 1 U. B. R. 66 : 10 I. C. 991.

Ex parte Decree.

——S. 11—Ex parte *decree—Status.*

An *ex parte* decree declaring the status of certain persons as reversioners will operate as *res judicata* in a subsequent suit between the parties and their representatives. 33 Mad. 459, 24 Bom. 77 Ref. (*Sunder Lal, JJ.*) GANGA BISAN *v.* MAHAR ILAHI KHAN, **12 A. L. J. 1011 : 25 I. C. 224.**

——S. 11—Ex parte *decree—Question of relationship of landlord and tenant not raised and decided*—Maxim Omnia Presumuntur esse rite *acts, application of.*

An *ex parte* decree in a rent suit wherein the relationship of landlord and tenant was neither raised nor decided is not *res judicata* in a subsequent suit for rent upon the question of relationship. The effect of an *ex parte* decree does not depend on the question whether the decree has or has not been executed. (*Holmwood and Chapman, JJ.*) CHOWDHURY *v.* JAFAR MUHAMMAD. **24 I. C. 739.**

——S. 11—Ex parte *decree—Landlord and tenant—Decree for rent.*

An *ex parte* decree in a rent suit is *res judicata* regarding the question of relationship of landlord and tenant because a decree for rent can only be passed upon a determination that such a relation does exist. But it may not operate as *res judicata* in respect of the rate of rent, 8 Cal. 383 Ref. 16 Cal. 300 dist. (*Chatterjee and Beachcroft, JJ.*) RAJ KUMAR ROY CHOWDHURY *v.* ALIMADDI.

16 I. C. 911 : 17 C. W. N. 627.

——S. 11 (Expl. IV)—Ex parte *decree—Effect of—Plea in subsequent suit barred.*

Where, an *ex parte* decree was passed against the deft. under the terms of a bond for interest and compound interest, the deft. cannot plead undue influence, etc. in a subsequent suit on the same bond for principal, interest and compound interest ; but the plea as to compound interest not being claimable is open to him. (*Johnstone and Chevis, JJ.*) GOBIND LAL *v.* RAO BALDEO SINGH

128 P W R 1914 : 12 P. R. 1915 . 226 P. L. R. 1914 : 24 I. C. 931.

——S. 11—Ex parte *decree — Rent suit — Landlord and tenant.*

C. P. CODE (V OF 1908), S. 11—Ex parte decree.

The decision in a suit for recovery of rent between landlord and tenant, in which the tenants were *ex-parte* and in which all the points in dispute were left open is not *res judicata* between the parties in a subsequent suit for compelling the acceptance of a *patta* as there was no adjudication therein on the question as to what the terms of the proper *patta* were. 16 C. L. J. 124, ref. (*Spencer and Coutts Trotter, JJ.*) AYYA PERUMAL UDAYAN *v.* RAMASWAMY CHETTIAR.

29 M. L J. 362 : (1915) M. W. N. 614 : 2 L. W. 650 : 30 I. C. 983.

——S. 11—Ex parte *decree — Foreclosure — Mortgage— Paramount title—Assertion of, in later suit.*

A decree for foreclosure passed *ex parte* against a person joined as defendant on the only ground that he possesses the mortgaged property does not operate as *res judicata* so as to prevent him or his transferee from setting up a title paramount in a subsequent suit, where there has been no express adjudication on the question of title, though the final decree orders delivery of possession and possession has been delivered thereunder. 20 Cal. 79 P. C. dist. (*Drake Brockman, J. C. Batten and Mitra, A. J. C.*) LAXMIXARAYANA RAMNARAYAN *v.* VITHOBA.

15 N.L. R. 114 : 52 I. C. 82 (F. B.),

——S. 11—Ex parte *decree.*

An *ex parte* decree can render a question *res judicata* But regard must be had to the rule that where the allegation on the record is uncertain there is no *res judicata* and the difficulty with regard to decrees passed *ex parte* is to ascertain precisely what matters must be taken to have been decided by the court, that is to say, what matters are involved in that *ex parte* decree passed by the Court. (*Chamier, J C.*) BALAMUKUND *v.* ABDUL BASHID. **12 I. C. 329**

——S. 11—Ex parte *decree.*

Per *Mullick, J.*—An *ex parte* decree can operate as *res judicata* only on an issue which is necessary to be determined (*Mullick and Jwala Prasad, JJ.*) NAND LAL PAL *v.* NARESH CHANDRA DEB. **2 Pat. L. W. 108 : 41 I. C 468.**

——S. 11—Ex parte *Judgment.*

The principle of *res judicata* applies to *ex parte* decree also. (*Parlett, J.*) C. BURN *v.* D. T. KEYMER. **6 Bur. L.T, 160: 7 L.B.R. 56: 20 I.C 971**

Fraud.

——S. 11 *Fraud—Suit to set aside decree.*

A suit to set aside a decree on the ground of fraud is not an exception to the rule of *res judicata* but is independent of it. The unsuccessful party can impeach Courts erroneous judgment by appeal or review but not by suit. (*Benson and Sundara Iyer, JJ.*) LOGADAPATTI CHINNAYYA *v.* KOTLA RAMMANNA. **38 Mad. 203 : (1913) M. W. N. 387 13 M. L. T. 421 : 25 M. L. J. 228 19 I.C. 579.**

——S. 11—*Fraud.*

So far as plaintiff relied on perjured evidence the suit is not maintainable. The alleged fraud having been in effect adjudicated upon, an attempt to reopen the case cannot be allowed. (*Pratt, J.*) ARLANDU *v.* SITHAMBARAM.

74 I. C. 278 : 1 Bur. L. J. 129 : 1923 R. 82 (1).

CIVIL PRO. CODE (V OF 1908), S. 11—Heard & decided.

Heard and finally decided.

See also C. P. Code, S. 97.

———S. 11—*Heard and finally decided—Appeal—No decision on the merits—Effect of.*

To support a plea of *res judicata*, besides the parties and the matter in issue being the same, the matter in issue must have been heard and finally decided. If there is an appeal it destroys the finality of the decision of the lower Court and if the ultimate Court of appeal dismisses the suit as being badly framed the merits of the case are not *res judicata*. 24 I. A. 50 ref. (*Mr. Ameer Ali*). ABDULLA ASHAGAR ALI KHAN *v.* GANESH DAS.

45 Cal. 442 : 44 I. A. 213 : 128 P. W R. 1917 : 22 M. L. T. 451 : 22 C. W. N. 121 : 3 Pat. L. W. 381 : 26 C. L. J. 568 : 15 A. L. J. 889 : 19 Bom. L. R. 972 : 34 M. L. J. 12 : 7 L. W. 62 : 132 P. L. R. 1917 : 42 I. C. 959 : (1918) M. W. N. 7 (P.C.).

———S. 11—*Heard and finally decided—Mortgage suit—Decree for redemption—Fresh suit for redemption—Maintainability of.*

A mortgagor who has obtained a decree for redemption which does not contain a provision that if payment is not made on the date fixed by the Court, the mortgagor shall be absolutely debarred of all right to redeem the property, and who has not enforced that decree and paid the decretal amount, can subsequently bring a second suit for redemption of the mortgage in respect of which such decree was obtained. The mere fact that in the previous suit the Court ordered that on default of payment of the amount of the mortgage decreed within the time fixed, the suit should stand dismissed, does not operate as a bar to a fresh suit for redemption. 24 A. 44 foll. (*Ryves and Stuart, JJ.*) HARI RAM *v.* INDRAJ.

44 A 730 : 9 O. & A L. R. 123 : L. R. 3 A, 397 : 69 I. C. 167 : 20 A. L. J. 631 : 1922 All. 377.

———S. 11—*Heard and finally decided.*

A dismissal of an appeal, for want of a copy of the first Court's judgment necessary under the Allahabad High Court rules, does not operate as *res judicata*. (*Tudball and Sulaiman, JJ.*) BINDESHRI *v.* AFZAL KHAN. **63 I. C. 344 : 19 A. L. J. 706.**

———S. 11—*Heard and finally decided—Appealability not the test.*

Where a suit of the nature cognisable by a Court of Small Causes is tried as a regular suit, the decision operates as *res judicata* even though it is not appealable. (*Piggott and Walsh, JJ.*) RAM FAQIR *v.* BINDESAN SINGH.

41 All. 54 : 47 I. C. 837 : 16 A. L. J. 782.

———S. 11 and O. 9, Rr. 3 and 6 ; O. 17, Rr. 2 and 3—*Heard and decided—Dismissal of suit for non-prosecution—Second suit.*

Where on the date fixed for hearing, the defendant was *ex parte*, and the plff. failing to adduce evidence, the suit was dismissed for want of prosecution. *Held*, that the Court must be deemed to have acted under O. 17, R. 3 and dismissed the suit on the merits and that second suit for the same relief was barred. 'Want of prosecution' could only mean that the plff. did nothing to support his claim and that there was no evidence on record supporting his claim. (*Banerjee and Abdul Raoof, JJ.*) HINGO SINGH *v.* JHURI SINGH.

40 All. 590 : 46 I. C. 390: 16 A. L. J. 462.

———S. 11—*Heard and decided—Fresh cause of action—Fresh suit.*

Plff. obtained a decree for possession of certain property which was not executed for three years. Possession over the property had been obtained otherwise than in execution and plff. was subsequently dispossessed, *Held*, that dispossession of the plff. subsequent to the date of the decree was a fresh cause of action and the suit was rightly brought. (*Richards, C. J. and Rafique, J.*) DHANRAJ SINGH *v.* LAKRANI KUAR.

38 All. 509 : 35 I. C. 601 : 14 A. L. J. 709.

———Ss. 11 and 47—*Heard and decided—Suit on the basis of a decree if maintainable—Decree for possession—Execution of decree barred by limitation.*

Where plff. obtained a decree for possession but that decree is unenforceable owing to limitation a fresh suit is maintainable on the decree. Neither S. 11 nor S. 47 of the C. P. Code operates as a bar. (*Walsh, J.*) LAKRANI KUAR *v.* DHANRAJ SINGH. **32 I. C. 634 : 14 A. L. J. 102.**

———S. 11—*Heard and finally decided—Partition suit—Compromise—Subsequent suit maintainable.*

Where a suit for partition is dismissed under a compromise which was not carried out a second suit for partition is not barred by *res judicata*. The right to bring a suit for partition is a continuing right incidental to the ownership of the joint property. 23 All. 219 ; 13 All. 309 ; 28 All 627 ref. (*Richards and Banerjee, JJ.*) T. C. MUKERJI *v.* AFZAL BEG.

37 All. 155 : 27 I. C. 694 : 13 A. L. J. 98.

———S. 11—*Heard and decided—Dismissal in default.*

A judgment which dismisses a suit in default does not operate as *res judicata*. (*Knox, J.*) LACHMI NARAIN SINGH *v.* DHONDU SINGH.

24 I. C. 480 : 12 A. L. J. 911.

———S. 11—*Heard and decided—Dismissal of suit for default—Subsequent suit on difficient cause of action.*

A dismissal of a suit for default does not operate to bar a second suit on the same cause of action, much less to bar a second suit on an entirely different cause of action. (*Piggott, J.*) BINDRAVAN *v.* MOTI. **22 I.C 820 : 12 A.L.J. 53.**

———S. 11—*Heard and decided—Mortgage suit—Suit for possession and mesne profits by prior mortgagee—Subsequent suit by second mortgagee for redemption—Prior mortgagee if can claim mesne profits in second suit.*

Where a prior usufructuary mortgagee sued the subsequent mortgagee and obtained a decree for possession and mesne profits, he cannot again claim mesne profits in a subsequent suit for redemption by the subsequent mortgagee, by reason of the operation of the rule of *res judicata*. (*Piggott, J.*) LAL MOHAN *v.* KESHO RAM.

22 I. C. 70 : 11 A. L. J. 937.

CIVIL PRO. CODE (V OF 1898), S. 11—Heard & decided.

———S. 11—*Heard and decided—Mortgage—Redemption—Decree—Second suit for redemption.*

The right to redeem is not lost unless an order absolute is obtained under S. 93, T. P. A., and a fresh suit for redemption is not barred by the preliminary decree for redemption. (*Tudball and Rafique, JJ.*) GHULAM *v.* HIMAYATULLAH.
18 I. C. 326

———S. 11—*Heard and decided—Mortgage—First suit not framed as a redemption suit—Decree for possession—Second suit for redemption.*

Where the former suit was not properly framed as a redemption suit but ended in a decree for possession subject to the payment of the amount due under the mortgage and the amount remained unpaid within the prescribed period of 30 days, *held* a second suit for redemption was not barred by *res judicata*. 24 A. 44, ref. (*Piggott, J.*) GANPAT SINGH *v.* TOHFA.
15 I. C. 15 : 10 A. L. J. 36.

———S. 11—*Heard and decided—No decision—Execution — Application for possession — Separate suit, if lies.*

An auction purchaser applied for possession of property under S. 318 of the old Code. Both the lower Courts rejected it as time barred. The second appeal too was dismissed on the same ground but the question whether the order of the first Court was an order under S. 244 of the old Code was not decided by the High Court. The auction purchaser was entitled to bring a separate suit for possession as the decision did not operate as *res judicata*. (*Karamat Hussain and Chamier, JJ.*) BALDEO SINGH *v.* HIRALAL
13 I. C. 951 : 9 A L. J. 67.

———S. 11—*Heard and finally decided—Two decrees in same suit—Appeal against one decree only.*

Where both parties to a suit appealed and the appellate Court therein framed two decrees, an appeal against one decree only would be barred by *res judicata*, (*Griffin, J.*) RAM CHARAN *v.* LACHMAN PERSHAD. **9 I. C. 667.**

———Ss. 11 and 47—*Heard and decided—Mortgage suit—Decree not executed—Subsequent suit for redemption—Maintainability of.*

If a mortgagor brings a redemption suit and obtains a decree *nisi* which entitles him on payment of a certain sum by a certain time to get back the property, and nothing further is done, and no attempt is made to get back possession, and no order is made barring the mortgagor's right to redeem, then a second suit can be brought for redemption and the same would not be barred either by S. 11 or S. 47 of the Civil Procedure Code. There is nothing in the Dekhan Agriculturists' Relief Act to prevent the operation of the above. If the first redemption decree is passed in a suit under the Act, the question whether the decree is a decree *nisi* or a decree which puts an end to the mortgage will be one depending on the facts of the case. 43 B. 334 foll. (*Macleod, C. J. and Crump, J.*) RAMCHANDRA LAXMAN *v.* BALBHIM BABAJI. **72 I. C. 315 : 25 Bom. L R. 211: 1923 Bom. 287 (2).**

CIVIL PRO. CODE (V OF 1898), S. 11—Heard & decided.

———S. 11—*Heard and decided—Suit by Hindu widow—Bar under S. 244 (old Code)—Second suit by reversioner—Not barred.*

Where a Hindu widow sued for a declaration that a certain execution sale was not valid and binding, but it was dismissed not on the merits but on the ground it was barred by S. 244 (old Code), a suit by the reversioner after the widow's death was not barred by *res judicata* as there was no adjudication on the merits in the prior suit. (*Macleod, C. J. and Shah, J.*) GANESH RAMCHANDRA KULKARNI *v.* LAXMIBAI VENKATESH NARAYAN. **46 Bom. 726 : 24 Bom. L. R. 249 : 67 I. C. 209 : 1922 Bom. 96.**

———S. 11—*Heard and finally decided—Suit against Receiver on allegations already found against plaintiff.*

Where a Court appointing a Receiver has gone into the Receiver's accounts and has passed them overruling the objections of the party impugning the accounts a suit will not lie against the Receiver for damages for negligence based on the same allegations already considered and overruled. (*Macleod, C. J. and Heaton, J.*) SHRINIWAS KUPPUSAMY MUDALIAR *v.* M. C. WAZ.
22 Bom. L. R. 1126 : 59 I. C. 421 : 45 Bom. 99.

———Ss. 11 and 47—*Heard and decided—Mortgage—Decree nisi—Failure to apply to make the decree absolute—Execution time barred—Second suit for redemption.*

Held, by the Full Bench (*Shah, J.* dissenting), a mortgagor, who has brought a suit for redemption and obtained a decree *nisi* which neither the mortgagor nor the mortgagee has applied to be made absolute, can after the execution of that decree is time-barred, bring a fresh suit for redemption, and the same would not be barred by S. 11 or S 47 of the Code. (*Per Scott, C. J.*)—The accounts up to the date of the previous decree *nisi* cannot be re-opened in the subsequent suit. (*Scott, C. J., Macleod and Shah, JJ.*) RAMJI *v.* PANDHARINATH. **21 Bom. L. R. 56: 49 I.C. 894: 43 Bom. 334, 477.**

———Ss. 11 and 47—*Heard and decided—Mortgage—Suit for redemption—Subsequent suit under the Deccan Agr. Relief Act.*

Where in a suit for redemotion of a mortgage a decree for payment of the mortgage amount by instalments is passed under the Deccan Agr. Relief Act, but the decree is left unexecuted, it is not open to the mortgagor or any person claiming under him by a title subsequently derived, to bring a suit for redemption of the property. The remedy of the mortgagor or his representative is in execution and S. 47 of the C.P. Code will bar a suit. (*Heaton and Shah, JJ.*) BABUJI RAMCHANDRA *v.* GUJA MHADU DHANGAR. **20 Bom. L. R. 164 : 44 I. C. 908 : 42 Bom. 246.**

———S. 11—*Heard and decided—Partition—Second suit for partition.*

Parties can bring a second suit for partition if the first decree, declaring their right to partition has not been given effect to. (*Batchelor and Rao, JJ.*) JAGU BABJI VARANG *v.* BALU LAKSHMAN VARANG. **14 Bom. L. R. 1198 17 I. C. 955: 37 Bom 307.**

CIVIL PRO. CODE (V OF 1908), S. 11—Heard & decided.

——S. 11—*Heard and decided—Failure to plead—Effect.*

As between two inconsistent decrees it is the latter decree that will operate as *res judicata*. (*Chandavarkar, A.J C. and Batchelor, J.*) SHANKAR KRISHNU GOKHALE *v.* RAGHUNATH HARI DHARAP. **17 I. C. 205 : 14 Bom. L. R. 884.**

——S. 11—*Heard and finally decided—Obiter dictum.*

A, a khoja Mahomedan of Bombay, governed by Hindu Law in matters of succession, was in possession of certain property. In 1884, one of A's sons sued A and another of his sons for partition of his property in A's possession. The two main questions in the suit were, whether the property in the hands of A was ancestral and as such belonging to the joint family and whether, if so, the son could, during his father's life-time claim a partition. The original Court decided both the questions in favour of the son. A preferred an appeal. The Appellate Court found that it was not proved that, according to the general custom of the parties, the son could demand partition of ancestral property. The Appellate Court expressed an opinion that the property was not ancestral In a subsequent suit between A and his issue A contended that the question as to the property not being ancestral was *res judicata*. In the latter suit, besides the two sons who were parties in the previous suit, another son and a grandson of A were impleaded, the former as well as the latter's father was alive in 1884 but they were not impleaded in the former suit, *Held*, that the question that the property was not ancestral was not *res judicata*, because, in the first place, the opinion of the Appellate Court on the character of the property in the previous suit was mere *obiter dictum*, and secondly, the decision could not be binding on the son and grandson who were not parties to that suit. 13 B. 534 cons. and discussed. 24 C. 900 dist. (*Davar and Robertson, JJ.*) AHMEDABAI HABIBHOY *v.* DINSHAW MANECKJI PATIT. **12 I. C. 813 : 13 Bom. L. R. 1061.**

——S. 11—*Heard and decided—Dismissal for default of appearance.*

The dismissal of a suit under S. 120, C. P. C. (1882) for default of appearance in obedience to the Court's order, is a decree and bars a subsequent suit on the same cause of action. (*Chandavarkar and Hayward, JJ.*) PUNAMCHAND *v.* MOLLISON. **13 Bom. L. R. 658 : 11 I. C. 986.**

——S. 11—*Heard and finally decided—Decree nisi.*

A decree *nisi* is not *res judicata* and so is not the material upon which it is based (*Beaman, J.*) HOPEMILLS, LTD. *v.* SIR KOVASJI READYONEY. **10 I. C. 748 : 13 Bom L R 162.**

——S. 11—*Heard and finally decided—Subsequent change in the law—Effect.*

A question once decided against a party cannot now be allowed to be re-agitated merely because a Special Bench of the High Court has enunciated a rule different from what was recognised in previous case. (*Mookerjee and Panton, JJ.*) ABINASH CHANDRA PAL *v.* KHETRA MOHAN DALOI. **1923 Cal. 629.**

CIVIL. PRO. CODE (V OF 1908), S. 11—Heard & decided.

——S. 11—*Heard and decided—Wrong decision in a rent suit.*

In a suit for the recovery of arrears of rent on the basis of a *kabuliat* the *kabuliat* stipulated that arrears of rent should bear interest at the rate of 75 per cent. per annum. Both Courts below enforced the stipulation and decreed the plaintiff's claim as it appeared that the respondent had twice before obtained decrees for the arrears of rent on basis of this *kabuliat* with interest at the rate stipulated in 1911 and in 1915, *Held*, that the liability of the defendant-appellant to pay interest on arrears of rent at the rate provided for in the *kabuliat* is *res judicata* between the parties. 39 Cal. 848 and 32 Cal. 49 dist. (*Cuming and Panton, JJ.*) HAMID ALI *v.* MAHOMED NURERJJAMA MEAH. **76 I.C 444: 1923 Cal. 361.**

——S. 11—*Heard and finally decided-Judicial order—Made in one stage of a suit binding.*

The validity of a judicial order made at one stage of a suit of litigation, unless forthwith challenged, is conclusive and cannot be attacked at a latter stage. (*Mookerjee and Panton, JJ.*) RAJA SASIKANTA ACHARYA *v.* SARAT CHANDRA RAI. **70 I. C. 6 : 34 C.L J. 415.**

——S. 11—*Heard and decided—Unnecessary finding* res judicata—*Decree in an ejectment suit—Absence of notice—Permanent tenancy.*

Where an ejectment suit is dismissed on the ground of absence of notice but the Court records a finding that the permanent tenancy alleged by the deft is not proved, under such circumstances the decree cannot operate as *res judicata* on the question whether the deft. had a permanent tenancy or not. (*Chatterjee and Pearson, JJ.*) RAJENDRA KISHORE *v* KUMUD BAN MAHATA. **67 I. C. 271.**

——S. 11—*Heard and decided—Rent suit—Ex parte decree—Omission to raise defences—B. T. Act, Ss. 29 and 147-A—Effect of.*

Ex parte decrees in prior suits in which no issue was raised as to the rate at which the rent was payable by defendant and there was no decision with regard to such rate, do not operate as *res judicata* in favour of the plaintiff's landlords. 16 C. 300 Ref. Even though the defendant did not take in the previous rent suits the defence under S. 29 of the B. T. Act he can raise it in a subsequent suit for rent as there cannot be an estoppel against a statute. (*Suhrawardy and Cuming, JJ.*) NAFAR CHANDRA PAL CHOUDHURY *v.* BHUSI MALLA. **65 I. C. 581.**

——S. 11—*Heard and decided—Unnecessary issue.*

A question raised at the instance of a party and decided by the Court as necessary operates as *res judicata* in a subsequent suit, even though the issue in the previous suit was in fact not necessary. (*Woodroffe and Walmsley, JJ.*) MIDNAPORE ZAMINDARI *v.* NARES NARAIN. **63 I. C. 161 : 33 C. L. J. 317.**

——S. 11—*Heard and decided—Point left open by Appellate Court.*

Where in a previous suit for declaration as to the genuineness of a will, the lower Court decided

CIVIL PRO. CODE (V OF 1898), S. 11—Heard & decided.

not only that it was genuine but that the will was admissible as an authority to adopt though the latter point was not in issue and the Appellate Court decided in favour of genuineness only, the validity of adoption can be questioned in a subsequent suit. (*Tuenon and Huda, JJ.*) KALA CHAND MUKHAPADHYA *v.* JOTINDRA NATH CHUKRERBUTTY. **57 I. C. 852.**

——S. 11 and O. 9, R. 9—*Heard and decided—Dismissal for default—Suit for possession—Subsequent suit for abatement of rent.*

Dismissal of a suit by a tenant against his landlord for recovery of possession of certain property comprised in the plaintiff's *dar mourashi* tenure for default does not preclude him in a subsequent suit for rent brought by the landlord from claiming abatement of rent owing to dispossession by the landlord. (*Chatterji and Panton, JJ.*) PROMOTHO BHUTHAN DEB ROY *v.* NARENDRA BHUSAN ROY. **56 I. C. 932.**

——S. 11—*Heard and decided—Partition—Right to—Continuing right—Successive suit.*

The right to sue for partition is a continuing right incidental to the ownership of joint property. Therefore so long as the property remains joint, one of the co-owners can bring a second suit for partition though a previous suit for partition has been dismissed. (*Richardson and Huda, JJ.*) JAGMOHINI DASI *v.* SHIVA GOPAL BANERJEE. **56 I. C. 610.**

——S. 11—*Heard and finally decided—Claim not adjudicated—Not* res judicata.

A decision is not *res judicata* on a question which the Court deliberately abstained from deciding. The dismissal of a claim based on survivorship on the death of a certain person does not operate as *res judicata* in a subsequent suit, for declaration that a kot kabula executed by the deceased and a compromise decree entered into in a suit to enforce it are not binding on the inheritance when it comes to the hands of the plff. as a reversioner. (*Fletcher and Huda, JJ.*) HARA NARAIN BERA *v.* SRIDHAR PANDE. **47 I. C 2.**

——S 11—*Heard and finally decided—Dismissal for default.*

No question of *res judicata* arises in favour of either litigants when a suit has been dismissed for default. (*Mookerjee and Walmsley, JJ.*) GIRI LALA DASI *v.* NITYA LAL SINHA. **41 I. C. 905.**

——S. 11—*Heard and finally decided—Issue not decided upon.*

Where a question though directly and substantially in issue was left open though it should have been decided, it is not *res judicata.* (*Sanderson, C. J. and Chatterjee, J.*) PRIYA SANKAR *v.* JITENDRA NATH, **41 I. C. 19.**

——S. 11—*Heard and decided—Relinquishment of portion of claim without leave—Consequence of.*

Where the plff. relinquished his claim without leave of the Court in respect of the part of property in suit and the suit was dismissed with regard to that item, *held*, that a subsequent suit for recovery of possession against the defts, was *res judicata.* (*Mookerjee and Beachcroft, JJ.*) DANESH MOLLA *v.* DANANJOY BISWAS. **40 I. C. 408 : 29 C. L. J. 11.**

CIVIL PRO. CODE (V OF 1898), S. 11—Heard & decided.

——S. 11—*Heard and finally decided—Plea of* res judicata—*Decision on.*

The decision regarding the operation of the *res judicata* between the parties in a previous suit is conclusive as between the parties or their representatives. 11 C. L. J. 461 : 39 Cal. 848, 15 C. L. J. 684 ; 13 C. L. J. 119 Ref. (*Mookerjee and Beachcroft, JJ.*) MOHENDRANATH BISWAS *v.* SHAMSUNNESSA KHATUN. **21 C. L. J. 157 : 27 I.C. 954 : 19 C. W. N. 1280.**

——S. 11—*Heard and finally decided—Issue left open by consent.*

Where a claim for abatement of rent had been raised in a previous litigation but by mutual consent it was left open for consideration by the Court the matter would not be *res judicata* in a subsequent suit for rent. (*Mookerjee and Beachcroft, JJ.*) RASH MOHINEE DASEE *v.* NAFAR CHANDRA PAL CHOWDHURY. **27 I. C. 265.**

——S. 11—*Heard and decided—Dismissal for default of both parties.*

A dismissal for default of both parties does not operate as *res judicata.* 31 Cal. 428 ; 39 Cal. 527. 34 All. 599, dist. (*Chatterjee and Mullick, JJ.*) BRIJ NANDAN SINGH *v.* KAILASH TEWARY. **24 I.C. 17.**

——S. 11—*Heard and decided—Plea of rent free title found against—Subsequent suit for different land on same titles barred.*

A rent-free title set up by deft. in the first suit for rent and decided against him bars a subsequent title suit against the then plff. relating to different land but involving the same question of title. (*Richardson and Newbould, JJ.*) RAHIM UNNESSA KHATUN *v.* KARAM ALI KHAN. **59 I, C, 632.**

——S. 11—*Heard and decided—Dismissal for default—B. T. Act, S.* 106—*Dismissal for default.*

The dismissal of a suit under S. 106 of the B. T. Act for default may bar a second suit of the same scope and nature, but it does not operate as *res judicata* Where there is no adjudication about the rent as alleged by the tenant or by the landlord the decree does not bar the determination of the question in controversy in a subsequent suit between the parties. 16 Cal. 98, Rel. (*Mookerjee and Carnduff, JJ.*) SARJUG PRASAD NARAIN SINGH *v.* AJODHYA RAI. **15 I. C. 863.**

——S. 11—*Heard and decided—Appellate decree—Death of widow pending suit—Legal representative.*

The appellate decree supersedes the original decree and in deciding whether a certain decree operates as *res judicata* it should be seen whether the appellate decree had been passed against any body representing the interest of the plff. in the subsequent suit. So where a decree for foreclosure had been passed against a widow and she died pending appeal, and her legal representatives were brought on record and the appellate decree confirmed the lower Court's decree. nevertheless a subsequent suit by a reversioner is not barred inasmuch as the legal representative of the widow against whom the appellate decree had been passed did not and could not represent the

CIVIL PRO. CODE (V OF 1908), S. 11—Heard and decided.

full estate (*Jenkins, C. J. and Chatterjee, J.*) KAILASH CHANDRA BASU *v.* GSRJA SUNDARI DEBI.
39 Cal. 925 : 14 I. C. 299 : 16 C. W. N. 658.

——S. 11—*Heard and decided*—Ex parte *decree—Defence which would have been raised.*

A decree though *ex parte* none the less operates as *res judicata* as regards defences which could have been raised in the prior suit. (*Chitty and Chatterjee, JJ.*) GOLOKA CHANDRA ROY *v.* SAFAR ALI. **9 I. C. 363.**

——S. 11—*Heard and finally decided—Dismissal of prior application as barred by limitation not* res judicata.

Decision of a point on the ground of limitation only and not on the merits does not operate as *res judicata*. (*Martineau, J.*) SHANCHI KHAN *v.* KARAM CHAND. **73 I. C. 705: 1923 Lah. 150 (2),**

——S. 11—*Heard and decided—Suit—Counter-claim—Appeal preferred in suit only—Effect of.*

Plff. sued to recover a sum of money from the deft. on accounts and the latter denied the claim and counter-claimed for a sum of Rs. 46. The plff.'s suit was dismissed and the dftt's. counter-claim decreed by the first Court and the plff. thereupon filed two appeals, one against the dismissal of the suit and the other against the decree on the counter-claim. The District Court dismissed both the appeals whereupon the plff. preferred two second appeals, as in the Court below but the appeal against the decree on the counter claim was dismissed as being out of time. *Held*, the dismissal the operates as res judicata for plff.'s claim. 16 C. 233: 33 C. 1101: 29 M. 333:3 P. R. 1897: 31 P.R. 1895 :85 A.R. 1905: 33 A. 51 : 24 M.350·1 Lah. 83 Ref. (*Leslie Jones and Broadway, JJ.*) GHANIYA LAL *v.* ROSHAN LAL. **4 Lah. L.J. 344.**

——S. 11—*Heard and decided—Mortgage—Successive suits.*

A mortgagee who has sued for and obtained a decree for possession under his mortgage from the mortgagor is barred from a fresh suit for possession unless he had been dispossessed after the date of the former decree. (*Leslie Jones and Dunnas, JJ.*) HAR CHAND SINGH *v.* NARAIN SINGH. **67 I. C. 281 : 2 Lah. L. J. 678.**

——S. 11—*Heard and finally decided—Dismissal of suit to contest alienation — Subsequent suit for possession.*

A suit to declare an alienation by a widow not binding upon the reversioner and which was dismissed, is *res judicata* in a subsequent suit by the same reversioner for possession after the death of the widow. (*Chevis, J.*) NAWAB *v.* PUNJAB. **59 I. C. 946.**

——S. 11—*Heard and decided—Issue expressly excluded from decision—Decision not* res judicata.

Expl. 4 of S. 11 of the C. P. Code is not applicable to a case where the parties had in a previous suit, put forward all the grounds of attack and defence which were embodied in clear and distinct issues but the Court not only did not decide them but expressly exoluded them from decision. (*Scott-Smith and Shadi Lal, JJ.*) MADAN MOHAN LAL *v.* BOROOAH CO. **70 P. R. 1918 : 11 P. L. R. 1918 : 44 I. C. 859 : 71 P. W. R. 1918.**

——S. 11—*Heard and decided—Question raised but not decided*

A question raised in the previous suit between the same parties but remaining unadjudicated upon does not become *res judicata*. (*Le Rossignol, J.*) SHAMAR *v.* GURJO. **6 P. W. R. 1918.**

——S. 11—*Heard and decided—Mortgage—Decree—Effect—Merger.*

(*Obiter*). When a decree is once passed in a suit on a mortgage, the mortgage merges in the decree and a second suit on the mortgage cannot be brought. (20 I C. 59 rel. on.) (*Shadi Lal and Broadway, JJ.*) KHUB RAM *v.* SURAT. **20 P. R. 1917: 22 P. W. R. 1917: 39 I. C. 753: 26 P. L. R. 1917.**

——S. 11—*Heard and decided—Partition suit—Previous unexecuted decree.*

Where a joint owner fails to execute the decree which he obtained in a previous suit for partition, and brings a fresh suit for obtaining partition, it is not barred by the previous non-executed decree. A decree-holder is not barred from bringing a fresh suit for possession of property for which he got a conditional decree previously and failed to execute it. (*Shadi Lal, J.*) GAMAN *v.* IMAM BAKHSH. **77 P. R. 1915 : 31 I. C. 205 : 164 P. W. R. 1915.**

——S. 11—*Heard and decided—Issues left open—No bar—C. P. Code, O. 2, R. 2.*

Where a Court expressly declares (rightly or wrongly) that it is not competent in a particular suit to grant a specific relief claimed therein and directs the plaintiff to take separate proceedings for the relief, his subsequent suit to get that relief is not barred by *res judicata* or by O. 2, R. 2 C. P. C. (*Rattigan, J.*) MUHAMMAD BAKHSH *v.* BALKISHAN, **72 P. W. R. 1915: 29 I. C. 731: 160 P. L. R. 1915.**

——Ss. 11 and 47—*Heard and decided—Mortgage suits—Puisne mortgagee's suit against prior mortgagee for redemption and against mortgagor for possession—Subsequent suit for possession against mortgagor alone.*

A *puisne* mortgagee sued the prior mortgagee for redemption and the mortgagor for possession of the mortgaged premises and in 1893 obtained a decree for redemption and possession. In 1908 he again sued the mortgagor for possession alone dating his cause of action in 1897, the date of payment of the prior mortgage. *Held*, the suit for possession was not a question relating to the execution, discharge, or satisfaction of the decree, though the plaintiff might have obtained possession by execution and that the cause of action against the mortgagor in both the suits was the same, and that the present suit was barred by S. 11. (*Shah Din and Scott-Smith, JJ.*) RAM DAS *v.* MEHR DAD. **12 P. R. 1914: 22 I. C. 896: 124 P. L. R. 1914.**

——S. 11—*Heard and decided—Previous suit decreed only against some defts. and dismiss-*

CIVIL PRO. CODE (V OF 1898), S. 11—Heard & decided.

ed against the rest—No cause of action—Subsequent suit whether barred.

In a declaratory suit a decree was passed against some of the defts. who compromised their dispute with plffs. and the suit was dismissed as against the others (as it appeared to the Court that no cause of action had been disclosed against them. According to the decision the plffs. were allowed to bring another suit against these latter defts. *Held*, that there was no adjudication between the plffs., and the defts. against whom the suit was dismissed. Consequently a subsequent suit by plffs. against the same defts. was not barred either by the rule of *res judicata* or by O. 2, R. 2, of the C. P. Code. (*Johnstone and Rattigan, JJ.*) DEBIDATTA *v.* NATHU.

56 P. R. 1912: 245 P. W. R. 1912: 15 I. C. 930 : 251 P. L. R. 1912.

———**S. 11 and O. 17, R. 3**—*Heard and decided—Dismissal of suit under O. 17, R. 3—If bars a subsequent suit.*

A dismissal of a suit under O. 17, R. 3 operates as *res judicata* in respect of the rights of the plff. to recover in a subsequent suit the property sued for in the first suit. (*Kensington, J.*) MUHAMMAD *v.* IMMAM KHATUN. **37 P. W. R. 1912 13 I. C. 172: 25 P. L. R. 1912.**

———**S. 11**—*Heard and finally decided—Suit withdrawn—Subsequent suit on same cause of action, if barred.*

The doctrine of *res judicata* has no application to a case where a suit is withdrawn and a fresh suit is brought based on the same cause of action, especially when in the prior suit there is no adjudication on any of the questions at issue. (*Johnstone, J.*) SADAT SULTAN BEGUM MUHAMMAD MUNIR KHAN, **149 P. W. R. 1911 : 11 I. C. 831: 249 P. L. R. 1911.**

———**S. 11**—*Heard and finally decided—Suit by ryot to set aside a distraint on the ground that tender of patta is not proper—Decision as regards propriety of the tender*—Res judicata *in subsequent suit for rent.*

Suit by ryot to set aside a distraint on the ground that tender of patta is not proper. Where it is heard and finally decided. Decision as regards propriety of tender works as res judicata in subsequent suit for rent. (*Spencer and Krishnan, JJ.*) VARADA REDDI *v.* SRINIVASA MUDALIAR. **45 M. L. J. 199: 18 L. W. 169 : 33 M. L. T. (H. C.) 34 : (1923) M.W.N 357 : 72 I. C. 683 : 1924 M 299.**

———**S. 11, Expln. IV**—*Heard and finally decided—Dismissal of prior suit for non-joinder of parties.*

Where a prior suit for the same relief was dismissed for non-joinder of parties, the dismissal does not operate as *res judicata*. Expln. IV to S. 11, C.P. Code deals only with a case which has been tried on the merits. (*Spencer and Krishnan, JJ.*) COTASSERI E. V. SANKARAN NIMBI *v.* KONHOLI D. ANTHERJENAM. **43 M. L. J. 572 ; (1922) M. W. N. 428: 16 L. W. 26: 73 I. C. 491 : 1922 Mad. 259.**

———**S. 11**—*Heard and decided—No decision.*

Where a matter is only heard but not decided either because it is unnecessary or it is reserved, the matter is not *res judicata*. A mere ground of attack relating to the main relief is not a separate relief and a refusal to entertain such a ground relating to the relief which is adjudicated upon is not a refusal within the explanation 5 of the section and is not *res judicata*. Where there is an appeal the conclusion of the decision of lower Court is no longer final. (*Abdur Rahim, O. C. J., Oldfield and Seshagiri, Aiyar JJ.*) MARUVADA VENKATARATNAMA *v.* MARUVADA KRISHNAMA. **57 I. C. 735 : 13 L. W. 25.**

———**S. 11**—*Heard and finally decided—Decision subject of appeal—No bar.*

Where an appeal is filed and admitted the matters decided by the Lower Court ceases to be *res judicata* and if the appeal is disposed of on some other ground, the finding of the Lower Court is not *res judicata* concerning matters not referred to by the Appellate Court. (*Sadasiva Iyer and Burn JJ.*) VENGANAT RAJA VASUDEVA RAVI VARMA *v.* NATHISTATH MATATHIL. **56 I. C. 199 : 27 M. L. T. 54.**

———**S. 11**—*Heard and finally decided—Appellate judgment pending subsequent suit.*

The prohibition in S. 11 of the C. P. Code applies not only to the original Court but also to an appellate Court ; 10 Cal. 233 and 29 Mad. 333 Ref. 11 All 148 and 13 M. L. J. 135 foll. Where pending a second appeal, the former suit is decided on second appeal, it operates as *res judicata*. It is open to the High Court in second appeal to admit fresh evidence if necessary for the decision of the appeal. (*Oldfield and Phillips, JJ.*) GADDAN PARAMASIVUDU *v.* MULAKALA SUBBANNA. **52 I. C. 625 : (1919) M. W. N. 455.**

———**S. 11**—*Heard and finally decided—Co-heirs—Suit for partition—Other heir and stranger made parties defts.—Defendant co-heir supporting plaintiff's claim and claiming share for himself—Dismissal of suit—Appeal by plaintiff, defendant co-heir being respondent—Reversal of finding.*

A suit was brought by some of the heirs of the deceased owner impleading an alienee from the widow and another co-heir as defendants. The first Court dismissed the suit as barred by limitation. Plaintiffs appealed making the defendant, co heir respondent who died pending appeal without his legal representatives being brought on record. The appellate Court gave the plffs. a decree for share claimed by them. The legal representatives instituted another suit for recovery of his share. *Held*, that the finding of the Munsiff in the prior suit on the question of limitation having been reversed by the Appellate Court in an appeal to which the co-heir was a party, there was no subsisting decision of the Munsiff on the question of limitation to operate as a bar to the plaintiff's suit. The finding of the Appellate Court on the issue of limitation operated as a bar in plff's. favour by precluding the alienee from raising the plea. 28 Mad. 457 dist. (*Abdur Rahim and Napier, JJ.*) LINGAPPAYA *v.* SHANKARA NARAYANA BHATTA. **49 I. C. 156 : 35 M. L. J. 325.**

CIVIL PRO. CODE (V OF 1908), S. 11—Heard & decided.

———S. 11—*Heard and decided—Dismissal of suit for default—Effect of.*

Where a suit brought by one of the parties to the reference to complete the arbitration and for a decree in terms of the award which might be passed, is dismissed for default it will not operate as *res judicata* in a subsequent suit for possession of the specific property awarded by the award. (*Wallis, C. J. and Spencer, J.*) KUPPUSWAMY CHETTY *v.* KUSALA RAMIAH.

8 L. W. 551 : 24 M. L. T. 424 : 49 I. C. 89 : (1918) M. W. N. 683.

———S. 11—*Heard and decided--Implied adjudication--Co-defts.*

In order to constitute the decision in a prior suit *res judicata* on an issue in a subsequent suit, it is not necessary that there must have been an actual adjudication on the issue in the prior suit. It is sufficient if the decision come to in the prior suit impliedly decides the point subsequently in issue. 40 Bom. 210, 33 M.L.J. 740 foll. Where the parties to a suit were both defts. in a prior suit and there was nothing to show that there was a clear conflict of interest between them *inter se* in the prior suit, *held*, that the prior decision cannot be *res judicata*. 29 Mad. 515 ref. 37 Mad. 270 dist. (*Seshagiri Aiyar, J.*) POYYALI NAICKER *v.* SUBBA NAICKER. 24 M. L. T. 205 : 8 L. W. 206 : 48 I. C. 905 : (1918) M. W. N. 567.

———S. 11—*Heard and decided—Dismissal on pleadings—No bar,*

If a suit is dismissed on the pleadings there was no decision on the merits and it is not barred by *res judicata*. (*Ayling and Seshagiri Aiyar, JJ.*) DASARTHY NAIDU *v.* PALALA KUMARAMMAL. 7 L. W. 557 : (1918) M. W. N. 427 : 45 I. C. 969 : 24 M. L. T. 311.

———S. 11 and O. 2, R 2—*Heard and decided—Partition—Two suits.*

After a decree for a partition the only remedy for the plffs. is in execution and not by separate suit. 16 C. W. N. 839; 37 All. 155 and 35 Cal. 961 Diss. The cause of action for partition is one and the same and once it has merged into a decree a second suit for partition will not lie. An application to pass a a final decree in accordance with the terms of preliminary decree is not an application in execution. (*Sadasiva Iyer and Napier, JJ.*) SETHU RAMA SAHIB *v.* CHOTTA RAJA SAHIB. 40 I. C. 820 : (1917) M. W. N. 327.

———S. 11--*Heard and decided--Decree barred—No fresh suit after.*

No fresh suit for ejectment, unless for a fresh cause of action, is permissible after execution of original decree is barred. (*Sadasiva Aiyar and Spencer, JJ.*) RAMAN MENON *v.* MAMMALI, 39 I. C 954 : (1917) M. W. N. 560.

———S. 11—*Heard and decided—Point left open—Consent of parties—Effect of,*

Where in a suit for money deft. pleaded discharge, and the Court decreed with the consent of the parties the full amount, reserving the right of the deft. to bring a separate suit for the amount of his plea, *held*, that the reservation by agreement was not known to law and that a subsequent suit for the amount was barred by *res judicata* and not maintainable. (*Oldfield and Sadasiva Iyer, JJ.*) POTLA SUBBRAYADU *v.* RAVI LAKSHMAYYA. 18 M. L T. 93 : 30 I. C. 260 : 2 L. W. 605.

———S. 11—*Heard and finally decided—Reliefs not granted, not heard and decided.*

If a cause of action in a suit had not arisen on the date of the presentation of the plaint in the first suit, reliefs claimed in the first suit but matter relating to which was not finally heard and decided owing to a compromise decree having been passed which does not grant the reliefs can be claimed in the second suit (*Sadasiva Aiyar and Napier, JJ.*) THEVAN *v.* KRISHNA THEVAN. 27 I. C. 708.

———S. 11—*Heard and decided—Decision on oath*—Res judicata.

The decision by oath of any matter in issue in a former suit between the parties is *res judicata* in a subsequent litigation between them. (*Benson and Sundara Aiyar, JJ.*) SANYASI BARITYA *v.* ARTASWARAO. 36 Mad. 287 : 24 M. L.J. 321 : 13 M. L. T. 261 : 18 I. C. 835 : (1913) M. W. N. 220.

———S. 11—*Heard and decided obiter dictum—First suit by wife for maintenance—Second suit for recovery of property.*

In a suit by a wife for a declaration that a transfer of property by her husband A. to B. was inoperative against her right to maintenance, there was no issue as to whether they were nominal or sham transactions but in one portion of the judgment they were characterised as bogus transactions, while in another portion they were treated as collusive transfers brought about by A. and B. After A's death, the wife sued B, to recover the properties on the ground that the transfers were nominal transactions. *Held*, that the question whether the transfers were nominal, was not res judicata by reason of the decision in the previous suit and that the judgment in the previous suit could not be treated as evidence on the question of the nominal character of the transfers. (*Miller and Sundara Iyer, JJ.*) RAYI KRISHNAYYA *v.* GANGA BAI. 15 I. C. 357 : (1912) M. W. N 380.

———S. 11—*Heard and finally decided--Appellate Court—Findings not recorded by Appellate Court.*

If an Appellate Court does not record findings on certain points raised in the case, on the ground that they were not necessary for the decision of the case, its judgment in respect of those points does not operate as *res judicata* 24 Cal. 616 ref. *Quaere.* Whether when an appellant in a Court of appeal does not argue against the findings on some of the points and confines his arguments to some issues, the decision of the Appellate Court, will be *res judicata* on the points not argued. (*Abdur Rahim and Ayling, JJ.*) AIYYAGARI NARAYANAMURTHI *v.* DHALIPALA VENKATARAMAYYA. 15 I. C. 229.

———S. 11—*Heard and decided—Dismissal for default—Previous suit against plaintiff—Plea of discharge—Dismissal of suit—Subsequent suit against defendant—If* res judicata.

CIVIL PRO. CODE (V OF 1898), S. 11—Heard & decided.

Where a previous suit by the defendant against the plaintiff for *waram* due to the former was dismissed for default and in that suit the plaintiff had raised the plea of discharge in respect of a loan due by the defendant to the plaintiff, a subsequent suit by the plaintiff against defendant for money advanced is not barred by *res judicata* when the pleadings and judgment in the previous suit had not been produced. (*Sundara Aiyar, J.*) AKILANDAM PILLAI *v.* CHINNASWAMY MOOPAN. **11 M. L. T. 201 : 13 I.C. 649: (1912) M. W. N. 172.**

——S. 11—*Heard and decided—Implied finding.*

Where in a previous suit the question of correctness of tendering a *patta* was considered, the question of title to land is not barred in a subsequent suit. (*Munro and Sankaran Nair, JJ.*) BOMMIDDI BHAYYA NAIDU *v.* BOMMIDI PARADESHI NAIDU. **35 Mad. 216 : 21 M. L. J. 344 : 10 M. L. T. 533 : 10 I. C. 75 : On appeal See 37 Mad. 70 : 23 M. L. J. 543 : 12 M. L. T. 500 : 17 I. C. 445: (1913) M. W. N. 1.**

——S. 11—*Heard and finally decided—Suit for rent—Other land included in patta—Plea taken in previous suit.*

The plaintiff sued for arrears of rent. The defendant protested that the *Patta* tendered in evidence by the plaintiff covered some land not belonging to the plaintiff. The plaintiff and contended that the plea was raised in a previous suit for arrears of rent and the *Patta* was found to be a proper one. *Held*, (*per Sankaran Nair, J.*) :— There being no express finding nor any implied decision in the previous suit, regarding the title to the land covered by the *Patta* the question was not *res judicata*. Cases dealt with by S. 11, can be divided in two classes, *viz.* trials of suits and trials of issues. In cases of the former class the suit is either dismissed or decreed and a question not expressly decided may be dealt with impliedly in such cases. In the latter class of cases there can be no implied decision and there must be express finding, to create a bar of *res judicata*. To hold that an issue was raised, the matter must be alleged by one and denied by the other party, and there must be a finding of the court thereon. Where there is no such finding the question can be raised in a subsequent suit. It is not necessary for the plaintiff to sue on all causes of action. After failing in one he can pass on to another. (*Per Munro, J.*) The finding in the previous suit determined the relationship of tenant and landlord in respect of the land covered by the *Patta* and the defendants were bound by the *patta* and could not in the subsequent suit put the landlord to the proof of title. The question was *res judicata*. (*Munro and Sankaran Nair, JJ.*) BAMMIDI BAYYA NAIDU *v.* BAMMIDI PARADESI NAIDU. **21 M. L. J. 344 : 10 M. L. T. 533 : 10 I. C. 75 : 35 M. 216.**

——S. 11—*Heard and decided—Final decision essential.*

For the bar of *res judicata*, a hearing as well as a final decision by the competent Court is necessary. (*Miller and Munro, JJ.*) VALESWARA IYER *v.* MUTHUKRISHNA AIYAR. **21 M. L. J. 57 : 9 I. C. 686 : 9 M. L. T. 288.**

CIVIL PRO. CODE (V OF 1898), S. 11—Heard & decided.

——S. 11—*Head and decided—Dismissal for default.*

The dismissal of a suit under O. 9, R. 8, C. P. Code is not intended to operate in favour of the defendant as *res judicata*. The application of principle of *res judicata* cannot be avoided by a defendant on the ground that he did not appear at the trial, but the conclusive effect of the decision must be confined to the point actually decided in the suit. 16 Cal. 300 (F. B.) foll. (*Darke Brockman, J. C.*) TIKARAM *v.* RAMACHANDRA. **54 I. C. 789.**

——S. 11 — *Heard and finally decided—Meaning of—Dismissal on technical ground.*

To conclude a plaintiff by a plea of *res judicata* it is necessary to show not only that there was a former suit between the same parties for the same matter upon the same cause of action but also that there was a decision finally granting or witholding the relief sought. 3 M. H. C. R. 84, foll. If a suit has been dismissed on some purely technical ground such as the frame of the suit rendering it unmaintainable, then a subsequent suit is not barred. 8 C. P. L. R. 3 foll. Though a decree read by itself may be an unconditional dismissal of the suit we are entitled to look at the judgment to see what was actually decided. (*Mittra, A. J. C.*) DEODHAR *v.* THAKUR NIHALSINGH. **47 I. C. 909.**

——S. 11—*Heard and decided—Prior suit dismissed on preliminary point.*

A question not directly in issue in a previous suit which had been dismissed in a preliminary point cannot be *res judicata* in a subsequent suit between the parties unless there has been a judicial determination expressly or impliedly on the matter. 28 Cal. 17, 24 Cal. 711 rel. (*Prideaux, A. J. C.*) DATTATRAYA KRISHNA *v.* CAWADAJI WANI. **42 I. C. 508.**

——S. 11—*Heard and decided—Dismissal for default—No* res judicata.

Dismissal under O. 9, R. 8 cannot operate in favour of the defendant as *res judicata*. (*Mittra, O. A. J. C.*) BUKHARAM *vl* RAMJI, **23 I. C. 878 : 10 N. L. R. 39.**

——S. 11—*Heard and decided—Dismissal of suit as premature—Second suit—Limitation.*

There is no *res judicata* where the decision in the previous suit merely amounted to this that on the plaintiff's own contention, the claim then made was premature and there is no decision of the plea that the claim was even then time-barred or not: 11 Cal, 301 Ref. to. There was no estoppel by defendant's plea in the former case as plaintiff's position had in no way been affected by it, for it limitation ran from the date of sale the claim was then already barred, (*Skinner, A.J.C.*) RAMJI *v.* SHEIKH MANSUR. **15 I. C, 890 : 8 N. L. R. 68.**

——S. 11—*'Head and decided,'*

When the taluqdars had brought their suit for resumption of muafi they had made plaintiff and

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defendants 2 and 3 parties in an application claiming, as he claimed in this suit to be partner with plaintiffs and defendants 2 and 3. He was made a party but ultimately the decree was given only against plaintiffs and defendants 2 and 3. As regards the defendant No. 1 it was said that his name was not entered in the papers where he was recorded as a sub-tenant only. The question whether he was a partner was pronounced to be one for a Civil Court and he was discharged from the suit. *Held* in plaintiff's suit, there is no *res judicata* here. What was decided by the Revenue Court was that the taluqdars were entitled to get the relief they sought from the plaintiffs whom they themselves had named, and who were the only ones entered in the revenue papers. There was a decision that defendant, had no independant rights in the plots, but the court refused to decide whether or not he had any partnership right. (*Simpson, A. J. C.*) KHALIL *v.* MOHMOD ISMILE.
9 O. L. J. 540 : 74 I. C. 195 : 1923 O. 101.

——S. 11—*Heard and decided—Mortgage—Two redemption suits.*

There can be no second suit for redemption when once a decree has been passed, though it does not fix time for payment and consequences of non-payment. (*Lindsay, J. C. and Kankaiya Lal, A. J. C.*) SHEORAJ BAHADUR SINGH *v.* GAJADHAR SINGH.
48 I. C. 922 : 5 O. L. J. 698.

——S. 11—*Heard and decided—Dismissal of suit for want of evidence.*

Where a tenant's suit to contest a notice of ejectment is dismissed because of his failure to give evidence in support of his allegations, the decision bars a subsequent suit by him for recovery of occupancy land based on the same allegations, in spite of his being ready to prove them. (*Campbell, J. M.*) HARBAX SINGH *v.* LALLA. 34 I. C. 640 : 3 O. L. J. 236.

——S. 11—*Heard and decided*—Obiter dictum.

Where a Court does not actually decide a point but simply expresses its concurrence with an *Obiter Dictum* quoted from another decision, its finding on the point does not operate as *res judicata*. (*Lindsay, J. C.*) AMIR MIRZA *v.* HAIDAR MIRZA. 28 I. C. 217 : 2 O. L. J. 113.

——S. 11—*Heard and finally decided—Suit dismissed for misjoinder—Subsequent suit—No bar.*

In a suit for recovery of possession as owner, an alternative relief for redemption cannot be asked inasmuch as the two reliefs are contradictory. And if the relief for possession is refused on the merits and that for redemption owing to the defect of misjoinder of reliefs, the plaintiff can bring a fresh suit for redemption. (*Stuart, A. J. C.*) CHOTTI BEGAM *v.* RAM PRASAD.
27 I. C. 575.

——S. 11—*Heard and decided—Mortgage—Successive suits for redemption.*

A decree for redemption of usufructuary mortgage was defective in form as it did not fix a period for payment of mortgage amount and did not contain any provision or consequence for its non payment. The decree not having been executed by the mortgagor, his sons brought a suit for redemption. Per *Piggot, A. J. C.* The suit was not barred. Per. *Evans, J. C. and Lindsay, A. J. C.* The suit was barred under S. 11 as the original cause of action had been exhausted. Case Law discussed. (*Evans, J. C. Piggott and Lindsay, A. J. Cs.*) BH OLA SINGH *v.* JAI GALIND.
12 I. C. 993 : 14 O. C. 257.

——S. 11—*Heard and finally decided—Dismissal for default—Fresh one is competent.*

There is nothing in law to prevent the entertainment of a fresh appeal after the dismissal for default of a previously filed appeal, provided the latter appeal was otherwise in order and was filed within the period of limitation. (*Das and Kulwant Sahay, JJ.*) SURAJDEO NARAIN SINGH *v.* PRATAP RAI. 2 Pat. 739 : 4 Pat. L. T. 405 : 75 I. C. 284 : 1923 Pat, 213 : 1923 P. 514.

——S. 11—*Heard and finally decided—Rent suit—Area of holding—Record of rights—Entry in.*

In a prior suit for rent, the area of one holding was decided to be a certain number of bighas. *Held*, in the absence of any allegation as to encroachment, increment, fraud or error, this finding will be *res judicata* in a subsequent suit for rent, though it is alleged and proved that a later record of rights has an entry different from what was found before as regards the area. (*Mullick and Bucknill, JJ.*) RADHIKA RAMAN *v.* SATNARAIN KOERI. 74 I. C. 961.

——S. 11—*Heard and decided—Cess—Liability to pay—Former decision.*

In as much as a cess under Bengal Act IX of 1890 is a recurring charge, prior decree for cess does not operate as *res judicata* in a subsequent suit for recovery of the cess. (*Jwala Prasad and Ross, JJ.*) PITAMBER CHOWDHURY *v.* RAHMAT ALI.
1 Pat. 218 : 3 Pat. L. T. 282 : 65 I. C. 138 : 1922 Pat. 167 : 1922 P. 303.

——S. 11—*Heard and finally decided—Appellate judgment—Point left undecided.*

An appellate Court's judgment takes the place of and supersedes the decision of the trial Court and if the appellate Court does not decide a point decided by the first Court, it does not operate as *res judicata*. (*Jwala Prasad, J.*) GOBIND MISSER *v.* BEHARI COPE. 47 I. C, 685.

——S. 11—*Heard and decided—Refusal to decide issue.*

Refusal of the Court to determine a particular issue does not operate as *res judicata* in the trial of that issue in a subsequent suit. (*Roe and Jwala Prasad, JJ.*) DHAKESWAR PRASAD NARAIN SINGH *v.* POOKHAR PANDEY. 4 Pat. L. W. 299 : 45 I. C. 326 : 1918 Pat. 152.

——S. 11—*Heard and finally decided—Pending appeal.*

A matter pending appeal is not finally determined till the Appellate Court decides and if the suit

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is withdrawn with permission, there is no decision, (*Atkinson and Jwala Prasad, JJ.*) RAM LOCHAN SINGH *v.* JATADHARI SINGH.
40 I. C. 853.

——S. 11—*Heard and decided— Absence of parties.*

A suit disposed of in the absence of both the parties does not operate as *res judicata*. (*Chapman and Roe, JJ.*) SASIMAN CHOUDHURY *v.* SIBNARAYAN CHOUDHURI.
39 I. C. 755 : 1 Pat. L. W. 375.

——S. 11—*Heard and decided—Dismissal of suit for wrong description of property does not bar a subsequent suit.*

S. 11, C.P.C., should not be pressed literally so as to contravene the principles underlying it. Nonsuit does not operate as a bar. A Court in India should not refuse relief against a judgment or other proceeding at law not founded upon consent upon the ground merely that there has been a mistake in the pleadings or in the conduct of the case. (*Chapman and Roe, JJ.*) JANAKDULAR SARAN MISSER *v.* AMBICA PRASAD SINGH.
39 I. C. 126 : 2 Pat. L. J. 313.

——S. 11—*Heard and decided—Decision in proceedings for letters of administration.*

In a previous proceeding for letters of administration the present parties were rival claimants. Their evidence was taken at length as in a regular suit and the claim of the respondent was decided against her, she being held to be not the legitimate daughter of the deceased. *Held* the decision in those proceedings barred the present suit for declaration by the respondent that she is the heir of the deceased. (*Pratt and Carr, JJ.*) MAUNG HMAT *v.* MA HTAY.
1 Rang. 258 : 1923 R. 257.

——S. 11—*Heard and decided—Decree in administration suit declaring rights of parties —Suit to enforce rights—Maintainability of.*

Where in an administration suit a decree is passed declaring the shares of the heirs to the estate after payment of the charges thereon, it is open to the heirs to bring a suit for distribution of the shares declared by the decree. The subsequent suit is not barred by *res judicata* as the plaintiff could not have enforced his rights under the prior decree. 6 B. 7 : 14 A. L. J. 102 : 22 C. L. J. 272 : 6 B. H. C. R. 231 ref. (*Maung Kin, J.*) MAUNG PO THIN *v.* KO THA YE.
64 I C. 813 : 11 L. B. R. 60.

——S. 11—*Heard and decided—Suit for possession—Execution of decree barred—Regular suit if lies.*

When the execution of a decree for possession is time-barred the appellant is entitled to eject the judgment debtor on the basis of the decree. (*Parlett, J.*) ABDUL SHAKUR *v.* SHWE YOUK KE.
28 I. C. 851.

——S. 11—*Heard and finally decided—Matter left open on appeal.*

Where an appeal is preferred against the finding of an issue but the Appellate Court does not decide finally on that point the appeal being disposed of on other points the finding of the lower

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Court is not final and the decision cannot operate as *res judicata*. (*Shaw, J C.*) NGA TI *v.* NGA PAN.
27 I.C. 959 : 7 Bur. L. T. 249.

——S. 11—*Heard and decided—Mortgage—Successive suits for redemption.*

Though redemption decree until made final does not extinguish the equity of redemption it may bar a second redemption suit by mortgagor. (*Pratt, J. C. and Crouch, A J. C.*). BIKHOMAL *v.* RAJALMAL.
19 I. C. 393 : 6 S. L. R. 140.

Issue of Fact.

——S. 11—*Issue of fact—Mixed question of fact and law.*

The question whether there has been eviction of the tenant by the landlord is a mixed question of fact and law. (*Mookerjee and Carnduff, JJ.*) PURNA CHANDRA *v.* RASIK CHANDRA.
9 I. C. 568 : 13 C. L. J. 119.

——S. 11—*Issue of fact—Erroneous decision —Evidence not fully placed before the Court.*

Per Sadasiva Iyer, J. An erroneous decree establishing rights is as much *res judicata* between the parties as a just decree and evidence adduced to prove that the former decision is erroneous is irrelevant. A party's ignorance of a ground of plea during the former litigation does not make the former decision any the less binding. (*Oldfield and Sadasiva Iyer, JJ.*) MUHAYADEEN ALLI SAHIB *v.* BACHA SAHIB.
(1918) M. W. N. 580 : 49 I. C. 369 : 8 L. W. 473.

Issue of Law.

——S. 11—*Issue of Law.*

A decision in a previous suit on a question of law even if erroneous, would operate as *res judicata* in a subsequent suit. 15 All. 327 ; 28 Cal. 318 and 24 All. 138 foll. (*Banerji, J.*) LATARE *v.* BINDRABAN.
19 I. C. 244.

——S. 11—*Issue of Law.*

Where the plaintiff Inamdar got a decree for the *Mamool* rates for the years 1888, 1890 in the year 1892 against the defendant's Khots and where Survey Settlement was introduced in the village in 1855-86 and where he filed a suit in 1917 for proper construction to be placed on S. 216 though not strictly speaking *res judicata* still, on the principle of *stare decisis* the previous construction should be adhered to, 18 Bom. 525 doubted. *Per Macleod, C. J.*—An abstract question of law, *viz.*, construction of a section of a statute and not a concrete question such as the construction of a document is not a question of *res judicata* since at least a Full Bench will form its own opinion as to what the law is. But it is a question whether the principle of *stare decisis* would be invoked. 18 Bom. 525 doubted. *Per Shah, J.*—The binding character of *res judicata* does not depend on the correctness of the reasons for the conclusion. No distinction is made between issues of fact and issues of law. 18 Bom. 525 affirmed. *Per Fawcett, J* —It is doubtful whether distinction between decisions on abstract questions of law and concrete questions such as construction of a particular document can be made. At least where parties seek to litigate

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again the very same cause of action such a distinction cannot be drawn. (*Macleod, C. J., Shah and Fawcett, JJ.*) SITARAM *v.* LAXMAN.
45 Bom. 1260 : 64 I. C. 162 : 23 Bom. L. R. 749 (F. B.).

——S. 11—*Issue of Law—Erroneous Decision—Subsequent legislation.*

In a suit on a mortgage of 1893 the High Court held in August, 1908, that the deed of mortgage was void and had no effect, on account of want of attestation as required by S. 59, T. P. Act. On 24th June, 1908, Govt. had by a notification excluded certain districts including the district to which the case belonged from the operation of S. 59, T. P. Act and given that notification a retrospective effect from 1893. Plff. thereupon brought another suit to enforce his mortgage : *Held*, that the suit was barred by *res judicata*. The Govt. notification did not remove the case out of the principle of *res judicata* as defendants had acquired as against the plaintiff a vested right under the decree of the High Court. The decree of the High Court was still subsisting and was not affected by Govt. notification although the notification operated retrospectively also. The notification could not put an end to rights which had been judicially declared and had become merged in decrees. A Govt. notification cannot have higher force than a rule of law. (*Chandavarkar, A. J. C. and Batchelor, J.*) LAKSHMAN KRISHNAJI *v.* BALKRISHNA RANGANATH.
36 Bom. 617 : 16 I. C. 1002 : 14 Bom. L. R. 744.

——S. 11—*Issue of Law—Construction of document.*

Held, that had the matter been *res integra* the plaintiff landlord would have been barred by the clause in the *solenama* from obtaining a personal decree against the defendant and the facts that they had ceased to be tenants, did not make the decree any less a decree for rent although it would not be executed as a rent decree. But owing to a prior decision of the High Court to which the appellant was *pro forma* defendant that the decree was a money decree, which did not fall within the provisions of the *solenama*, the plaintiff was entitled to a personal decree against defendants. (*Greaves and Newbould, JJ.*) DWARKA NATH CHAKRAVARTI CHOUDHURY *v.* ATUL CHANDRA.
46 Cal. 870 : 51 I. C. 922 : 29 C. L. J. 465.

——S. 11—*Issue of Law—Mixed question of fact and law.*

A decision upon a mixed question of law and fact operates as *res judicata*. A decision on a pure question of law even though erroneous may, in certain cases operate as *res judicata*. 11 C. L. J. 461, 1 C. W. N. 687 foll. (*Mookerjee and Beachcroft, JJ.*) RASH BEHARI SARKAR *v.* MAHENDRA NATH GHOSE. 21 I. C. 979 : 19 C. L. J. 34.

——S. 11—*Issue of law.*

In a previous suit between the parties the Court came to the conclusion that defendants had no right to deduct the Govt. revenue and the cesses but they were entitled to deduct only the collection charges from the gross income of the estate to

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determine the net assets upon which *malikana* was to be calculated. *Held*, that this being a mixed question of fact and law, the decision upon it, though erroneous, was binding upon the parties and their successors. 11 C. L. J. 461. (*Mookerjee and Carnduff, JJ.*) MOHAMAYA *v.* RAM
15 I. C. 911 : 15 C. L. J. 684.

——S. 11—*Issue of law—Erroneous decision on.*

A decision that is contrary to law when that expression is used in the wide sense attributed to it, as for example in S. 100 of the Code, may or may not have the force of *res judicata*. Where a decision lays down what the law is and is found to be erroneous it cannot have the force of *res judicata* in a subsequent proceeding to recover a different relief 11 C.L.J. 461 foll. A decision cannot alter the law of the land. 1 C.W N. 687, 28 C. 318 ref. (*Coxe and Imam, JJ.*) BAIJNATH GOENKA *v.* PUDMANAND SINGH 39 Cal. 848 : 16 C. W. N. 621 : 14 I. C 124 : 16 C. L. J. 154.

——S. 11—*Issue of law—Mixed question of law and fact.*

Where the parties seek to litigate the same cause of action as had been decided in a previous suit the rule of *res judicata* applies in its entirety. But where the dispute though relating to matters which have already been in controversy in a previous suit is based on a distinct cause of action the estoppel ought to be limited to matters distinctly put in issue and should further be restricted to questions of fact or mixed question of fact and law and should not be extended to questions of law. 11 C.L J. 46 foll. (*Mookerjee and Carnduff, JJ.*) PURNA CHANDRA *v.* RASIK CHANDRA. 9 I. C. 568 : 13 C. L. J. 119.

——S. 11—*Issue of law—Erroneous decision on—Effect.*

A decision on a question of law may be *res judicata* but an erroneous decision on a question of law cannot be allowed to operate as *res judicata* so as to prevent a Court from deciding the same question on its arising between the same parties in a subsequent suit. (*Broadway and Abdul Quadir, JJ.*) LALA MOTI SAGAR *v.* DHANNA MAL. AND OTHERS. 72 I. C. 177 : 29 P. W. R. 1922 : 1922 Lah. 329.

——S. 11—*Issue of law—Custom—Fact.*

The existence of a custom is a question of fact and an erroneous decision on that point between the same parties operates as *res judicata* even though the subsequent suit relates to properties other than those involved in the prior suit. If, however, the decision was not necessary to the prior suit it does not operate as *res judicata* in the subsequent suit. (*Scott-Smith and Shadi Lal, JJ.*) TANI *v.* TARACHAND. 82 P.R. 1918 : 160 P.W.R. 1918 : 47 I.C. 373 : 109 P.L.R. 1918.

——S. 11—*Issue of law—Erroneous decision.*

In an appeal from a Munsiff's order of dismissal of the suit on the ground that the document was a promissory note and was inadmissible for want of stamp it was held to be an agreement. Plaintiff filed a fresh suit for compensation for breach of the agreement. *Held*, that though the document

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was a promissory note the question was *res judicata* for it had been held that it was an agreement. (*Le Rossignol, J.*) RALLA RAM SHAH *v.* BHIMOEN. **89 P.L.R. 1917**

——S. 11—*Issue of law— Limitation—Question of limitation decided but suit dismissed under O. 9, R. 2*—Res judicata.

A redemption suit was dismissed under O. 9, R. 2, but before dismissal the issue of limitation was decided in favour of plaintiff. The decision on the question of limitation would operate as *res judicata* in a subsequent fresh suit for redemption by plaintiff as the issue involved not merely a question of law but a mixed question of law and fact. (*Rattigan, J.*) JHANDA *v.* BUDHA.

99 P.W.R. 1913: 19 I.C. 399: 156 P.L.R. 1913.

——S. 11—*Issue of law—Reference to pleadings.*

Whether a matter has been dealt with and adjudicated upon is to be determined by a reference to the plaint, written statement, the issues and the judgment. An issue of law may be *res judicata* of the cause of action in the subsequent suit if it is the same as that in the former suit. The operation of a decree as *res judicata* so far at any rate as the subject-matter of a direct adjudication contained in the decree is concerned can in no way be attacked in the absence of fraud or collusion, by the fact that the decision was based on a mistake of law. As between the parties thereto it must be held to be binding and to operate as *res judicata*. (*Seshagiri Aiyar and Moore, JJ.*) VENKATA SUBBAN PATTER *v.* AYYATURAI.

37 M. L. J. 554 : 54 I. C. 202 : 26 M. L. T. 364.

——S. 11—*Issue of law—Mixed question of law and fact*—Res judicata *as regards finding of a right to levy of cess.*

Plaintiff sued his tenants to recover cess in 1902 with the result that the Munsiff decided against plff. A similar suit between the same parties on the same subject in 1905 ended with a similar decision. On appeal against this decision the Dt. Judge reversed the decision. A second appeal having been preferred, it was held that the decision of the Dt. Munsiff in 1902 was *res judicata*, and also that the decision of the High Court in 1912 that that decision was *res judicata* was also *res judicata*. What is meant exactly by "mixed question of fact and law" in the convenient proposition that the doctrine of *res judicata* does not apply to a case of mixed question of fact and law? The answer depends on the frame of the issues in the case. Any issue involving both questions of law and of fact must be so split up as to admit of a pure issue of law being framed on the hypothesis of a finding of fact one way or another. A decision on an abstract question of law is not *res judicata* but a decision on the construction of a document as settling the rights of parties is *res judicata*. (*Sadasiva Iyer and Napier, JJ.*) BOMMEDEVERA VENKATA *v.* ANDAVOLU VENKATARATNAM.

(1917) M. W. N. 321 : 5 L. W. 682 : 37 I. C. 857 : 32 M. L. J. 63.

——S. 11—*Issue of law—Execution proceedings.*

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Per Sadasiva Iyer, J.—The decision on a question of law in one proceeding does not bar later proceeding except that the right which was the object-matter of the former proceeding and was established in favour of one party cannot be questioned in the subsequent proceeding. (*Abdur Rahim, O. C. J., Seshagiri Iyer and Phillips, JJ.*) AIYASWAMIER *v.* VENKATACHELA MUDALI.

40 Mad. 989 : 31 M. L. J. 513 : 20 M. L. T. 391 : 4 L. W. 507 : 37 I. C. 741 : (1916) 2 M. W. N. 296.

——S. 11—*Issue of law—Erroneous decision—Suit for damages.*

Deft., being a surety for the plff. to a third party and being in default, the latter sued plff. and obtained a decree against him. The plff. then sued the deft. and the third party to compel the deft. to pay the amount of the previous decree to the third party. This suit was dismissed as plff. did not actually pay the decree-amount, and the suit was premature. Thereafter plff. discharged that decree and brought the present suit against the defts. to recover the amount. The Sub Judge dismissed the suit, holding that it was barred as the previous suit was wrongly decided and should have been decreed, *held*, that the deft. could not contend that the decision in the previous suit was wrong and not binding upon him under S. 11, 5 M. L. J. 79, rel. (*Tyabji, J.*) SUBBAH UDAYAR *v.* SRNIVASA UDAYAR. **36 I. C. 268.**

——S. 11—*Issue of law—Construction of document—Other property affected.*

Where a grant has been construed in a suit between the parties, the construction though erroneous binds them in a subsequent suit relating to property not involved in the original litigation. 15 C. L. J. 684 foll. (*Wallis, C. J. and Phillips, J.*) SECRETARY OF STATE *v.* MAHARAJAH OF VENKATAGIRI.

31 M. L. J. 97 : 20 M L. T. 284 : (1916) 2 M. W. N. 96 : 35 I. C. 266 : 4 L. W. 133.

——S. 11—*Issue of law—Later suit decided on wrong view of law.*

A decision in a later suit, not on merits, but on mistaken view of law does not render the question raised in appeals against decrees in earlier suits on similar subject matter, *res judicata*. (*Ayling and Kumaraswami Sastri, JJ.*) CHENGALAWALA GURRAJU *v.* MADAPATHY VENKATESHWAR ROW.

(1916) 1 M. W. N. 223 : 19 M. L. T. 268 : 33 I. C. 9 : 30 M. L. J. 379.

——S. 11—*Issue of law—Erroneous decision, if* res judicata.

An erroneous decision on a question of law in a previous suit is no bar to a subsequent suit between the same parties, but the findings of facts and the relief given in a previous suit may operate as *res judicata*. 4 Mad. 219, 19 Cal. L. J. 34; 30 Mad. 461; 37 Mad. 70, foll. (*Sadasiva Iyer and Napier, JJ.*) VEERARAGHAVA THATHACHARIAR *v.* KRISHNASWAMI THATHACHARIAR.

31 I. C. 269.

——S. 11—*Issue of law—Decree by consent.*

The rule that estoppel by *res judicata* does not apply to a question of law has no force in the

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case of consent decree. (*Benson and Sundara Aiyar, JJ.*) KUMAR VENKATAPERUMAL *v.* THATHA RAMASWAMI CHETTY. **35 Mad. 75 : 9 M. L. T. 487 : 21 M. L. J. 709 : 9 I. C. 875 : (1911) 1 M. W. N. 290.**

——S. 11—*Issue of law—Erroneous decision.*

Decision in prior suit, though wrong in point of law, may bar subsequent suit on the same matter between the same parties. In a previous suit defts. were held liable for interest on arrears of rent. In a subsequent suit defts. pleaded they were *thikadars* and therefore not liable under S. 141 of the Oudh Rent Act to pay interest on arrears. *Held*, that the former decision operated as *res judicata*. (*Lindsay, J. C.*) BHAGWATI PRASAD SINGH *v.* PARMESHWAR DUTT. **45 I. C. 252 : 5 O. L. J. 16.**

——S. 11—*Issue of law—Custom.*

Decision in prior suit, as to mere existence of custom, is not *res judicata*. (*Lindsay, J. C.*) BANDI DIN *v.* DHARAMANGAL SINGH. **22 I. C. 138.**

——S. 11—*Issue of law.*

The section draws no distinction between an issue of fact and an issue of law; and an issue of law operates as *res judicata* in the same way as an issue of fact. Consequently a decision of a question of law in an execution case is *res judicata* in a subsequent application for execution of the same decree even though the view of law enunciated in the prior execution case has been since disapproved by a full Bench. (*Das and Kulwant Sahay, JJ.*) RAM LAL MALIK *v.* DEODHARI RAI. **2 Pat. 771 : 74 I. C. 781 : 5 Pat. L. T. 7.**

——S. 11—*Issue of law—Erroneous decision on question of construction of deed of transfer.*

An erroneous decision on the question of the construction of a deed of transfer operates as a bar. 29 Bom. 339 at 347 (P. C.); 10 Cal. 697 foll.; 26 Cal. 428; 6 C. W. N. 66 dist. (*Atkinson and Jwala Prasad, JJ.*) ZALIKHA BIBI *v.* KRISHNA DAYAL GIR. **41 I. C. 778 : 2 Pat. L. W. 146.**

Judgment in personam.

——S. 11 and O. 21, R 63—*Judgment in personam—Parties and representatives—Claim suit—Decision in—If* res judicata *against auction purchaser.*

Where a claim suit under O. 21, R. 63 was decided against the claimant and the property was then sold in auction, and the auction purchaser brought a suit for possession against the claimant; *held*, that the latter could not now set up a title at variance with what had been determined in the previous suit though there cannot be said to be any *res judicata* between the parties to the suit. 36 Mad. 141, ref.; 29 Cal. 187 (P. C.) foll. (*Jenkins, C. J. and Mookerjee, J.*) PEARI MOHAN SHAHA *v.* DURLAVE DASYA. **19 C.L.J. 441 : 20 I. C. 815 : 18 C. W. N. 954.**

——S. 11—*Judgment in* personam—*Not* inter partes.

A judgment not *inter partes* or *in rem* is not *res judicata* in a subsequent suit. But such a judgment or the whole record in that previous suit is admissible as evidence that a right had, in the previous suit, been unsuccessfully set up by one of the parties to the present suit. (*Reid C. J.*) AMAR SINGH *v.* SHANKAR SINGH. **105 P. W. R. 1912 : 14 I. C. 66 : 142 P. L. R. 1912.**

CIVIL PRO. CODE (V OF 1908), S. 11—Judgment in rem.

——S. 11—*Judgment* in personam—*Judgments not* inter partes—*Relevancy of—Not* res judicata.

Former judgments not *inter partes* do not operate as a bar to the trial of a suit though they may be received as evidence in the case. In a suit by the plaintiffs against the Government for recovery of emoluments of a certain office, the Government pleaded as a bar to the maintainability of the suit, a former judgment in which the plaintiffs' claim to the office against certain contesting claimants was negatived though the Government was not a party to that litigation. *Held*, that it was open to the plaintiff to reassert his title to the office in spite to the former judgment. Distinction between the operation of judgments *in rem* and judgments *in personam* discussed. 33 Mad. 483; 36 Mad. 141, overruled. (*Wallis, C. J. Spencer and Kumaraswami Sastri, JJ.*) SECRETARY OF STATE FOR INDIA *v.* SYED AHMAD BADSHA SAHIB. **44 Mad. 778: 41 M. L. J. 223 and 278: 14 L. W. 128 and 188 : 67 I. C. 971 : (1921) M. W. N. 576. (F. B.)**

——S. 11—*Judgment* in personam.

When in a mortgage suit persons interested in equity of redemption were not impleaded in first suit, subsequent suit on the mortgage impleading those persons is not barred. (*Batten, J. C.*) PUNA *v.* LAXMAN PRASAD. **65 I. C. 654.**

——S. 11—*Judgment in personam—Later adjudication—Effect of.*

In cases of judgments *inter partes* the later adjudication should be taken as superseding the earlier. There is no question whether the former adjudication was pleaded as a bar to the later suit or not. (*Ayling and Srinivasa Aiyanger, JJ.*) MORURI SHESHAYYA *v.* VENKATADRI APPA ROW. **(1916) 2 M. W. N. 219 : 36 I. C. 289 : 31 M. L. J. 219.**

——S. 11—*Judgment* in personam—*When binding on third parties.*

A decision between the plaintiff and another person that the latter is a co-proprietor with him binds all the third parties when the contention depended upon the relation between the plaintiff and such other person. (*Sundara Aiyar and Phillips, JJ.*) VENUGOPAL RAO GARU *v.* NEKHALAPUGI VENKATARAYUDU. **12 I. C. 715 : 10 M. L. T. 450.**

Judgment in Rem.

——S. 11—*Judgment* in rem—*Parties and representatives—Creditor—Bound by adjudication against debtor.*

A creditor is bound by an adjudication against his debtor on his title to property in the absence of fraud, collusion, etc. It is not necessary that the adjudication should have been on the merits.

CIVIL PRO. CODE (V OF 1898), S. 11—Leave to withdraw Suit.

It is enough if the adjudication has the effect of effectually depriving the debtor of his right to the property so long as the judgment stands. 33 Mad. 167 ; 36 Mad. 141 ; 29 M. L. J. 558 foll. (*Seshagiri Aiyar and Moore, JJ.*) RAHIMUNNISSA BEGAM *v.* SRINIVASA IYENGAR. **33 M. L. J. 266 : 54 I. C. 565 : 11 L. W. 139.**

Leave to withdraw Suit.

——**S. 11**—*Leave to withdraw suit—Given in appeal—Effect on decision of trial Court.*

Where in appeal, permission is granted to withdraw a suit with liberty to file a fresh suit the order of the trial Court on the merits *ipso facto* falls to the ground and hence cannot operate as *res judicata*. (*Ryves, J.*) TEWARI GAJRA SINGH *v.* SRI THAKURJI MAHARAJ. **74 I.C. 894.**

——**S. 11**—*Leave to withdraw suit—Irregular grant of—Finality of.*

Where an order is made allowing plff. to withdraw his suit with liberty to sue afresh, the order though erroneous and unjustifiable is not void or one made without jurisdiction. Consequently when a suit is subsequently instituted on leave so granted, the prior order cannot be ignored or treated as a nullity nor is the prior suit *res judicata*. (*Mookerjee, A. C. J., Fletcher Chatterjee, Teunon and Chaudhuri, JJ.*) HIRDOY NATH RAI *v.* RAMCHANDRA. **31 C. L. J. 482 : 58 I. C. 806 : 24 C. W. N. 723 : (F.B) [Overruling. 44 Cal. 367: 20 C. W. N. 1000 : 23 C. L. J. 489 : 33 I.C. 670 : *Also* 32. M. L. J. 434 : 21 M.L.T.229 : 40 I.C. 611 : (1917) M.W.N. 234**

——**S. 11**—*Leave to withdraw suit—Suit re-filed after permission to withdraw with liberty to bring a fresh suit—When barred by* res judicata.

An order by an appellate Court permitting a plaintiff appellant to withdraw his suit (which has been dismissed by the Court of first instance) on the ground that he had not been able to produce all the evidence he would have liked to produce with liberty to bring a fresh suit being without jurisdiction a suit filed in pursuance of such an order is barred as *res judicata* by reason of the decision by the first Court of the previous suit. (*Sanderson, C. J. and Newbould, J.*) KALI PRASANNA SIL *v.* PANCHANAN NANDY. **44 Cal. 367 : 23 C. L. J. 489 : 33 I.C. 670 : 20 C. W. N. 1000.**

[Overruled by 24 C. W. N. 723 31 C. L. J. 482 : 58 I. C. 806. (F. B.)] [Contra 32 M. L. J. 434 : 40 I. C. 611 : 21 M. L. T. 22.]

——**S. 11 and O. 23, R. 1**—*Leave to withdraw suit—Order granting leave—Effect of*—Res judicata.

Per *F. B.*—An appellate Court can, in a proper case, when reversing the Lower Court's decree, give the plaintiff leave to withdraw the suit with liberty to file a fresh suit. In such a case where the appellate Court allows the appeal to be withdrawn with liberty to file fresh suit, the lower Court's decree is wiped out and the subsequent suit is not barred as *res judicata*. (*Wallis, C. J., Abdur Rahim and Srinivasa Iyengar, JJ.*) BALIDE KAMAYYA *v.* PREGADA PAPAYYA. **40 Mad. 259 : 21 M.L.T. 82 : 5 L. W. 588 : 32 M. L. J. 477 : 37 I. C. 414 : (1917) M.W.N. 217 and 246. (F.B.)**

CIVIL PRO. CODE (V OF 1898), S. 11—Litigating under the same title.

——**S. 11 and O. 23, R. 1**—*Leave to withdraw suit.*

When plff. brings a fresh suit after withdrawal of the first with permission, the deft. cannot plead *resjudicata* in the subsequent suit. (*Kanhaiya Lal, A. J. C.*) MAUNOOLA *v.* KEDARNATH. **22 I. C. 918.**

——**S. 11**—*Leave to withdraw suit—Fresh suit—Bar.*

O. 23, R. 1, C. P. C. being the only provision for permitting suits to be withdrawn, the decision of the trial Court operates as *res judicata* where an appellate Court allows a suit to be withdrawn without jurisdictiou. (*Coutts and Ahmad, JJ.*) RAMASINGH *v.* JANAKSINGH. **2 U. P. L. R. (Pat.) 121 : 4 Pat. L.T. 300 : 56 I. C. 697 : 1920 Pat. 232.**

——**S. 11, O. 23, R. 1**—*Leave to withdraw suit—Order—Effect of.*

An appeltlae Court has no jurisdiction to dispose of a case properly constituted otherwise than on the merits ; it cannot allow a withdrawal of the suit dismissed by the trial Court for want of evidence, on the ground that the necessary evidence has not been let in. A subsequent suit brought in pursuance of the withdrawal will be barred by the rule of *res judicata*. 12 W.R. (P.C.) 43 ; 24 Cal. 616 (P.C.) 21 A 505 (P.C.) ref. (*Chapman and Roe, JJ.*) SATIYABADI GOUNTIA *v.* BEDIADHA BARPANDE. **46 I. C. 392 : 3 Pat. L. J. 404 : [But *See* 24 C. W. N. 723 : 31 C. L. J 482 : 58 I. C. 806 (F. B.) 40 I. C. 611 : 32 M. L. J. 434.]**

Litigating under the same Title.

——**S. 11—Expln. VI**—*Litigating under the same title—Public right.*

Where the ownership of a deal regarding which there is a dispute between the trustees of a mosque and the Municipality was decided against the former, they cannot in a subsequent suit by the public set up their rights to it. (*Walsh and Ryves, JJ.*) RAM CHAND *v.* MAULA BAKSH. **21 A. L. J. 882 : L. R. 4 A. 583 : 46 All. 110 : 1924 All. 178.**

——**S. 11 Expln. VI**—*Litigating under the same title—Former suit brought to establish personal right—Subsequent suit on behalf of guild.*

Where a suit by the members of a community to assert their personal rights is dismissed, it is no bar to a subsequent suit by them as representatives of the community to establish the right of the community, (*Piggott and Walsh, JJ.*) RADHA KISHEN *v.* RAM NATH. **18 A. L. J. 150.**

——**S. 11**—*Litigating under the same title—Suit brought on representative capacity and defended on personal capacity.*

A person was sued as trustee of an idol but he defended the suit in his personal capacity and

CIVIL PRO. CODE (V OF 1898), S. 11—Litigating under the same title.

was unsuccessful ; later on he sued on the same grounds as his defence in the prior suit. The suit is barred. (*Grimwood Mears, C.J. and Ryves, J.*) RAM KARAN *v.* RAM NARAINJI. **60 I. C. 74.**

——S. 11—*Litigating under the same title—Suit on pro-note and sale deed—Subsequent suit for breach of covenant in sale-deed.*

Plaintiff claimed certain money on the basis of a pro-note executed in favour of the defendant which the defendant had transferred to the plaintiff by a deed. The suit was dismissed. In a subsequent suit by plaintiff upon a covenant of indemnity in the conveyance executed by the defendant in his favour. *Held*, that the plaintiff was not suing the defendant under the title which was the basis of the previous suit and that the subsequent suit was not, therefore, barred by *res judicata*. (*Piggott, J.*) GOBIND RAM *v.* RAMCHANDAR. **42 I. C. 895.**

——S. 11—*Litigating under the same title—Suit on behalf of public.*

Where two Mahomedans brought a suit *bona fide* in respect of a public right claimed in common for themselves and others and the suit was dismissed, a subsequent suit by two other Mahomedans in respect of the same right is barred by *res judicata*, as the latter must be deemed to be persons claiming under the former. (*Richards, C.J. and Banerjee, J.*) MUHAMMAD AMIR *v.* SUMITRA KUAR. **36 All. 424 : 24 I. C. 97 : 12 A. L. J. 643.**

——S. 11—*Litigating under the same title—Former suit for possession—Second suit for the same on title.*

Where a Mahomedan widow was in possession of the whole of her husband's property in lien of her dower debt and on her death her personal heirs got a decree against the personal heirs of her husband, for recovering the property which was in the widow's possession, *Held*, that the heirs of the widow's husband were not barred by the decree obtained by the widow's heirs from instituting a suit to recover the ¾th share of the property (excluding the widow's share), and the matter was not *res judicata*, (*Banerji, J.*) JAMADAR *v.* IMAM BAKSH. **16 I. C. 431 (2).**

——S. 11—*Litigating under the same title.*

Dismissal of a suit by a person claiming possession of the property as reversionary heir of the deceased on the ground that the property was gifted away to a Hindu deity does not bar a subsequent suit by the same person for the recovery of the same property as trustee. (*Chandavarkar and Hayward, JJ.*) GHELLABHAI *v* UDERAM. **13 Bom. L. R. 989 : 12 I. C. 577 : 36 Bom. 29.**

——S. 11—*Litigating under the same title—Suit against a person setting up title of a third person—Subsequent suit impleading that person—Prior decision, if a bar.*

A sued B for a declaration that he was entitled to receive rent at a certain rate from him and that B was a tenant under C and bound to pay rent to A as part of the settlement between them. In a prior rent suit by A against B the latter had set up that he held the land not under A but under C who was not a party to that suit. The prior suit had been dismissed. *Held*, that the decision in the prior suit was no bar to the trial of the issue as to B's liability for rent. 26 C. 428 foll. (*Greaves and Ghose, JJ.*) GOPINATH *v.* BHAJAHARI DAS. **68 I. C. 472 : 1923 Cal. 327 (2).**

——S. 11—*Litigating under the same title—Trustee—Individual capacity.*

A decision against a person in his individual capacity does not bind his successor in the office of trustee of an endowment. (*Richardson and Huda, JJ.*) NARAIN DAS *v.* KAZI ABDUR RAHIM. **24 C.W.N. 690 : 58 I.C. 705 : 47 Cal 866.**

——S. 11—*Litigating under the same title—Claim raised—Not decided.*

Where the plaintiff in a subsequent suit sues under a title different from the one he endeavoured to support in a prior suit, the decision in the prior suit will not be *res judicata*. Where the plaintiff in a prior suit is debarred from raising a point it does not operate as *res judicata* in a later suit. (*Sanderson, C. J. Mookerjee and Fletcher, JJ.*) MOHAN LAL SHAHA *v.* JAHURI LAL SHAH. **55 I. C. 767 : 31 C. L J. 163.**

——S. 11—*Litigating under the same title—Zamindar purchasing tenure—Possession disputed by tenant of neighbouring Zamindar—Suit as both purchaser and Zamindar to establish title in properly purchased—Zamindar's title, if in issue.*

Where a 4/5ths proprietor of a Zamindari purchased in execution of a decree for his share of the rent a defaulting tenure and sued the Zamindar of an adjoining estate and his tenant to establish his title both as landlord and purchaser of the tenure and obtained a decree that the tenure was situate in his Zamindari. *Held*, that the plaintiff in that suit was interested in establishing his title both as Zamindar and as purchaser and the Zamindari title having, upon the pleadings, been directly put in issue the decision so far as the plaintiff's 4/5ths Zamindari title was concerned was as between the rival Zamindars *res judicata*. (*Woodroffe, Chitty and Huda, JJ.*) SHIB CHANDRA ROY *v.* HARINDRA LAL RAI CHOUDHURI. **28 C. L. J. 223 : 47 I. C. 315 : 22 C. W. N 721.**

——S. 11—*Litigating under the same title—Judgment in the earlier suit.*

When a person is not litigating under the same title in both the cases, judgment in the prior suit does not bind him in the subsequent suit as *res judicata*. (*Chatterjee and Newbould, JJ.*) RAMANI MOHAN ROY *v.* JAGABANDHU KARMAKAR. **37 I. C. 881.**

——S. 11—*Litigating under the same title—Previous decision in another capacity is conclusive.*

Previous adjudication of the High Court as to the invalidity of *Wakf* between the same parties but in another capacity is conclusive though not as *res judicata*. (*Jenkins, C.J. and Chatterjea, J.*) MUHAMMAD BAKSH *v.* AJMON RAJA. **43 Cal. 158 : 32 I. C. 701 : 19 C. W. N. 967.**

——S. 11—*Litigating under the same title—Reversioner—Suit to set aside alienation by widow—Necessity.*

CIVIL PRO. CODE (V OF 1898), S. 11—Litigating under the same title.

In a former suit between a reversioner and a purchaser from a Hindu widow an issue as to legal necessity was raised and decided adversely to the purchaser, but the reversioner's suit for a moiety of the property failed as he had no title to it then. The reversioner filed the present suit after that moiety had passed to him. *Held*, that the decision on the issue of legal necessity was *res judicata* as in both the suits the plaintiff litigated as the owner of the reversion and the defendant as the purchaser from the widow. (*Jenkins, C. J. and Woodroffe, J.*) SURJA KANTA RAI CHOWDHURY *v.* FANI BHUSHAN BANERJEE.

27 I. C. 226 : 18 C. W. N. 888

———**S. 11**—*Litigating under the same title—Erroneous view of law—Pre-emption suit.*

In a previous suit a decision was given in favour of plaintiff pre-emptor, though a descendant of a remote ancestor of vendor, that he was entitled to inherit vendor's property. When the vendor again sold another property, plaintiff and another pre-emptor filed suits. The suit of the latter was decreed and upheld in appeal and in view of the decision the trial Court dismissed plaintiff's suit and the appellate Court decided on merits that the previous judgment was not of binding effect in determining plaintiff's status as a pre-emptor as it held the decision was wrong. *Held*, on the one hand plaintiff and vendor *pro forma* defendant in the first case and on the other plaintiff and the present vendees in this suit, both suits being pre-emption suits, cannot be said to be parties litigating under the same title. As the vendees did not claim under the vendor, plaintiff did not and could not challenge vendee's right to own and possess the land in suit and his claim would therefore amount to asking the vendees to re-transfer in his favour the land in suit in virtue of the decision in the previous suit. The previous decision was based on the wrong view of law that a person descended from a remote ancestor of the vendor of altogether unknown degree is a person entitled to inherit the vendor's property. 34 P. W R. 1921 Dist. (*Campbell, J.*) AHMAD-KHAN *v.* JAWAHIR SINGH. **1923 Lah. 16.**

———**S. 11**—*Litigating under the same title—Sale of proprietary rights—Purchase by tenants—Sale set aside—Detivery of possession—Subsequent suit for establishing occupancy rights.*

The proprietor of certain land sold it to the occupancy tenants on the land and some time after his death his successor impugned the sale on the ground that it was not supported by necessity or consideration and obtained a decree for possession. In execution of the decree the occupancy tenants were turned out of possession. Thereupon they sued for restoration of their occupancy rights. *Held*, that the suit was not barred by *res judicata* or by S. 47, C.P. Code. The occupancy tenants were litigating in different capacities in the two suits. (*Chevis and Abdul Qadir, JJ.*) SURAJ KAUR *v.* NAGINA SINGH. **4 Lah. L. J. 400: 67 I.C. 485 : 1922 Lah. 44.**

———**S. 11**—*Litigating under the same title—Suit for possession under a lease—Subsequent suit on title not* res judicata.

Where a suit for possession of property based on a lease is dismissed, a subsequent suit for possession based on ownership is not *res judicata*. (*Chevis, J.*) GIRDHARI LAL *v.* UMDAJAN.

63 I. C. 717 : 3 Lah, L. J. 215.

———**S. 11**—*Litigating under the same title—Vendor—Reversioner.*

Where A, as a purchaser of certain properties, sued B, his vendor, and C for possession of the properties and the suit was dismissed on the ground that C was entitled to the property owing to an earlier purchase, whereupon A sued C again as a reversioner impeaching the alienation to C. *Held*, that the former suit did not operate as a bar by *res judicata* to the latter suit. (*Johnstone and Shah Din, JJ.*) KURA *v.* MADHO,

151 P. W. R. 1915 : 31 I. C. 159 : 68 P. R. 1915.

———**S. 11**—*Litigating under the same title—Guardian* ad litem *of miner—Suing in his personal capacity about same right.*

A decree against the minor represented by his guardian *ad litem* can be contested by the guardian in this individual and personal capacity on rights peculiarly his own; and the fact that he acted as guardian *ad litem* before, will not estop him from claiming his right. (*Kensington and Beadon, JJ.*) GANGA RAM *v.* NARAIN DASS.

118 P. L. R. 1914 : 22 I. C. 955 : 1 P. R. 1914.

———**Ss. 11 and 92**—*Litigating under the same title—Different capacity—Finding in suit for assertion of individual right—Effect on scheme suit.*

Where a suit is brought by certain persons under S. 92, C. P. Code, with the sanction of the Advocate General for a scheme a finding in a prior suit by them that the defendant was hereditary trustee does not operate as *res judicata* especially when the Court which tried the prior suit is not competent to try the subsequent suit (*Spencer and Devadoss, JJ.*) GOPU NATARAJA CHETTY *v.* RAJAMMAL. **43 M.L.J. 448 : (1922) M.W N. 464 : 31 M. L. T. 125 (H.C.): 16 L. W. 122 . 69 I. C. 15 : 1922 Mad. 394.**

———**S. 11**—*Litigating under the same title—First suit on a gift—Second suit as a heir—No bar.*

Plaintiff sued for possession of certain property basing his claim on a gift of the property by his grandmother. The suit was dismissed and he brought a suit for possession of certain other property as heir of his mother. *Held*, that the suit was not barred as *res judicata*. (*Mitra, A.J.C.*) BHAGWANSA *v.* MAROTI. **43 I. C. 395.**

———**S. 11, Expln. VI**—*Litigating under the same title.*

It has been laid down by Explanation VI, S. 11, C.P.C., that when some persons are litigating *bona fide* for a private right which they claim in common for themselves and others, all the persons interested therein shall in respect of that right be considered to claim under the litigants. This explanation is applicable where there is a community of interest claimed on common title and where the claim is in good faith for enforcing or defending that common interest. Such common interest may have been vested in a joint family which may form its basis or it may rest on joint

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title obtained in some other way. (*Kanhaiya Lal, J.C.*) HANSLA BAKHSH SINGH *v.* RAJ BUKHSH SINGH. **4 U.P.L R. (O. C.) 47.**

——S. 11—*Litigating under the same title—Proprietary and under-proprietary rights.*

Where the point at issue in a suit was as to who was entitled to the proprietary estate of a deceased holder the decision therein does not bar a fresh dispute as to possession on the strength of under-proprietary rights. (*Stuart, J.C. and Kanhaiya Lal, A.J. C.*) SURAJ BIKRAM SINGH *v.* CHANDRABHAN SINGH. **17 I.C. 334**

——S. 11—*Litigating under the same title—Meaning of.*

If the parties are not litigating under the same title in a subsequent suit, the decision in a prior suit will not operate as *res judicata*. The words "litigating under the same title" in S. 11 mean that the disputed title between the two parties must be the same in both cases. (*Evans, J.C.*) GANESH DAT SINGH *v.* SUKHRAJ SINGH. **14 I.C. 12.**

——S. 11—*Litigating under the same title—Suit on promissory note dismissed—Suit for damage for malicious prosecution—No* res judicata.

Plaintiff sued defendant for money due on a promissory note. The suit was dismissed on the finding that the pro-note was not genuine Defendants then prosecuted the plaintiff for forgery but plaintiff was acquitted. In a suit for damages for malicious prosecution, inasmuch as plaintiff was not litigating under the same title in both the suits, the finding as to the genuineness of the pro-note in the prior suit was not *res judicata* in the latter. (*Mullick and Imam, JJ.*) TEJU BHAGAT *v.* DEOKE NANDAN PRASAD. **47 I.C. 141.**

Might and Ought.

Alternative claims and relief.
Cause of action.
Constructive res judicata.
Defences.
Execution sale.
Grounds of attack.
Knowledge of facts.
Mesne profits.
Mortgage suit.
Omission to plead.
Partition.
Pro-forma defendant.
Recurring charges.
Relief not claimed.
Scope of the rule.
Set off.
Suit on title.

Might and Ought—Alternative claims and relief.

——S. 11, Expln. IV—*Might and ought—Alternative relief—Dekhan Agriculturist's Relief Act, S. 10 A,—Inconsistent pleas.*

The plaintiff sold his property to the defendant on the 16th March, 1906, but continued in possession as tenant. The defendant agreed by a *satekhat* executed on the 13th August 1906, to resell the property to the plaintiff at any time within twelve years for Rs. 395 and received Rs. 5 as

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earnest money. The plaintiff sued in 1911 to redeem the property, under S. 10-A of the Dekkhan Agriculturists' Relief Act, 1879, alleging that the sale was a mortgage. The suit failed. The plaintiff sued again in 1918 to recover the property on payment of Rs. 395 under the *satekhat*. A question having arisen whether the second suit was barred as *res-judicata*, *held*, that the second suit was not barred by *res judicata*, for the plaintiff was not bound in the first suit to have sued also for specific performance. The two suits were mutually inconsistent and if the plaintiff failed in proving the mortgage, he still had a number of years left under the *satekhat* within which he could have sued to get back the property on payment of the consideration mentioned in the *satekhat*. (*Macleod, C. J. and Shah, J.*) DOLA KHETAJI VAHIVATDAR *v.* BALYA KANOO PATEL. **24 Bom. L. R. 236 : 66 I. C. 815 : 1922 Bom. 29.**

——S. 11—*Might and ought— Alternative relief.*

Where a suit claiming relief, alternatively against A and B is decreed against B who prefers an appeal, and the appeal is allowed, a subsequent suit against A for the same reliefs is not barred by *res judicata*. (*Fletcher and Newbould, JJ.*) SARAT CHANDRA BOSE *v.* THE KHARAREA MEZEJULA ZEMINDARI SYNDICATE. **42 I. C. 548.**

——S. 11, Expln. IV— *Might and ought —Alternative claims—Title by purchase asserted and negatived—Subsequent suit on title by heirship—Bar of.*

When plaintiff sued to recover possession of property from a trespasser on the ground that he was owner by joint purchase with two others, and obtained a decree for his share, and subsequently brought a suit against the same defendant for possession of the remaining portion of the property claiming as heir to a deceased person, a title which he could have put forward in the alternative in the earlier suit but did not, the subsequent suit is barred by *res judicata*. 11 Beng. L. R. 158, 50 Cal. 1 relied on ; 41 I. A. 142 distinguished. (*Krishnan and Ramesam, JJ.*) THONA SINA NAINA MUHAMMAD ROWTHER *v.* ABDUL RAHMAN ROWTHER. **46 Mad. 135 : 72 I. C. 207 : 17 L. W. 188 : 32 M. L. T. (H. C.) 82 : (1922) M. W. N. 845 : 1923 Mad. 257.**

——S. 11—*Might and ought — Alternative claims.*

A suit, the question in which was not in issue in a prior suit between the parties cannot be barred by *res judicata* by such prior suit. It is not necessary to put forward a claim and also an inconsistent claim in the alternative in the same suit. (*White, C. J. and Tyabji, J.*) DHANAPALA CHETTY *v.* ANANDA CHETTY.
13 M. L. T. 305 : 21 M. L. J. 418 : 18 I. C. 973 : (1913) M. W. N. 322.

——S. 11, Expln. IV—*Might and ought—Alternative claims.*

If a plaintiff sets up a title as a proprietor and if he has two alternate capacities upon which to rest such a title he must disclose both these two

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capacities provided that they might and ought to have been made grounds of attack. The question as to whether a plaintiff can or cannot bring a second suit depends upon whether (1) he could have based his former suit upon the same cause of action, and (2) whether he ought to have so based it. In the first case he can escape from the operation of S. 11 and from O. 2, R. 2, if he can show that he was, when he instituted the first suit, actually unaware of his second cause of action. In the second case he can similarly escape from the operation of those sections if he can show that he could not unite his two causes of action in a single suit without inconsistency and confusion. *Held*, that the Court had to determine three points—(*a*) whether the plaintiff in the first suit did actually put forward his alleged claim as a heir as a basis for his suit, (*b*) whether, if he did not, he was unaware at the time that he could also claim as an heir, and (*c*) whether, although he knew of this second cause of action as an heir he was nevertheless unable to combine it with his cause of action as a vendee without inconsistency and confusion. (*Pipon, J. C.*) AKHI *v.* HAZRAGUL.
71 I. C. 1009.

———S. 11—*Might and ought — Alternative claims—Test to determine whether the defence ought to have been raised.*

A matter which ought to be raised but which, as a matter of fact, is not raised in a suit cannot be decided in specific terms in that suit. But this fact cannot be fatal to the plea of *res judicata* If the effect of the decision in a former suit is necessarily inconsistent with the defence that ought to have been raised but has not been raised, that defence must be deemed to have been finally decided against the person who ought to have raised it. Where it was open to the plaintiffs in their defence in the former suit to claim in the alternative, that they had a vested right in half the property in suit, but they were content to plead a partition whereby they became owners of the whole and in the result their defence failed and it was held that the property belonged to their father. *Held*, that this decision was necessarily inconsistent with the alternative defence that might and ought to have been raised. 13 C.W.N. 513 foll. (*May Oung, J.*) MAUNG NO *v.* MAUNG POTHEIN.
1 Rang. 363 : 2 Bur. L. J. 109 : 1923 Rang. 239.

———S. 11, Expln IV—*Might and ought—Alternative claims—Suit for recovery of land—Subsequent suit on different title—Bar.*

The point for determination in the case was whether the present suit was *res judicata* by reason of a former suit. Both the suits were instituted in the same Court between the same parties and the subject-matter was the same. In the former suit the plaintiff claimed title to three pieces of land as having been given to him by his father who at the time of that suit was dead. It was held that the gift was not valid. In the present suit he sued as the *aurasa* son of his father and mother, claiming a half share in the same three pieces of land. *Held*, that the plaintiff should in the former suit have made in the alternative the claim which he made in the present suit and that by reason of his omission to do so the present

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suit was barred by *res judicata*. (*Maung Kin, J.*)
MAUNG BA THAW *v.* MA HNIT. 2 Bur. I. J 34 :
11 L. B. R. 451 : 72 I. C. 14: 1923 Rang. 122.

———S. 11, Expln. IV—*Might and ought—Alternative claims--First suit on contract—Second suit for compensation for service*—Res judicata.

In a prior suit plaintiff sought to establish his claim on a personal contract with defendant for the supply of boats at an agreed rate. The case was decided against him and he brought another suit for recovery of the same money as compensation for services rendered. *Held*, that the second suit was barred as *res judicata*. The matter directly and substantially in issue in the first suit was whether the defendant owed the plaintiff any sum on account of the use by him of the plaintiff's boats. The ground in the second suit ought to have been taken as an alternative in the first suit in the event of a direct contract not being proved. (*Fox, C. J. and Hartnoll, J.*) P. L. CHRISTENSEN *v.* SATTIA.
15 I. C. 374 : 5 Bur. L. T. 95.

Might and ought—Cause of Action.

———S 11, Expln. IV—*Might and ought—Cause of action—First suit on pro-note—Subsequent suit on original cause of action—Bar.*

The dismissal of a suit on a promissory note is a bar to a subsequent suit on the original cause of action. Plaintiff's cause of action is one and indivisible and the fact that the transaction was recorded in his account book did not give him another or different cause of action. (*Lindsay, J.*)
MUNDAR BIBI *v.* BAIJ NATH PRASAD.
54 I. C. 424 : 18 A. L. J. 81.

———S. 11, Expln. IV—*Might and ought—Cause of action—First suit for possession as landlord—Second suit as reversioner.*

Plaintiff sued for possession of the suit property treating defendant as his tenant. It was dismissed as the Court found that the relationship of landlord and tenant did not subsist. The plaintiff again brought the present suit alleging that he was a reversioner entitled to the properties. *Held*, that the second suit was not barred by *res judicata* as the causes of action in the suits are different, 8 Mad. 520 foll. *Per Sadasiva Aiyar, J.*—The question whether a plaintiff was bound to mention in the first suit all facts which he mentioned in a subsequent suit alleging a different cause of action will depend upon the question whether it was practicable to have framed the first suit by alleging the facts put forward in the second suit without the evidence adducible on the two sets of facts being actually destructive. (*Sadasiva Aiyar and Spencer, JJ.*) MANGALATHAMMAL *v.* VEERAPPA GOUNDAN.
52 I. C. 813 : (1919) M. W. N. 287.

Might and ought—Constructive res judicata.

———S. 11, Expln. IV—*Might and ought—Constructive* res judicata—*Implied decision.*

The validity of certain conveyances to a registered company was established in a suit against the company and others by the plaintiff who subsequently brought another suit against the same parties for a declaration that the company was not duly incorporated and that the property

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conveyed to it should be transferred to the persons "entitled to the same." *Held*, that the question of the validity of the incorporation of the company might and ought to have been made a ground of attack by plaintiff in such former suit and that the subsequent suit for the purpose was barred by *res judicata*. The plaintiff ought to have made the objection a ground of attack in the former suit because all the facts on which the second suit was based were known to the plaintiff at the time of the former suit. No further evidence would have been needed. Nothing was wanting but the addition of an issue on the point in the former suit. 19 I. C. 234 foll. (*Lord Macnaughton.*) MOOSA GOOLAM ARIFF *v.* EBRAHIM GOOLAM ARIFF. 40 Cal. 1 : 39 I. A. 237 : 16 C. W. N. 937 : 23 M. L. J. 215 : 16 C. L. J. 642 : 14 Bom. L. R. 1211 : 12 M. L. T. 449 : 5 Bur. L. T. 211 : 10 A. L. J. 486 : 6 L. B. R. 119 : 16 I. C. 70 : (1912) M. W. N. 1097 (P. C.).

——S. 11—*Might and ought—Constructive* res judicata—*Implied decision — Necessarily implied.*

Where a question has been necessarily decided in effect though not in express terms between the parties to a suit they cannot raise the same question as between themselves in any other suit in any other form. (*Chatterjee and Duval, JJ.*) APPURBA KRISHNA RAI *v.* CH. PARMANIK. 54 I. C. 952 : 24 C. W. N. 223.

——S. 11, Expln. IV—*Might and ought—Constructive* res judicata.

The present plaintiffs were defendants in the original suit in the sense that they were members of the firm; the matter is *res judicata* if the plea now taken could have been taken by their respective fathers and grandfathers whose names were shown in the plaint. (*Le Rossignol and Harrison, JJ.*) RAM RATTAN *v.* THE FIRM OF HUSSUKH ROY. 43 P.L.R. 1922 : 69 I. C. 783 : 1924 Lah. 26.

——S. 11—*Might and ought—Constructive*—Res judicata—*Implied decision.*

The plaintiff sued for the property of his uncle's son S. The defendant claimed to be the adopted son of the plaintiff's uncle and stated that S was an imbecile and the *factum* and validity of adoption were *res judicata* as in previous suit the plaintiff had alleged that S was an imbecile and denied the *factum* and validity of the adoption and claimed the whole of the property of another uncle. The first Court had found that S was imbecile and that adoption was not proved. On appeal the adoption was held proved and opinion was expressed that the question of imbecility of S should not have been discussed. *Held*, that the plaintiff's present suit was barred by *res judicata*, for in the previous suit the Court by deciding in favour of adoption had impliedly found that S was an imbecile. (*Shadi Lal and Le Rossignol, JJ.*) ONKAR LAL *v.* RADHA NATH. 36 I. C. 267 : 95 P. L. R. 1916.

——S. 11—*Might and ought—Constructive* res judicata—*Implied decision, finding necessary for arriving at conclusions—Boundary Marks Act, Ss. 24 and 25—Order under—Finality of.*

The plea of *res judicata* is available not only as regards final conclusions, but also regarding the findings necessary for arriving at conclusions, even if they are given on formal issues. A decision under S. 25 of the Boundary Marks Act as well as its grounds are *res judicata* between the parties. (*Wallis, C.J., Ayling and Seshagiri Iyer, JJ.*) MUTHAMMAL *v.* SECY. OF STATE. 27 M. L. J. 529 : 16 M. L. T. 432 : 26 I. C. 817 : 39 Mad. 1202.

——S. 11—*Might and ought—Constructive* res judicata—*Implied decision—Scope.*

The principle of implied decision is not confined to the decree but also applies to issues directly and substantially in issue in the previous suit. So even though the matter was not essential to the relief granted or the decree passed, still if it had been put in issue, it must be deemed to have been directly and substantially at issue. (*Wallis, Sundara Iyer, and Sadasiva Iyer, JJ.*) BOMMIDI BAYYAN NAIDU *v.* BOMMIDI SURYANARAYANA. 37 Mad. 70: 12 M. L. T. 500 : (1913) M. W. N. 1 : 17 I. C. 445 : 23 M. L. J. 543 (F. B.)

[On appeal from 35 Mad. 216 : 21 M. L. J. 344 : 10 I. C. 75 : 10 M. L. T. 533.]

——S. 11, Expln. IV—*Might and ought—Constructive* res judicata—*Deposit under Ss. 83 and 84 of the T. P. Act—Objections.*

Where the defendant (mortgagor) deposited the amount due on the mortgage under S. 83 of the T. P. Act and the mortgagee plaintiffs appeared in answer to the notice of the deposit sent to them under S. 84 of the T.P. Act, the only reason they gave for refusing to accept it as sufficient was that it did not include interest up to the date on which they were summoned to appear in Court. There was no suggestion that it was not the full amount due for principal and interest on the date on which the deposit was made. In a subsequent suit on the mortgage the plaintiffs claimed a much larger amount than was deposited as due under the mortgage. *Held*, on the principle embodied in S. 11 (Expl. 4) of the C. P. Code the plaintiffs could not be heard to say that the amount deposited was less than the sum due to them on the mortgage on that date. (*Hallifax, A. J. C.*) KESHOORAM *v.* BHANGILAL. 67 I. C. 324 : 1922 Nag. 174.

——S. 11, Expln. IV—*Might and ought—Constructive* res judicata—*Scope of the rule.*

S. 11, C. P. C., Explanation 4, barred the claim so far as the particular village was concerned, but the suit was not barred as to the entire Taluka, as the entire Taluka was not the subject-matter of the previous litigation. (*Lindsay, J. C. and Stuart, A. J. C.*) BISESHWAR BAKSH SINGH *v.* RAMESHWAR BAKSH SINGH. 4 O. L. J. 648 : 44 I. C. 368 : 21 O. C. 1.

——S. 11—*Might and ought—Constructive* res judicata—*Extraneous issues.*

The refusal of a Court to try extraneous issues in a case does not bar a subsequent suit. 41 Cal,

69 ; 40 Cal. 29 ; 18 Cal. 647 ; 12 C. W. N. 292, 7 Mad. 264 ; 20 Cal. 79 (P. C.) ref. The doctrine of constructive *res judicata* must not be extended beyond the strict limits of S. 11. 24 Cal. 711 ; 1 C.L.J. 248 , 1 C.L.J. 337, ref. A verdict between parties upon one question does not bind them in an issue on another, unless the point in issue was clearly the same in both cases. The two questions should not simply be allied but should be identical. (1844) 13 M. and W. 137 ; 25 T. L. R. 291, ref. (*Roe and Jwala Prasad, JJ*) TAFAZEL HUSAIN v. HIRA LAL SAHU. **36 I. C. 650.**

Might and Ought—Defences.

———**S. 11, Expln. IV** — *Might and ought—Defences—Ejectment—Plea of mortgage.*

B was the owner of a village which passed on his death to his widow who continued in possession till her death in 1887. Her husband's brother's son R took possession as the next reversioner and borrowed money on the security of the property to pay off the widow's debts from the plaintiff. After the widow's death the defendant, who is the Rajah of Basti, brought a suit against the reversioner and the other transferees including the plaintiff, for possession of the entire property. The present plaintiff set up a claim as mortgagee but the suit was decreed. The plaintiff brought this suit for sale upon the mortgage executed to him by the reversioners against the Rajah on the ground that the Rajah took the village subject to a charge in his favour and that he was estopped from denying his mortgage. *Held*, that the plaintiff ought to have raised the question of estoppel in the previous suit brought by the Rajah and the present claim was barred by *res judicata*. (*Viscount Haldane.*) NAGESHAR PRASAD PANDE v. RAJA NARAIN SING. **3 L. W. 454 : 20 C. W. N. 265 : 34 I. C. 673 : (1916) 1 M. W. N. 142 (P. C.)**

———**S. 11 Expln. IV**—*Might and ought—Defences—Mortgage from an ostensible owner—Plea of estoppel not raised by a mortgagee—Suit by mortgagee.*

R mortgaged the property in dispute to N. P brought a suit against R and N for possession in which P.'s title was denied. P, however, got a decree for possession. N then on the strength of his mortgage brought this suit for sale of the property and pleaded that P was estopped from denying his title as mortgagee. *Held*, that N could set up this plea in the former suit and the decision in that suit therefore operated as *res judicata*. (*Stanley, C. J. and Banerjee, J.*) PATESHRI PARTAB NARAIN SINGH v. NAGESHAR PRASAD. **10 I. C. 961 : 8 A. L. J. 358.**

———**S. 11**— *Might and ought — Defences—Plea of easement*

Where in a suit for declaration of title to certain land and for demolition of an *osara* built thereon by defendant, the defendant only pleaded that the *osara* was built with the plaintiff's consent and does not raise a plea of right of way by easement thereto ; he is debarred from instituting a fresh suit therefor. (*Banerji, J.*) ARTHUR BARBER v. BADRI RAI. **9 I C. 813.**

———**S. 11** — *Might and ought — Defences—Ground of defence.*

A defendant who had been impleaded in a suit for declaration and possession on the ground that he had purchased a portion thereof is not bound to put forward therein a plea of under-tenancy with respect to the holding. (*Coxe, J*) FAZAR PARAMANIK v. URMAN BIBI. **9 I.C. 585.**

———**S. 11, Expln. IV**—*Might and ought—Defences—Suit by transferee from widow for redemption—Mortgagee's plea of reversionary right overruled for not raising it in first Court—Subsequent suit after widow's death by mortgagee claiming reversionary title.*

Where a plea of reversionary right by a mortgagee in a redemption suit by the transferee from a widow was overruled on the ground that it was not raised in the first Court, a subsequent suit by the mortgagee after the widow's death claiming reversionary title is not barred by *res judicata* as the previous suit did not finally decide that the latter was not the reversionary heir. Ex. IV of S. 11, C. P. C., does not apply as the mortgagee could not have resisted the suit for redemption during the widow's lifetime. (*Shah Din and Chevis, JJ.*) NIHAL SINGH *v.* HIRA. **87 P. R. 1913 : 82 P. L. R. 1913 : 18 I. C. 787 : 91 P. W. R. 1913.**

———**S. 11, Expln. IV**—*Might and ought—Defences—Part payment to vendor's agent not pleaded.*

The plff. in a previous suit by deft. for the price of jewels sold to him did not plead part payment of the price made to deft. No. 2 agent of deft. No. 1 Plff. then sued the defendants Nos. 1 and 2 for recovery of the amount paid by him previous to the decree. The suit against principal was barred. *Held*, the High Court could pass a decree against the agent although the plaintiff did not ask for a revision of the order of the lower Court dismissing the suit against the agent. 13 I.C. 649 : Dist. (*Srinivasa Iyengar, J*) SREEKAKULAM KAMIAH SETTI v. KAPULOORU CHINNIAH. **33 I. C. 623.**

———**S. 11**—*Might and ought—Defences—Suit on agreement for arrears of maintenance—Second suit—Plaintiff not entitled to rely on events prior to former suit—Subsequent events.*

Plaintiff agreed to give maintenance to defendant in consideration of her executing a will bequeathing all her moveable property to him after her death. Defendant sued in 1907 for two years' payment due to her under the agreement and obtained a decree. Then the plaintiff sued for a declaration that there was a failure of consideration and the agreement could not be enforced against him *Held*, that plaintiff could not rely on events prior to the suit of 1907 to avoid the agreement as he was bound to put forward in that suit all pleas which would entitle him to get the Court to hold that the agreement was not enforceable against him. The fact that the defendant made false complaints to Police of loss of some properties included in the will and also concealed some of them in a third person's house, subsequent to the suit disclosed no cause of action to avoid the agreement and that the allegation of mere intention on her part to defeat the bequests

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was not sufficient. (*Sundara Aiyar, J.*) *In re* ATYAM VENKIAH. 15 I. C 186 : (1912) M. W. N. 182.

——S. 11, Expln. 4—*Might and ought—Defences—Matter which might have been made a ground of defence, if* res judicata—*Cause of action in two suits—Identity, if necessary.*

A matter which might have been made a ground of defence in a former suit may be *res judicata* in a subsequent suit even though it has not been actually decided there. Identity of causes of action in the two suits is not a condition requisite for the application of the doctrine of *res judicata.* (*Chamier, J. C.*) NAWAZISH AHMAD *v.* MURTAZA HUSAIN. 11 I. C. 346 : 14 O. C. 117.

——S. 11, Expln. IV— *Might and ought—Defences—Omission to plead title in defence.*

S the mortgagee brought a suit for sale against M the mortgagor and her son B alleging that M had gifted the property to B. It was found that M was the absolute owner of the property and a decree for sale was passed, and the property was sold. B brought a suit for possession after M's death alleging that she had only a life interest and so the auction purchaser bought only a life interest. *Held*, that B's suit was barred by the rule of *res judicata* as he ought to have raised that plea in the first suit. A plaintiff and a defendant are both bound to take every possible plea in support of his action or defence as the case may be. (*Evans and Piggott, A. J. Cs.*) GIRZA LAL *v.* BRIJ BHUKHAN. 10 I. C. 29.

——S. 11, Expln. IV—*Might and ought—Defences— Ownership of water*—Jus tertii—*Suit for levy of tax*—Ex parte *decree.*

The allegation that the water-course belonged to the Government and not to the plaintiff was a matter which might and ought to have been made a ground of defence in a former suit by the plaintiff for recovery of water-tax from the defendant and the judgment in that suit operated as *res judicata*, as it held that the water-course was the plaintiff's property and that the defendants had no right to take water from it. The decree in the prior suit though *ex parte* was a bar. (*Fawcett. J. C. and Crouch, A. J. C.*) GOBIND RAM *v.* SABGHATULLAH. 27 I. C. 999 : 8 S. L. R. 218.

Might and Ought—Execution Sale.

——S. 11, Expln. IV — *Might and ought—Execution sale—Application to set aside—Dismissal of—Subsequent suit on fresh grounds—Bar.*

In a proceeding to set aside an execution sale the applicants set up that the person whose property was purported to have been sold and whose legal representatives they were, had died before the decree and did not put forward the case upon which they later on sued to set aside the sale, *viz.*, that the judgment-debtor died after the decree but before attachment. *Held*, that the suit was barred by the rule of *res judicata.* (*Richardson and Huda, JJ.*) JAGADISH BHATACHARJEE *v.* BAMA SOUNDARI DASYA. 23 C. W. N. 608 : 51 I. C. 972 : 29 C. L. J. 411.

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Might and Ought—Grounds of attack.

——S. 11, Expln. IV—*Might and ought—Grounds of attack—Test.*

The test, whereby to determine whether it ought to have been matter of attack is this : are the matters so dissimilar that their union might lead to confusion ? Where the plaintiff might have, in the former suit, put in the claim, that he made in the subsequent suit as an alternative claim, and if he did so, there would have been no confusion, and all questions relating to his title in the property would have been completely and finally determined. *Held*, he ought to have made the claim that he made in the subsequent suit as a ground of attack in the former suit, and for this reason, the subsequent suit must be held to be *res judicata.* Where plaintiff claims title to the certain property, in proving his title to that property he ought to put forward all means of attack in his armoury. S. 11 omits all references to the cause of action. A plaintiff's cause of action is a very different thing from his title; the one being something done contrary to a persons interest which obliges him to seek the aid of the Court, the other the proof that that something affords him a valid ground for relief. (1892) I L. R. 20 C. 79 (1900) I. L. R. 25 Bom. 189 *F.* (*Maung Kin, J.*) MAUNG BA THAW *v.* MA HNIT, 1 Bur. L. J. 34 : 72 I. C. 14 : 1923 Rang. 122.

——S. 11—Expln, IV—*Might and ought—Grounds of attack.*

Matters which are substantially and directly in issue in the suit or which might and ought to have been made a ground of attack or defence in the suit cannot be allowed to be raised in execution proceedings. (*Campbell, J.*) MIR KHAN *v.* SHARFU. 5 L. L J. 163: 74 I. C. 577: 1923 Lah. 560.

Might and Ought—Knowledge of facts.

——S. 11, Expln. IV and O. 2, R. 2—*Might and ought—Knowledge of title—Essential.*

A subsequent suit based on a claim of title, which the plaintiff, owing to want of knowledge of it, could not put forth as a ground of attack in a prior suit, is not barred under Expl. IV of S. 11, C. P. C. and under O. 2, R. 2. (*Quaere* :—Is a plaintiff suing to recover possession of property obliged to show all his titles regarding it. (*Rattigan, J.*) AISHAN *v.* MUHAMMAD DIN. 37 I. C. 119: 94 P. R. 1916.

——S. 11, Expln. IV—*Might and ought—Knowledge of facts.*

Explanation IV of S. 11 of the C. P. C, only applies when the claim was made during the previous proceedings within the knowledge of the person making it. (*Shaw, J. C.*) NGA PO TUN *v.* MI THET PON. 10 I. C. 991 : (1910) 1 U. B. R. 66.

Might and Ought—Mesne Profits

——S. 11—*Might and ought—Mesne profits—Suit for possession and future profits—Subsequent suit for mesne profits—No bar.*

Where in a prior suit for possession and future mesne profits the Court did not purport to decide the question of future mesne profits a

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subsequent suit for mesne profits *pendente lite* is not barred. (*Richards, C. J. and Bannerji, J.*) ISHAG KHAN *v.* RUSTUM ALI KHAN.
16 A. L. J. 182: 44 I. C. 88: 40 All. 292.

——S. 11—Expln. V and O. XX, R. 12.—*Might and ought—Mesne profits.*

The Court is empowered to order mesne profits under O. 20 R. 12, C. P. C. Hence the plaintiff is entitled to claim them in the case of partition and possession. When on such claim being made the decree is silent as to the claim of future mesne profits it will be taken to have been refused and a separate suit will be barred by the Explanation V to S. 11 of the Code. (*Macleod, C.J. and Heaton, J.*) ATMARAM BHASKAR *v.* PARSHRAM BALLAL. **22 Bom. L. R. 982 : 58 I. C. 419: 44 B. 954.**

——S 11—*Might and ought—Mesne profits —Future.*

"Relief" is one which has accrued at the date of suit. Therefore suit for mesne profits from the date of suit to the date of delivery of possession is not barred by a previous decision awarding past mesne profits in a suit for possession, and past and future mesne profits but being silent as to future profits. (*Wallis, C. J, Ayling and Kumaraswami Sastri, JJ.*) DORAISAMI AIYAR *v.* SUBRAMANIA AIYAR. **41 Mad. 188: 22 M. L. T. 484: 33 M. L, J. 699: 6 L. W. 784 : 42 I. C. 929: (1917) M. W. N. 847 (F. B.)**

——S, 11, Expln. IV—*Might and ought—Mesne profits--Suit under S. 9 of the Sp. Rel. Act.*

Plaintiffs having been forcibly dispossessed by defendants filed a suit under S. 9 of the Sp. Ref, Act for possession with crops or their value and the decree in that suit awarded them only the possession of lands. The plffs. subsequent to their getting possession of the lands filed a suit for mesne profits for 8 years including the one in which the suit was instituted alleging that as they got possession after the cultivation season they could not get any profits for that year. *Held*, that the second suit was not barred by the provisions of S. 11 or O. 2, R. 2 of the C. P. Code. 24 All 501: 25 Cal. 803: 15 M. L. J. 462, foll 24 M. 491, dist. (*Sadasiva Iyer and Hannay, JJ.*) THAVASI *v.* ARUMUGAM. **30 M. L. J, 326: 2 L. W. 157: 28 I. C, 1 : (1915) M. W. N. 170.**

—— S. 11—*Might and ought—Mesne profits —Future profits not granted in a decree—Suit for recovery barred.*

A subsequent suit for future mesne profits not allowed by a decree in a previous suit for possession and future mesne profits is barred. A plea that a part of them should not be allowed was taken in lower Court; on appeal the plea that the whole of them should not be allowed was taken and accordingly the whole suit was dismissed. (*Ayling and Hannay, JJ.*) RAMASAMI IYER *v.* SRIRANGARAJA IYENGAR.
2 L. W. 8 : 26 I. C. 622 : 41 Mad. 188 : [Overruled. 33 M. L. J. 699: (1917) M. W. N 847: 6 L. W. 784: 42 I. C. 929 : 22 M. L. T. 484 (F, B.

——S 11—*Might and ought—Mesne profits —Alienee from plaintiff pending suit.*

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An alienee from the plaintiff pending a suit by him for mesne profits cannot after the suit is decided against the plaintiff sue for the recovery of the land from the same defendant as he will be barred by *res judicata*. (*Sadasiva Iyer and Tyabji JJ.*) TALARI KAVOLI NAGADU *v.* VISVANATHAN PEDDA GOVINDAPPA. **1 L. W. 587 : 25 I. C. 133 : 16 M. L. T. 158.**

——S. 11—*Might and ought—Mesne profits —Suit for past and future mesne profits—Decree silent as to latter—Fresh suit.*

When the decree in a previous suit for possession and past and future mesne profits is silent about future mesne profits a fresh suit for future mesne profits is not barred by *res judicata* by the mere omission of the Court to adjudicate upon the claim as to future mesne profits in the previous suit. (*Mc Coll, A. J. C.*) MI SAU *v.* NGA. MEIK. **31 I. C. 103 : (1915) II U. B. R. 81.**

Might and Ought—Mortgage Suit.

——S, 11 Expln. IV—*Might and ought—Mortgage suit—Prior mortgagee—Impleaded in suit on puisne mortgage,—If bound to set up his prior mortgage in defence.*

A prior mortgagee who is impleaded in a suit on a subsequent mortgage, but whose mortgage is not impugned has a paramount title outside the controversy of the suit and is not bound to set up his mortgage as a defence within the meaning of Expl. IV of S. 11 of the Code. (*Sir Lawrence Jenkins.*) RADHA KISHUN *v.* KHURSHED HUSSAIN
47 Cal. 662: 47 I. A. 11: 38 M. L. J. 424: 11 L. W. 518: 25 C. W. N. 417: 22 Bom. L. R. 557: 55 I C. 959: (1920) M. W. N. 308 (P. C.)

——S. 11, Expln. IV—*Might and ought—Mortgage suit—Omission to put forward claim in suit by puisne mortgagee—Bar—T. P. Act, S. 85.*

Where a prior mortgagee is impleaded as a party to a suit by a puisne mortgagee and the former fails to set up his own mortgage and claim priority and a decree for sale follows in pursuance of which the properties are sold, neither the prior mortgagee nor his assignees (by subrogation) could thereafter enforce the claim under the prior mortgage. The claim in respect of the prior mortgage would be barred under S. 11, Expl. IV, C. P. Code. (*Sir John Edge.*) MAHOMED IBRAHIM HOSSEIN KHAN *v.* AMBIKA PERSHAD SINGH. **39 Cal, 527: 39 I. A. 68 : 11 M.L T. 265 : 9 A.L.J. 332 : 14 Bom. L.R. 280 : 16 C.W.N 505 : 15 C.L J. 411 ; 22 M.L.J. 468 : 14 I.C. 496 : (1912) M. W. N. 367 (P.C.)**

——S. 11, Expln. IV—*Might and ought—Mortgage suit—Mortgage by conditional sale followed by simple mortgage—Suit on simple mortgage and purchase of portion of equity of redemption—Suit to enforce conditional sale for full amount— Subsequent suit for declaration of ownership of property purchased in execution.*

Plaintiff held two mortgages one by conditional sale and the other a simple mortgage. In execution of a decree on the latter mortgage he purchased the equity of redemption in respect of a portion of the properties forming subject of the conditional sale. The plaintiff subsequently sued

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to enforce the conditional sale for the full amount and the mortgagor paid up the amount. He then sued for declaration of title as regards the property purchased in execution. *Held*, that as plaintiff had deliberately agreed to return the property free from all incumbrances on being paid a certain sum and as that sum had been paid the suit was barred by equitable estoppel. It would not make any difference even if the defendant was in a position to know that the plaintiff had a title under which he could have retained full proprietary rights over a portion of the property concerned. (*Stuart and Ryves, JJ.*) RAJA RATTAN SEN SINGH *v.* TRIPATHI UGARNATH. **1 U. P. L. R. (H. C.) 130; 52 I. C. 690: 17 A. L. J. 988.**

———**Ss. 11 and 47**—*Might and ought—Mortgage suit—Omission to plead prior mortgagee and get relief*—Res judicata.

In a suit by a puisne mortgagee against an auction purchaser of the equity of redemption the latter set up a prior mortgagee right as a shield. The preliminary decree gave priority to the auction purchaser in respect of his claim, but the final decree as well as the execution sale that followed did not mention or provide for his rights as prior mortgagee. The puisne mortgagee purchased the property and got possession. *Held*, that the auction purchaser could not sue upon his prior mortgagee rights in a fresh suit. (*Tudball and Raoof, JJ.*) MOTIRAM *v.* BANKILAL. **47 I. C. 954 : 16 A. L. J. 685.**

———**S. 11. Expln. IV**—*Might and ought—Mortgage decree--Sale in execution of mortgagor's claim as proprietor—Revenue Court—Mutation—Rejection—If mortgagor can plead non-saleable interest.*

Where in execution of a decree on a mortgage of an interest in land admittedly proprietary, the plaintiff purchased it and applied for mutation which was rejected by the Revenue Court, and the plaintiff brought a suit for possession against the defendant (the original mortgagor.) *Held*, that the defendant's plea that his interest in the land was only a non-transferable occupancy right, which plea was not raised in the mortgage suit, could not be sustained in the present suit. (*Tudball and Raoof, JJ.*) DEODATT SINGH *v.* RAM CHARRITAR JATI. **46 I. C. 897 : 16 A. L. J. 557.**

———**S. 11—Expln. IV**—*Might and ought—Mortgage suits.*

A subsequent mortgagee claiming title as owner of a portion in a prior mortgage suit may set up his title in a separate suit as the question cannot be raised in the former suit. 35 I. C. 294 rel. on. (*Banerji and Raoof, JJ.*) GOBARDHAN *v.* MANNA LAL. **16 A. L. J. 639 : 46 I.C. 559 : 40 All. 584.**

———**S. 11—Expln. IV**—*Might and ought—Mortgage suit—Rights of—Mortgagee.*

A mortgagee was under his mortgage entitled to possession of the mortgaged properties and sued for possession; his suit was dismissed on the ground that the properties were not transferable under the *sanad* under which they were granted to the mortgagor; he was however given a money-decree. In execution of that decree he attached other properties of the mortgagor obtained by him under the same *sanad* under which he obtained the mortgaged properties. The mortgagor objected on the ground that under the *sanad* the properties were not transferable and pleaded that the matter was *res judicata* by reason of the decision in the suit. *Held*, overruling the plea, that so long as the mortgagee did not seek to avoid the operation of the prior decree by attempting to sell the mortgaged properties, he was entitled to ask for an adjudication on the question whether, under the terms of the *sanad*, the properties sought to be attached were inalienable though, his plea could only be supplied by arguments to prove that the prior decision was erroneous. (*Piggott and Rafique, JJ.*) RAM NANDAN DHAR DUBE *v.* KANIZ FATIMA BIBI. **15 A. L. J. 369 : 39 I. C 902 : 39 All. 379.**

———**S. 11**—*Might and ought—Mortgage suit—Prior mortgagee party to suit on subsequent mortgage—Not pleading his mortgage—Effect.*

The fact that in a previous suit on a subsequent mortgage, a prior mortgagee was made a party, but did not plead or prove his debt, does not debar him from bringing a suit on his mortgage. (*Knox and Rafique, JJ.*) AJODHYA PANDEY *v.* INAYATULLAH. **11 A. L. J. 57 : 18 I. C. 21 : 35 All. 111.**

———**S. 11**—*Might and ought—Mortgage suit—Prior mortgagee not setting up priority in previous suit.*

Where in a suit for sale by the puisne mortgagee the prior mortgagee though a party to the suit did not set up his priority and where the sale sought was not alleged to be subject to the first mortgage, *held*, that he could not subsequently set up his priority. 39 Cal. 527, rel. (*Karamat Hussain and Tudball, JJ.*) GAJADHAR TELI *v.* MT. BHAGWANTA. **10 A. L. J. 244 : 16 I. C. 8 : 34 All. 599.**

———**S. 11**—*Might and ought—Mortgage—Three mortgages in favour of same person—Mortgage decree on one mortgage subject to charge—Mortgagee auction purchaser--Suit by mortgagor's sons—Mortgagee not setting up his mortgage—Subsequent suit on those mortgages—Whether barred.*

Where a person holds three mortgages in his favour, on the basis of one of which he obtained a decree subject to a charge created by the other mortgages and in execution himself purchased the property but subsequently the sons of the mortgagor sued to set aside the sale to the extent of their shares, the failure of the mortgagee to set up his other two mortgages as a defence is a bar to a subsequent suit by him on the same. (*Knox and Piggott, JJ.*) GOKUL CHAND *v.* GANGA BAKHSH. **11 I. C. 257 : 8 A. L. J. 936.**

———**S. 11, Expln. IV**—*Might and ought—Mortgage suit.*

A, B and C mortgaged with possession their property to R. Subsequently B and C mortgaged their 2/3 share again to S. S brought a suit on his mortgage, to which R was made a party. S redeemed R's mortgage fully and caused 2/3 share belonging to B and C to be sold. He made

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no prayer in his plaint for possession of the 1/3 share. *Held*, that a subsequent suit for possession of 1/3 share was barred, the question being *res judicata* as S ought to have prayed for possession of 1/3 share in his first suit, since the law at the time of the previous suit required a prior mortgagee to be made a party. (*Karamat Hussain, J.*) BHURA *v.* GHURA.
10 I. C. 925 : 8 A. L. J. 352.

——S. 11—*Might and ought—Mortgage suit—Prior and subsequent mortgages—Suits on.*

A suit on a prior mortgage in which the subsequent mortgagee also is impleaded does not bar a second suit by the subsequent mortgagee, for the subsequent mortgagee though a defendant in the previous suit cannot resist the prior mortgagee's claim by setting up his own mortgage rights. (*Stanley, C. J. and Banerji, J.*) SHIAM SUNDER LAL *v.* HARNARAYAN. **9 I. C. 158.**

——S. 11—*Might and ought — Mortgage suit—Void mortgage—Mortgage of unrecognized sub-division of a* bhag—*Second suit to recover mortgage money.*

In 1896, K (father of defendants Nos, 1 and 2) mortgaged to R (predecessor-in-title of defendant No. 3) an unrecognized share of a *bhag* stipulating that after 11 years the mortgage money was to be paid on demand either out of property or by the mortgagor or his heirs personally. R took possession of land; but his rights under the mortgage were purchased by the plaintiff at a Court sale. The plaintiff sued in 1910 the defendants for possession of the property. The suit was dismissed on the ground that the mortgage was illegal In 1911, he filed the present suit to recover Rs. 788-7-0 from the estate of the deceased mortgagor or, in the alternative to recover a smaller sum from the holder of a decree against the representative of the deceased mortgagee. The claim was resisted on the ground that it was barred by limitation and constructive *res judicata*. *Held*, that the claim was not barred by *res judicata* for (1) the claim for possession was not a claim on the mortgage but a claim by purchase by the plaintiff of the mortgagee's rights; and (2) at the time of the suit of 1910 his right according to the terms of the mortgage deed had not matured as no demand was made since the expiry of the eleven years mentioned in the deed. (*Scott. C. J, and Heaton, J.*) BAI DIWALI *v.* UMEDBHAI,
18 Bom. L. R. 773 : 36 I. C 564 : 40 Bom. 614.

——S. 11, Expln. IV—*Might and ought—Mortgage suit—Suit on later mortgage reserving first—Fresh suit barred.*

Where a mortgagee having two mortgages of different dates upon the same property sues upon the mortgage of later date first and has the property sold without reference to the prior mortgage he cannot afterwards bring a separate suit on the prior mortgage. (*Beaman and Hayward, JJ.*) DHONDA RAMACHANDRA KULKARNI *v.* BHIKOJI GOPAL. **17 Bom. L. R. 144 : 27 I. C. 1005 : 39 Bom. 138.**

——S. 11—*Might and ought—Mortgage suit—Preliminary decree—Mortgagor not redeeming—No final decree—Subsequent suit—No bar.*

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If a mortgagee does not apply in a foreclosure suit for a decree absolute he does not get rid of the relationship of mortgagor and mortgagee. Therefore a mortgagor or his representative who fails to redeem the mortgage within the six months' time is not barred by reason of S. 47, C.P.C., from filing a fresh suit for redemption nor is his suit barred by S. 10, C.P.C., but he cannot go behind the decree amount in the prior suit for foreclosure by the mortgagee; *Obiter* :—A dismissal for default of a mortgagor's suit for redemption, does not bar the bringing of a fresh redemption suit by him. (*Scott, C. J. and Beaman, J.*) RAMA TULSA MAHAR *v.* BHAGCHAND MOTIRAM. **39 Bom. 41 : 27 I. C. 249 : 16 Bom. L. R. 687.**

——S. 11, Expln. IV—*Might and ought—Mortgage suit—Plea of paramount title not set up - Effect.*

Where the defendant in a mortgage suit had a double capacity, *i. e.*, purchaser of equity of redemption and also settlement holder of a non-transferable occupancy holding, but he failed to set up the defence that the mortgage could not be enforced against the property in his hands, he will afterwards be barred by *res judicata*. A question of paramount title can be enquired into in a mortgage suit in certain cases. (*Mookerjee and Chotzner, JJ.*) SRIMANTA SEAL *v.* BINDUBASINI DASI. **38 C. L. J. 183 : 76 I. C. 517 : 1924 Cal. 138.**

——S. 11—*Might and ought—Mortgage by some members of Joint Hindu family—Suit to enforce security—Non-executants*—Res-judicata *constructive—Suit for recovery of mortgaged property--Enquiry into invalidity of the mortgage as regards non-executant not barred.*

Though the validity of the mortgage as against a non-executant of it cannot properly be raised and determined in a suit to enforce the security in spite of such person having been impleaded as representative of a deceased executant, yet the question can be raised in a subsequent suit for recovery of the mortgaged property and an enquiry into the same is not barred by the doctrine of constructive *res judicata* on the ground that it was not pressed at the trial of the mortgage suit. 33 Cal. 425 and 11 C. W. N. 284 relied on. (*Mookerjee and Roe, JJ.*) GIRJA KANTA CHAKKRABARTY *v.* MOHIN CHANDRA ACHARJIYA.
23 C. L. J. 587 : 35 I. C. 294 : 20 C. W. N. 675.

——S. 11 — *Might and ought—Mortgage suit by prior mortgagee—Notice to subsequent mortgagee—Failure of subsequent mortgagee to appear or set up priority.*

A subsequent mortgagee who has been made party to a suit on a prior mortgage but who has failed to appear, cannot afterwards raise the plea that he had paid off a prior lien and was therefore in the position of a prior mortgagee 39 Cal. 572 (P.C.) foll. The test in all such cases is, was the defendant impleaded as puisne mortgagee and therefore, a necessary party; if he was, he is bound to set up his prior mortgage as well as his subsequent mortgage. 26 I. C. 673 ref. (*Holmwood and Walmsley, JJ.*) HANKAR RAI *v.* KAMTA PROSHAN SAHU,
29 I. C. 875 : 19 C. W. N. 947.

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——S. 11, Expln. IV—*Might and ought—Mortgage suit—Priority.*

A prior mortgagee obtained an *ex parte* decree on his mortgage and purchased the property himself in Court auction, and subsequently a subsequent mortgagee sued on his mortgage impleading the prior mortgagee purchaser as party and the latter did not therein set up his priority and a decree was passed in favour of the subsequent mortgagee. Subsequent to this decree, the decree on the prior mortgage was set aside and the suit re-opened under O. 9, R. 13, C. P. C. *Held*, that the right of the prior mortgagee to set up his right of priority was barred by S. 11, Expl. IV of the Code. (*Teunon, J.*) RAJENDRA KUMAR GHOSE *v.* ADINADI. **26 I. C. 860.**

——S. 11—*Might and ought—Mortgage suit—Suit by second mortgagee impleading first—Non-appearance of first—Decree for sale ex parte—Second mortgagee purchaser in execution—Previous decree by first mortgagee not impleaded—First mortgagee purchasing in execution.*

Where in a suit on the second mortgage, the first mortgagee was made a party and owing to the non-appearance of the latter, a decree for sale was passed *ex parte* and as to the prayer for an account as to the sum due to him, no order was passed, *held*, (1) the Court never intended to say that the mere absence of the first mortgagee would never give a priority to the second mortgagee. 35 All. 111 foll; 31 Cal. 428 dist. The fact that in a previous suit by the first mortgagee the second mortgagee was not made a party does not mean that the second mortgagee would get the benefit of the first mortgage by reason of the doctrine of merger. Nothing was decided in the former suit with reference to first mortgagee's encumbrance and so there was no *res judicata*. (*Fletcher and Richardson, JJ.*) MAHIRUDDIN MANDAL *v.* INDRA KUMARI DASI.
24 I. C. 42 : 18 C. W. N. 1013.

——Ss. 11, Expln. IV, and 47 — *Might and ought—Mortgage suit—Sale pursuant to prior mortgage—Rejection of an application by party to reserve his rights under hypothecation bond.*

The plaintiff had deposited Rs. 4,500 to release from a Court sale, held under a previous mortgage, the property included in his hypothecation bond. His application to reserve his rights thereunder had been rejected but he preferred no appeal. He instituted a suit later on for the recovery of the same. *Held*, there was no bar to the suit either under S. 11 or S. 47. S. 47 does not apply because the question raised in the suit cannot be said to relate to the execution, discharge or satisfaction of a decree. S. 11 (Expln. IV) does not apply because in the previous suit on a prior mortgage, all that the present plaintiff as defendants in that suit, could have done was to bring to the notice of the Court his own hypothecation bond and this was done; no further relief could have been asked for then. 24 All. 429 Distinguished. (*Abdul Raoof and Abdul Qadir, JJ.*) RAHIM-UD-DIN *v.* SHAFQAT ULLAH.
1922 Lah. 368 (2).

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——S. 11—*Might and ought—Mortgage suit—Suit against mortgagor, only having mortgagee rights—Subsequent suit against owner—If lies.*

A mortgagor mortgaged only the mortgagee's interest in certain lands. The mortgagee first brought a suit against the mortgagor only but not the owner of the property. *Held*, he could not bring a second suit against the owner of the property under S. 11 of the Code. (*Wallis and Seshagiri Aiyar, JJ.*) NUMBERUMAL CHETTY *v.* RAGHAVACHARIAR.
71 I. C. 391 (2): 14 L. W. 563.

——S. 11, Expln. IV—*Might and ought—Mortgage suit—Representatives of mortgagor—Omission to set up non-liability—Subsequent suit for declaration.*

Where in a suit on a mortgage, persons who were not parties to the mortgage were put on record not merely as the representatives of the mortgagor but also liable in their personal capacity as well but did not plead that their shares were not properly mortgaged and should be exonerated and subsequently brought a suit for a declaration that their personal rights were not affected by the previous mortgage decree. *Held* they were disentitled from setting up the plea in a separate suit, because failure to do so constitutes the matter *res judicata*. 20 C. W. N. 675 dist. (*Spencer and Krishnan, JJ.*) RANGAI GOUNDAN *v.* VENKATTAMMAL.
55 I. C. 30.

——S. 11 Expln. IV—*Might and ought—Mortgage suit—Puisne mortgagee impleaded as defendant in suit by prior mortgagee—Subsequent suit.*

Where in a suit by a prior mortgagee the puisne mortgagee is also impleaded as party and a decree is passed directing the sale of the property and the payment of any surplus proceeds to the mortgagor, the puisne mortgagee is not debarred from enforcing his mortgage in a subsequent suit, by the fact that he omitted to bring the property to sale in the prior mortgagee's suit. 42 Mad. 90 foll.; 24 All. 429 (P. C.) expl.; 40 All. 407 (P. C.) dist. (*Ayling and Krishnan, JJ.*) BRAHMANDAM VENKATA LAKSHMI NARAYAN ROW *v.* ALLAMANENI VENKAYYA.
49 I. C. 466 : (1918) M. W. N. 902.

——Ss. 11, Expln. IV, and 47—*Might and ought—Mortgage suit—Suit for sale by prior mortgagee against mortgagor and puisne mortgagee—Rights of puisne mortgagee—Fresh suit by him for recovery of his mortgage amount.*

In a suit by prior mortgagee against the mortgagor and a puisne mortgagee, a decree for sale was passed. The decree declared the amounts due to the plaintiff and puisne mortgagee but directed the redemption only of plaintiff's mortgage and ordered the sale of the mortgaged properties only in the event of the amount of the plaintiff's mortgage not being paid. The puisne mortgagee was given only the right to share in the surplus, if any, arising out of the sale. The mortgagor sold the mortgaged property by a private sale and paid off the amount due to the first mortgagee. The puisne mortgagee not having been paid, instituted a suit against the mortgagor and the private purchaser from him.

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Held, that the puisne mortgagee was not entitled to execute the decree in the prior suit and S. 47, C. P. Code, had no application to the case. The suit was not barred by *res judicata*, because it was beyond the pecuniary limits of the jurisdiction of the Court which tried the prior suit and the puisne mortgagee was not in a position to have his claim satisfied in the prior suit. (*Phillips and Kumaraswami Sastri, JJ.*) VEDAVYASA AIYAR *v.* THE MADURA HINDU SABHA NIDHI CO., LTD. **42 Mad. 90 : 35 M L.J. 639 : 24 M. L. T. 473 : 9 L. W. 70 : 49 I. C. 36 : (1918) M. W. N. 898.**

———**S. 11**—*Might and ought—Mortgage suit—Order for sale in Melkanomdar's suit—Jenmi's title—Prior suit by Melkanomdar.*

The Jenmi's (mortgagor's) title does not end by an order for sale passed in a prior suit by the Melkanomdar (2nd mortgagee). Under S. 93, T. P. Act, an order for sale extinguishes the plaintiff's right to redeem the security of the mortgagee so far as the plaintiff is concerned. Ordinarily a redemption suit by a mortgagor is not barred by *res judicata* by a previous suit by a second mortgagee to redeem the first. 35 Mad. 42, Ref. (*Spencer and Krishnan, JJ.*) PURUSHOTHAMAN NAMBUDRI *v.* SANKUNNI MENON. **36 I. C. 551 : 4 L. W. 184.**

———**S. 11**—*Might and ought—Mortgage-suit—Decree in mortgagee's suit with option of redemption not executed—Subsequent suit for redemption.*

Whether the decree be in a suit for foreclosure or in a suit for sale or in a suit for redemption there is in each case a conditional decree for redemption in favour of the mortgagor, the condition being the payment by the mortgagor of the amount decreed on or before the date fixed ; but they are none the less " final judgments " having the force of *res judicata*. 25 Mad. 300 ; 31 M. 354 foll. ; 39 B. 41 not foll. A subsequent suit for redemption is barred. (*Sadasiva Iyer and Napier, JJ.*) RANGA IYENGAR *v.* NARAYANA CHARIAR. **30 M. L. J. 13 ; 18 M. L. T. 596 ; 32 I. C. 30 : 39 Mad. 896.**

———**S. 11**—*Might and ought—Mortgage suit—Mortgagee holding two mortgages—Suit on second mortgage reserving the rights under the first.*

A person holding two mortgages on a property may sue for sale on the second mortgage reserving the rights under the first A mortgagee having separate mortgages has separate causes of action and is not bound to sue on them all. (*Wallis, C. J., Ayling and Sadasiva Iyer, JJ.*) SUBRAMANIA IYER *v.* BALA SUBRAMANIA IYER. **38 Mad. 927 : 30 I. C. 317 : 29 M. L. J. 195 (F. B.).**

———**S. 11**—*Might and ought—Mortgage suit—Payment of decretal amount — Redemption suit.*

A mortgagor paying the amount due to puisne mortgagee, who obtained against a prior mortgagee a redemption decree, to which the mortgagor was a party, but who did not execute it cannot subsequently sue for redemption. (*Benson and Sundara Aiyar, JJ.*) VEERAPPUDAYAN *v.* MUTHU KARUAPA THEVAN. **24 M. L. J. 534 : 13 M. L. T. 463 : 19 I. C. 589 : (1913) M. W. N. 400.**

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———**S. 11, Expl. IV**—*Might and ought—Mortgage suit—Puisne mortgagee—Omission to set up right to redeem in prior suit.*

A subsequent mortgagee need not set up his right of redemption as defence in a suit for ejectment. He can rely upon his right of redemption in a subsequent suit for possession. (*Mittra, A.J.C.*) BALIRAM *v.* NARAYAN. **54 I. C. 276.**

———**S. 11**—*Might and ought—Mortgage suit against father—Omission to plead invalidity under Sch. III, para. 2, C. P. C.—Sons bound.*

Where in a suit to enforce a mortgage against the father of a joint Hindu family defendant omits to raise the plea that the mortgage is void under Sch. III, para. 2, C.P.C., it is not competent to his sons to sue to set aside the decree as regards their shares on that ground. (*Mitra and Prideau, A. J. Cs.*) MOTI RAM *v.* ASARAM. **53 I. C. 776.**

———**S. 11**—*Might and ought—Mortgage suit—Claim of pre-emption.*

The failure to advance a claim to pre-empt as a defendant to a suit on a mortgage is no bar to a subsequent suit for pre-emption. (*Batten, A. J. C.*) BAPU *v.* ANAND. **21 I. C. 287 : 9 N. L. R. 143.**

———**S. 11**—*Might and ought—Mortgage suit—Party failing to set up later mortgage.*

If a person having two mortgages on the same property and suing on the first mortgage is a party to the suit in respect of the second mortgage also and if he omits to mention his second mortgage in that suit and obtains a decree on the basis of his first mortgage he cannot afterwards sue to enforce his second mortgage against the property. 40 All. 407, dist. ; 20 All. 322, 2 Pat. L. J. 118 diss.; 25 Mad. 108, 30 Mad. 353, 30 Bom. 156, 39 Bom. 128 foll. (*Lyle, A. J. C.*) GUR PRASAD *v.* CHHUTKU LAL. **53 I. C. 753 : 6 O. L. J. 482.**

———**S. 11**—*Might and ought—Mortgage suit—Omission to plead previous mortgages.*

A pre-emption decree was obtained in respect of property which had been sold free of charge with a covenant by the vendor to discharge previous mortgages. The vendee then purchased the previous mortgages and put them in a suit. It was held the suit was maintainable though the previous mortgages had not been put forward in the pre-emption suit as a plea regarding them could not be the subject of a pre-emption suit. (*Piggott, J. C.*) SHEO SAHAI *v.* SHIB SINGH. **17 I. C. 318.**

———**S. 11, Expln. IV**—*Might and ought—Mortgage suit—Prior mortgagee impleaded as party — Omission to set up priority — Effect — Subsequent suit—Bar.*

Where a prior mortgagee is impleaded as a defendant in an action on a subsequent mortgage and it is sought to displace his prior title and to postpone it to the title of the plaintiff it is

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the duty of a prior mortgagee to prove his prior mortgage. If he fails to contest the suit, the decision in the suit will operate as *res judicata* against him. (*Das and Kulwant Sahay, JJ.*) LAL BIHARI SINGH *v.* GURPRASAD SINGH.

4 Pat. L. T. 108 : 1923 Pat. 118 : 71 I. C. 948: 1 Pat. L. R. 238 : 2 P. 435 : 1923 P. 290.

——S. 11, Expl. IV—*Might and ought—Mortgage suit—Prior mortgagee impleaded as party—Omission to set up his mortgage—No bar.*

Unless relief is claimed against the prior mortgagee, the latter need not set up his prior mortgage and his subsequent suit on the prior mortgage will not be barred under S. 11 especially when no issue is raised and the question as to the prior mortgage is expressly left undecided. In a suit by puisne mortgagee making a prior mortgagee a party the Court must give reasons for its decision against the claim of the prior mortgagee otherwise the decree cannot be *res judicata* against him. (*Coutts and Sultan Ahmad, JJ.*) LACHMI NARAYAN MARWARI *v.* BHAGWAT SINGH.

58 I. C. 33 : 1 Pat. L. T. 629.

——S. 11, Expln. IV—*Might and ought—Mortgage suit—Two mortgages—Suit on latter mortgage does not bar subsequent suit on former one.*

Where a person holds two mortgages over the same property, a suit on the latter one will not bar a subsequent suit on the other. (*Maung Kin, C. J.*) MA. MYIL *v.* SHARMA.

69 I. C. 897 : 10 L. B. R. 360.

——S. 11 and O. 2, R. 2—*Might and ought—Mortgage suit for declaration dismissed—Second suit for redemption.*

Dismissal of suit by mortgagor in possession of property for a declaration that the mortgage had been satisfied and for recovery of money overpaid on the ground that the mortgage debt had not been satisfied does not bar a subsequent suit for redemption nor does it bar the second suit under O. 2, R. 2 as it was more than a mere suit for account. (*Pratt, J. C. and Crouch, A. J. C.*) BIKHOMAL *v.* RAJALMAL.

19 I. C. 393 : 6 S. L. R. 140.

Might and Ought—Omission to Plead.

——S. 11, Expl. IV—*Might and ought—Omission to plead.*

In a suit filed on the Original Side of the High Court against the defendant for rents collected by him on behalf of the plaintiffs, the defendant set up a counter-claim in which he prayed for a declaration that he was a monthly tenant of plaintiff at Rs. 185 per mensem and for an injunction restraining the plaintiffs from preventing the defendant's sub-tenants from paying rent to him. The High Court dismissed the plaintiff's suit and granted the declaration and injunction prayed for by the defendant. Plaintiffs subsequently filed a suit claiming arrears of rent at the rate of Rs. 185 per mensem and the defendant pleaded that he was liable to pay only the standard rent of Rs. 150 per mensem under the Bombay Rent Act. *Held*, that the defendant having waived the benefit of the Rent Act in the previous counter

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claim and given up his right and obtained a declaration on that footing was barred by *res judicata* from setting up the plea under the Rent Act. (*Shah, A. C. J. and Crump, J.*) FATMABAI *v.* FRAMROZ.

70 I. C. 103 : 24 Bom. L. R 1281 : 1923 Bom. 145.

——S. 11, Expl. IV—*Might and ought--Omission to plead available ground of defence.*

Where a prior suit for declaration had been decreed in the presence of the defendant who did not urge either of the pleas which he now put forward and which if proved would have been sufficient to defeat the prior suit, the decision in the prior suit operates as *res judicata* and the defendant could not raise again the pleas which he had omitted to put forward on the prior occasion. (*Le Rossignol and Harrison, JJ.*) NABI BAKSH *v.* MUHAMMED SALAM ULLAH.

5 Lah. L. J. 251 : 72 I. C. 91 : 24 P. W. R. 1923 : 1924 Lah. 83.

——S. 11, Expl. IV—*Might and ought—Omission to plead--Subject-matter not the same—Effect.*

Where in a suit for rent by the purchaser at an auction sale of an undivided share in a house against another sharer the other sharer's absence of a transferable interest was not pleaded, the point will be *res judicata* in a subsequent suit for possession. The fact that the actual subject-matter in the two suits is not the same does not affect the question. (*Campbell, J.*) THAKUR DAS *v.* BRIJ LAL.

73 I. C. 457.

——S. 11— *Might and ought—Omission to plead—Necessary plea not taken in former suit—Effect.*

Where a plea if established would have been a complete answer to the former suit, it would be deemed to have been adjudicated upon against the defendant. (*Reid, C J. and Banerjee, J.*) BHAGAT SINGH *v.* SHER SINGH.

156 P. L. R. 1914 : 24 I. C. 212 : 29 P. R. 1914.

Might and Ought—Partition.

——S. 11—*Might and ought—Partition suit --Decree in subsequent suit alleging deficit in area by co-sharer who was defendant in former suit.*

If a co-sharer applies for a partition the other sharers must be made defendants, because the partition which is made in his favour is a partition against his co-sharers. That which gives him a portion of the property takes away all right which they would otherwise have to that portion and therefore it is a decree against them and in favour of himself. A decree for partition in a suit instituted by one member of a joint family impleading the others as parties is *res judicata* between all the sharers who are parties to the suit. (*Lord Moulton.*) NALINI KANTA LAHIRI *v.* SARNAMOYI DEBYA.

1 L. W 607 : 27 M. L. J. 76 : 16 M. L. T 544 : 21 C. L. J. 23 : 17 Bom. L R. 1 : 19 C. W. N. 531 : 24 I C. 294 : (1914) M. W. N. 948 (P. C.)

——S. 11—*Might and ought — Partition—Subsequent claim for maintenance.*

A suit for maintenance is not barred by *res judicata* by a previous one for partition in which

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plaintiff was impleaded as a party but did not claim maintenance. (*Imam, J.*) NILMADHAB MITRA *v.* JOTINDRANATH MITRA.
18 I. C. 764 : 17 C. W. N. 341.

——S. 11—*Might and ought—Partition suit —Not a bar to suit for share of gifted property.*

A suit for a declaration of a co-sharer's right to certain property gifted by an ancestor is not barred by reason of his having instituted a prior suit for partition of the inheritances. (*Broadway, J.*) SRI RAM *v.* KAUSHI RAM.
121 P. L. R. 1917 : 40 I. C. 255 : 87 P. W. R. 1917.

——S. 11, Expln. IV, and O. 2, R. 2—*Might and ought—Partition—First suit for partition of some items of family properties—Whether a subsequent suit for other items maintainable — Properties lying in different jurisdictions.*

Where one suit for partition of some of the joint family properties was brought and disposed of another suit for partition of the remaining properties does not lie even though the properties comprised in the later suit are within the jurisdiction of a District Munsif other than the one in whose Court the prior suit was brought. There is nothing in Ss. 16 and 17 of the Code of Civil Procedure to give a person power to bring two suits in two Courts for the partition of properties under different jurisdictions so as to contravene the principle involved in S. 11 Expl. 4 and O. 2, R. 2 of the Code. A suit for partition of joint family property is a comprehensive ascertainment of the assets including immoveable properties belonging to the family and the liabilities to be satisfied out of those assets : and it is settled law that only one suit for partition would lie. (*Oldfield and Venkatasubba Rao, JJ.*) BANKARA BASAVANA GOWD *v.* BANKARA DODDA LINGAPPA.
44 M.L J. 652 : (1923) M. W. N. 294 : 72 I. C. 430 : 17 L. W. 740 : 1923 Mad. 584.

Might and Ought—Pro-forma Defendant

——S. 11, Expln. IV— *Might and ought—* Pro forma *defendant — Properties not claimed against him though claimed against others—Defence not set up—Subsequent suit to recover properties from him—Decision in first suit—Effect.*

A person impleaded as *pro forma* defendant in a suit would be as much bound by the decision there as any other defendant. A person brought in to defend his rights in respect of one property in a suit ought to set up his rights, if any, to the other properties as well and cannot avoid the bar of *res judicata* in a subsequent suit on the ground that he was not called upon to assert his right in respect of the other properties in the first suit, 8 W.R. 366, 39 Cal.527 (P C), 24 All. 429 (P.C.) and 24 All. 599 foll.; 2 Mad. 23 (P.C.) dist. (*Ayling and Seshagiri Aiyar, JJ.*) SETHURAMA IYER *v.* RAMACHANDRA IYER.
(1917) M. W. N. 336 : 38 I. C. 184 : 5 L W. 659.

——S. 11—*Might and ought*—Pro forma *defendant—Representative suit.*

Where one of several persons interested in a property brings a suit and the others interested are made *pro forma* defendants, the latter cannot, upon

C. P. CODE (V OF 1908), S. 11—Might and Ought. Scope of the Rule.

the failure of the plaintiff, harass the defendant upon the same cause of action in a fresh suit. (*Sharfuddin and Roe, JJ.*) BISHESWAR DAYAL SAHU *v.* BANSROPAN SAHU.
44 I. C. 546.

Might and Ought—Recurring Charges.

——S. 11, Expln. IV—*Might and ought—Recurring charges—Suit for—Amendment—Notice* —Res judicata.

When without notice to the defendant of an application for amendment, the amendment was allowed and a preliminary decree was passed and the decree-holder afterwards applied for a decree absolute under S. 89, T. P. A., and notice of this was sent to the defendant and he did not appear upon which a final decree was passed, the defendant will be barred by *res judicata* in a subsequent suit for recovering charges from pleading that his properties are not liable. (*Tudball, J.*) MUHAMMAD ABDUL HAMID *v.* HEDAYETUNNISSA BIBI.
25 I. C. 284 : 12 A. L. J. 751.

Might and Ought—Relief not claimed.

——S. 11 —*Might and ought—Relief not claimed.*

Where a Subordinate Judge not only dismissed the suit of a plaintiff for possession by partition but also granted the defendant a decree for pre-emption and the plaintiffs appealed only against the dismissal of their own suit and the lower Court granted a decree in their favour, *held*, that the decree for pre-emption stood, as it was not appealed against and the question of title was directly and substantially in issue in the pre-emption case, it was *res judicata* as between the parties and the plaintiffs and therefore the decree in favour of the plaintiffs given by the lower appellate Court is invalid. (*Leslie Jones and Wilberforce, JJ.*) MAHAMMAD JAN *v.* DULICHAND.
74 I. C. 583: 3 L. L. J. 473.

——S. 11—*Might and ought—Relief not claimed—Relief not granted because not claimed —No* res judicata.

Where a Court refuses to grant a relief on the ground that no such relief was claimed, such refusal does not bar a subsequent suit for relief. (*Lindsay, J. C.*) RATIPAL *v.* BIPIN CHANDRA CHATTERJEE.
41 I. C. 80 : 4 O. L. J. 354.

Might and Ought—Scope of the Rule.

——S. 11—*Might and ought—Scope of the rule—Inconsistent pleas.*

In a previous suit for redemption plaintiff alleged that the defendant had taken the property sued for in exchange for another property held by him as mortgagee. It was dismissed as he was not able to prove the exchange. The second suit in ejectment on his title is not barred by *res judicata.* Whether any matter might and ought to have been made a ground of attack or defence depends upon the fact whether the matters in the two suits are so dissimilar that their union might lead to confusion. (*Chandavarkar and Hayward, JJ.*) MAHOMED IBRAHIM *v.* SHEIKH HAMJA.
35 Bom. 507 : 12 I. C. 387 : 13 Bom. L. R. 895.

——S. 11—*Might and ought—Scope of the rule.*

C. P. CODE (V OF 1908), S. 11—Might and Ought. Scope of the Rule.

The mere failure to have adjudicated upon in a suit, a plea which might have been a ground of defence does not necessarily operate as *res judicata*. (*Oldfield, and Tyabji, JJ.*) ADATRAO GAVAYAYYAMMA *v.* DANDI SEETHARAMASWAMI.
25 I. C. 615 : 1 L. W. 821.

——S. 11, Expln. IV—*Might and ought—Scope of the rule—Omission to raise a point.*

S. 11, Expln. IV, applies even where the matter in dispute was not heard and finally decided in the former suit. The question whether the person ought to have raised a point in a suit so that his failure to raise it should preclude him from raising it in a subsequent suit is a question of fact. (*Drake-Brockman, J. C.*) PYARELAL *v.* PANNALAL. 56 I. C. 193.

——S. 11, Expln. IV—*Might and ought—Scope of the rule.*

The word "ought" in Expln. IV should be considered with reference to the array of parties to the previous litigation and the nature of the estate claimed. 4 I. C. 763 foll. (*Stuart, J.C. and Kanhaiya Lal, A. J. C.*) SURAJ BIKRAM SINGH *v.* CHANDRABHAN SINGH. 17 I. C. 334.

——S. 11—*Might and ought—Scope of the rule.*

Before any argument can be advanced on the basis of Expl. IV, it must be shown that the matter sought to be concluded, not only might have been a ground of attack or defence but that it ought to have been so made. (*Das and Adami, JJ.*) RAMAN CHOUKEY *v.* BACHA MISIR.
60 I. C. 393 : 2 Pat. L. T. 285.

——S. 11, Expln. IV—*Might and ought—Scope of the rule.*

Where it is not certain that a matter would have affected the result of the suit it cannot be said that it ought to have been made a ground of attack within S. 11, Expln. IV. (*Chapman and Atkinson, JJ.*) SAHDEO NARAYAN DEO *v.* KUSUM KUMARI. 46 I. C. 929.

Might and Ought—Set-off.

——S. 11, Expln. IV—*Might and ought—Set off—Omission to put forward.*

The fact that a defendant omitted to claim a set-off in a suit brought against him by the plaintiff would not bar his claim in a subsequent suit as he was under no obligation to avail himself of the right to claim a set-off in the former suit, (*Shadi Lal, J.*) AMRITSAR NATIONAL BANKING CO. *v.* FAZL ILAHI. 52 I. C. 850 : 74 P. R. 1919.

——S. 11, Expln. IV—*Might and ought—Set-off.*

A defendant who can claim a set-off is not bound to put forward his claim in answer to the suit against him, and his omission to do so cannot take away his right to sue for the amount subsequently. 26 Bom. 661 ; 31 Bom. 527 dist. (*Seshagiri Aiyar and Kumaraswamy Sastri, JJ.*) PICHI AIYAR *v.* SUBBARAYAR. 29 I. C. 34 : 28 M. L. J. 513.

Might and Ought—Suit on Title.

——S. 11—*Might and ought—Suit on title—Ejectment on ground of sub-tenancy—Dismissal of—Subsequent suit in Civil Court on ground of trespass—Maintainability of.*

C. P. CODE (V OF 1908), S. 11—Might and Ought. Suit on title.

Where a suit by a person in a Revenue Court for ejectment on the ground of sub-tenancy of the defendant inrespect of certain grove land was dismissed, a subsequent suit by the same person in a Civil Court on the ground of trespass is barred by *res judicata*. (*Tudball, J.*) CHOTTEY LAL *v.* HAR NARAIN. 13 I. C. 634.

——S. 11, O. 11, R. 2—*Might and ought—Suit on title—Easement—Right of way—Suit on title*—Res judicata.

A claim for right of way included in a suit on title as an alternative prayer may be separated from it, and left to a second suit. The fact that a right of way was not claimed in a previous title suit does not bar a subsequent suit for a declaration of a right of way either by way of *res judicata* or under O. 11, R. 2 of C. P. C. (*Teunon and Huda, JJ.*) KALACHAND MUKHAPADHY *v.* JOTHINDRA NATH CHACKERBUTTY. 57 I. C. 852.

——S. 11—*Might and ought—Suit on title—Suit for possession—Subsequent suit on different title.*

Plaintiff purchased a jote and instituted a suit for declaration of title and the recovery of possession of some lands as appertaining to the jote. The suit was dismissed. In a subsequent suit by the plaintiff for possession of the same lands on the allegation that they appertained to another jote, *held*, that the subsequent suit was barred by *res judicata*. *Semble*—A matter which might and ought to have been made a ground of attack in a previous suit between the same parties may be *res judicata* even though it was not finally decided in the previous suit. (*N. R. Chatterjee and Richardson, JJ.*) TAKKARUNNESSA CHOWDHURANI *v.* TARINI CHARAN SARKAR. 43 I. C. 221.

——S. 11, Expln. IV—*Might and ought—Suit on title—Different titles to property—Duty to set up.*

Where the point for decision in a subsequent suit was the same as that in a former suit between the same parties with the difference that the plaintiff claimed in the latter, by virtue of a relationship different from that set up in the former suit and the plaintiffs might and ought to have set up the latter relationship in the first suit ; *held*, that the second suit was barred by *res judicata*. (*Reid, C. J. and Beadon, J.*) KESAR SINGH *v.* ASA SINGH.
324 P. L. R. 1913 : 213 P. W. R. 1913 : 20 I. C. 890 : 86 P. R. 1913.

——S. 11 Expln. IV—*Might and ought—Suit on title—All grounds to be put forward.*

Where a plaintiff sued to eject a trespasser basing his claim on an ancestral right and failed therein, he could not bring another suit against the same defendant claiming to be the heir of a certain person as the title as heir could and ought to have been made a ground of attack in the former suit. 11 B. L. R. (P. C.) 158 and 31 Mad. 385 foll., 26 Mad 760 diss. If a defendant has two grounds for denouncing a claim made by the plaintiff and wilfully chooses to keep back one of the grounds of attack, he is not entitled to put forward the omitted ground in a later suit. This principle enunciated with regard to a defendant is equally applicable to the case of a plaintiff. 11 B.L R. 158 (P.C.) referred. Where a person can

C. P. CODE (V OF 1908), S. 11—Minor.

claim a right on two titles which are mutually destructive or if there be embarrassment in joining the rights the two titles can be separately litigated. 31 Mad. 385 referred. (*Coutts-Trotter and Seshagiri Aiyar, JJ.*) GARIYA RANGASWAMI PATRUDU *v.* MAJJI APPALASWAMY.
34 I. C. 456 : (1916) 1 M. W. N. 286.

Minor

——S. 11—*Minor —Representation—Plaintiffs not represented in the former suit as minors —One of the plaintiffs* pro forma *party to the former suit—Second suit not barred.*

S. 11 does not bar a suit if plaintiffs in the second suit were minors and were not adequately represented in a prior suit or a plaintiff was merely a *pro forma* defendant therein, although the other conditions of *res judicata* are present. (*Beamon and Heaton, JJ.*) SUNDARA *v.* SAKHARAM.
39 Bom. 29 : 26 I. C. 444 : 16 Bom. L. R. 616.

——S. 11—*Minor—Compromise—No sanction —Effect.*

A compromise involving a minor without the Court's sanction prescribed by O. 32, R. 7, C. P. Code, does not operate as *res judicata*. (*Chandavarkar and Hayward, JJ.*) PIROJSHAH BHIKAJI VANDRIVALLA *v.* MANIBHAI NICHHABAL.
13 Bom. L. R. 963: 12 I. C. 543 : 36 Bom. 53.

——S. 11—*Minor—Negligence of guardian —Whether exonerates the minor from the effect of a decree.*

Where there is no gross negligence on the part of the guardian *ad litem* in not appealing the decree binds the minor. 38 Bom. 309 (F.B.); 11 C. L. J. 623 ; 38 Bom. 272 Fol.: 35 P. R. 1898; 22 Cal. 8 dist. (*Shah Din, C. J. and Broadway, JJ.*) BABU LAL *v.* HARI BAKSH
122 P. W. R. 1917 : 41 I. C. 479 : 13 P. R. 1918.

——S. 11—*Minor—Negligence of guardian —Effect of.*

Where the guardian *ad litem* of a minor is guilty of negligence in conducting the defence on behalf of the minor a decree obtained by the plaintiff would not bind the minor, and in a subsequent suit brought by the minor it will not operate as *res judicata*. (*Abdul Rahim and Spencer, JJ.*) PONNUSWAMI PILLAI *v.* SUBRAMANIA PILLAI. **53 I. C. 412.**
[*Also* **27 M. L. J. 486 : 26 I. C. 16.**]

——S. 11—*Minor—Decree against guardian* ad litem.

Where it was not shown that a guardian *ad litem* acted in fraud of the minor's interests or that his or her interest was adverse to the minor, the minor is bound by the decree in the prior suit. (*Spencer and Krishnan, JJ.*) RAMADH BIBI AMMAL *v.* KANDASWAMI PILLAI. **25 M. L. T. 154 : 9 L. W. 479 : 51 I. C. 724 : (1919) M. W. N. 82.**

——S. 11—*Minor—Negligence of guardian.*

A minor is not bound by a decree passed against him in which his guardian was guilty of gross negligence in conducting it. (*Sankaran Nair and Spencer, JJ.*) GOTTEPATI SUBBANNA *v.* GOTTEPATI NARASAMMA.
26 I. C. 16 ; 27 M. L. J. 486.

C. P. CODE (V OF 1908), S. 11—Miscellaneous Proceedings.

——S. 11—*Minor—Negligence of guardian.*

Negligence of a guardian is a good answer to a plea of *res judicata*. (*White, C. J. and Oldfield, J.*) RANGANATHAM CHETTY *v.* LAKSHMI AMMAL. **14 M. L. T. 189 : 25 M. L. J. 379 : 21 I. C. 15 : (1913) M. W. N. 690.**

——S. 11—*Minor—Representation.*

Where a party was not properly represented in a suit, the decision therein will not be *res judicata* against him in a subsequent suit. (*Robinson, J.*) SAW LAN *v.* MAUNG LUN. **22 I. C. 673.**

Miscellaneous Proceedings.

——S. 11—*Miscellaneous proceedings—Insolvency—Decision in—Finality of.*

Where a stranger to the bankruptcy whose property is wrongfully seized by the receiver applies under S. 22 of the Insolvency Act and his application is dismissed on the merits he cannot begin again and raise the same issue in a Civil Court. (*Piggott and Walsh, JJ.*) PITARAM *v.* JUJHAR SINGH. **43 I. C. 573 : 39 All. 626.**

——S. 11 — *Miscellaneous proceedings — Jamabandi.*

An order passed by a Settlement Officer in a *Jamabandi* amendment case is not a decision in a suit to operate as *res judicata* either in a Civil or Revenue Court. (*Banerjee, J.*) SAKHAWAT ALI *v.* SURAJ PRASAD. **33 I. C. 343 : 14 A. L. J. 140.**

——S. 11—*Miscellaneous proceedings—Insolvency — Dismissal of first application—Subsequent application.*

Where the first application to be declared an insolvent was dismissed owing to failure to produce evidence a second application for the same is not barred by *res judicata*. (*Karamat Husain and Tudball, JJ.*) SALIGRAM *v.* RAM KISHEN DAS.
15 I.C. 51 : 10 A. L. J. 51.

——S. 11—*Miscellaneous proceedings — Award—Application to file—Refusal thereon.*

Refusal to file a supplementary award does not operate as *res judicata* on a suit brought to enforce such award. (*Stanley, C.J. and Banerjee, J.*) SHIB CHARAN DAS *v.* RAMACHANDRA SARUP.
8 A. L. J. 315 : 9 I. C. 827 : 33 All. 490.

——S. 11 and Sch. II, paras. 20 and 21—*Miscellaneous proceedings—Arbitration—Award, order refusing to file—If* res judicata *in a suit to enforce award.*

Proceedings under paras. 20 and 21 of Sch. II to the Code are not proceedings in a suit and therefore an application to file an award, which is refused, is not *res judicata* in a suit to enforce the award (*Macleod, C. J. and Fawcett, J.*) RAJMAL GIRDHARLAL *v.* MAMTI SHIVRAM.
22 Bom. L. R. 1377 : 59 I. C. 755 : 45 Bom. 329.

——S. 11—*Miscellaneous proceedings—Probate—Probate and Administration Act, S. 83—Contentious probate proceedings whether a suit —Finding, whether* res judicata.

Contentious probate proceedings being required to be in the form of a suit under S. 83 of the Prob. and Adm. Act they constitute a suit under S. 11 of the C. P. C. and a finding by a probate Court in such proceedings though not a judgment

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operates as *res judicata* between the parties thereto. (*Scott, C. J., Batchelor and Davar, JJ.*) KALYANCHAND LALCHAND *v.* SITABAI DHANSA.
38 Bom. 309 : 23 I. C 325 : 16 Bom. L. R 5 (F.B.).

——S. 11—*Miscellaneous proceedings—Interlocutory order—Finality of.*

The validity of an order made at one stage out of a litigation unless forthwith challenged by an appropriate proceeding in a superior tribunal is conclusive between the parties and cannot be questioned or collaterally attacked at a later stage. 2 I. A. 283, foll (*Mookerjee and Panton, JJ.*) RAJA SASHIKANTA *v.* RAJA SHARAT CHANDRA.
70 I. C. 6 : 34 C. L. J. 415.

——S. 11 — *Miscellaneous proceedings — Remand.*

An order of remand, if not appealed against, is final and cannot be re-opened thereafter. (*Fletcher and Walmsley, JJ.*) SARADA SUNDARI DASYA *v.* GANGAHARI SAHA.
52 I. C. 801 : 46 Cal. 738.

——S. 11— *Miscellaneous proceedings — Assessment of mesne profits.*

The rejection of an application for assessment of mesne profits awarded by a decree in a suit has the effect of dismissing the suit and a further application for the purpose is barred. (*Teunon and Greaves, JJ.*) PURNA CHANDRA ROY *v.* JOGENDRA NATH. **50 I. C. 262 : 29 C. L. J. 470.**

——S. 11—*Miscellaneous proceedings*—Ex parte *decree—Fraud—Application to set aside.*

A subsequent suit to set aside a decree on the ground of fraud is barred by *res judicata*, if fraud in the service of summons had been already alleged and decided upon in a previous application under O. 9, R. 13, C.P.C, to set aside the *ex parte* decree. This is so where the fraud in the subsequent suit is conjoined to the mode of serving summons, but not so when the question in the subsequent suit was whether the whole suit was bad *ab initio*. (*Chitty and Smither, JJ.*) CHANDRA KUMAR ROY CHOWDHURY *v.* ASWINI KUMAR DAS CHOWDHURY. **45 I. C. 250.**

——S. 11—*Miscellaneous proceedings—Assessment of mesne profits—Subsequent applications.*

When the Court dismisses an application for ascertaining mesne profits, all subsequent applications are barred, in spite of a direction in the decree to ascertain mesne profits in execution. (*Fletcher and Richardson, JJ.*) GANGA PRASAD DUTTA *v.* HEMANGIRI DEBI. **37 I. C. 997.**

——S. 11 and O 21, Rr. 60 to 63—*Miscellaneous proceedings—Claim petition*—Res judicata.

An order in a claim case on the validity of a waqf is not *res judicata* in a suit between the same parties, in which the property in dispute is not the same as that in the claim case though both were included in the waqf. (*N. R. Chatterjee and Sheepshanks, JJ.*) ASNA BIBI *v.* JAIGUNNISA BIBI. **21 C. W. N. 222 : 37 I. C. 887 : 44 Cal. 698.**

——S. 11—*Miscellaneous proceedings—Land acquisition—Omission to put forward claim—Bar to subsequent suit.*

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Where a *patnidar* though a party to a reference omits to make a claim at the time of the apportionment of the compensation, a subsequent suit to recover a portion of the compensation in a Civil Court is barred. (*Holmwood and Imam, JJ.*) RANAJIT SINHA *v.* SAJJAD AHMAD CHAUDHURY.
32 I. C. 922.

——S. 11 — *Miscellaneous proceedings—Amendment of decree – Refusal—Bar.*

Where an application to amend a decree has once been refused on the merits, the decision is conclusive between the parties and no further applications lie. 39 Cal. 265 ref. (*Mookerjee and Beachcroft, JJ.*) JITENDRA NATH ROY *v.* RASIK LAL SEN. **27 I. C. 300.**

——S. 11 — *Miscellaneous proceedings — Review—Compromise decree—Suit to set aside—Dismissal of previous application.*

A party whose application for review of a compromise decree on the ground of non-consent has been dismissed cannot afterwards sue to set aside the decree on the same ground. 10 C. W. N. 529 foll ; 13 C. W. N. 1197 dist. (*Jenkins, C. J. and Woodroffe, J.*) KAILASH CHANDRA *v.* GOPAL CHANDRA. **26 I. C. 125 : 18 C. W. N. 1204.**

——S. 11 — *Miscellaneous proceedings — Review—Rejection of application—No bar.*

A suit cannot be barred by *res judicata* by reason of the rejection of an application for review of a judgment in a previous suit made upon the same grounds as an application for review is not a suit within section 13, C P.C. Mere technicality shou'd not stand in the way of granting a relief which a person is entitled to. (*Holmwood and Chapman, JJ.*) SRISH CHANDRA PAL *v.* TRIGUNA PRASAD PAL **18 I. C. 444 : 40 Cal. 541.**

——S. 11 — *Miscellaneous proceedings — Amendment.*

Successive applications for amendment can be entertained provided there has been no adjudication on a former application on the merits, either for default or because the Court thought the amendment unnecessary. Else a second application will be barred under the general principles of law of *res judicata*. 11 I. A. 37 ; 11 I. A. 181 ref. (*Mookerjee and Carnduff, JJ.*) LANGAT SINGH *v.* JANKI KOER. **14 C. L. J. 481 : 12 I. C. 151 : 39 Cal. 265.**

——S. 11 — *Miscellaneous proceedings—Probate—Matter decided in former suit.*

An application for grant of a probate only requires the question of representation to be settled. And its findings about rights and titles of parties are only incidental. (*Mookeriee and Caspersz, JJ.*) LALIT MOHAN DAS *v.* BADHA RAMAN SAHA.
15 C. W. N. 1021 : 10 I. C. 434 : 13 C. L. J. 547.

——S. 11 — *Miscellaneous proceedings — Company—Liquidation.*

On dismissal of a suit by the voluntary liquidator against a person for the recovery of a certain sum due by him to the Company by reason of his being a shareholder an application by an official liquidator to place defendant on list of

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contributories of the Company is barred. (*Shadi Lal, J.*) RUP RAM *v.* FAZAL DIN.
57 I. C. 223 : 1 Lah. 237.

——S. 11—*Miscellaneous proceedings--Letters of administration — Decision in proceedings—Matter directly and substantially in issue.*

In an application for Letters of Administration the Court has merely to decide in a preliminary way whether the applicant is an heir to the whole or part of the estate of the deceased and whether he is a fit person to whom Letters of Administration should be granted. Such a decision does not operate as *res judicata* in a subsequent suit for possession of the property as heir by the defeated applicant, (*Shah Din and Scott-Smith, JJ.*) MAQBUL SHAH AHMAD *v* MUHAMMAD AZMATULLAH, **49 P. R. 1918 : 46 P. L. R. 1918 · 43 I. C. 723 : 34 P. W. R. 1918.**

——S. 11 and O. 21, R. 66—*Miscellaneous proceedings—Omission to appear and settle terms does not bar plea that property was not liable to attachment.*

Mere non-attendance of the non-applicant to appear for settling terms does not estop him from contending that the property was not liable to attachment in execution. (*Schwabe, C. J., Oldfield and Ramesam, JJ.*) CHIDAMBARAM CHETTI *v.* KANDASAMI GOUNDAN. **46 Mad 768 : 45 M. L. J. 346 : (1923) M. W N. 571 : 74 I. C. 155 : 18 L. W. 757 : 1924 Mad. 1 (F. B.)**

——Ss 11 and 47, O. 21, R. 90—*Miscellaneous proceedings— Application under O. 21, R. 90 rejected as being too late—Defence, plea of invalidity of sale*—Res judicata.

Where a sale certificate was given in respect of lands not included in the decree and an application by the defendant under O. 21, R. 90 to set aside the sale was rejected on the ground that it was too late, *held*, in a suit by the auction-purchaser for possession of the property that the defendant was not barred by *res judicata* from raising the contention that the sale was invalid and that S. 47 was no bar to the defendant's plea being maintained (*Ayling and Spencer, JJ.*) MUNSHI CHINA DANDUSI *v.* MUNYHI PEDDA TATTIAH. **14 L. W. 424 : (1921) M. W. N. 536 : 70 I. C. 303 : 41 M. L. J. 261.**

——S. 11—*Miscellaneous proceedings—Interlocutory Order.*

A joint finally adjudicated upon at a previous stage cannot be reopened. (*Das and Ross, JJ.*) SURAJ PRASAD PANDAY *v.* SOMRA MAHTON.
68 I. C, 903 : 2 Pat. L. T. 648.

——S. 11—*Miscellaneous proceedings—Legal representative—Order declaring a person as the legal representative of a deceased plaintiff.*

A decision in a previous suit as to whether a person should be appointed the legal representative of deceased plaintiff to continue the suit would not operate as *res judicata* in a subsequent suit between the parties as such a question is not one arising for decision in the suit itself. (*Benson and Sundara Aiyar, JJ.*) SAMSARIVSA *v.*, M. K. PATHUMMA. **14 M. L. T. 176 : (1913) M.W.N. 673 : 20 I. C. 950 : 25 M. L. J. 279.**
[*Also* **42 Mad. 76 : 9 L. W. 26 : 49 I. C. 11.**]

C. P. CODE (V OF 1908), S. 11—Parties and Representatives.

Parties and Representatives.

——S. 11—*Miscellaneous proceedings—Probate—Suit upon will—Prior decision.*

The decision in a probate proceeding that two prior wills of the testator had not been revoked by a third does not bar a subsequent suit where the question is how far the dispositions in the prior wills were affected by the third will. (*Benson and Sundara Iyer, JJ.*) MARI AMMAL *v.* KALIAMMAL. **21 M. L. J. 485 : 9 M. L. T. 319 : 9 I. C. 613 : (1911) 1 M. W. N. 189.**

——S. 11—*Miscellaneous proceedings—Extension of time—Appeal against order.*

When an appeal against an order refusing to extend the time for payment of the mortgage amount has been made, and dismissed the same point cannot be raised again as a ground of appeal in the appeal against the final decree. (*Batten, A. J. C.*) MAHDEO *v.* GANPAT RAO.
42 I. C. 392 : 14 N. L. R. 25.

——S. 11—*Miscellaneous proceedings—Administration—Application for letters.*

Where in an administration suit it is found that the plaintiff's claim against the administrator for a share in the estate is excluded by limitation the determination of that case is *res judicata*, as regards an application by the same plaintiff for a revocation of the grant of administration. (*Twomey, C. J. and Ormond, J.*) ABDUL RAHMAN *v.* MAUNG MISS. **12 Bur. L. T, 114 : 51 I. C. 355 : 9 L. B, R. 273.**

Parties and Representatives.

——S. 11— *Parties and representatives—Lessor and lessee—Rival lessees from same lessor —Alteration of boundary by agent of lessor.*

To affect rights of the lessees conferred by leases, it would have to be shown that all the then lessees entered into an agreement that the plots marked out should be put down for those granted under the respective leases, and in the absence of any such agreement the rights created would not be affected by any events happening subsequent to the grant of the lease between the lessor and the subsequent lessees. (*Lord Moulton.*) DEBENDRA NATH GHOSE *v.* NEW FETTURYA COAL COMPANY, LTD,
24 C. W. N. 746 (P.C.).

——S. 11 — *Parties — Auction-purchaser—Execution sale— Incumbrances— Notification of.*

Purchaser is not estopped from questioning consideration for incumbrances though they were notified in the proclamation. (*Stuart and Sulaiman, JJ.*) ROSHAN LAL *v.* LALLU.
20 A. L. J. 722 : L. R. 3 A. 500 : 68 I. C. 790 : 1922 All. 443.

——S. 11— *Parties and representatives—Decision against one reversioner not* res judicata *against another.*

A decision against one reversioner is not *res judicata* against another inasmuch as no one reversioner claims through another. (*Rafique and Stuart, JJ.*) DAPBARI LAL *v.* GOBIND RAM.
19 A. L. J. 514 : 63 I. C. 524 : 43 All. 558

——S. 11—*Parties and Representatives—Suit by sons—Fresh suit against father.*

The sons of a Hindu sued to set aside the sale by the father as not being one for necessity. The

C. P. CODE (V OF 1908), S. 11—Parties.

father was not made a party. The sale was set aside and the purchaser sued the father for refund of the purchase money, *held*, that the father not being a party to the prior suit, the decision therein did not bind him and therefore the other questions in the suit, cannot be determined. (*Gokul Prasad and Stuart, JJ.*) AJODHYA *v.* RAMSUNDER. **63 I. C. 240.**

——S. 11—*Parties and representatives—Mortgagor and mortgagee—Mortgage executed during the pendency of a mortgage suit—Effect of dismissal of suit.*

A mortgage executed during the pendency of a mortgage suit in which the mortgagor's title is in question is subject to the result of the suit and if it goes against the mortgagor a subsequent suit by the mortgagee would be barred by *res judicata* (*Banerjee, J.*) KOLPATI KUAR *v.* RAJADHARI LAL. **13 I. C. 641.**

——S. 11—"*Parties*"—*Stranger—Decision binding only on parties.*

The matter decided in the previous suit is *res judicata* only as against those who had been parties to the previous suit but not against the other parties. (*Knox, Banerjee and Karamat Hussain, JJ.*) JAI MANGAL DEO *v.* BEDSARAN KUER. **33 All. 493 : 9 I. C. 819 : 8 A. L. J. 345.**

——S. 11—*Parties and their representatives—Prior suit by mortgagee for possession—Title of mortgagor found—Subsequent suit for redemption.*

In a suit for possession by the mortgagee the title of the mortgagor was disputed by a third party but found against. In a later suit for redemption, the son of the third party again disputed the title, *Held*, the decision in the prior suit was *res judicata* (*Macleod, C. J. and Crump, J.*) BAPUJI RAO RAOJI RAO *v.* RAGUNATH RAO. **74 I. C. 285**

——S. 11—*Parties and representatives—Saranjamdar—Suit by, to recover possession for non-rendering of service—Dismissal of suit—Second suit for recovering possession on the same ground by the next Saranjamdar.*

Plaintiff's brother, a Saranjamdar, sued the predecessors-in-title of the defendants for recovery of possession of land alleging that the defendant had ceased to perform services, and held the lands wrongfully without assessment. The suit was dismissed on the ground that defendants did not hold the lands on service tenure. The plaintiff who succeeded his mother sued in 1912, to recover possession of the land on the ground that the defendants had ceased to render service and in the alternative to recover assessment of the lands. *Held*, that the prior decision barred the suit as *res judicata* for the plaintiff inherited the estate from the previous holder on conditions of formal resumption and re-grant by Government free from debts and charges under the Saranjam rules. The claim for payment of assessment was barred by limitation, as there was neither a special mode of devolution nor an incapacity for alienation which prevented limitation from running. (*Scott, C. J. and Heaton, J.*) MADHAV RAO *v.* ANUSUYA BAI. **18 Bom. L. R. 768 : 36 I. C. 505 : 40 Bom. 606.**

C. P. CODE (V OF 1908), S. 11—Parties.

——S. 11—*Parties and representatives—Mortgagor and mortgagee—Decree whether binds mortgagee.*

During the minority of defendant No. 1 his land was sold by his mother to Bhoje who conveyed it to Bavchi in exchange; Bavchi mortgaged it to plaintiff in 1891. Defendant No. 1 on attaining majority brought a suit in 1898 against his mother Bhoje and Bavchi to set aside the sale but did not join the plaintiff in the suit. The Court decreed in defendant No. 1's favour and in execution he recovered possession of the land in 1901. About that time the plaintiff obtained a mortgage decree against Bavchi and he purchased the land at a Court sale held under it. The plaintiff having sued to recover possession of the property was met by the plea of *res judicata*, as he was bound by the decree against his mortgagor Bavchi in 1898:—*Held*, that the plaintiff was not bound by the earlier decision, because his title arose prior to the suit decreed against his mortgagor. The mortgagor Bavchi did not sufficiently represent the mortgagee in the suit instituted after the mortgage. 8 All. 324 Ref. The principle of *res judicata* applies only when there is some privity between the parties in the earlier and later suit. (*Batchelor, A. J. C. and Shah, J.*) RAMCHANDRA *v.* MALKAPA. **40 Bom. 679 : 36 I. C. 443 : 18 Bom. L. R. 757.**

——S. 11—*Parties and representatives—Mortgagor and mortgagee, estoppel by judgment—Suit for injunction against mortgagee of ship dismissed — Subsequent suit for injunction against vendees of ship if barred.*

Where a charterer of a ship sued the mortgagee thereof for injunction on the ground that the latter intended to avoid the charter parties and the suit was dismissed for want of evidence as to the intention alleged. *Held*, that a subsequent suit by the charterer against the vendees of the ship under the decree on the mortgage for injunction restraining them from dealing with the vessel in any manner inconsistent with the agreement of charter party is not barred by the judgment in the previous suit. (*Scott and Batchelor, JJ.*) ANDREW YULE AND CO. *v.* ARDESHIR BOMENJI DUBASH. **24 I. C. 758 : 16 Bom. L. R. 178.**

——S. 11—*Parties and representatives—Donor and donee.*

The donee of land is not estopped as being privy in estate by a judgment obtained in an action against the donor when the action commenced after the purchase. (*Scott, C.J. and Batchelor, J.*) ABDUL ALI *v.* MAKHAN. **13 Bom L. R. 268 : 10 I. C. 890: 35 Bom. 297.**

——S. 11—*Parties and representatives—Suit against a person setting up title of a third person—Subsequent suit impleading that person—Prior decision if a bar.*

A sued B for a declaration that he was entitled to receive rent at a certain rate from him and that B was a tenant under C and bound to pay rent to A as part of the settlement between them. In a prior rent suit by A against B the latter had set up that he held the land not under A but under C, who was not a party to that suit. The prior suit had been dismissed. *Held* that the

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decision in the prior suit was no bar to the trial of the issue as to B's liability for rent. 26 C. 428 foll. (*Greaves and Ghose, JJ.*) GOPINATH *v.* BHAJA HARI DAS. **68 I.C. 472 : 1923 Cal. 327 (2).**

——— **S. 11**— *Parties—Mortgage suit— Party dismissed from suit—Subsequent suit for redemption—Bar.*

A party in a suit for redemption dismissed from the suit for setting up a claim adverse to the mortgagor and mortgagee is barred from subsequently suing for redemption of the same property. (*Choudhuri and Ghose, JJ.*) RAM GOPAL DAS *v.* JOGENDRA NATH MAITY. **57 I.C. 980.**

——— **S. 11**—*Parties and representatives—Purchaser at revenue sale — Recovery of rent from tenant at rate decreed in favour of ex-proprietor.*

A decree for rent obtained by a proprietor of a revenue-paying estate against a tenant does not bar a suit for rent by a purchaser of the estate at a revenue sale as the latter does not claim under the ex proprietor within S. 11. But the purchaser may elect to take advantage of the decree obtained by the proprietor (*Woodroffe and Chatterjee, JJ.*) NAKUL CHANDRA BASU *v.* SOSHI CHARAN BISWAS

56 I. C. 390 : 24 C W. N. 399.

——— **S. 11**—*Parties and privies—Absence of notice.*

A party who is privy to a decree is bound by the decree whether he has notice thereof or not. (*Fletcher and Cuming, JJ.*) RAJA PROMATHA NATH *v.* BEJOY MADHAB. **53. I. C. 143.**

——— **S. 11**—*Parties and representatives—Mortgagee or permanent lessee— Not bound by later adjudication.*

A permanent lessee or a mortgagee from the owner of property is not bound by an adjudication against the owner after the creation of the mortgage or lease unless the lessee or mortgagee is himself a party to the suit. 8 All. 324 ; 43 Mad. 459 ref. (*Woodroffe, Chitty and Huda, JJ.*) SHIVACHANDRA ROY *v.* HAREND LAL RAI.

28 C. L. J. 223 : 47 I. C. 315 : 22 C. W. N. 721.

——— **S. 11**—*Parties and representatives—Prior title—Not affected.*

Where the plaintiff in a subsequent suit has derived no title subsequent to the previous suit, the subsequent suit is not barred by *res judicata*. Where no issue was raised or tried in the former suit between the parties to the new suit. *Held*, that the claim was not barred by S. 11, C. P. C. (*Fletcher and Roe, JJ.*) SURENDRA NARAIN MITRA *v.* DEJINDRA PROSAD MITRA.

29 I. C. 464 : 23 C. L. J. 215.

——— **S. 11**—*Representatives— Benamidar—Estoppel against—Whether binds beneficiary.*

A benamidar deft. in a mortgage suit represents the beneficiary and an estoppel created by judgment and decree against the former binds the latter. (*Fletcher and Chatterje, JJ.*) KANIA LAL JALAN *v.* RASIKA LAL SADHU KHAN.

23 I. C 762 : 19 C. W. N. 361.

——— **S. 11**—*Parties and representatives—Purchaser at revenue sale.*

C. P. CODE (V OF 1908), S. 11—Parties.

There is no precise position ascribable to purchaser at a patni sale and he is not in privy to the estate to a defaulting proprietor, and does not derive his title from him because under S. 11, of the Patni Regulation he acquires property free from all encumbrances that might have been created by the defaulter, his representatives or assignees. The purchaser, can, therefore, successfully sue his tenant for rent subsequently to that of the defaulting proprietor as he could not establish his relationship with the then deft. as landlord and tenant. The previous suit does not bar his suit on the principle of *res judicata*. Limitation for ejectment proceedings taken by the purchaser begins from the date when his purchase became final. A person's interest in the property held adversely for the statutory period is an incumbrance. Therefore a purchaser at patni sale need not annul an incumbrance of a trespasser, dispossessing a defaulting patnidar. (*Mookerjee and Beachcroft, JJ.*) SATISH CHANDRA SINHA *v.* MUNJANALI DEBI.

15 I. C. 869 : 17 C. W. N. 340.

——— **S. 11**—*Parties and representatives—Father and son—Suit for declaration of right—Defence of special custom—Second suit for partition—Same defence taken by son.*

G, the father of deft. was recorded as a *jagirdhar* in the Collector's Register, sued 1lff. for declaration of his rights against G. The plaintiff based his claim under the ordinary law, but G pleaded that the custom of primogeniture gave him right to the jagir. The Court held in that case that the special custom was not proved and that the plff. was entitled to succeed.

The plff. subsequently brought another suit for partition and the defendant again pleaded primogeniture. *Held* that as the matter was now *res judicata*, the deft. could not take up the same defence which his father had taken in the former suit. (*Coxe, and Imam, JJ.*) KALI CHURN SINGH *v.* SHEO BAKHSH SINGH.

17 C. L. J. 93 : 15 I. C. 657 : 16 C. W. N. 783.

——— **S. 11**—*Parties and representatives—Shebait—Consent decree against him as shebait, whether binding on successor.*

A decree by consent against the shebait of a temple as such who to the knowledge of the plff. has been dismissed from temple is not binding on the properties of the endowment in the hands of his successor in office. (*Mookerjee and Carnduff, JJ.*) UMESHANANDA DUT *v.* MOHANDRA PRASAD.

11 I. C. 280 : 14 C. L. J. 337.

——— **S. 11**—*Parties and representatives—Legal representative—Decision against—Appeal decree.*

Though a wrong person is brought on record to represent the estate in an appeal from a mortgage decree against the widow, still if the mortgage is not fraudulent and is executed for necessary purposes the real representative of the estate is bound by the appellate decree. (*Coxe, J.*) GIRIJA SUNRARI DEBI *v.* KAILASH CHANDRA BOSE.

10 I. C. 32.

——— **S. 11**—*Parties and Representatives.*

So far as plaintiffs were concerned it was held in a previous suit that they had agreed to the

alienation which had been for their benefit and could not question it, that they could under no circumstances inherit any of the estate left by the widow and that should they survive her another reversioner would be entitled to take that portion that had been alienated and that portion which had not been sold. Plaintiff brought a subsequent suit to the effect that this sale should not affect his reversionary rights. This was dismissed in 1913. Plaintiffs with his two younger brothers again brought a suit for a portion of the land which was not alienated after the death of the widow; *held* the question is clearly *res judicata* as between them and the widow and her successors. (*Martineau and Harrison, JJ.*) MAULA BAKSH *v.* MT JIWI. 1923 Lah. 556.

———S. 11—*Parties and representatives — Suit against joint Hindu family—All the members bound by the judgment.*

Where a person obtains an *ex parte* decree against the managers of a joint Hindu family business, the junior members cannot subsequently sue for a declaration of their immunity on the ground that the contract on which the decree was given was a wagering contract. The managers should have raised this plea, as defence to the previous suit and their omission operates as res-judicata. (*Le Rossignol and Harrison, JJ.*) RAM RATTAN *v.* THE FIRM OF HURSUKH ROY.
43 P. L. R, 1922 : 69 I. C. 783 : 1924 Lah. 26.

———S. 11—*Parties and representatives—Litigating under the same title — Decision against defendant in individual capacity does not bar suit in representative capacity.*

Where in the former suit the defendants were impleaded in their representative capacity but, were proceeded against in their individual rights the decision in the suit does not operate as *res judicata* in a subsequent suit against the defendants as representing the community. (*Broadway and Abdul Qader, JJ.*) SITARAM *v.* GHAANNO.
69 I. C. 528.

———S. 11—*Parties*—Pro forma *deft.*

A decision arrived at in a prior suit is not *res judicata* against a person who was merely a nominal deft. in the previous suit. (*Shadi Lal, J.*).
GOKAL CAND *v.* MILKHAI. 65 P. R. 1916 :
157 P. W. R. 1916 : 35 I.C. 543 : 1 P. L. R. 1917.

———S. 11—*Parties and representatives—Successors in title.*

In 1856 S. sued his brothers F and J for recovery of ⅓ share in the ancestral estate but by compromise accepted a certain area in lieu of his claim. After death of S. his sons sued for the alleged share of S and the suit was dismissed in 1860. S and his sons were entered in the Revenue Records as full proprietors of the land and as having a right to a share in the village *shamilat* by some mistake which was repeated from time to time. In a suit by the descendants of F. in 1908 for the rectification of the entry in the Revenue Records, *Held*, that the plaintiffs could succeed, the decision of 1860 operating as *res judicata*. (*Kensington, C. J, and Rattigan, J.*)
MUHAMMAD *v.* MUZAFFAR. 98 P. L. R. 1915:
26 I. C, 388: 28 P. W. R. 1915.

———S. 11—*Parties and representatives — Vendor and purchaser—Previous suit by vendor after sale—Subsequent suit by vendee—Estoppel.*

Where in pursuance of a covenant in a sale deed by A to B that A would get possession of the property sold, from C, and deliver it to B. in pursuance of which A sued C. and B was a witness therein for A and made no mention of the sale to him, *Held*, that a subsequent suit by B against C, was barred by *res judicata* and that B was estopped from saying that he was not bound by the previous suit. A decision of title operates as *res judicata* in a subsequent suit where the previous suit was for ejectment. (*Robertson, J.*)
HUSSAIN BIBI *v.* JAGANNATHA.
85 P. W R. 1913: 18 I. C. 278:
104 P. L. R. 1913 (r. B.).

———S. 11—*Parties and representatives—Decree in suit by Hindu widow—Reversioners when barred—Reversioners impleaded in first court but not in appeal where judgment in favour of the widow was reversed—Effect of.*

To a suit by a Hindu widow for the recovery of the property of her husband from a person who claimed to be his validly adopted son, persons, who were presumptive reversionary heirs of the estate, were made parties defendants. The first Court found against the adoption and decreed the suit The alleged adopted son preferred an appeal making the widow alone a party respondent. The appellate court found in favour of the adoption and dismissed the widow's suit. In a subsequent suit filed after the death of the widow by the reversioners who were parties defendant to the prior suit against the adopted son. *Held* that, whatever might have been the character in which plaintiffs were impleaded in the prior suit, inasmuch as the widow represented the estate in the appeal therein, the decision in the appeal was *res judicata* in favour of the adopted son, there being no suggestion of fraud or collusion between the widow and the adopted son in the proceedings in the suit or appeal. The expression "special cause" referred to in the *Shivaganga-cases.* 9 M. I. A. 539 must be *ejusdem generis* with unfairness or irregularity in the proceedings to which explicit reference is made. 43 B. 869 Ref. (*Oldfield, and Venkatasubba Rao, JJ.*)
NACHIKALAI *v.* AIYAKANNU. 43 M. L. J. 95 :
16 L. W. 94: (1922) M. W. N. 418 :
31 M. L. T. 129 (H. C.) 70 I. C. 387 :
1922 Mad. 233.

———S. 11—*Parties and representatives—Landlord and tenant—Adjudication as to rate of rent—Successor not bound.*

A decision of Court negativing landholder's right to levy faisal rate and upholding a contract between him and his tenant for payment of reduced rent will not be *res judicata* in a suit by the landholder's successors to enforce the original rate S. 26 (3) of the Madras Estates Land Act confers a special privilege on the successor, *viz.* the right to enhance an unduly low rate of rent agreed to by his predecessor. *Per Bakewell, J.* -The prior decision will not operate as *res judicata*, unless it is shown that the plaintiffs in that suit had an absolute interest in the property, in order that they might be held to be the

predecessor in title of the landholder seeking to enforce the original rate in the subsequent suit. (*Bakewell and Phillips, JJ.*) KARUPPA GOUNDAN *v.* NARAYANA CHETTIAR.
(1918) M. W. N. 188 : 7 L. W. 376 : 45 I. C. 406 : 24 M. L T. 35.

———S. 11—*Parties and representatives—Legal representative — Decree against—Binding on all persons claiming from the deceased.*

A decree passed in a suit against the widow or the deceased owner as his legal representative is binding on all those who claim under him and if the widow in a former suit omits to raise any available ground of defence, it will be *res judicata* in a subsequent suit against the persons claiming under the deceased owner. (*Abdur Rahim and Napier, JJ.*) VENKATA RANGAYGA *v.* GANDAVARPU NARASAMMA. **23 M. L. T. 208 : 8 L. W. 19 : 44 I.C. 852 : (1918) M. W. N. 195.**

———S. 11—*Parties and representatives—Stranger—Decision in suit by—Equitable estoppel.*

In a suit for redemption of a mortgage by a person who had paid off a previous mortgage it appeared that the title to the property had been decided against the plaintiff in a previous suit by a third party against himself and the mortgagor, *Held*, that the matter was *res judicata* though the former suit was brought in a Court which had no jurisdiction over the present suit. 25 M. L. J. 379: 8 Mad 83 foll. The prior decision even if not *res judicata* operated as an equitable estoppel, against plaintiffs asserting title to the properties in question. (*Sadasiva Aiyar and Hannay, JJ.*) THEKKEMANENGATH RAMAN *v.* KAKKESSARI PAZHIYOT MANAKKAL. **2 L. W. 433: 27 I. C. 989: 28 M. L. J. 184.**

——— S. 11— *Parties and representatives—Suit against Taluq President—Subsequent suit against private parties.*

A former suit against a Taluq President for cancellation of an order forbidding erection of a 'warp' on his land does not bar a subsequent suit against private parties for declaration of title to the property. (*Ayling and Tyabji, JJ.*) ARUNACHALA MUDALI *v.* GOVINDARAJA MUDALI.
25 I. C. 434: 1 L. W. 673.

———S. 11— *Parties and representatives—Co-tenants—Decree against one.*

A decree for ejectment by the landlord against one of several joint tenants of a holding does not bind the other tenants. (*Sundara Iyer and Sadasiva Iyer, JJ.*) NARAYANASWAMI NAIDU *v.* THIRUMALAISETTI SUBBAYYA. **(1913) M. W. N. 96 : 16 I. C. 698: 24 M. L. J. 79.**

——— S. 11—*Parties or representative.*

Defendants got certain property attached and sold in execution of a money decree and themselves purchased it. Plaintiffs sued for possession on the ground that the sale was not binding on them inasmuch as an injunction was issued to the Munsif to stay the execution proceedings and the Munsiff without waiting for the Subordinate Judge's order cancelling the injunction, confirmed the sale, that when he applied for a review of the order confirming the sale, the application was

rejected with an order that a regular suit was necessary. *Held* the question whether suit can lie is not *res judicata* as the defendants were not parties to or heard in the proceedings in which the order was passed. (*Kotwal, A. J. C.*) BRIJOMOHAN SINGH *v.* KASTURCHAND. **68 I. C 693 : 1922 Nag. 189.**

———S. 11—*Parties and representatives—Stranger--Interested in litigation--Whether necessary party—Whether bound by result.*

A person interested in litigation is not bound to apply to make him party and in default he is not bound by the result of the litigation. (*Mitra, A. J. C.*) NARHAR *v.* NARAIN. **56 I. C. 386.**

———S. 11—*Parties and representatives — Adoption pendente lite—Adopted son bound*

If during the pendency of a suit or appeal against a widow as representing the estate, she adopts a son, the adopted son is bound by the result of the suit or appeal and a fresh suit by the adopted son is barred by *res judicata*. (*Batten, Prideaux and Mitra, A. J. Cs.*) GANPATRAO *v.* LAXMI BAI. **43 I. C. 64: 15 N. L. R. 24.**

———S. 11—*Parties and representatives — Vendor and Vendee.*

A person having a charge on property under S. 55, T.P. Act can enforce it against a person who obtains the property from the vendor by a consent decree with notice of the charge and he is not bound by a decision regarding this property when he was not a party to the suit. 26 I. C. 810, 32 Cal, 283, 8 All. 324 Ref. (*Mitra, O. A. J. C.*) KESAR *v.* MUNNA. **39 I. C. 50 : 13 N. L. R. 19.**

———S. 11—*Parties and representatives—Mortgagor and Mortgagee.*

A mortgagor is not precluded by adjudication of title against the mortgagee only. (*Lindsay, J. C.*) KHUNNU *v.* BANDI. **45 I. C. 849 : 5 O. L. J. 121.**

———S. 11—*Parties and representatives — Mortgagors—Redemption suits by co-mortgagors.*

On failure of a co-mortgagor plaintiff to comply with a decree in prior redemption suit, in which other co-mortgagors were defendants the latter may subsequently sue for redemption. The co-mortgagors plaintiffs in the subsequent suit cannot be said to claim under the plaintiff in the previous suit. (*Lindsay, J.C.*) BHAIRON BAKSH *v.* RAGHUBANS KUNVAR. **45 I.C. 300 : 5 O.L.J. 43.**

———S. 11—*Parties and representatives—Mortgagor and mortgagees — Decision against latter if binding on mortgagee.*

In resumption suits, a mortgagee from the grantee is not a necessary party and is bound by the decision in the suit if fairly conducted between the grantor and grantee. If not so conducted and when the mortgagee is a party, he can have his pleas fully heard and determined. (*Baille, S.M. and Tweedy, J.M.*) MADARI LAL *v.* PHAKAL WAN SINGH. **28 I. C. 440 : 2 O. L. J. 161.**

———S. 11—*Parties -- Previous suit with third party.*

The question whether or not the present Plaintiffs Respondents had acquired by prescription

the right to a flow of water from the Defendant Appellant's land was not decided in previous suit. All that was decided was that the Defendant had not at that time acquired the prescriptive right upon which the claim for damages was based. *Held* : If the defendant with the consent of third party should make a cutting through the middle of the bund so as to let the water flow on to the latter's land, it is difficult to see how anything decided in the previous suit would give the Plaintiffs any right to object. Plaintiffs could not maintain an action merely because the rights of a third party may possibly have been infringed. (*Dawson Miller, C. J., and Mullick, J.*) MT. SARBAN *v.* PHUDO SAHU.

4 P.L.T. 81 : 1922 Pat. 305 : 69 I.C. 947 : 2 P. 110 : 1923 P. 65.

———S. 11—*Parties and representatives — Auction purchaser—Execution of money-decree—Decision between decree holder and judgment debtor if binding on auction purchaser.*

An auction purchaser who purchases in execution of a money decree is bound as between himself and the decree-holder by any previous litigation between the decree-holder and the judgment-debtor whose interests he has purchased. S. 11 of the Civil Procedure Code applies to the facts of the case. 22 C. 909 : 10 C. L. J. 150 foll. 14 M. I. A. 101 : 7 Cal. 107 (P.C.) dist. 14 Cal. 401 diss. The representative of the judgment-debtor seems to be on the same footing as the person claiming under him. A person claims through or under another when he derives his title through that other either by assignment, inheritance or succession or when he holds a subordinate title granted by the other, and except in cases specially provided for by statute or common law he can have no better title than the person through or under whom he claims. (*Dawson Miller, C.J. and Coutts, J.*) KALI DAYAL *v.* UMESH PRASAD. **1 Pat. 174 : 67 I.C. 266 : 3 P.L.T. 506 : 1922 Pat. 33 : 1922 P. 63.**

———S. 11— *Parties and representatives—Third parties.*

A finding in an earlier suit between a defendant and third party is not *res judicata* between the parties to the subsequent suit. (*Rattigan, C. J. and Martineau, J.*) SAIN DAS *v.* BISHANHAR DAS. **50 I.C. 333.**

——S. 11—*Parties*—Pro forma *defendant.*

A judgment in a case in which a party is a mere *pro forma* defendant against whom no relief was claimed is not *res judicata* against him. (*Mullick, J.*) SUGRIVE MISSER *v.* JOGI MISSER. **45 I.C. 318.**

———S. 11—*Parties and representatives — Vendor and purchaser—Suit between vendor and a previous purchaser, when operates as* res judicata *between two purchasers.*

For a previous decision against a transferor to be *res judicata* as against the transferee his title must have arisen subsequent to the commencement of the previous suit (*Ormond, J.*) MA U. *v.* MG LU GALE. **32 I.C. 610 : 9 Bur. L T. 86.**

Plea of

———S. 11—*Plea of* res judicata *—Proof—Plaint and judgment to be produced—Decree ambiguous.*

The Privy Council refused to uphold a plea of *res judicata* on the ground that the summary of the plaint as set out in the decree was ambiguous and that the original pleadings should have been filed. The Privy Council refused to allow the appellant to put in evidence the documents in support of the plea when the appellant was remiss, in spite of the objections taken in the courts below to the defect in the record. (*Sir Lawrence Jenkins,*) RADHA KISHUN *v.* KHURSHED.

47 Cal. 662 : 47 I.A. 11 ; 18 A.L.J. 401 : (1920) M. W. N. 308 : 11 L.W. 518 : 22 Bom. L. R. 557 : 55 I.C. 959 : 38 M.L.J. 424 (P.C.).

———S. 11—*Plea of—Matter of substance and not of form—Rule known to Hindu Law.*

Though the rule of *res judicata* as embodied in S. 11 of the C. P. Code may be traced to an English source, it only embodies a doctrine known to Hindu Law. The application of the rule by the Courts in India should not be influenced by technical considerations of form, but by matter of substance within the limits allowed by law. (*Sir Lawrence Jenkins,*) SHEO PARSAN SINGH *v.* RAMNANDAN PRASAD SINGH. **43 Cal 694: 43 I.A. 91 : 14 A.L.J. 466 : 20 C.W.N. 738 : 18 Bom L R. 397 : 23 C.L J. 621: (1916) 1 M.W.N. 419 : 20 M.L T. 1 : 3 L W. 544 : 33 I.C. 914 : 31 M.L.J. 77 (P.C.).**

[Affirming 6 I.C. 301 : 11 C.L.J. 623.]

———S. 11—*Plea of—Substance of decision.*

A suit dismissed on the ground that the plaintiff could not establish his contentions, bars a subsequent suit on the same contention in another form. 13 Bom 326 dist. (*Scott, C.J. and Beaman, J.*) MUHAMMAD GANS DADASAHEB *v.* RAJ BAX ROSHAN BAX. **37 Bom. 224 19 I.C. 558 : 15 Bom. L.R. 266.**

———S. 11—*Plea of—Proof,*

The question as to wheter certain matters are or are not *res judicata* between certain parties is a question peculiar to the facts and circumstances surrounding each particular case. (*Davar and Robertson, JJ.*) AHMEDBHAI HABIBHOY *v.* DINSHAW MANECKJI PATIT. **12 I.C. 813: 13 Bom. L.R. 1061.**

——— S. 11—*Plea of—Nature of—Estoppel and* res judicata.

Res judicata differs from estoppel. A true *res judicata* ousts the jurisdiction of the Court, while estoppel shuts the mouth of a party. Estoppel means that a person shall not be allowed to say one thing at one time and the opposite at another while *res judicata* means that the person shall not say the same thing twice over. (*Beaman, J.*) BHAISHANKAR *v.* MORARI. **36 Bom. 283 : 12 I.C 535 : 13 Bom. L.R. 950.**

———S. 11—*Plea of—Proof of—Reference to judgment.*

If a question of *res judicata* arises upon a decree expressed in general terms, the Court may look

C. P. CODE (V OF 1908), S. 11—Plea of.

at all the intrinsic evidence before it and the materials of the case as a whole. (*Beaman, J.*) HOPE MILLS, LTD. *v.* SIR KOVASJI J. READYMONEY.
10 I.C. 748 : 13 Bom. L.R. 162.

——S.11—*Plea of—Proof.*

To decide the question of *res judicata* the court has to look to the pleadings and judgment to ascertain the matter in controversy and the decision actually given. (*Mookerjee, J.*) PANCHU *v.* CHANDRA KANTA. **12 I.C. 9 : 14 C.L.J. 220.**

——S. 11—*Plea of—Proof—Second appeal.*

A plea of *res judicata* depending upon a finding of fact not contested in the Lower Appellate Court cannot be maintained in second appeal. (*Shadi Lal and Wilberforce, JJ.*) FARZAND ALI *v.* ZAFAR ALI. **46 I C. 119 : 132 P.W.R. 1918.**

——S. 11—*Plea of—Allegations in plaint—Necessity for.*

Where all the conditions requisite for the application of the rule of *res judicata* are not stated in the plaint, it is impossible to say that on the face of it the suit is barred by *res judicata* under S. 11, C.P.C. (*Shah Din, J.*) MANICHAND *v.* MUSSAMMAT SHUKRI. **75 P.W.R. 1913 : 18 I.C. 1007: 194 P. L. R. 1913.**

——S. 11—*Plea of—Party affected—Must be given notice and opportunity.*

The party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contentions against such a decision. (*Schwabe, C. J. Olafield and Ramesam, JJ.*) CHIDAMBARAM CHETTI *v.* KANDASAMI GOUNDAN. **46 M. 768 : (1923) M.W.N. 571 : 45 M.L.J. 346 : 18 L. W. 757 : 74 I. C. 155 : 1924 M. 1 (F.B.).**

——S. 11—*Plea of—Waiver.*

The plea of *res judicata* being one in bar of a trial of a suit or an issue, and not affecting the jurisdiction of the Court may be waived by the party. The effect of waiver is the same whether it was omitted to be taken by mistake, accident or design. (*Ayling and Srinivasa Iyengar, JJ.*) MOTURI SESHAYYA *v.* VENKATADRI APPA ROW
(1916) 2 M. W. N. 219 : 36 I C. 289 : 31 M. L. J. 219.

——S. 11—*Plea of—Strict proof.*

The plea of *res judicata* being one in restraint of the right of a litigant to have his case fully tried and determined the judgment which is pleaded in bar of this right must be strictly construed. (*Seshagiri Iyer and Phillips, JJ.*) LAXMIPATHAYA *v.* RAMA CHANDRA. **31 M. L. J. 311 : 20 M. L. T. 228 : 35 I. C. 421 : (1916) 2 M. W. N 133.**

——S. 11—*Plea of—One of substance—Form of plaint.*

A party cannot by manipulation of the form of plaint, get round the bar of *res judicata*. (*Sadasiva Aiyar and Napier, JJ.*) PAYKAT MANAKKAL *v.* THEYYANKARAN. **32 I C. 624 : (1916) 1 M. W. N. 171**

C. P. CODE (V OF 1908), S. 11—Prior decision.

——S.11—*Plea of—Foundation of—Inconsistent pleas—Parties' case and position should be same.*

The theory of *res judicata* requires the position and the case of the parties to be the same in both suits A party against whom a judgment has been given is not permitted to show that it is erroneous whether as plaintiff or as defendant in a subsequent proceeding but not a party in whose favour it was rendered. The latter may be prevented from doing so, if to permit it will contravene the principle of not allowing a person to derive an equitable benefit by adopting inconsistent positions. (*Benson and Sundara Aiyar, JJ.*) VELUSWAMY NAIKER *v.* BOMMACHI NAIKER.
14 M.L.T. 229 : (1913) M. W. N. 776: 5 L. W. 299 : 21 I. C. 219 : 25 M. L. J. 324.

——S. 11 and O. 2, Rr. 2 and 3—*Plea of—How determined.*

It is only when, on the facts relied upon in the plaint to constitute the cause of action in the first suit, it is open to ask for the relief praved for in the second suit that the latter suit would be barred under O. 2, Rr. 2 and 3. 12 Cal. 291 ; 8 Cal. 819 : 14 All. 512 rel. (*Sankaran Nair and Oldfield, JJ.*) SILILAN SAHIB *v.* BONTALA HAMAN SAHIB.
38 Mad. 247 : (1913) M. W. N. 554 : 20 I. C. 418 : 25 M.L.J. 125.

——S. 11—*Plea of—Decree and judgment—Consideration of.*

Where a decree is expressed in general terms the judgment may be referred to ascertain what the real issues were, in order to see how far the decree operates as *res judicata*. (*Miller, C.J. and Adami, J.*) RAGHUNATH KURMI *v.* DEO NARAIN RAI. **51 I. C. 981 : 1919 Pat. 393.**

——S. 11—*Plea of—Proof of—Onus.*

The person who pleads *res judicata* must show from the record that the Court had found in his favour in another proceedings. (*Mullick and Atkinson, JJ.*) BANSRAJ LAL *v.* MOTI LAL.
(1918) Pat. 21 : 42 I. C. 425 : 3 Pat. L. W. 360.

——S. 11—*Plea of—Proof—Onus.*

A person who wishes to set up the plea of *res-judicata* must produce such documents as will bring the case under S. 11 of C. P. C. (*Chamier, C. J. and Roe, J.*) AKBAR ZAMANKHAN *v.* SHEO PARSHAN LAL. **39 I. C. 908 : 3 Pat. L W. 327.**

——S. 11—*Plea of—Plaint in previous suit—Construction.*

To determine whether a claim is *res judicata*, the plaint in the previous suit should be construed in the same way as the Court which decided the former suit construed it. (*Ormond, O. C. J. and Parlett, JJ.*) CHRISTENSON *v.* COMMOTTO.
42 I. C. 518 : 11 Bur. L. T. 192.

Prior Decision.

——S. 11—*Prior decision—Rent decree—Puttah and Muchalkhas, Question of—Madras Estates Land Act, S. 52 (3).*

Where the appellants contended that the previous judgments are *res judicata* in the suits as they have fully gone into the question of custom relating to the different stipulations in the puttah

C. P. CODE (V OF 1908), S. 11—Prior decision.

Held, their Lordships cannot sustain on legal grounds the plea of *res judicata* as suggested. The doctrine of *res judicata* is not in question, but the application of the special rules stated in S. 52 (3), Madras Estates Land Act under which, Muchilikas decreed for any revenue year remain in force, until the beginning of the year for which fresh ones are exchanged or decreed, and there is no reason for restricting the scope of the general reference to muchilikas decreed to those decreed by any particular description of court. (*Lord Shaw,*) RATHA KRISHNA AYYAR *v.* SUNDER SWAMY IYER. **49 I. A. 211 : 45 Mad. 475 : 43 M. L. J. 323 : 27 C. W. N. 1 : 20 A. L. J. 937 : 36 C. L. J. 450 : 16 L. W. 18 : 74 I. C. 584 : 31 M.L.T. 31 : 1922 P.C. 257 : (P.C.).**

——S. 11—*Prior decision—Decision not appealed from Effect of Reversal in another proceeding.*

Where a decision is not appealed from but it is in effect reversed by the order made by the High Court in an appeal from another proceeding in the same suit, it does not operate as *res judicata*. (*Stuart and Ryves, JJ.*) KESHRI *v.* BHAWANI RAI. **76 I. C. 473 : 1923 All. 456.**

——S. 11 — *Prior decision — Subsequent — Inconsistent decision—Later decision to prevail.*

Where there are two inconsistent decisions it is the later decision that operates as *res judicata*. So held with reference to an adjudication in the course of an execution proceedings. (*Piggott and Walsh, JJ.*) LALTA PRASAD *v.* SURAJ KUMAR. **44 All. 319 : L. R. 3 A. 111 : 20 A. L. J. 185 : 65 I. C. 877 : 1922 All. 145.**

——S. 11—*Prior decision — Inconsistent orders—Later one prevails.*

There was a compromise between the 4th defendant and some of the judgment debtors by which they were set free, The transferee of the decree applied for execution against these judgment debtors also, Their objection was allowed. In a second application for execution against them also, they objected, but their objection was lost in default. In a third application against them, held their objection was barred by *res judicata* as the latter of the two inconsistent decisions must prevail. (*Chamier and Piggott, JJ.*) DAMBAR SINGH *v.* MANWARALI KHAN. **37 All. 531 : 30 I. C. 775 : 13 A. L. J. 764 :**

——Ss. 11 and 47—*Prior decision—Mortgages—Redemption—Provision in preliminary decree that if not redeemed in a certain time all rights will cease—Failure—Effect.*

Where a mortgagor is given a preliminary decree for redemption on condition that if he does not pay the amount within a certain time, he would be debarred from all rights to redeem, and if he fails so to redeem he cannot bring a second suit to redeem. (*Macleod, C. J. and Shah, JJ.*) KUSHABA *v* BUDHAJI. **46 Bom. 348 : 23 Bom. L. R. 1176 : 64 I. C. 1004 : 1922 Bom. 127.**

——S. 11—*Prior decision—Redemption previously decreed—Right to redeem reserved—Subsequent suit for redemption.*

Where the decree in a suit for redemption of a mortgage provided for payment by instalments by the mortgagor of the mortgage money, in default

C. P. CODE (V OF 1908), S. 11—Prior decision.

of which the mortgagee was to remain in possession in lieu of interest, and also reserved the right to redeem, a subsequent suit for redemption is not barred. (*Macleod, C. J. and Shah, J.*) ABDUL RAJAK ALLISHA MULANI *v.* VAMAN GANESH PAPLIKAR. **45 Bom. 1335 : 63 I. C. 902 : 23 Bom. L. R. 593.**

——S. 11—*Prior decision.*

In a former suit between the parties the amount mentioned in the *patta* was taken as the basis of the value of rent payable in kind, *held* that it does operate as *res judicata* in a subsequent suit. (*Fletcher and Newbould, JJ.*) SARAT CHANDRA ROY *v.* ABBAS ALI. **41 I C. 833.**

——S. 11—*Prior decision—Redemption—Second suit not barred.*

When a plaintiff has obtained a decree for redemption of mortgage by payment into Court of a certain sum within a certain time and when no steps have been taken by the plaintiff towards making such payment and the period fixed elapsed without any payment being made, still a second suit to redeem on payment of the self same sum is not barred by the rule of *res judicata*.

The right of redemption could not be extinguished by the preliminary decree and could only be extinguished by a final decree. (*Campbell, J.*) SUNKA *v.* JARUN. **75 I. C. 919 : 1923 Lah. 680.**

——S. 11—*Prior decision—In suit based on non-existent cause of action—If* res judicata.

The decision in a suit which proceeds on a cause of action, which has no existence in the eye of the law, cannot operate as *res judicata*. (*Shadi Lal, C. J. and Wilberforce, J.*) BUTA SINGH *v.* JHANDU. **3 U.P.L.R. (Lah.) 49 : 61 I.C. 375 : 3 Lah. L.J. 211.**

——S. 11.—*Prior decision — Adoption by widow—Suit by reversioner for declaration.*

Where a reversioner brought a suit for a declaration that an adoption by a widow is not binding on him and got a decree, the question of relationship is *res judicata* in a second suit for a declaration that a gift by her is not binding on him. (*Shadi Lal, C.J. and Leslie Jones, J.*) INDRAJ *v.* RANJI LAL. **59 I.C. 808 : 34 P.W.R. 1921.**

——S. 11—*Prior decision—Effect of, though erroneous—Construction of grant.*

In a prior litigation to which the plaintiff was a party it was decided that the question whether the properties in suit were wakf properties must be held in the affirmative by reason of *res-judicata* owing to a decision in a still prior suit. It was however over-looked that the plaintiff was not a party to that prior suit. *Held* that notwithstanding the mistake the decision in the prior suit operated as *res judicata* and that the plaintiff could not raise the question of the wakf character of the suit property again. (*Phillips and Devadoss, JJ.*) JAGGA ROW BAHADUR GARU *v.* GONHER BIBI. **17 L.W. 521 : (1923) M.W.N. 347 : 72 I.C. 789 : 1923 M. 545.**

——S. 11.—*Prior decision—Possession, nature of, declared in a previous suit*—Res judicata.

A judgment in a prior suit operates as *res judicata* in a subsequent suit between the same

C. P. CODE (V OF 1908), S. 11—Prior decision.

parties or their representatives in interest if it decides what was the character of the possession of any person who was a party to that suit, *e.g.* whether it was then adverse or permissive possession or whether it was separate or joint possession. (*Spencer and Venkatasubba Rao, JJ.*) SINGARAVELU MUDALIAR *v.* CHOCKA MUDALIAR.

16 L.W. 514 : 31 M.L.T. 298 : (1922) M.W.N. 676 : 43 M.L.J 737 : 46 Mad. 525 : 70 I.C. 994 : 1923 Mad. 88 (2).

——S. 11—*Prior decision—Not inter parties*—Res-judicata.

A sued X for a declaration that he was entitled to the *Asari Sheriff* office and the suit was dismissed on the ground that A should prove his title to the office. A subsequently sued the Government for recovery of money alleged to be due to him as the person entitled to the office of *Asari Sheriff*, *held* that the suit was not barred by *res judicata*. Distinction between judgments *in rem* and judgments *in personam* considered. 33 M. 483 and 36 M. 141, overruled. (*Wallis, C. J., Spencer and Kumaraswami Sastri, JJ.*) SECY OF STATE *v.* SYED AHMED BADSHA SAHIB.

44 Mad. 778 : 14 L W 128 : 41 M.L.J. 223 : 67 I.C. 971 : (1921) M.W.N. 576 (F.B.).

——S. 11—*Prior decision — Judgment of Revenue Court.*

A judgment in a rent suit by the lessee for a term of a Zamindari against the tenant does not bar a subsequent suit by the Zamindar after surrender of the lease though the claim in the latter suit is one for a period covered by the lease.

Per *Krishnan, J.*—Surrender determines the tenancy and lets in the landlord's rights (*Napier and Krishnan, JJ.*) RAJAH OF RAMNAD *v.* RAMANATHASWAMI.

44 Mad. 514 : 29 M.L.T. 322 : 63 I.C. 205 : 41 M.L.J. 288.

——S. 11—*Prior decision — Findings on application.*

In a proceeding under a mortgage decree, the assignee decree-holder applied to the Court to be recognised as such and to pass a final decree. The Court dismissed the application holding that no final decree can be passed, as the legal representatives of the deceased deft. were not brought on record within proper time. The present application is therefore made asking for sale of the mortgaged property. *Held*, that the application is barred on the principle of *res judicata*. (*Sadasiva Aiyar and Coutts Trotter, JJ.*) KONDU NAGAYYAN CHETTIAR *v.* SRINIVASA AIYANGAR.

62 I C. 856 : 14 L.W. 18.

——S. 11—*Prior decision.*

Where a claim of a third person based on a mortgage is disallowed, and also his suit for declaration of his mortgage rights is dismissed, he cannot enforce, by a regular suit, his rights under the mortgage. (*Ayling and Odgers, JJ.*) SINGARIAH CHETTY *v.* CHINNABI.

44 Mad. 268 : 12 L.W. 725 : 28 M.L.T. 420 : (1921) M. W.N. 33: 60 I.C. 780 : 40 M L.J. 7.

——S. 11—*Prior decision—Conflicting decisions—Maxim "Estoppel against estoppel sets the matter at large"—Meaning of.*

C. P. CODE (V OF 1908), S. 11—Representative suit.

In judgments *inter partes* the later adjudication should be taken as superseding the earlier, whether or not the former adjudication was pleaded as a bar to the trial of the suit in which the later adjudication is made. The plea of *res judicata* may be waived by accident, mistake or intentionally. The maxim "Estoppel against estoppel sets the matter at large" is not applicable to estoppels by record. (*Ayling and Srinivasa Aiyangar, JJ.*) SESHAYYA *v.* VENKATADRIAPPA RAO.

31 M. L. J. 219 : 36 I. C. 289 : (1916) 2 M.W.N. 219.

——S. 11—*Prior decision though wrong is* res-judicata. (*Kotwal, A.J.C.*) LATU *v.* ZIPRI.

61 I. C. 603.

——S. 11—*Prior decision.*

When the *taluqdars* had brought their suit for resumption of *muafi* they had made plaintiffs and defendants 2 and 3 parties to it. Defendant No. 1 however had put in an application claiming as he claimed in this suit to be partner with plaintiffs and defendants 2 and 3. He was made a party but ultimately the decree was given only against plaintiffs and defendants 2 and 3. As regards the defendant No. 1 it was said that his name was not entered in the papers where he was recorded as a sub-tenant only. The question whether he was a partner was pronounced to be one for a Civil Court and he was discharged from the suit.

Held, in plaintiff's suit, there is no *res judicata* here. What was decided by the Revenue Court was that the *taluqdars* were entitled to get the relief they sought from the plaintiffs whom they themselves had named, and who were the only ones entered in the revenue papers. There was a decision that Deft. No 1 had no independent rights in these plots, but the Court refused to decide whether or not he had any partnership rights. (*Simpsan, A. J. C.*) KHALIL *v.* MAHOMED ISMAIL.

74 I.C. 195 : 1923 Oudh 101.

——S. 11—*Prior decision—Wrong decision—Whether* res-judicata.

A wrong decision in a previous suit bars a subsequent suit. A Settlement Court in deciding the question of title as between a mortgagor and his mortgagee lost sight of the fact that the mortgagor's right of redemption under the deed in suit had been taken away by proper foreclosure proceedings and declared the mortgagee to have acquired full proprietary rights in the property. *Held*, the decision operated as *res judicata*. 15Cal. 800 (P.C.) Dist (*Stuart and Kanhaiya Lal, A.J.C.*) TILAK CHANDA *v.* SHAMBHU SINGH.

7 O.L.J. 524 : 2 U.P.L.R. (J.C.) 163 : 60 I.C. 404 : 23 O.C. 269.

Representative Suit.

——S. 11—Expln VI — *Representative suit—Company — Winding up—Liquidator —Decision against, binding on all.*

The official liquidator represents the debenture holders and creditors as well as the company, and if an order is made against him upholding the claim of a particular creditor to a charge on the company's property, the order so long as it stands is conclusive in the winding up on all parties so

represented. If any debenture holder or other pe son desires to attack the decision, it is open to him to ask that he should be made a party and should have leave to appeal. (*Viscount Fin'ay.*) KRISHNA AIYANGAR *v.* NALLAPERUMAL PILLAI.

43 Mad. 550 : 47 I.A. 33 : 38 M L J. 444 : 28 M.L.T. 28 : 12 L.W. 92 22 Bom. L.R 568 : 18 A L.J. 489 : 2 U P.L.R. (P. C) 118 : 56 I. C. 163 : (1920) M. W. N. 419 (P.C)

[Affirming 30 I.C. 286 : 29 M.L.J 110.]

——— S. 11—*Representative suit—Benamidar. —Decision against binds real owner.*

A decision in a suit by or against a *benamidar* is *res judicata* against the real owner. (*Mr. Ameer Ali.*) GUR NARAIN *v.* SHEOLAL SINGH

46 Cal 566 : 17 A. L. J. 66 : 9 L. W 335 : 28 C. W. N. 521 : 49 I. C. 1 : 1 U. P. L. R. (P. C.) : 36 M. L. J. 68 : 46 I. C 104 ; (P. C.) :

[Also 27 I. C. 136 : 18 C. W N. 814. 22 C W. N. 807].

——— S. 11 — *Representative suit — Hindu widow—Decree against—Reversioners when bound —Estoppel affecting widow.*

A decree fairly and properly obtained against a Hindu widow in possession of her husband's estate is, in the absence of fraud or collusion, binding on the reversionary heir, and where in a suit the merits are tried and the trial is fair and honest, a Hindu lady does not cease to represent her husband's estate merely owing to a personal disability or disadvantage as litigant A suit by a Hindu widow for a declaration that she had not validly adopted the deft as a son to her deceased husband was dismissed on the ground among others that by her own acts she was personally estopped from denying the validity of the adoption. It was also found that the adoption was otherwise valid. On the death of the widow the next reversioner sued to eject the adopted son alleging he had not been validly adopted ; *held*, that though the rule of *res judicata* as enacted in S. 11 of the C P. Code did not strictly apply, the principle of *res judicata* as stated above was applicable and the decision in the widow's suit on the validity of adoption barred the suit of the reversioner. (*Sir John Edge.*) RISAL SINGH *v.* BALWANT SINGH.

40 All. 593 : 28 C. L. J. 519 : 24 M. L. T. 361. 9 L. W. 52 : 23 C W. N. 326 : 32 M. L J. 597 : 21 Bom. L. R. 511 : 45 I. A 168 : 48 I. C. 553 : (1919) M. W. N. 155 : (P C) [Affirming 37 All. 496 : 30 I. C. 657 : 13 A. L. J. 594.]

——— S. 11 — *Representative suit — Hindu widow — Decision against when binding on reversioner—Compromise decree.*

On the death of a Hindu leaving his daughter and a minor son by her, disputes arose between the daughter and the agnates of the deceased. A compromise was come to between the parties under which the bulk of the immoveable properties was to be enjoyed by the agnates and the infant son was given nothing. An award of arbitrators was passed on the footing of the compromise and a decree followed on the award. In a suit by the daughter's son to recover the estate on the death of the daughter. *Held*, that the compromise and award did not bind him as the conditions

which make a decree against a limited owner binding on the estate were absent in the case. (*Mr. Ameer Ali.*) NARAYAN SINGH *v.* JAYASINGH.

45 Cal 590 : 45 I. A. 35 : 23 M L T 142 : 22 C. W. N. 409 : 27 C. L. J 296 : 34 M. L J 298: 16 A. L. J. 265 : 7 L W. 581 : 4 Pat. L. W 221 : 20 Bom. L. R. 546 : 44 I C. 409: (1918) M W. N. 306 : (P C.).

——— S. 11—*Representative suit— Manager of joint Hindu family—Decree against.*

In a suit on a mortgage against the Manager of a joint Hindu family without impleading the jun or members as parties, the decree is binding on the junior members as well, for, the manager represents the family. (*Lord Moulton.*) SHEO SANKER RAM *v.* JADDO KUNWAR.

36 All. 383 : 18 C. W. N. 968 : 16 M. L T. 175 : 1 L W. 645 : 20 C. L. J. 282 : 12 A L. J. 1173 : 16 Bom. L. R. 810 : 41 I. A. 216 : 24 I. C. 504 : (1914 M W N. 593 : (P. C).

[Affirming 33 A. 71 : 7 I. C, 902 : 7 A. L. J. 945.

——— S. 11 — *Representative suit — Hindu widow—Decree against—Cause of action personal—No* res judicata *against reversioner.*

Where in execution of a decree against a Hindu widow a stranger purchases her right to the emoluments attached to the shebaitship of a temple and subsequently the widow brings a suit to set aside the decree and execution sale as being fraudulent and fails therein. *Held*, that the prior decision is no bar to a suit by a reversioner as a *shebait* on the death of the widow to recover possession of the emoluments attached to the office. (*Sir John Edge.*) BHAIGAJI THAKUR *v.* JHARULA DAS.

42 Cal 244 : 18 C.W N 1929 : 27 M L.J. 100 : 1 L. W. 549 : 16 M. L. T 210 : 12 A. L J. 1176 : 20 C. L. J. 360 : 16 Bom L. R. 845 : 24 I C. 501 : (1914) M. W. N. 636 (P. C.)

[Affirming 14 I.C. 142 : 39 Cal. 887]

——— S. 11, Expln. VI — *Representative suit —Binding nature of suit.*

Where a suit is instituted in the interests of the whole estate and for the benefit of all persons who might come to inherit it, the decree in the absence of collusion or fraud has the effect of *res judicata* in a subsequent suit. (*Sulaiman, J.*) CHHAJU *v.* GOKUL. 75 I. C. 593 : 1923 All. 338.

——— S. 11, Expln. VI —*Representative suit— Hindu Law — Alienation by widow — Nearest presumptive reversioner assailing alienation— Subsequent suit after widow's death between actual reversioner and alienee, if operates as* res judicata.

A suit by a reversioner for a declaration that an alienation made by a Hindu widow in possession is without legal necessity and inoperative beyond her lifetime, is brought by him not for his personal benefit but in a representative capacity, that is, as representing the whole body of reversioners, for the protection of the estate and to remove an apprehended injury to the common interests of all the reversioners. A decree, in such a suit is, therefore, binding; if obtained after a fair contest and, in the absence of fraud and collusion, not only between the reversioner who

brought the suit and the transferee, but also as between the whole body of reversioners on the one hand and the transferee or his representative in title on the other. This is so, not because one reversioner must, in that case, be deemed to claim title through another but because the reversioner who sues represents the others and Explanation VI of S. 11 comes into operation inasmuch as the right claimed by the presumptive reversioner who sues is a right to demand that the estate be kept intact and free from danger during its enjoyment by the widow, and is claimed in common for himself, and all the members of the reversionary body. (*Banerji, Tudball and Sulaiman, JJ.*) KESHO PRASAD SINGH *v.* SHEOPARGASH
44 A. 19 : 19 A. L. J. 749 : 3 U. P. L. R. (All.) 17 : 64 I. C. 248 : 1922 A. 301

———S. 11—*Representative suit—Manager of joint Hindu family—Junior member made* pro forma *defendant—Second suit by latter.*

The managing member of a joint Hindu family had brought a suit against certain persons in respect of a house belonging to the joint family without expressly stating that he sued in his capacity as managing member. The suit was dismissed on the merits. Then a junior member of the family and a *pro forma* defendant in the former suit instituted a suit in respect of the same house against the same defts. and on the same cause of action. *Held*, that the suit was barred by *res judicata*. (*Tudball and Rafique, JJ.*) CHAUBE KUN MAN *v.* CHAUBE JAGANNATH.
42 All. 309 : 56 I.C. 846 : 2 U.P.L. R (A) 74 18 A. L J. 326.

———S 11—*Representative suit—Hindu widow—Compromise decree.*

A compromise decree against a Hindu widow binds the reversioners if it is shown that the alienation was made for purposes justifying sale by Hindu widow. (*Piggott and Lindsay, JJ.*) KANHAIYA LAL *v.* KISHORI.
14 A. L. J. 881 : 35 I. C. 633 : 38 All 679

———S. 11—*Representative suit—Hindu widow—Decree against Compromise—Collusion.*

Where a mortagee filed a suit for redemption and, on his death, his widow collusively compromised the suit and after a time the mortgagor's reversioner filed a second suit for redemption, this latter was not barred by *res judicata* 25 Mad. 300, 29 All. 481 dist. (*Rafique, J.*) MUHAMMAD FAIYAZ ALI KHAN *v.* BHIKHAMBAR DAS. **21 I. C. 605 : 11 A.L.J. 574**

———S 11—*Representative suit—Father—Son if bound.*

A mortgaged his share in 1887 to B. In 1892 he mortgaged the same share to C In 1893 he again mortgaged that share along with other properties to B. The sum due under the mortgage of 1887 was a part of the consideration of the mortgage of 1893. In 1899, the heirs of C filed a suit on the mortgage of 1892 and impleaded B as subsequent mortgagee; B was in jail and his son was not a party to the suit, *Held*, the son was not bound by the decree, as he was not represented in the suit. (*Chamier, J.*) PRAG *v.* RAM NIRANJAN. **17 I. C. 734 : 11 A. L. J. 36.**

———S. 11—*Representative suit—Manager of joint Hindu family.*

A decree fairly obtained against the Manager of a joint Hindu family in his representative capacity is binding on the family. (*Tudball, J.*) BINDHACHEL RAI *v.* AYA GRAI. **17 I.C. 290 (All.).**

———S. 11 — *Representative suit — Hindu widow—Decree against—When binding on reversioner.*

A decree given against a widow on a ground personal to herself and on her admission in the prior litigation could be no more binding upon the reversioner than an alienation by her otherwise than for necessity. *Per Hayward, J.* There must be a real trial of the reversioner's claim and there must also be freedom from fraud in order to prove the rule in the Shivaganga case, *i. e.*, of *res judicata* against the reversioner. The rule is a special rule applicable to the peculiar position of limited holders under Hindu Law and not the general and strict rule of *res judicata* prescribed by S. 11 of the C. P. Code. This special rule has to be applied with due regard to the peculiar precaution necessary in the country to prevent the exercise of pressure over limited female holders to the prejudice of the rights of the reversioners. (*Scott, C. J. and Hayward, J.*) BAI KANKU *v.* BAI JADAV. **21 Bom L. R. 857 : 53 I. C. 164 : 43 Bom. 869.**

———S. 11 — *Representative suit — Hindu widow— Decree against—Reversioner—Compromise decree.*

A decree fairly obtained against a Hindu widow binds the reversioners. The principle does not apply either to a compromise or an award decree and it has to be determined in each case whether the decree can be properly said to have been fairly obtained against the widow as representing the whole estate including the rights of the reversioners. The Court will weigh the matter with special caution where the decree is a compromise or award decree on the same grounds upon which it has been held that legal necessity must definitely be proved in the case of purchases from Hindu widows and that transactions must definitely be shown to have been explained and fully understood in the case of purdah ladies. (*Heaton and Hayward, JJ.*) RAMA SANTU *v.* DAJI. **43 Bom 249 : 48 I. C. 125 : 20 Bom. L. R. 947.**

———S. 11 — *Representative suit — Hindu widow—Decision against, when* res judicata.

In a litigation which is personal to a widow in possession of her husband's estate or which arises out of acts of her own affecting the estate, the widow, whether plff. or deft., does not represent the estate fully so as to give right to the bar of *res judicata* against the reversioners. (*Beaman and Kajiji, JJ.*) SUBHI GANPATIBHATTA NEELWANA *v.* RAMA KRISHNABHATTA SHANKERBHATTA. **42 Bom. 69 : 43 I. C. 233 : 19 Bom L. R. 919.**

———S. 11 *Representative suit—Hindu widow.*

In a suit by a widow against her husband's brother for possession of property it was declared that the property was joint. No appeal was prosecuted by widow. *Held*, the point of joint property was *res judicata* against her in a subs

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sequent suit by the reversioners of her husband. (*Chandavarkar and Rao, JJ.*) GHELABHAI *v.* BAIJAVER. 14 Bom. L. R. 1142 17 I.C. 866 : 37 Bom. 172

——S. 11—*Representative suit—Reversioner if claims through widow.*

Decree passed against widow for a genuine deb due by husband binds the reversioners (*Greaves and Cuming, JJ.*) SHASHI KUMAR *v.* CHANDRA KUMAR SAMMADAR. 30 C. L. J. 348 : 68 I. C. 322 : 1923 C. 204.

——S. 11—*Representative suit—Tenants in common—Decree against one.*

A tenant can, under certain circumstances, so represent his tenancy that a decree against him by the landlord will bind all the perso is interested with him in the tenancy. (*Mookerjee and Panton, JJ.*) SARAT CHANDRA *v.* BIBHABATI DEBI. 66 I. C. 433 (2) : 34 C. L. J. 302.

——S. 11—*Representative suit—Decree against Hindu widow—Reversioners are bound.*

The reversioner is bound by a decision against Hindu widow obtained on a fair trial and the decision operates as *res judicata* as regards the questions tried in that suit. (*Mookerjee and Buckland, JJ.*) PRAMATHA *v.* BHUBAN. 49 Cal. 45 : 25 C. W. N. 985 : 33 C. L. J. 421 : 64 I. C. 980 : 1922 Cal. 321.

——S. 11—*Representative suit-Hindu widow—Decree against—Reversioner bound.*

A decree obtained upon a fair trial in a suit by or against a Hindu widow in possession of the estate of the full owner, operates as *res judicata* regarding only the questions tried in the suit. 9 M. I. A. 539 : 6 C. L. J. 490 ref. (*Mookerjee and Beachcroft, JJ.*) MOHENDRA NATH BISWAS *v.* SHAMSUNESSA KHATUN. 19 C. W. N. 1230 : 27 I. C. 934 : 21 C. L. J. 157.

——S. 11—*Representative suit—Shebait—Decree against—Binding on successor.*

A decree passed in a suit against shebait as representing an idol is binding on the succeeding shebaits in absence of fraud or collusion. (*Mookerjee and Beachcroft, JJ.*) UPENDRANATH *v.* KUSMA KUMARI DASI. 20 C. L. J. 489 : 19 C. W. N. 520 : 27 I. C. 328 : 42 Cal. 440.

——S. 11—*Representative suit—Hindu widow—Decree against—Reversioners, how affected.*

A widow's *bona fide* confession of judgment binds the reversioners where their rights to the estate are not in question and they are also bound by a decree fairly and properly obtained against her. 29 All. 487 : 8 All. 305 dist. (*Baillie S. M. and Tweedy, J. M.*) MANGAL DAS *v.* MAHENDRA DATTA SINGH. 25 I. C. 921 : 1 C. L. J. 490.

——S. 11—*Representative suit*—Shebait—*Decree against.*

A decision in a suit contested by the *shebait* of a debutter estate is binding on all successive *Shebaits.* (*Brett and Chapman, JJ.*) KALIDAS *v.* PROBAL CHANDRA. 18 I. C. 394 : 17 C. W. N. 964.

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——S. 11—*Representative suit—Public right.*

Plff. on behalf of the Mahomedan community sued for a declaration that the land sold by the deft. No. 1 was *waqf* and that the sale deed was null and void. The plff. had brought a suit of the same kind before on behalf of the Mahomedan community and obtained the decision of a Court. *Held*, that the question whether the area in dispute is the *waqf* or not was directly and substantially in issue in the earlier suit, and having been adjudicated upon could not be reopened. 157 P. R (1889) dist. (*Bevan Petman, J.*) KALLAN *v.* MAHOMED MIR. 53 I. C. 886.

——S. 11—*Representative suit—Hindu widow—Compromise decree*—Res judicata.

Where a Hindu widow brings a suit as against her daughter-in-law for possession of a portion of her husband's estate, the decree on a compromise in a prior suit by the collateral against the widow does not operate as *res judicata.* (*Scott Smith and Shadi Lal, JJ.*) BHOLI BAI *v.* CHUNNI BAI. 45 P. W. R 1918 : 44 I. C 92 : 23 P. L. R. 1918.

——S. 11—*Representative suit—Widow—Decree binding on reversion—Fair and* bona fide *contest.*

Where in a suit on mortgage executed by the last male owner, the mortgagee obtained a decree for foreclosure against the widow, and there had been a fair trial between the widow and the mortgagee and the widow had done all that she could to protect the property) the decree in favour of the mortgagee put an end to the original owner's proprietary rights and consequently to the reversionary right also. (*Le Rossignol, J.*) DUNI CHAND *v.* THUNIAN 44 P. L. R. 1918 : 43 I. C. 523 : 32 P. W R. 1918.

——S. 11—Expln. VI—*Representative suit—Communal land—Decree—Second suit by same.*

The decision in a suit by the proprietors of a portion of a village against their rival faction regarding title to the common land is, if not appealed against, *res judicata.* Where in the subsequent suit there is a difficulty about identifying parties in the previous suit the doctrine of *res judicata* applies and in the absence of evidence, the former suit could be presumed to be *inter partes.* (*Johnstone and Beadon, JJ.*) PIRTHI *v.* RATTI RAM. 18 P L. R 1914 : 21 I. C. 972 : 19 P. W. R. 1914.

——S. 11, Expln. VI—*Representative suit—Rights claimed individually and in common with others—Decision when* res judicata—*Compromise decree.*

Where a prior suit was brought by four persons claiming to be trustees of a temple for recovery of certain lands belonging to the temple and the suit was compromised by two of the trustees and the compromise was found to be *bona fide, held*, that a subsequent suit by other persons for recovery of the same temple lands was barred by *res judicata.* It is not necessary to attract the operation of S. 11, Expln. VI, C.P. Code, that the former suit should have been instituted with the

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leave of the Court under O. 1, R. 8, C. P. C. (*Ayling and Odgers, JJ.*) CHENRAYA GOUNDAN *v.* ATHAPPA GOUNDAN. **18 L. W 177 : 75 I. C. 336 : (1923) M. W. N. 545 : 1924 M. 88.**

———**S. 11, Expln. VI**—*Representative suit—Malabar Tarwad—Suit by karnavan—Dismissal—Subs quent suit by junior members as Uralan—Bar*

The karnavan of a tarwad brought a suit for the recovery of certain property on the ground that the tarwad was entitled to them as the heir of the last owner. The Court dismissed the suit on the ground that the last owner of the property followed the Makkathayam Law and that the plaintiff was not proper heir under that law. In a subsequent suit by the junior members of the tarwad for recovery of the property held by the last owner as Uralan *held* that the decision in the prior suit that the last owner followed Makkathayam Law and that therefore the plaintiff's tarwad was not the heir was *res judicata* and the present suit was therefore unsustainable (*Schwabe, C. J. and Wallace, J.*) KOONAMVALLI UNNARA *v.* K. P. KUNHI RAMAN.

44 M. L. J. 443 : 72 I. C 582 : 17 L. W 322 : 32 M. L. T. (H. C.) 146 : 1923 Mad, 514.

———**S. 11, Expln. VI**—*Representative suit—Malabar tarward—Decision against—Decision of appellate Court operates as* Res judicata.

A decree in a suit in which the karnavan of a tarwad is joined as a defendant in his representative capacity and which he honestly defends is binding on the other members of the family though not actually made parties. In considering the plea of res judicata it is the judgment of the appellate Court that has to be to looked to. 20 M. 129 : 3 C. 145 ; 9 L. W. 84, ref (*Spencer and Devadoss, JJ.*) ABUBAKKAR *v.* KUNHIKUTTUYALI **16 L. W. 768 : 31 M. L. T. 389 : 74 I. C. 27 : 1923 M. 153.**

———**S. 11, Expln. VI**—*Representative suit—Hindu widow—Decision against—When binding on reversioners.*

Whether the widow represented the inheritance **in a litigation** against her may be gathered from the nature of the defence put forward and the issues raised, tried and decided in the former suit. The mere allegation that she did or did not, would be of little value. Was the suit based upon a mere personal cause of action by or against the widow ? Was it a ground personal to the female heir that was taken in a previous suit ? Was it a claim by or against the widow personally or the inheritance which she represented ? To decide these questions the Court must examine the averments, the issues and the findings in the previous suit. If the contentions raised are those connected with the inheritance and the trial was with reference to them the widow must be held to be representing the estate; if not the litigation must be deemed personal to her and not binding upon the reversioners. (*Spencer and Venkatasubba Rao, JJ.*) POTHUKUCHI RAJAGOPALAN *v.* V RAMAMOORTHY. **73 I. C. 284 : 18 L. W. 491.**

———**S. 11, Expl. VI**—*Representative suit—Tenants—Agraharamdars—Decision as to rent.*

C. P. CODE (V OF 1908), S. 11—Representative suit.

A suit for setting the amount of Kattubadi due from an agraharam is one in which all the agraharamdars are necessarily interested and the decision therein is, if the litigation is conducted *bona fide*, binding on all agraharamdars by virtue of Expln. VI of S. 11. Cases in which a party is represented at one stage of the suit and afterwards ceases to be represented owing to a failure to bring his legal representative on the record are not exceptions to the rule laid down by the explanation. Courts should hesitate to hold that any litigation had been *bona fide* within Expln. VI to S. 11 in which there had been a substantial departure from the accepted rules as to the joinder of parties as for instance by suing without the leave of the Court in a case properly falling under O. 1, R 8. The failure of the plffs. in the prior suit to implead the legal representatives of a party could not in the circumstances of the case be said to constitute such a want of *bona fides* as to render the explanation inapplicable. (*Wallis, C. J. and Spencer, J.*) MADABHUSHI GOPALACHARULU *v.* UMMANI SUBBANNA. **43 Mad. 427 : 38 M. L. J. 493 : 55 I. C. 984: (1920) M. W. N. 435.**

———**S. 11**—*Representative suit—Hindu father—Alienation—Dismissal of suit to set aside by father—Effect of.*

The dismissal of a suit by a Hindu father to set aside an alienation of joint family properties on the ground of undue influence and fraud is no bar to a suit by the sons to set aside the alienation on the ground that it is not for a binding family purpose. (*Abdur Rahim and Napier, JJ.*) KILLARY KAOTTAYA *v.* POLAVARAPPU DURGAYYA. **47 I. C, 192 : 35 M. L. J. 451.**

———**S. 11, Expln. VI**—*Representative suit—Public right—Pathway—Dismissal of first suit on the ground that no damage was proved—Subsequent suit—Defence that pathway is private.*

In a previous suit instituted by plaintiffs against defts. it was found that the site was a public one, but the suit was dismissed on the ground that no special damage was alleged and the present suit was brought by the plffs. after obtaining the requisite sanction under S. 91 of the C. P. Code; defts. pleaded right of way. *Held* that the finding in the previous suit operated as *res judicata* in the present suit. Apart from the law of *res judicata* a party who has been defeated on a particular view of the facts of the case put forward by him should not be allowed to resile from that position and to raise a defence inconsistent with his original contentions and should be held estopped from questioning the judgment to which he was a party. 36 Mad. 141 Rel. (*Seshagiri Aiyar and Napier, JJ.*) KHAJI SAYYID YUSUF SAHIB *v.* EDIGA NARASIMHAPPA. **(1918) M. W. N. 175 : 44 I. C. 367 : 8 L. W. 377.**

———**S. 11**—*Representative suit—Hindu widow—Reversioner.*

Where an alienee from a widow of the last owner gets a declaration of the validity of his alienation against the mother who is the next reversioner the decision is binding on the male reversioners. 27 I. C. 109, foll. (*Spencer and*

C. P. CODE (V OF 1908), S. 11—Representative suit.

Seshagiri Aiyar, JJ.) KUNJARU VENKATARAMANAYYA *v.* DEJAPPA KONDE. 22 M. L. T. 233 6 L. W 530 : 34 M. L. J. 319 : 42 I. C. 540 : (1917) M. W. N. 679.

——S. 11— *Representative suit — Hindu widow—Decision against of—Reversioner, when barred.*

A decision against a widow who does not establish her right to recover the estate of her deceased husband within 12 years of the death of the latter, does not operate as *res judicata* against reversioner whose title to possession only accrues on the death of the widow. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) RAMCHANDRA REDDI *v.* KAKUTURU ANDEMMA. 42 I. C. 228. : 32 M. L. J. 627.

——S. 11, Expln. VI, and O. 1, R. 8—*Representative suit—Common rights—Suit to establish a private common right and individual right—Subsequent suit for establishment of same private common right only.*

The expln. VI is not confined to cases in which the prior suit was brought with the permission of the Court under O 1, R. 8 thereof. The explanation applies though the prior suit was for the establishment of the plaintiff's individual right in addition to the right claimed by him in common to himself and others in so far as his claim in respect of the latter right is concerned. The decision in a suit by an *agraharamdar* of a village for establishing the joint right of himself and other *agraharamdars* of the village (some of whom were made parties, as defendants) in some sites in the village and the plaintiff's exclusive right of way over the sites and ejecting the defendants in the suit from those sites and for delivery of joint possession of the entire sites to the plaintiff and the other *agraharamdars* and for an injunction as regards the right of way, bars a subsequent suit by other *agraharamdars* against the defendants in the prior suit and the other *agraharamdars* for ejecting the said defendants from the same sites and for delivery of possession thereof jointly to the plaintiffs and the other *agraharamdars*; the expln. VI applies though one of the plaintiffs in the subsequent suit was not a party to the prior suit and was allowed to come in as a co plaintiff by order of Court.

Per *Sadasiva Aiyar, J.*—The expression "private right claimed in common" in Expln. VI is not confined to the right of joint Hindu family to the rights of a Malabar Tarwad, to joint trusteeship rights, etc. but extends to village communal rights. (*Sadasiva Iyer and Moore, JJ.*) RANGAMMA *v.* NARASIMHACHARYULU. 31 M. L. J. 26 : 35 I. C. 116 : (1916) 2 M. W. N. 258.

——S. 11 — *Representative suit — Hindu widow—Defence— Omission to plead—Ground of* res judicata.

Where in a suit instituted against a widow for possession of immoveable property it was open to her to plead the invalidity of an adoption but she failed, she must be held to have raised it. The question as to adoption is *res judicata* in any subsequent suit between the reversioners to her husband's estate and the alienees. (*Sankaran Nair and Spencer, JJ.*) VENKOBA RAO *v.* THUNIA NATARAJA CHETTIAR. 27 I. C. 109 : (1914) M. W. N. 903.

——S. 11 (Expln. VI)—*Representative Suit—Suit against Hindu widow—Decree when binding on reversioners.*

When a Hindu reversioner brings a suit against a widow in possession of her husband's estate for a declaration that a will set up by her as having been executed by her husband is a forgery the suit is brought by the reversioner to protect an interest common to the entire reversionary body, Expln. VI to S. 11, C.P Code is applicable and the decision if obtained after fair contest must necessarily bind all the reversioners and it is not open to the reversioner who may happen to be entitled when the succession opens to claim to have the matter reagitated. To hold otherwise would be to let in the very mischief which the Expln. was enacted to avoid. On grounds of public policy it would be highly mischievous that a question of fact which was decided after full contest as between the reversioners on the one hand and the widow on the other should be liable to be reopened as between other representatives of the same sets of rival claimants after a lapse of time. 38 M. 406, P. C. : 39 M. 634 : 19 A. L. J. 749; 40 A. 593, Relied on. (*Daniels and Lyle, A. J. C.*) KUAR NAGESHAR SAHAI *v.* KUAR MATA PRASAD. 9 O. L. J. 235 : 69 I. C. 730 : 25 O. C. 189 : 1922 Oudh 236.

——S. 11—*Representative suit—Hindu reversioners—Suit by—Effect of suit by some reversioners.*

Decision in a suit by some reversioners in the interest of the whole body is binding on the entire reversionary body, even though some of the plaintiffs withdrew from the suit. (*Stuart and Kanahaiya Lal, A. J. C.*) BISRAM SINGH *v.* SANWAL SINGH. 7 O. L. J. 342 : 57 I. C. 541 : 2 U. P. L. R. (J. C.) 123 : 23 O. C. 238.

——S. 11 — *Representative suit— Hindu widow—Decree against, when binds reversion.*

A Hindu widow cannot be deemed to represent her husband's estate so as to bind the reversionary heirs of her husband in relation to anything which she may have done herself to the prejudice of these reversionary heirs. She represents the estate as against the strangers for the purpose of protecting or preserving it. A decree obtained by a mortgagee against a Hindu widow alone, on the basis of a mortgage not executed by her for legal necessity cannot bind the reversioners. Nor are the reversioners liable to pay the costs of the mortgage suit to the extent of the amount of the mortgage money which was taken for legal necessity. (*Kanhaiya Lal, J. C.*) BAIJ NATH *v.* SHEO RAJ SINGH. 22 O. C. 260 : 53 I. C. 761 : 6 O. L. J. 469.

——S. 11 — *Representative suit — Life Tenant—When binding on remainderman.*

A decision in a suit against the Hindu widow holding a life estate under the will of her

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husband is not binding on the remainderman under the will. (*Lyle, A. J. C.*) ACHHAIBAR SINGH *v.* HARIGOBIND SINGH. 22 O. C. 156 : 52 I. C. 845 : 6 U. L. J. 355.

——S. 11—*Representative suit—Public right—C. P. Code, O. 1, R. 8—Decision in suit, if binding on the public.*

If the plaintiff suing for a declaration that he is owner of a piece of land free from any right on the part of the public to use it as a highway, chooses to bind the public he must comply with the provisions of O. 1, R 8 of the C. P. Code and must observe the conditions on which permission is given by the Court under that rule. (*Manuk, J.*) HARBANS NARAIN SINGH *v.* BHAJOO NONIA. 49 I. C. 796.

——S. 11—*Representative suit—Hindu widow—Decision against.*

A decision against widows as representing their husband's estate is *res judicata* against the reversioners in a subsequent suit in regard to the same estate. (*Mullick and Atkinson, JJ.*) ATUL CHANDRA MITRA *v.* MIRTUNJOY BOSE. 46 I. C. 162 : 3 Pat. L. J. 426.

——S. 11—*Representative suit—Limited owner—Father represents son.*

In the case of police jagirs in Pachete the Government can appoint a successor other than the heir of the last holder, but if it does so succession is hereditary. The dismissal of a suit by the father to set aside an execution sale of the jagir bars a suit by the son on his succession for the same purpose. (*Mullick and Jwala Prasad, JJ.*) JADAB LAL *v.* DEBI LAL SINGH. 3 Pat. L. W. 149 : 2 Pat. L. J. 725 : 42 I. C. 399 : 1919 Pat. 426.

——S. 12 (1)—(1898) S. 46 (1)—*Acquisition by joint family—Alienation by father—Minor sons, if bound.*

An alienation by the father of his interest in an occupancy holding is not binding on a minor son except in those cases in which an alienation of the family property binds the son. An occupancy right may be acquired by an individual, a firm, a body corporate or a joint family. (*Miller, C. J. and Roe, J.*) SUKURU MALI *v.* SRI BRAHMA PURA BALBHARA MAHAPRABHU. 51 I. C. 896 : 4 Pat. L. J. 354.

——S. 12 (1) and (3)—(1898) S. 46—*Surrender if a transfer.*

A surrender is in no sense a transfer, much less a transfer within S. 46 of the C. P. Tenancy Act, (1898.) The Act while providing for the recovery of possession of a holding by the heir of a surrendering tenant, makes no provision for such recovery by a co-sharer landlord. (*Mullick and Atkinson, JJ.*) DINABANDHU PANDA *v.* TRILOCHAN PANDA. 44 I. C. 317 : 3 Pat. L. J. 88.

——S. 13—*Judgment on the merits—Meaning of—Enforceability in British India.*

A judgment given against defendant on his failure to answer interrogatories after striking out his defence is not a judgment "on the merits" and cannot be enforced in British India as such. S. 13 (*b*), C. P. C. refers to cases where, for one

C. P. CODE (V OF 1908), S. 13.

reason or another, the controversy raised in the action has not, in fact been the subject of direct adjudication by the Court. (*Lord Buckmaster*) KEYWER *v.* VISVANATHAM REDDI. 40 Mad. 112 : 44 I. A. 6 : 32 M. L. J. 35 : 21 M. L. T. 78 : 15 A. L. J. 92 : 19 Bom. L. R. 206 : 21 C. W. N 358 : 25 C. L J. 233 : 10 Bur. L.T. 175 : 38 I.C. 683 : 5 L.W 342 (P.C.) [Affirming 27 I. C. 386 : 39 Mad. 95.]

——S. 13—*Foreign judgment—Effect of- Suit on.*

A foreign judgment has no force or authority as such in British India, but may give a cause of action for a suit to obtain the same relief in British India. It is only in such proceedings that the question of effect of the foreign judgment properly arises. (*Lord Atkinson.*) THAGBUL FATIMA *v.* AMIR HASAN KHAN. 20 C. W. N. 1213 : 36 I. C. 710 : (1916) 2 M. W. N. 153 (P. C.).

——S. 13—*Foreign court—Suit on judgment of—Plea of want of jurisdiction—Merits, if open.*

When a suit is brought in British India on a foreign judgment and a plea is brought forth that the foreign court had no jurisdiction but it is found the defendants appeared and contested the claim, the plea is open. The general rule in such case is that one court which entertains a suit on a foreign judgment cannot institute an enquiry into the merits of the original action or the propriety of the decision. (*Piggott and Stuart, JJ.*) GANGA PRASAD *v.* GANESHI LAL. 21 A. L J. 890 : L. R. 4 A. 604 : 46 All. 119 : 1924 All. 161.

——S. 13—*Judgment on merits—Solicitor appearing for the party.*

A judgment delivered against a party represented by a solicitor who accepted services of the writ of summons, (the party himself being unable to appear and defend the suit in London) is a judgment given on the merits within S. 13. (*Richards, C.J. and Banerji, J.*) COLE *v.* HARPER. 50 I. C. 780 : 17 A. L. J. 501.

——S. 13—*Foreign Court—Fraud—Effect of.*

Where the decision in a Foreign Court was obtained between the widow and the alleged son of the deceased, it must be held that the widow completely represented the estate and that any decision between the parties in that suit, provided there was a direct adjudication upon the point, is conclusive between them and between their successors-in title, provided also that the judgment is not disqualified by any of the flaws set forth in S. 13 of the Code. But where the decision is obtained by fraud it is not *res judicata* between the parties. (*Le-Rossignol and Martineau, JJ.*) GOOR BACHAN SINGH *v.* GIAN SINGH. 1922 Lah. 175.

——S. 13—*Judgment on the merits—Filing of written statement—Solicitor reporting no instructions.*

Defendant was sued in the Court of Straits Settlements. Written statement was filed but at the trial the defendant's solicitor reported no instructions. Thereupon judgment was given for the plaintiff on his examining his witnesses. On

C. P. CODE (V OF 1908), S. 13.

this judgment a suit was laid against the defendant in the Courts in British India. *Held*, that the judgment of the foreign Court was given on the merits and that the same was conclusive against the defendant in the present suit. 40 Mad. 112 (P.C.) rel. (*Abdul Rahim and Seshagiri Aiyar, JJ.*) VENKATACHALAM CHETTY *v.* PICHAI AMMAL.
11 L.W. 609 : 57 I.C. 742 : (1920) M W.N. 412.

——S. 13 and 44—*Foreign judgment—Error as to onus of proof—Effect of.*

A wrong view as to burden of proof will not make a foreign judgment erroneous on the face of it. A mistake of law in a foreign judgment is no ground for vacating it. There must be something in the procedure anterior to the judgment which is repugnant to natural justice. (*Seshagiri Aiyar and Bakewell, JJ.*) RAMA SHENOI *v.* HALLAGNA. 41 Mad. 205 : 45 I C. 703 : 34 M.L.J. 295.

——S. 13—*Foreign Judgment—Judgment of French Indian Court removing trustees and appointing new ones—Enforceability of, in British Indian Court where property is situate.*

Per :—*Abdur Rahim, Offg. C.J.* (*Phillips, J. dissenting*). A judgment of a French Indian Court removing trustees appointed by the will of a testator and appointing new ones, cannot be enforced by an action in a Br. Court for possession of properties covered by the will and situated in Br. India especially when the Letters of Administration have been granted in Br. India to defendants, the first trustees. The plaintiffs who were newly appointed trustees will have to sue the defendants in a Court of British India for removing the defendants from a trusteeship. (*Abdur Rahim, C. J. and Phillips, J.*) SHIYALI SUBRAYA CHETTY *v.* CALVE SUBRAYA CHETTIAR.
21 M.L.T. 315 : 37 I.C. 404 : 5 L.W. 720.

——S. 13— *Jurisdiction — Submission to—Foreign Court—Effect.*

The fact of having taken an objection to the jurisdiction of the foreign court, in the lower court is vitiated by the fact that the same plea was not raised in the appellate court and hence this conduct implied submission to the jurisdiction of the foreign court. This submission debars the same question being raised at the time of the execution of the decree by the British Court, 6 T.L.R. 85, Foll. (*Oldfield and Seshagiri Aiyar, JJ.*) PARAMESWARAN *v.* SUBRAMANIA PATTAR.
29 I.C. 456.

——S. 13—*Judgment on merits—Foreign Judgment.*

A decision is not on merits when the defendant's written statement is struck out for his failure to answer interrogatories and he is not allowed to go on the merits. A suit on foreign judgment thus obtained is unenforceable in British India (*Wallis, C.J. and Seshagiri Aiyar, J.*) VISWANTHA *v.* KEYMER. 39 Mad. 95 : 27 I.C 356 : 27 M L.J. 670.

[Affirmed on appeal by the Privy Council.
See 40 Mad. 112 : 44 I.A. 6:
38 I.C 683 : 32 M.L J. 35 (P.C.)]

—— S. 13—*Submission to jurisdiction—When voluntary.*

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A submission to jurisdiction for saving property is not a voluntary submission even if a written statement is filed objecting to the jurisdiction and raising a defence on the merits. A British executing Court has jurisdiction to go behind a decree passed by a Native State and see whether the Court which passed the decree had jurisdiction to do so. Scope of Ss. 13 and 14 considered. (*Wallis, C J. Ayling and Seshagiri Iyer, JJ.*) VEERARAGHAVA IYER *v.* MUGA SAIT. 39 Mad. 24 : 16 M.L.T. 479 : 27 M.L.J. 535 : 1 L W. 887 : 26 I.C. 287 : (1915) M W.N. 162 (F.B.)

[On appeal from, (1913) M.W.N. 605 : 20 I.C. 704 : 14 M.L.T. 96.]

——S. 13—*Estoppel by judgment.*

If all who have a right to appear and be heard in a cause, have been duly made parties, the judgment establishes a perfect and complete right against all as much as would a conveyance of a joint estate by all the parties interested. Judgment in an action strictly in *personam* indeed binds third persons in that way; all that is necessary is that all those who have the exclusive right to litigate the cause are proper parties to it and that the question should be determined without collusion. Where a question relating to ownership of a land, was entirely between A. and B. and the former obtained a judgment against the latter and the latter sued the Secretary of State for a declaration that the land was not liable to assessment. *Held* that the suit could not be maintained for want of title which the plaintiff was barred from claiming owing of the judgment in a previous suit. All cases of estoppel by judgment are not covered by S. 13, C.P.C. (*Sundara Aiyar and Phillips, JJ.*) SAYAM RAMAMOORTHI DORA *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. 24 M L J. 469 : 19 I.C. 656 : 36 M. 141.

——S. 13—*Foreign judgment—Jurisdiction—Partnership suit—Service on agent within jurisdiction and out of jurisdiction in foreign territory on non-resident partners.*

The circumstances that give a court jurisdiction to entertain a suit on a foreign judgment and to render the defendants liable thereon are alternative (1) the defendant being a foreign subject (2) his residence in a foreign country (3) his selection of forum (4) his submission by appearance and (5) his contract to submit. Judgment against a firm does not amount to a personal decree against the members thereof residing in foreign territory. A service on the agent within jurisdiction cannot create jurisdiction in a foreign court against non-resident partners on the ground of residence. But when there has been submission to the *forum* by the partners for many years, a decree against them can be personally enforced against them. (*Sankaran Nair and Napier, JJ.*) RAMANATHAN CHETTIAR *v* KALIMUTHU PILLAI.
37 Mad. 163 : 18 I. C. 189 : 24 M. L. J. 619.

——S. 13—*Foreign judgment—Opposed to Indian Law.*

The judgment of a competent foreign Court having jurisdiction cannot be impeached by a plea that if the suit had been brought in India, the

C. P. CODE (V OF 1908), S. 13.

suit would have been barred by time. (*Robinson J.*) S. KING *v.* D. J. BUCHANAN.
35 I. C. 741: 9 Bur. L. T. 106.

——S. 13—'*Judgment on merits*'—Ex parte *judgment.*

Where after due summons, the defendant entered appearance and had an opportunity of defending the action, but did not do so and the Court passed judgment *exparte* in plaintiffs favour; *held*, that the judgment must be held to have been given on the merits. (*Parlett, J.*) C. BURN *v.* D. T. KEYMER. 6 Bur. L.T. 160: 7 L B. R. 56: 20 I. C. 971.

——Ss. 13 (a) and 44—*Foreign Court—Competency of - Submission to jurisdiction.*

S. 13 should be determined by the International Law and not by the law of that country. If the defendant submits to the jurisdiction of a foreign Court and takes the chance of a judgment in his favour then the decree is binding but if he appears not voluntarily but under decrees or coercive process he is said to have not appeared. The mere intention of avoiding an inconvenience that might happen in the future does not make defendant's appearance involuntary. (*Wallis, C. J. Seshagiri Aiyar and Phillips, JJ.*) RAMA AIYAR *v.* KRISHNA PATTRR. 39 Mad. 733: 3 L. W. 90: 19 M. L. T. 68: 30 M. L. J. 148: 32 I. C. 597: (1916, 1 M. W. N. 83.

——S. 13 (b)—*Foreign judgment—Judgment "on the merits"—Meaning of.*

In an action for recovery of money in the King's Bench Division of the High Court in England the defendant having failed to comply with an order to answer interrogatories his defence was struck off and judgment was entered for the amount claimed by plaintiff. The plaintiff brought a suit on the judgment against the defendant in Madras. *Held*, that the judgment of the English Court was one which had not been given on the merits of the case within S. 13 (B) C. P. C. and no action could be maintained on it in Indian Courts, S. 13 (b) refers to cases where the controversy raised in the action has not been, in fact, the subject of direct adjudication by Court. (*Lord Buckmaster.*) KEYMER *v.* VISVANATHAM REDDI.
40 Mad. 112 · 44 I. A. 6: 15 A. L. J. 92: 21 M. L. T. 78: 32 M. L. J. 35. 5 L. W. 342: 19 Bom. L R. 206: 21 C W. N. 358: 38 I.C. 683: 25 C L J. 233: 10 Bur. L.T. 175: (P.C.)
[Affirming 39 Mad. 95: 27 M. L. J. 670: 27 I. C. 386.]

——S. 13 (d)—*Suits on foreign judgments—Contrary to natural justice.*

The fact that foreign Courts do not regard rules of the Courts of British India as imperative even if the rules are of legal application in such states, should not be a reason for dismissing suits based on such foreign judgments on the ground that they are contrary to natural justice. (*Jones, J.*) MULK SHAH *v.* TARA SINGH.
13 P. W. R. 1916: 34 I. C. 255.

——S. 14—*Previously instituted suit.*

The jurisdiction of the Court trying the previously instituted suit need not depend upon actual facts but upon allegations made in the plaint. (*Imam, J.*) PADAMSEE NARAYANJEE *v.* LAKHAMSEE RAISEE. 43 Cal. 144: 33 I. C. 288.

C. P. CODE (V OF 1908), S. 16.

——S. 14—*Foreign judgment—Suit on—Jurisdiction—Presumption—Onus.*

In a suit on a foreign judgment the plaintiff need not state that the Court had jurisdiction over the parties or the cause, every presumption being made in favour of the foreign judgment. The defendant must prove that none of the conditions which would give jurisdiction was present. If the parties were not present it will be presumed they submitted to the judgment. (*Wallis, C. J. and Spencer, J.*) RAMANATHAN CHETTY *v.* LAKSHMANAN CHETTY. 24 M. L. T. 244: 49 I. C. 202:

——Ss. 15 and 24—*Suit instituted in Court competent to try it—Transfer.*

Once the institution takes place in accordance with the provisions of S. 15. C. P. C. the operation of the section is exhausted. The section does not authorise the transfer of a pending suit, merely because in the course of the trial, it is found, the plaintiff is entitled only to a part of the claim, which would have been cognizable by a lower Court. (*Stanyon, A. J. C.*) SHEKH NUR KHAN *v.* SHEIKH RAHIM, 54 I,C. 655.

——S. 15—*Jurisdiction, what determines.*

The value put by a plaintiff *prima facie* determines jurisdiction. (*Pratt, J. C. and Crouch A. J C.*) KHIATOMAL LAL CHAND *v.* FATEH MUHAMMAD. 32 I C. 629: 9 S. L. R. 164.

——S. 16—*Proviso—'defendant' includes all defendants.*

The word 'defendent' in the proviso to S. 16 C. P. C., means all the defendants, where there are more than one defendant in the suit. 21 W.R. 303 foll. (*Chatterjee and Panton, JJ.*) MAHOMED YASIN *v.* BIMOLA PRASAD MUKHERJEE.
73 I. C. 405.

——S. 16—*Jurisdiction—Secretary of State—Not a person within the local limits of Calcutta—Cause of action arising out of jurisdiction.*

The Secretary of State for India in Council is not a person who dwells or carries on business or personally works for gain within the local limits of Calcutta. Therefore when the alleged cause of action in a suit arises wholly out of the ordinary original civil jurisdiction of the Calcutta High Court the Court has no jurisdiction to entertain the suit. (*Jenkins, C.J. and Harington, J.*) RODRICKS *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. 21 I.C. 1: 40 C. 308.

——Ss. 16 and 17—*Properties in different jurisdictions.*

Where the properties are situate in different jurisdictions, these sections are no bar to parties bringing successive suits. 22 Bom. 922. 14 Cal. 835, Foll. (*Seshagiri Iyer, J.*) MAHALINGAM *v.* NATESA IYER.
(1916) 1 M. W. N. 146: 32 I. C. 423: 3 L. W. 107.

——Ss. 16 and 17—*Charge—Enforcement of—Jurisdiction.*

A suit to enforce a charge created on the land for Govt. revenue on it, can be instituted in the

C. P. CODE (V OF 1908), S. 16.

Court at the place where the land is situated. (*Wallis, C. J. and Srinivasa Iyengar, J.*) VENKATA SIMHADRI JAGAPATHIRAJA *v.* SRI LAKSHMI NARASIMHA ROOPA.

29 M. L. J. 639 : 2 L. W. 1046 : 18 M. L. T 464 : 31 I. C. 255 : 39 Mad. 795

——S. 16—*Jurisdiction—Land.*

S. 16 of the C. P. Code (1882) does not preclude all courts other than the Court within whose local limits the immoveable property is situate from trying any question relating to the title of the property, when the question is merely incidental to the reliefs claimed. (*Abdur Rahim and Ayling, JJ.*) SOWDAGAR NABHEKHAN *v.* MUHAMMAD HUSSAIN.

10 I. C. 267 : 9 M. L. T. 372.

——Ss. 16 Expln. and 20—*Suit for* Josbipan *income—If suit, for immoveable property.*

A suit for *Joshipan* income in respect of villages situated in and outside British India can be decreed only in respect of villages situated in British India. (*Findlay, A. J. C.*) BALWANT *v.* TULSIBAI. 46 I. C. 782.

——Ss. 16 (a) and (d) and 20—*Suit for dissolution of partnership—Forum.*

A suit for dissolution of partnership with the usual ancillary relief can be instituted in the Court within whose jurisdiction the parties reside or the cause of action arises. Such a suit does not fall either under clause (a) or (d) of S. 16, C. P. C. (*Richards, C. J. and Banerjee, J.*) DURGADAS *v.* JAI NARAIN. 50 I. C. 156 : 17 A. L. J. 567.

——S. 16 (d)—*Suit for maintenance—Prayer that maintenance be made charge on property within jurisdiction.*

A suit for maintenance with a prayer for a charge on property within jurisdiction of a Court against a subject of a Native State is cognizable by the Court. (*Scott, C. J. and Beaman, J.*) SITABAI *v.* LAKMIBAI.

40 Bom. 337 : 32 I. C. 985 : 18 Bom. L. R. 67.

——Ss. 16 (d) and 17—*Suit for declaration of plaintiff's right to immoveable properties in different districts—Lease by one of several defts.*

A declaratory suit as to the plff.'s title as heir to properties situated in different districts even if the plff. sues in any particular district, is not bad for misjoinder of cause of action, for the invasion of his right in one district is an attack on the whole property in the different districts inherited by him and so the Court had jurisdiction to try the suit under S. 17 of the C. P. Code. (*Coxe and Ray, JJ.*) BAL GOBIND SINGH *v.* GAJA LAKSHMI DASI. 21 I. C. 438.

——Ss. 16 (d) and 20 (c)—*Suit for declaration that a will is a forgery—Determination of right to immoveable property—Cause of action—Jurisdiction.*

A suit by a Hindu reversioner for a declaration that a will set up by the widow of the last male owner was a forgery and for its cancellation can be instituted under S. 20 (c), C.P. Code, in a court having jurisdiction over any one of the places where any part of the properties dealt with by the will is situate. Such a suit is not one falling

C. P. CODE (V OF 1908), S. 17.

within S. 16 (d) of the C P. Code. In a suit to set aside a will the plaintiff's allegation of interest and the threat to his rights are parts of his cause of action and where the properties are situate within different jurisdictions part of the cause of action arises under each jurisdiction. (*Krishnan and Venkatasubba Rao, JJ.*) NITTALA ACHAYYA *v.* NITTALA YELLAMMA. 43 M. L. J 615 : 72 I C. 920 : 1922 M. W. N. 834 : 16 L. W. 785 : 1923 Mad. 109.

——S. 16 (d)—*Suit for declaration in respect of mortgage*

The Court in whose jurisdiction the properties are not situate cannot try a case for declaration that a mortgage in favour of the deft. is invalid against the plff. (*Benson and Sundara Iyer, JJ.*) ARUNACHELLA CHETTIAR *v.* MUTHIA CHETTIAR. 23 M. L. J. 679 : 17 I. C. 758 : (1914) M W N. 52.

——S. 16 (d)—*Interest in immoveable property—Difference between suit by vendor and vendee.*

The nature of a suit depends upon the relief asked for, in the plaint. A suit for specific performance is not a suit for land or for the determination of any right to or interest in immoveable property. There is no difference between a vendor suing for specific performance and purchaser suing for it. (*Twomey and Ormond, JJ.*) MADAKI *v.* MISSER. 36 I. C. 431 : 9 Bur L. T. 119.

——S. 16 (e)—*Suit for mesne profits—Land situated outside British India.*

A British Indian Court can entertain a suit to recover mesne profits of lands situated outside British India, against a defendant residing within its jurisdiction. The proviso to S. 16 makes it clear that even although a wrong to immoveable property is alleged, yet where the relief sought can be entirely obtained through the defendant's personal obedience, then the suit can be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain. (*Macleod, C. J. and Shah, J.*) MAHADEO *v.* RAMACHANDRA. 23 Bom L. R. 903 : 68 I. C, 510 : 46 Bom. 108 : 1922 Bom. 188.

——S. 16 (f)—*Moveable property under attachment by a foreign Court—Jurisdiction.*

S. 16 (f), C P C. does not apply to a suit for recovery of moveable property which is under attachment by a foreign Court and the British Indian Courts have no jurisdiction to entertain such a suit even independently of S. 16 The case is different if the deft. is a resident of British India and attachment is made at his instance because then a personal decree may be passed and executed by enforcing personal obedience. (*Abdur Rahim and Sadasiva Aiyar, JJ.*) KATTICK RAMMUNNI *v.* UDAYAMANGALATH MITHALE. 14 I. C. 279 : (1912) M. W. N. 524.

——S. 17—*Sonthal parghanas—Portion of property situate in—Suit in ordinary Courts—Usury—Power to relieve—Sonthal Parghanas Act (XXVIII of 1855), S. 2—Sonthal Parghanas*

C. P. CODE (V OF 1908), S. 17.

Settlement Regulation (III of 1872), Ss. 5 and 6 —Sonthal Parghanas Justice Regulation (V of 1893), Part II.

A suit to enforce a mortgage of land of which a portion is situate in the *Sonthal Parghanas* must be brought before the Settlement Officer or other officer appointed under the Sonthal Parghanas Act and Justice Regulation. A Court having local jurisdiction outside the *Sonthal Parghanas* has no jurisdiction to try the suit even though the bulk of the property falls within its territorial jurisdiction and S. 17 of the C.P. Code does not apply. The consent of the parties cannot give jurisdiction to the latter Court. The Court exercising jurisdiction in the *Sonthal Parghanas* is bound by the rules as to usury found in S. 6 of the *Sonthal Parghanas* Regulation (1872). (*Lord Moulton*). MAHA PRASAD SINGH *v.* RAMANI MOHAN SINGH.

42 Cal. 116 : 41 I. A. 197 : 18 C. W. N. 994 : 16 M.L.T. 105 : (1914) M W.N. 565 : 1 L.W. 619 : 20 C.L.J. 231: 16 Bom. L.R. 824 : 25 I.C. 451: 27 M.L.J 459. (P.C.).

[On appeal from 4 I. C. 56 : 9 C. L. J. 288.]

——Ss. 17 and 20—*Cause of action—Sale of goods—Agreement to pay price and render account—Forum.*

Where a firm at Sialkot instituted a suit in the Sialkot Court against a commission agent carrying on business at Calcutta for sale proceeds of hydes sent by the former to the latter for sale on commission, and it appeared that the money was to be payable at Sialkot and the accounts were to be rendered there, *held*, that the Court at Sialkot had jurisdiction to try the suit. 26 P.R. 1918 rel. (*Broadway and Abdul Qadir, JJ.*) LAL SINGH *v.* THE FIRM OF HAJI KADIR BAKHSH

3 Lah. L.J. 499 : 69 I.C. 424 : 1922 Lah. 36 (2)

——S. 20.

Accounts.
Cause of action.
Contract.
Corporation.
Debtor and Creditor.
Decree
Ejectment.
Insurance.
Leave to sue.
Negotiable Instrument.
Partnership.
Place of suit.
Plff's right to choose forum.
Residence.
Restitution of conjugal rights.
Shipping.
Tort.

Accounts.

——S. 20 (c)—*Accounts—Mutual dealings —Oral settlement of account.*

In cases of mutual dealings an oral settlement of accounts may give rise to a cause of action. 21 Mad. 366 foll. 16 Mad. 339 diss. (*Sadasiva Aiyar and Moore, JJ.*) AYYASWAMI CHETTY *v.* CHINNIA NAINAR. **34 I. C. 431 : 3 L. W. 338.**

——S. 20 (c)—*Accounts—Suit against agent —Forum.*

C. P. CODE (V OF 1908), S. 20—Cause of action.

The cause of action in a suit for accounts against an agent arises at the place where the contract of agency took place or where it was to be performed and where account was refused. The fact that the moneys have to be sent from a particular place by the agent does not form a part of the cause of action. (*Maung Kin, J.*) J. M. V. ROWTHER *v.* K. M M. ROWTHER.

55 I. C. 266 : 12 Bur. L. T. 198.

Cause of action.

——S. 20 (c)—*Cause of action—Goods sent without order—Plaintiff asked to keep goods—Suit for charges incurred—Jurisdiction of Courts.*

Defts. from Cawnpore sent a bale of cotton to the plaintiff at Jhansi without an order or direction from the latter. Plaintiff accepted to hold the goods on behalf of deft. at deft.'s risk. In a suit for recovery of charges the cause of action was held to arise at Jhansi. (*Knox, A.C J.*) GANESH PRASAD *v* BANSIDHAR BARAUMIA.

41 I.C. 904 · 15 A. L. J. 513.

——S. 20 (c)—*Cause of action—What is.*

The expression "cause of action" means every fact necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court, (*Piggott and Walsh, JJ.*) MUHAMMAD YAKARIAYA *v.* MUHAMMAD HAFIZ.

39 All. 506 : 41 I.C. 233 : 15 A.L.J. 557.

——S. 20 (c)—*Cause of action—Arising in part—Jurisdiction.*

A Court has jurisdiction to entertain a suit if the cause of action arose even partly within its jurisdiction. (*Knox, J.*) EAST INDIA RAILWAY CO. *v.* BINDA. **26 I.C. 620 : 13 A L.J 66.**

——Ss. 20 and 21—*Cause of action—Suit for rent — Jurisdiction — Residence of defendant—Waiver of objection—B. T. Act, S. 144.*

Reading Ss. 20 and 21 of the C. P. Code together with S. 144 of the B. T. Act a suit for rent may be instituted in the court within the local limits of the jurisdiction of which lies the property in respect of which a suit for possession may have been brought. This however does not exhaust all the provisions of S. 20 C. P. Code. Cls. (a) and (b) of S. 20 C. P. Code allow a landlord to institute a suit for rent where the tenant resides. This must obviously be limited to cases where the landlord seeks a decree for money. Where, however, the landlord seeks a decree for rent as also ejectment under S. 66 of the B. T. Act the suit must be treated as one for the recovery of immoveable property within the meaning of S. 16 (4) C. P. Code and can consequently be instituted in the Court within the local limits of whose jurisdiction the property is situate. A suit for the recovery of rents of lands situate in one district may be brought in another district where the defendant is residing, although in such suits the plaintiff's title to the land in respect of which the rent is sought to be recovered may incidentally come in question. (*Mookerjee and Cholzner, JJ.*) KUNJA MOHAN CHAKRAVARTHY *v.* MANINDRA CHANDRA ROY CHOWDHURY.

27 C. W. N. 542 : 1923 Cal. 619.

C. P. CODE (V OF 1908), S. 20—Cause of action.

———S. 20 (c)—*Cause of action—Collusive and fraudulent decree—Suit to set aside decree—Jurisdiction of Court.*

Plaintiff obtained a decree against a person and attached his properties at Amritsar. The defendant who professed to have a decree of the Ferozepur court against the same person got it transferred to Amritsar and applied for rateable distribution along with plaintiff. Thereupon the plaintiff sued for a declaration that the decree obtained by the defendant was fraudulent and collusive. *Held*, that the Amritsar court had jurisdiction to try the suit. 25 A. 48; 37 A. 189; 39 A. 607 Rel. (*Abdul Raoof, J.*) BALLA MAL *v.* JAGAN NATH.
72 I. C. 392.

——S. 20—*Cause of action—Jurisdiction—Carrying on business—Objection to jurisdiction.*

Where there has been no failure of justice an objection to the place of suing could not be entertained on appeal.

It is doubtful whether the mere letting of house property through an agent can be said to be carrying on business. A contract is concluded where it is accepted and the place of suit in respect of its breach is the place where it was concluded or the place where it ought to have been performed. The mere sending of a cheque from a particular place towards the contract does not give rise to a cause of action in that place. (*Campbell, J.*) SOHAN SINGH *v.* RIDDICK. 66 I. C. 865 : 1922 Lah. 164.

———S. 20—*Cause of action—Place of suing—Place of business.*

Plaintiff resident of A ordered goods from defendants who carried his business at B. Plaintiff sued the defendant at A for damages on the ground that the goods supplied were not of the quality and quantity contracted for. *Held*, the cause of action arose at B and the Court at A could not try the suit and that the High Court could in revision set aside the interlocutory order. (*Abdul Raoof, J.*) HARPRASHAD SINGH *v.* SIVE RAM JADO RAI. 60 I. C. 481.

———S. 20 (c)—*Cause of action—Payment in one place.*

Where plaintiffs residents of Ludhiana ordered oil cakes from defendants residents of Darbhanga and remitted a part of the money to Darbhanga after they got the goods purchased and alleged that the goods were of bad quality and where the plaintiffs had agreed to accept the railway receipts which had to be sent by V. P. P. by the defendants, the plaintiffs' suit for compensation for loss was held to lie not at Ludhiana but at Darbhanga, though the defendants sent their agent to Ludhiana to get the payment because the V. P. P. for over a certain amount could not be issued. (*Leslie Jones, J.*) FIRM OF DAMRI SHAH *v.* FIRM OF RULLA MAL.
2 Lah. L. J. 555.

——— S. 20 (c)—*Cause of action—Money payable on death at Lahore.*

Where money deposited with the Hindu Mutual Relief Fund is payable on the death of S at Lahore but S died at Lyalpur, where the fund had carried on business through an agent, the Court at Lyalpur has jurisdiction to entertain a suit for recovery of the fund moneys due to S on the ground that the death of its member S which was part of the cause of action occurred at Lyalpur and that the defendant fund carried on its business at Lyalpur through an agent. (*Chevis, J.*) PUNJAB HINDU MUTUAL FAMILY RELIEF FUND, LAHORE *v.* SARDARI LAL 98 P. R 1918 : 45 I. C. 900 : 39 P. L. R. 1918.

———S. 20 (c)—*Cause of action—Meaning.*

The words 'cause of action" mean the whole bundle of material facts which it is necessary for a plaintiff to allege and prove to obtain the relief he claims in the suit (*Krishnan, J.*) NITTABA ACHAYYA *v.* NITTALA YELLAMNA.
16 L.W. 785 : 43 M. L. J. 615 : 72 I.C. 920 : 1922 M.W.N. 834 : 1923 M. 109.

———S. 20 (c)—*Cause of action—Scope of.*

Where a person employs an agent to sell his goods in certain districts and in breach of their agreement, he sold the goods in some of the districts through other agents, *held* in a suit for damages for breach of contract, the sale through other agents was part of the cause of action and such a suit can be filed in the district where the wrongful sale took place. (*Oldfield and Ramesam, JJ.*) RAIPUR MANUFACTURING CO. *v.* VENKATA SUBBA RAO. 70 I. C. 284 : 14 L. W. 341.

———S. 20 (c)—*Cause of action—Meaning of.*

Per *Krishnan, J.*—The term "cause of action" in S. 20 (c) means the cause of action as it was at the time when the right to sue arose for the first time. (*Oldfield and Krishnan, JJ.*) MANEPALLI MANGAMMA *v.* SATHIRAJU. 31 M. L. J. 316: 37 I. C. 681 : 5 L. W. 246.

———S. 20 (c)—*Cause of action—Pledge—Forum.*

The place where the cause of action arises in respect of a pledge must be determined with reference to the terms of the original contract and not by subsequent negotiations thereafter. (*Kotwal, A. J. C.*) TEK CHAND *v.* MAHADEO.
65 I. C. 65 : 1922 Nag. 127.

———S. 20 (c)—*Cause of action—What is.*

The cause of action has no relation to the defence set up or to the character of the relief prayed for in the plaint but refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. 10 Cal. 98 (P. C.) ref. (*Drake Brockman, J. C.*) MAHOMED ALI KHAN *v.* SHUJAT ALI KHAN. 46 I. C. 913 :

———S. 20—*Cause of action.*

Where several shops were owned by the plaintiffs and separate *Katas* were kept in respect of them but the transactions relating to one shop were with the defendant's consent entered in the accounts of the other shops and the whole set of transactions treated by the defendants in a cross suit filed by them as forming one cause of action and one account : *Held*, that the accounts in regard to each shop cannot properly be treated as entirely separate causes of action. (*Daniels, A. J. C.*) BANKE LAI *v.* KANHAIYA LAL.
1922 Oudh 124.

C. P. CODE (V OF 1908), S. 20—Cause of action.

———S. 20—*Cause of action—Meaning of.*

A cause of action includes every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his rights to the judgment of the Court. (*Wazir Hasan, A. J. C.*) MAHOMED HAMIDDULLAH KHAN *v.* FAKHRJAHAN BEGAM. **8 O. L. J. 650 : 65 I. C. 452 : 1922 Oudh 109.**

——— 20 (c)—*Cause of action—What comprises.*

The term "cause of action" comprises every material fact to be proved and includes an assertion of the right infringed and the manner of its infringement. (*Kanhaiya Lal, A. J. C.*) PREM NARAIN *v.* RAM LAL. **26 I. C. 225 : 1 O. L. J. 561.**

———S. 20—"*Cause of action*" *meaning—Causes based on contract of insurance—Cause of action does not include damage to insured property.*

For the purposes of S. 20 of the Code, the words 'cause of action' so far as suits on contract are concerned include the making of the contract and the performance or completion of performance of the contract and the payment of money under the contract, and that in cases based on contract of insurance they do not include the loss or damage of the property insured, which is merely a cause of the cause, and is not even a proximate cause since the real cause of action is the failure to pay the money due under the contract and the primary cause of that cause is the contract itself, the destruction of the property being only a secondary cause which is purely accidental, being due merely to the nature of the particular kind of contract under consideration. The meaning of the expression "cause of action" in the section in question when applied to suits based on contract, should be ascertained by a consideration of the meaning of the expression in the past in the course of the development of such legislation in India and the case-law thereon, and not by reference to any English decision on the construction of any English Statutes. (*Heald and Lentaigne, JJ.*) THE JUPITER GENERAL INSURANCE COMPANY, LTD., *v.* ABDUL AZIZ.
1 Rang. 251: 76 I. C. 482 : 1924 Rang. 2.

———S. 20 (c)—*Cause of action—Meaning of—Suit on pro-note executed outside jurisdiction but endorsed within—Residence—Govt. servant.*

Endorsement of a promissory note is part of the cause of action in a suit upon the same, and a suit lies at the place where it was so endorsed and delivered though the promissory note may have been executed at a place outside that jurisdiction. "Cause of action" explained. A Govt servant liable to be sent to various places, but stationed in one place for several years cannot be said to have only a temporary residence or lodging for the purposes of S. 20, C. P. C. (*Bell, J.*) SUBRAMANIAM CHETTY *v.* MAUNG PO THA.
11 I. C. 851 : 4 Bur. L. T. 183.

———S. 20 (c)—*Cause of action—What is—Forum.*

A cause of action consists of every fact which is material to be proved to entitle a plaintiff to succeed, every fact which the deft. would have a right to traverse. It arises in "part" within the jurisdiction of a Court, if, any fact material for the plff. to prove took place therein. A trader entered into a contract at Multan with the agents of a Karachi firm. The contract was to be completed in Karachi and the money was made payable at Karachi. *Held*, that the cause of action arose in part in Karachi and that the Karachi Court has jurisdiction to file an award based on a reference contained in the contract. (*Crouch, A. J. C.*) G. W. WILSON *v.* MESSRS. VOLKART BROTHERS. **27 I. C. 129 : 8 S. L. R. 107.**

C. P. CODE (V OF 1908), S. 20—Contract.

Contract.

———S. 20 (c)—*Contract for delivery of goods—Breach.*

Where a contract was made in Bengal for delivery of goods in Bengal, the mere despatch of goods from a place in the United Provinces does not give rise to a cause of action enforceable in the courts of the United Provinces in respect of the breach of the contract. (*Ryves, J.*) PURNA CHAND AMIR CHAND *v.* JODH RAJ RAM KUMAR.
66 I. C 501 : 1922 All. 448.

———S. 20 (c)—*Contract—Claim outside jurisdiction—Ancestral home of defendant within jurisdiction.*

Where a suit is brought on two contracts, one of which was entered into outside the jurisdiction of the Court, the portion of the plaint regarding that part of the claim was returned for presentation to the proper Court, *Held*, that the mere fact that defendants had their ancestral home within the jurisdiction of the Court though they actually resided outside such limits would not give the Court jurisdiction. (*Walsh and Wallace, JJ.*) KISHORI LAL *v.* RAM SUNDER.
64 I. C. 688 (1) : 19 A. L. J. 822.

———S. 20 (c)—*Contract—Purchase of goods at one place to be delivered at another.*

In a contract for the sale of goods, payment for, and delivery of the goods, was to be made at a place other than the place where the purchase was effected. *Held*, that a suit on account of non-delivery of a portion of the goods may be brought in a Court having jurisdiction over the place where delivery and payment were to be made. (*Bannerjee, J.*) ABDUL RASHID *v.* THE SIZING MATERIAL CO., LTD. **42 All. 480 : 2 U. P. L. R. (All.) 126 : 56 I. C 192 : 18 A. L. J. 566.**

———Ss. 20 (c), 21 and 115—*Contract—Suit on—Forum—Objection to—Revision.*

A contract is made where it is accepted and the buyer at Agra cannot sue at Agra for breach of a contract to sell goods concluded by acceptance at Delhi. If a formal order overruling the objection to jurisdiction is drawn, the High Court can revise it under S. 115, C. P. C. (*Rafique and Walsh, JJ.*) BHARGAVA AND CO. *v.* JAGANNATH BHAGWAN DAS. **41 All. 602 : 17 A. L. J. 718 : 51 I. C. 331 : 1 U. P. L. R. (H.C.) 120.**

———S. 20 (c)—*Breach of contract—Contract of sale—Accounts—Place of.*

Where the plff. to give jurisdiction to the Court in which the suit was filed alleged that by the custom of trade and by the contract between the parties, accounts were to be submitted within the

C. P. CODE (V OF 1908), S. 20—Contract.

Court's jurisdiction and let in no evidence on these points. *Held*, the Court had no jurisdiction to entertain the suit. (*Tudball and Rafique, JJ.*) LALTA PRASAD *v.* RAM SARUP. 40 I. C. 805.

———S. 20 (c)—*Contract—Place of suing—Place of delivery—Whether part of contract of sale of goods—Suit for damages—Jurisdiction.*

Where a contract for sale of goods was entered into at Bombay, the seller being directed to send the goods to buyer's address at Allahabad, and the buyer finding the goods defective and not answering to samples ordered, when they arrived at Allahabad, sued the defendant company for damages in the Court of Small Causes at Allahabad. *Held*, that the order of the Allahabad Court returning the plaint without taking any evidence to be presented to the proper Court stating that it had no jurisdiction to try it as the contract was completed at Bombay was bad and that the Small Cause Judge at Allahabad should have taken evidence as to whether the place of delivery was an essential part of the contract or not under S. 48 of the Contract Act. (*Knox, J.*) SHEO CHARAN LAL *v.* TAJ BHAI ALI BHAI.

39 All. 368 : 39 I. C. 524 : 15 A. L. J. 342.

———S. 20 (c)—*Contract—Suit for damages arising out of negligence or misconduct.*

The plff. a resident of Hathras in the Aligarh Dt. telegraphed to the deft. a Commission Agent at Karachi to buy some grain for him and despatch it by rail to Hathras and the deft. purchased the grain and despatched it as directed from Karachi but omitted to send the Railway receipt and invoice in time owing to which and other misconduct on his part at Karachi the grain was delivered to the plff. late, and thus caused him loss and damage. In a suit by the plff. for compensation at Hathras ; *Held*, the cause of action arose at Karachi as the Agent's negligence or misconduct occurred there, and the Court at Hathras could not entertain a suit. (*Tudball and Piggott, JJ.*) SALIG RAM *v.* CHUBA MAL.

34 All. 49 : 11 I. C. 712 : 8 A. L. J. 1160

———S. 20 (c)—*Contract—Cause of action.*

A Court within whose jurisdiction the deft. does not reside and no part of the contract was entered into, cannot entertain a suit on the contract. (*Richards and Tudball, JJ.*) GOKUL DAS *v.* HANSRAJ. 9 I. C. 824.

———S. 20 (c)—*Contract — Place of suing—Contract to be performed at a certain place.*

Where a contract was to be performed at a certain place the Court of that place has jurisdiction to entertain a suit for damages for breach of contract. (*Stephen and Coxe, JJ.*) BHUTTA CHARYA & Co, *v.* CAWNPORE WOOLLEN MILLS CO., LTD. 13 I. C. 943 : 16 C. W. N, 325.

———S. 20 (c)—*Contract—Breach of—Place of delivery—Not instituted in.*

The plaintiff firm residing in Gujranwalla arranged with defendant-firm residing in Calcutta to purchase certain goods and send them to Gujranwalla; the plaintiff-firm was to send the money to Calcutta to the defendant. The plaintiff remitted Rs. 800 to the defendant and the latter consigned the goods to itself in Gujranwalla

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sending the railway receipt by value payable post for the balance of the price. The plaintiff refused to take delivery of the railway receipt through the value payable post and it was returned to the defendant. Subsequently it turned out that the goods were lost and the plaintiff sent the balance of the purchase price and asked for the delivery of goods. The defendants could not comply with the plaintiff's request. In a suit for damages instituted by the plaintiff at the Gujranwalla Court *held* that the goods had to be delivered under the contract at Gujranwalla, that the non-delivery formed a part of the cause of action and that the plaintiff's suit was maintainable in the Gujranwalla Court. 39 M. 195 ; 77 P. R. 1909 ; 65 I. C. 282; 43 A. 334 referred to. (*Scott Smith, J.*) FIRM OF JAGANNATH DIWAN CHAND *v.* JAGANNATH MOTI LAL. 71 I. C. 38.

———S. 20 (c)—*Contract for sale of goods—Place of delivery—Breach.*

Plffs. carrying on business at Amritsar brought a suit in the court of Amritsar against a firm carrying on business at Bombay for damages for breach of a contract made in Bombay, to sell goods to plffs. *Held*, that delivery of the goods by the defts. to the Railway Company in Bombay for being despatched to Amritsar, would by S, 98 of the Contract Act, have operated as a delivery to the plaintiffs and the Railway Co would have held the goods as agents of the plaintiffs, consequently no part of the cause of action arose at Amritsar. (*Martineau, J.*) FIRM OF NAND LAL DAS MAL *v.* FIRM OF MIAN MAHOMED ALI.

67 I. C. 188 (1) : 1922 Lah. 474.

———S. 20 (c)—*Contract—Cause of action—Place of payment.*

Where money payable to plff. is, according to the contract to be paid at one place but is made payable in another place owing to the plaintiff's own default, advantage cannot be taken of that fact to give plaintiff a choice of forum. (*Leslie Jones, J.*) FIRM OF DAMRI SHAH THAKUR RAM *v.* FIRM OF RULIA MAL DOGAR MAL.

17 P. L, R. 1922 : 64 I. C. 387 : 2 L, L. J. 555.

———S. 20 (c) and O. 7, R. 10—*Contract—Offer and acceptance by wire--Suit for damages--Forum.*

Plaintiff a trader at L sent an order by telegram to defts. residing and carrying on business at B to purchase cotton seeds on his behalf. Defts. wired back agreeing to do so. But they sent only a part as the price had risen up in the meanwhile. The plaintiffs brought a suit for damages for non-delivery. *Held*, that the contract must be taken to have been made at B. where defts. carried on their business and where they received plaintiff's telegram and that the Court at L, had no jurisdiction to entertain the suit. 76 P. R. 1896 foll. 70 P.R. 1906: 36 P.R. 1908: 16 P. W. R, 1908 dist. It is open to the Court to consider the question of jurisdiction *suo motu* and to return the plaint at any stage of the suit for presentation to the proper Court. (*Rattigan, C.J.*) FIRM OF ASA BAMKALU RAO *v.* FIRM OF BAKSHI RAM KANHAIYA RAM. 53 I. C. 331.

———S. 20 (c)—*Contract—Breach of contract—Damages—Forum.*

C. P. CODE (V OF 1908), S. 20—Contract.

An action for damages for breach of contract for carriage of goods by a Railway can be brought either where the breach was committed or where the contract was made. (*Shadi Lal, J.*) MULCHAND SANWALDAS *v.* B. B. AND C. I. RY CO.
50 I. C. 139 : 43 P. W. R. 1919.

——S. 20 (c)—*Contract—Suit on—Breach—Performance.*

A suit for damages on a breach of contract can be instituted in a Court where the contract was made though it has to be performed elsewhere. (*Broadway, J.*) SITA RAM *v.* KAM CHANDRA.
26 P. R. 1918 : 51 P. W. R. 1918 : 44 I. C. 863 : 114 P. L. R. 1918.

——Ss. 20 (c) and 21—*Contract—Breach of contract—Betrothal.*

A Court is competent to try a case of breach of contract of betrothal when the breach took place within its jurisdiction, irrespective of the defendents residing in another place, the rule of law being that the Court within whose jurisdiction a cause of action arises wholly or partially is competent to try it. (*Rattigan, J.*) BHAG SINGH *v.* LABH SINGH. 37 I. C. 114 : 93 P. R. 1916.

——S. 20 (c)—*Contract—Breach of Contract—Indent form specifying place for settlement of disputes.*

Where an indent form provides that all disputes in connection with the indent are to be settled in a particular place the Civil Court of that place will have jurisdiction to try such a dispute. (*Robertson, J.*) COMMERCIAL E. I, A. CO., LTD *v*, S. C. MUKERJI. 96 P.L.R. 1913 : 18 I. C. 496 : 65 P. W. R. 1913.

——Ss. 20 (c) and 21—*Contract—Breach of contract—Supply of goods—Forum,*

Where under a contract, goods were deliverable at D, the D Court has jurisdiction to try a suit for damages for breach of the contract, though entered into at L. An objection as to the place of suing is entertainable only where there has been consequent failure of justice. (*Beadon, J.*) SURAJ BHAN *v.* PUNJAB COTTON PRESS CO., LTD.
45 P. L. R. 1913 : 18 I. C. 130 : 40 P. W. R. 1913.

——S. 20 (c)—*Contract—Breach of contract—Place where contract made.*

A suit on a contract can be filed at the place where the contract was made. (*Reid, C. J. and Rattigan, J.*) INDIA GENERAL N. AND RY. CO. LTD. *v.* HARCHARAN DAS. 233 P. L. R. 1912 : 111 P. R. 1912 : 15 I. C. 12 : 224 P. W. R. 1912.

——S. 20 (c)—*Contract—Cause of action—Consigning of goods for sale on commission—Price to be remitted by hundi.*

S, a merchant at Negapatam, consigned goods to M at Penang for sale on commission, on condition that M should remit the proceeds by sending to S at Negapatam hundials drawn on some firm in the Madras Presidency. On M's failure to pay as aforesaid S brought a suit against M in the Negapatam Court. *Held*, that the Court at Negapatam had jurisdiction to entertain the suit because M accounted for the sale proceeds by making payments through the agency of some person or persons in Negapatam and other places in the Madras Presidency on whom the hundials were to be drawn. (*Abdur Rahim and Phillips, J.*) NAINA MARACAYAR *v.* SOMASUNDARAM CHETTIAR.
56 I. C. 604 : 11 L. W. 593.

——S. 20 (c)—*Contract—Breach of contract—C. I. F.—Contract for sale of goods—Breach—Claim for damages—Jurisdiction.*

Plaintiff, a trader at Negapatam offered to buy timber from defendant at Mandalay. Under the contract defendant shipped the timbe from Mandalay, took the bills of lading in his own name and drew from a bank at Mandalay such sums of money as were due to him in respect of timber shipped, by handing over the bills of lading to a bank at Mandalay who in their turn passed it on to the plaintiff. The defendents made default in sending timber and plaintiff sued for damages. *Held*, that no part of the cause of action for the suit arose at Negapatam and the Negapatam Court had no jurisdiction to try the case. (*Seshagiri Iyer and Moore, JJ.*) MYLAPA CHETTIAR *v.* AGAMIRZA MAHAMED. 37 M L. J. 712: 54 I. C. 550 : 26 M. L. T. 504.

——S. 20 (c)—*Contract—Breach of contract—Cause of action—Place of offer.*

In a suit upon a contract the offer is a part of the cause of action and the suit can be instituted in the Court within whose jurisdiction the offer is made. In determining where the offer was made, the Court should look to the place where the final offer was made and not to the place were some preliminary negotiations only had taken place. (*Wallis, C.J. and Sadasiva Aiyar J.*) KUTHIRAVATTAM APPU THAMBAN *v.* FOULKES. 54 I. C. 260 : 10 L. W. 44.

——Ss. 20 (c) and 21—*Contract—Breach of contract for supply of goods—Breach of—Usurpation of jurisdiction.*

Defendants entered into a contract with the plaintiff at Kumbakonam for the supply of certain articles. Plaintiff sent the articles ordered with other articles which were not ordered. Defendants returned all the goods. Plaintiff instituted a suit at Kumbakonam for the value of the articles ordered and sent and also of the other articles on the ground that they were negligently re-transmitted causing loss to plaintiff. *Held*, the cause of action for the suit arose at Kumbakonam, the place where the proposal to suply goods was accepted by the plaintiff. S. 21, C.P.C., does not apply to the usurpation of the jurisdiction of a foreign Court. The cause of action in respect of damages arose out of British India and British Courts had no jurisdiction in respect of a cause of action not arising in British India. (*Oldfield and Sadasiva Aiyar, JJ.*) MANJAPPA *v.* RAJAGOPALCHARIAR. (1918) M. W. N. 378 : 45 I. C. 779 : 24 M. L. T. 95.

——S. 20 (c)—*Contract—Suit for price of goods.*

Where the buyer and the seller reside in different jurisdictions, the cause action for a suit by the seller for balance of accounts due from the buyer arises at the place of consignment of the

C. P. CODE (V OF 1908), S. 20—Contract.

goods to the railway. 1 M. H. C. R. 200 dist. (*Ayling, J.*) GOGI PADMARAJAPPA *v.* MADDURU VENKATA SUBBIAH. **24 I.C. 423: (1914) M.W.N 803.**

———S. 20 (c)—*Contract for sale of goods—Breach—Damages—Place of suit.*

The plaintiff was a resident of Yeotmal. The defendants carried on business in Bombay as commission agents. The plaintiff sent some bales of cotton to the defendants for sale in Bombay. He alleged that the defendants did not sell the bales on the day when they were instructed to sell them, that they described them as of a quality inferior to the real quality and that they thus failed to realise their proper value. He sued for damages occasioned by the defendant's conduct in the Court of the Subordinate Judge, Yeotmal. *Held* that suit was properly framed. (*Kotwal, A.J.C.*) CHAGAN LAL *v.* ABOOBAKAR ABDUR RAHMAN & CO., BOMBAY.

72 I. C. 465 : 1923 Nag. 167.

———S. 20 (c)—*Contract—Breach of the contract—Suit for damages—Contract by correspondence.*

Where the proposal and acceptance are made by letters, the contract is made at the time and at the place where the letter of acceptance is posted, though the contract is revocable before the acceptance reaches the proposer. Jurisdiction is determined by the place where the contract is made or in other words, where the cause of action arises. (*Mittra, A. J. C.*) MILL STORIES TRADING COMPANY *v.* MATHURA DAS.

57 I. C. 636 : 17 N. L. R 1.

———S. 20 (c) — *Contract—Breach of contract—Place of acceptance different from place of drawing—Suit against acceptor lies in the place where the drawing took place.*

A suit on a Hundi dishonoured after acceptance against the drawer and acceptor is brought in the proper *forum* if instituted in the Court having jurisdiction at the place of drawing. The cause of action against both the defendants (drawer and acceptor) arose at the place where the original contract was made by the drawing of the Hundi. (*Lindsay, J. C.*) JIWAN LAL DEOSAY *v.* OUDH COMMERCIAL BANK, LTD., LUCKNOW. **34 I. C. 191 : 3 O. L. J. 132.**

———S. 20 (c)—*Contract—Suit for damages—Breach of contract of marriage—Forum.*

In a suit for damages for breach of contract to marry, part of the cause of action arises at the place where the marriage is to take place, though the agreement to marry is entered into at another place. (*Coutts and Bucknill, JJ.*) MATHURA PRASAD SINGH *v.* SATYANARAYANA PRASAD.

65 I. C. 812.

———S. 20 (c)—*Contract—Forum.*

In suits on contracts though the place where the contract was made is not within the jurisdiction of the Court, the Court still had jurisdiction if the place where the contract was to be performed or where in its performance the money to which the suit relates was expressly or impliedly payable is within the jurisdiction of the Court: (*Saunders, J. C.*) MEGHRAJ RAMNIRANJAN DAS *v.* THAKUR DAS. **44 I. C. 609 : (1917) 3 U. B. R. 38.**

C. P. CODE (V OF 1908), S. 20—Contract.

———S. 20—*Contract—Breach of—Arbitration Act, S. 11.*

J. K. Cawnpore firm sold at Cawnpore certain goods to S and Co. a Karachi firm the goods being subject to inspection on arrival at Karachi in the presence of the seller's representative. There were other terms giving the buyers the right after such inspection to reject the goods and recover the price or accept them with an allowance. J. K. failed to consign any goods. S. and Co. went to arbitration under an arbitration clause in the contract and sought to have the award filed in the District Court at Karachi.

Held, that the Court was bound by the decision in 6 S. L. R. 97 that as a suit would lie in Karachi at the instance of the buyers for breach of the contract part of which was to be performed by passing the goods in Karachi an application to file an award under S. 11 of the Arbitration Act lay in the District Court at Karachi.

(*Quaere.*) Whether the part of the contract which was to be performed in Karachi was susceptible of individual performance in Karachi independently of the fate of another and distinguishable part of the contract. *viz.*, to consign the goods under the railway receipt in the buyer's name and if not whether the buyers could have brought a suit in Karachi.

Whether in this respect 6 S. L. R. 97 does not require consideration. 18 I. C. 316, Ref. (*Kemp, A. J. C.*) MESSRS C. H. PENNY *v.* MESSRS. STRAUSS AND CO., LTD. **15 S. L. R. 74: 64 I. C. 674 : 1922 S. 32.**

———S. 20 (c)—*Breach of contract—Proposal and acceptance.*

In the case of a proposal made from Karachi and accepted at Calcutta, the cause of action for breach of the contract arises at Calcutta. (*Crouch, A, J. C.*) FIRM OF VISHINJI GOVERDHAN DAS *v.* FIRM OF JESRAJ GIRDHARI LAL.

50 I. C. 146 : 12 S. L. R. 93.

———S. 20 (c)—*Contract—Breach of contract—No place fixed for performance of contract.*

If an agreement to pay money is to be performed without demand by the creditor and no place is fixed for performance it is open to the creditor to fix a reasonable place and he can sue at the place where he resides. (*Pratt, J. C. and Hayward, A. J. C.*) HEMANDAS *v.* DEVISHAH DIN DAYAL. **19 I. C. 433 : 6 S. L. R. 181.**

———S. 20 (c)—*Contract—Sale of goods—Forum.*

A contract for the sale of goods was entered into at Amritsar providing *inter alia* that the buyer's agents were to take delivery at Amritsar after paying 90 per cent of the price and that the remaining 10 per cent was to be paid after weighing and testing the goods at Karachi. It provided for reference to arbitration in case of dispute, *Held*, the performance of the contract was to be completed at Karachi and, therefore, the Karachi Court had jurisdiction to entertain an application for the appointment of an arbitrator under S. 8 of the Arbitration Act. (*Pratt, J. C. and Fawcett, A. J. C.*) BAYMAL THIAMAL BISHINDAS *v.* SANDAY PATRICK & CO.

12 I. C. 662 : 5 S. L. R. 97.

C. P. CODE (V OF 1908), S. 20—Corporation.

Corporation.

——S. 20, Expln. II—*Corporation—Breaches in different jurisdictions—Suit—Forum.*

A Corporation resides wherever it carries on its business, irrespective of the location of its head office and if a Corporation such as bank has 50 branch offices it has fifty separate and distinct jurisdictions, and a suit can be brought in any one of such Courts for the enforcement of a right in respect of which a cause of action exists within the limits of each independent jurisdiction. 39 Cal. 104 foll. (*Atkinson and Coutts, JJ.*) BANK OF BENGAL *v.* SARAT CHANDRA MITRA.

4 Pat L. J. 141 : 48 I. C. 943 : (1919) Pat. 155.

Debtor and Creditor.

——S. 20—*Debtor and creditor—Suit for price of goods or for recovery of money—Jurisdiction.*

Ordinarily, if goods are purchased or money is borrowed, the payment for the goods or repayment of the money must be presumed to have been agreed to be made at the place of residence of the seller or the lender as the case may be. (*Banerji, J.*) BANGALI MAL *v.* GANGA RAM.

71 I. C. 431 : 1923 A. 465 (1).

——S. 20 (c)—*Debtor and creditor—Suit against banker by depositor.*

The ordinary rule is that a debtor must seek his creditor to pay him. Ordinarily in a case against a Bank or a trader who holds himself out as a person it is not necessary that payment should be made at the place where business of the Bank is carried on. The repayment of the deposits is ordinarily not to be made at the Bank or at the place of business of the trader. The intention of parties is that the money should be paid to the depositor wherever he happens to be at the time he demands repayment. (*Tudball and Walsh, JJ.*) SRI NARAIN *v.* JAGANNATH.

41 I. C. 890 : 15 A. L. J. 653.

——S. 20 (c)—*Debtor and creditor—Parties resident, where money advanced—Absence of agreement to repay at other place—Presumption—Jurisdiction—Contract Act, Ss. 49 and 50.*

In a *hat chita* the creditor was described as resident of S. within the jurisdiction of the K. Court ; the money was alleged to have been advanced at S. and the parties at the time of the loan were residents of that place. *Held*, that the money was presumably repayable at S. where it was advanced and where the parties resided at the time of the transaction, and the Court at K. only had jurisdiction to take cognizance of the matter provided there was no agreement for repayment of the money at some other place. (*Mookerjee and Holmwood, JJ.*) SAILENDRA NATH MOOKERJEE *v.* RAM SUNDAR GHOSE.

15 I. C. 885 : 16 C. L. J. 279.

——S. 20 (c)—*Debtor and creditor—Suit on promissory note—Payment to be made within jurisdiction.*

Where money on a pro-note was intended to be paid in place A. the Court at A has jurisdiction to entertain a suit on the pro-note under S. 20 (c). (*Shadi Lal and Leslie Jones, JJ.*) MAHOMED ISHAQ KHAN *v.* MAHOMED ISLAM ULLAH KHAN.

2 P. R. 1916 : 31 I. C. 698 : 10 P. W. R. 1916.

C. P. CODE (V OF 1908). S. 20—Decree.

——S. 20 (c)—*Debtor and creditor—Place of payment.*

If there is nothing as to the place where the money under a bond is payable, the Court must be guided by the intention of the parties and where this cannot be determined, a presumption as to the place may be drawn. (*Prideaux, A. J. C.*) GUFFURUNISSA BEGUM *v.* NARAYAN.

49 I. C. 950.

——S. 20 (c)—*Debtor and creditor—Place of suing.*

A promise to pay something which the promisor is already under an obligation to pay is a promise without consideration and cannot be enforced. Therefore a promise by a debtor to repay a loan at a certain place for creditor's convenience does not in itself entitle the creditor to sue at that place unless the promise is one with consideration or it falls under S. 25 (2), Contract Act. 8 M. I A. 291; 8 Bur. L. T. 101; 30 Mad. 438, rel. (*Maung Kin, J.*) MAUNG BA TU *v.* BAMAN KHAN.

11 Bur. L. T. 67 : 39 I. C. 132 : 9 L. B. R. 75.

——S. 20 (c)—*Debtor and creditor—Payment of debt—Place.*

The cause of action for the payment of a debt will arise at the place where the debt is payable. (*Twomey, J.*) YAR MAHOMED KHAN *v.* AMIRUDDIN.

20 I. C. 683 : 6 Bur. L. T. 143.

Decree.

——S. 20 (c)—*Decree—Setting aside—Fraud—Forum.*

Defendant fraudulently obtained a decree in Sirajgang and transferred it to Agra and in execution had the plaintiff arrested in Agra. *Held*, a suit to set aside the decree as fraudulent could be filed at Agra, as the material portion of the cause of action had accrued at Agra. (*Tudball and Rafique, JJ.*) KHUSHALI RAM *v.* GOKHUL CHAND.

39 All. 607 : 41 I.C. 352 : 15 A. L. J. 638.

——S. 20 (c)—*Decree—Setting aside—Fraud—Jurisdiction.*

If a decree is obtained after fraudulent suppression of summons, the cause of action for a suit to set aside the decree arises where the summons was fraudulently suppressed. In such a suit the execution of the decree and application for the realization of the amount are acts of defendants which infringe the rights of plaintiff and afford him cause of action. A plaintiff in such a suit cannot succeed merely on proving that summons was not served. *Semble*:—If the property attached under the decree is within the jurisdiction of the Court in which the latter suit is filed, the Court has jurisdiction to entertain the suit. (*Chamier and Piggott, JJ.*) JAWAHIR *v.* NEKI RAM.

37 All. 189 : 28 I. C. 502 : 13 A. L. J. 190.

——S. 20 (c)—*Decree—Setting aside—Fraud—Cause of action.*

Where a decree was obtained in Calcutta *held* in a suit brought in Mainpuri to set aside the decree, that the Court at Mainpuri had no jurisdiction to entertain it as no cause of action had

C. P. CODE (V OF 1908), S. 20—Cause of action.

arisen at Mainpuri. 25 All. 48, 29 All. 418 ref. (*Richards, C. J. and Tudball, J.*) DAU DIAL *v.* MUNNA LAL.. 36 All. 564 : 24. I. C. 978 : 12 A. L. J. 955.

——S. 20 (c)—*Cause of action—Decree—Setting aside.*

Where a decree is sought to be set aside on the ground of fraud and no other relief is sough', the Court that has jurisdiction to entertain the suit is the Court in the District where the fraud was committed and the decree obtained. 29 All. 418. rel. Where, however, the fraudulent decree is threatened to be executed and there is a prayer for an injunction in addition to the relief for a declaration that the decree is null and void, the suit can be instituted in the district where the execution proceedings are threatened. (*Chatterjee and Pearson, JJ.*) THE INDIA PROVIDENT COMPANY *v.* GOBINDA CHANDRA DAS. 65 I. C. 318.

——S. 20 (c)—*Decree—Setting aside—Fraud—Jurisdiction.*

The Court within whose jurisdiction plaintiff ordinarily resides has jurisdiction to try a suit to set aside an *ex parte* fraudulent decree obtained against plaintiff in anotner Court by suppressing summons. (*Mullick, J.*) RAJ KUMAR SINGH *v.* RAJ KESWAR KEORI. 41 I. C. 161.

Ejectment.

——S. 20 (c)—*Ejectment—Cause of action—Infringement of plaintiff's right—Title of defendants.*

The cause of action of a plaintiff suing in ejectment is not affected by the title under which the defendants profess to hold possession. If the plaintiff's right has been infringed by one act or transaction that infringement gives him the cause of action against all persons interested in the infringement. 29 Cal. 871 foll. 6 Cal. W. N. 585, dist. (*Coxe and Ray, JJ.*) KALINATH BOSE *v.* AYESHA BIBI. 20 I. C. 347.

Insurance.

——Ss. 20 and 21—*Insurance — Cause of action—Policy of insurance—Death of assured.*

The expression "cause of action" in S. 20 means the whole of the cause of action or every fact which must be admitted or proved before plaintiff can succeed. The death of the assured being a part of the plaintiff's cause of action in a suit on an insurance policy the suit is maintainable at the place of his death. (*Richardson and Beachcroft, JJ.*) THE BENGAL PROVIDENT AND INSURANCE COMPANY *v.* KAMINI KUMAR CHOUDHURY. 44 I C. 694 : 22 C. W. N. 517.

——S. 20 (c)—*Insurance—Suit for recovery of insurance money—Death of insured, place of.*

A suit to recover money due on Life Insurance Policy can be instituted at the place where the insured died. (*Oldfield and Bakewell, JJ.*) VIVENDRA THIRTHA *v.* NATIONAL INSURANCE CO., LTD. 41 I. C. 392.

Leave to sue.

——S. 20—*Leave to sue.*

Where leave to sue was sought for but refused under S. 20 the suit cannot go on with the defendants on the record when no permission was granted by the Court. (*Macleod, C. J. and Shah, J.*) MAHOMEDBHAI *v.* ADAMJI. 46 Bom. 229 : 23 Bom. L. R. 1086 : 64 I. C. 919 : 1922 Bom 152.

C P. CODE (V OF 1908), S. 20—Partnership.

——S. 20 (b)—*Leave to sue.*

The order of the District Judge granting leave to the plaiutiff to sue in a Court within whose jurisdiction only one out of three defendants resided and thus reversing the order of the first Court was strictly within S. 20 (b), though the defendants were sued not as a firm but as separate parties. (*Seshagiri Iyer, J.*) ALAGAPPA CHETTI *v.* ANNAMALAI CHETTI. 35 I. C. 74 : 4 L. W. 411.

——S. 20 (b)—*Leave to sue*—Ex parte *grant of.*

Leave to sue may be granted under S. 20 (b), C. P. Code, without previous notice to the defendant. (*Robinson, C. J. and Heald, J.*) THE INDO-BURMA OIL FIELDS *v.* BURMA OIL COMPANY, LTD. 64 I. C. 794 : 11 L. B. R. 26.

Negotiable Instrument.

——S. 20 (c)—*Negotiable Instrument—Assignment of promissory note—If a cause of action.*

The assignment of a promissory note is part of the cause of action and the assignee can sue on it and gives jurisdiction to the Court within whose local limits it took place. *Read v. Brown*, (1889) 22 Q. B. D 128 foll. 34 All. 49 dist. 21 Mad. 153, 21 Mad. 91, 21 Bom. 126, 16 All. 165, 18 All. 403, 36 All. 564, 22 Cal. 451 foll. (*Oldfield and Krishnan, JJ.*) MANEPALLI MANGAMMA *v.* MANEPALLI SATHI RAJU. 31 M. L. J. 816 : 37 I. C. 681 : 5 L. W. 246.

Partnership.

——S. 20—*Partnership. Carrying on business, explanation and meaning of.*

"Carrying on business" is used in S. 20, C. P. C., as distinct from personally working ; of course a man personally working in a particular place is carrying on business, but a man may carry on business and thousands of people do, in a place where he does no personal work of any kind, and a firm may be carrying on business at a particular place either through an agency or through a manager or by its servants without ever having left his own town of Delhi.

"Carrying on business" means, in the section having an interest in the business transactions at a particular place ; a voice in what is done ; a share in the gain or loss as the case may be ; and some control, if not over the actual method of working, at any rate, upon the existence of the business. "Carrying on business" necessarily means making provision for the future.

Winding-up or disposing of goods with a view to winding-up, is just as much carrying on business while it lasts, as purchasing goods or investing capital in carrying on business. Selling of goods at a particular place is evidence of carrying on business there. Selling is the most important part of a business if any profits is desired to be made out of it. He still carries on

C. P. CODE (V OF 1903), S. 20—Partnership.

business if with a view to winding-up his business and preventing any further losses and committing a breach of the Insolvency Law, he proceeds to dispose of his stock. (*Walsh and Ryves, JJ.*) FIRM, KIRPA RAM SITA RAM *v.* FIRM, MANGAL SEN BISHAN MAL.

19 A. L. J. 696 : 3 U. P. L. R. (All.) 18 : 65 I. C. 93 : 1922 A. 367.

——S. 20 (c)—*Partnership—Accounts.*

In the absence of an agreement that account should be taken elsewhere, a suit for the taking of the accounts of a partnership should be instituted in the Court within whose jurisdiction the business of the partnership was carried on, (*Banerji and Piggott, JJ.*) NIRANJAN SINGH *v.* KUNDAN SINGH. **52 I. C. 655 : 17 A. L. J. 1015.**

——S. 20—*Partnership carried on in foreign territory—Residence of defendant in British India.*

A suit for a dissolution of a partnership commenced and carried on in foreign territory is maintainable in British India if the plaintiff and the defendant were within the jurisdiction of the Court. (*Macleod, C.J. and Shah, J.*) ISMAILJI HAJI HALIMBHAI *v.* ISMAIL ABDUL KADIR.

23 Bom. L. R. 543 : 63 I. C. 959 : 45 Bom. 1228.

——S. 20 (c)—*Partnership, Dissolution of—Capital subscribed at one place—Business carried on at another place—Suit where to be instituted.*

Where a partnership was entered into to carry on business at a certain place, a suit for its dissolution can be brought only at the place of business and not at any other place where capital for the concern might have been subscribed. (*Shadi Lal and Leslie Jones, JJ.*) ALLAH DITTA *v* SHANKER DAS.

42 P. R. 1916 : 33 I. C. 953 : 98 P. W. R. 1916.

——S. 20 (c)—*Partnership accounts—Suit for adjustment.*

A suit for adjustment of partnership accounts can lie at a place where the business is carried on or where the contract of partnership took place, unless there is a special agreement that accounts would be rendered at a particular place. It is immaterial to enquire where the contract of partnership took place, because the place of performance of an obligation is its main seat and place of jurisdiction. 4 M H. C. R 218 ref. (*Kanhaiya Lal, A. J. C.*) PREM NARAIN *v.* RAM LAL.

26 I. C. 225 : 1 O. L. J. 561.

Place of suit.

——S. 20—*Place of suit—False allegations—Abuse of the process of court.*

Where in order to bring a suit within the jurisdiction of a court of a particular locality, the plaintiff makes false statements knowing them to be false that is a fraud on the court and the court would have no jurisdiction to entertain the suit (*Mears, C. J. and Banerjee, J.*) ABDUL GHAFUR NURUDDIN AHMAD. **45 A. 193 : 71 I. C. 411 : 1923 A. 137 (2).**

——S. 20—*Place of suit—Conditions to be fulfilled.*

C. P. CODE (V OF 1908), S. 20—Place of suit.

S. 20 provides that a suit may be instituted within the local limits of whose jurisdiction each of the defendants, where there are more than one, at the time of the commencement of the suit, actually carries on business, and secondly in the alternative, within the limits of whose jurisdiction any of the defendants at the time of the commencement of the suit, carries on business, provided that in such a case either the leave of the Court is given or a defendant who does not carry on business acquiesces in the suit being brought. (*Walsh and Ryves, JJ.*) FIRM, KIRPA RAM SITA RAM *v.* FIRM, MANGAL SEN BISHAL MAL.

19 A. L. J. 696 : 3 U. P. L. R. (All.) 18 : 65 I. C. 93 : 1922 A. 367.

——S. 20—*Place of suit—Goods ordered by V. P. Post.*

Where A at Kasganj ordered goods of B at Delhi and the goods were sent by V. P. P. and on taking delivery A found that the parcel did not contain the goods ordered, whereupon he instituted a suit at Kasganj against B for damages, *held*, that the contract, though entered into at Delhi, was not completed till delivery was made and the goods paid for at Kasganj, that until such delivery and payment was made the goods remained the property of B at Delhi and that the Kasganj Court had jurisdiction to entertain the suit. (*Ryves and Gokul Prasad, JJ.*) RAM LAL *v.* BHOLA NATH. **42 All. 619 : 18 A. L. J. 749 : 59 I. C. 359 : 2 U. P. L. R (All) 254.**

——S. 20—*Place of suit—Cause of action—Hundi drawn in Cawnpore for acceptance and payment in Calcutta—Suit to recover sum paid.*

Where a Hundi drawn in Cawnpore for acceptance and payment in Calcutta is so accepted and paid in Calcutta and the plaintiff sued to recover the sum so paid, *held*, that as the cause of action, would not be complete unless he proved the fact that he had accepted the *Hundi* in Calcutta on the due date, part of the cause of action arose within the Ordinary Original Jurisdiction of the High Court of Calcutta. (*Sanderson, C. J., Mookerjee and Fletcher, JJ.*) RAM CHUNDER GOURI SHANKER *v.* GANPATRAM BISWANATH.

59 I. C, 539 : 47 Cal 583.

——Ss. 20, 115—*Place of suit—Order as to—Revision.*

No hard and fast rule as to revision can be laid down in cases of decisions as to jurisdiction under S 20 and each must be decided on its own merits. Ordinarily, interference in revision is inadvisable in such cases and should only be exercised in exceptional cases to remedy an injustice. Where the defendant is by law entitled to have the case tried at Patna it will be a grave injustice to him to insist on its trial in Jagraon in the Punjab which will put him to a very great expense merely because the trial Court has erroneously held that the Jagraon Court has jurisdiction. (*Moti Sagar, J.*) THE FIRM SITA RAM RAM DHAN *v.* THE FIRM BENARSI DAS PURAN CHAND.

1923 Lah. 565.

——S. 20—*Place of suit—Place of business—Test of—Joint Hindu family carrying on a business.*

C. P. CODE (V OF 1908), S. 20—Place of suit.

A man may carry on business either personally or through an agent and although the manager of a joint Hindu family is not liable to account to the sleeping partners in precisely the same way as the manager of an ordinary business, his position approximates more nearly to that of an agent than any other. He acts on behalf of the family and in its interests and each individual member of the family carries on business wherever a branch of the family firm is in active existence. He is therefore liable to be sued even in a purely personal suit at any of these places just as a partner in an ordinary partnership is liable to be sued wherever a branch of the business exits. (*Shadi Lal, C. J. and Harrison, J.*) JAMNA DAS *v.* MURLI DHAR. 67 I. C. 69.

——S. 20 (c)—*Place of suit—Suit to set aside ex parte decree obtained by fraud.*

A instituted a suit in Ferozepore against B, a resident of Lahore. The serving officer wrongly reported to the Court that B was evading summons, and an *ex parte* decree was passed against him, B, thereupon sued A in Lahore to set aside the decree on the ground of fraud, *held*, that the suit was maintainable inasmuch as, by the wrong report of the serving officer part of the cause of action arose in Lahore. 37 A. 189 F, (*Abdul Raoof, J.*) RAM LAL ISHER DAS *v.* SALIG RAM. 59 I. C. 2 : 7 P. W. R. 1921.

Plaintiff's right to choose Forum.

——S. 20—*Plaintiff's right to choose forum.*

Though S 20 of the old C. P. Code is dropped in the new Code, yet very strong reasons must be shown under the new, as required in the old Code, for depriving a plaintiff of his right to bring his suit in any Court which the law allows. (*Twomey and Parlett, JJ.*) MUTHIA CHETTY *v.* ARUNACHELLAM CHETTY.
7 Bur. L. T. 1 : 23 I. C. 345 : 7 L. B. R. 129

Residence.

——S. 20 (a)—*Residence — "Carries on business"—Personal presence or effort.*

In S. 20 (a) of the Code 'carrying on business' is used as distinct from personally working. It does not involve personal presence or personal effort. It means having an interest in a business, a voice in what is done, a share in the profit or loss and some control upon the business. (*Walsh and Wallach, J.*) KRIPA RAM *v.* MANGAL SEN.
19 A. L. J. 696 : 3 U. P. L. R. (All.) 18 : 65 I. C. 93 : 1922 A. 367.

——S. 20—*Residence—Carrying on business at a place.*

Where the defendants had no permanent office at Amritsar but there was only a travelling agent residing at that place who secured orders for them and forwarded them to the Head Office at Calcutta, but he had no power to enter into any contract or to receive any on behalf of the defendants. *Held*, that the defendants cannot be said to be carrying on business at Amritsar. (*Moti Sagar, J.*) FIRM OF HIRA NAND MURLIDHAR *v.* FIRM OF GURMUKH RAI. 73 I. C. 205 : 1923 Lah. 427.

C. P. CODE (V OF 1908), S. 20—Shipping.

——S. 20 (a)—*Residence—Ancestral abode—Visited occasionally, but actual residence elsewhere.*

Where defendant was found to have lived and carried on business at X for forty years and he never intended to return to his original home at N, his place of residence under S. 20 is at X and not at N although he had an ancestral abode there and some ancestral land at the latter place. 1 All. 51 ; 3 All. 91 (P. C.) ; 14 Bom. 541 ; 18 Bom. 290. (293), dist. (*Johnstone, C. J.*) GURANDITTA MAL *v.* KAMDAS. 38 I. C. 62 : 112 P. R. 1916.

——S. 20 (a)—*Residence of defendant.*

A Court may take cognizance and try a case if the defendants at the time of instituting such a suit are actually and voluntarily residing within the jurisdiction of that court, though temporarily. (*Sundara Aiyar, J.*) KADAR ROWTHER *v.* VENKATACHALAPATHY. 14 I. C. 573.

——S. 20 (a)—*Residence — Meaning of—Restitution of conjugal rights—Place of suing—Demand.*

In matrimonial suits to which the Divorce Act does not apply questions of jurisdiction should be decided under the C. P. Code. Under S. 20, residence means permanent residence not a temporary or casual residence as traveller. 38 B. 125 foll. (*Robinson, J.*) EZRA *v.* EZRA.
54 I. C. 65 : 12 Bur. L. T. 120.

Restitution of Conjugal rights.

——S. 20 (c)—*Restitution of conjugal rights—Forum.*

In a suit by a husband against his wife for restitution of conjugal rights, the cause of action arises from the wife absenting herself from the husband's residence. The Court, within whose local jurisdiction such residence is situate, is compentent to try such suit. (*Ryves, J.*) CHHITTAR *v.* HARJU. 54 I. C. 120.

Shipping.

——S. 20 (c)—*Shipping—Freight—Claim for freight illegally collected—Damages for short delivery—General average account—Non-resident foreigner—Jurisdiction of British Court.*

In a suit by plaintiff for refund of freight, the price of the bundles short delivered, or the amount due to him on a general average account instituted in the Court of C. *Held*, that the freight having been collected at C. the cause of action for its refund arose in that place. The cause of action for the price of goods short delivered arose partly in C where the goods were delivered according to the terms of the charter-party. The fact that the voyage came to an end was a part of the cause of action for a general average and that having taken place at C, the Court had jurisdiction to try the whole suit. 16 I. A. 240, ref. The term 'cause of action' in S. 20 of the C. P. Code means the whole bundle of material facts which is necessary for plaintiff to allege and prove to entitle him to succeed. A Municipal Court is entitled to exercise jurisdiction over a non-resident foreigner where the cause of action arises within its jurisdiction. The question whether its decree could be enforced against him in the foreign Court is one for the considera-

C. P. CODE (V OF 1908), S. 20—Tort.

tion of the Courts of that State. (*Phillips and Krishnan, JJ.*) MAISTRY RAJAH BAI NARAIN *v.* HAH KARIM MAMOOD.
35 M. L. J. 189 : (1918) M. W. N. 521 : 47 I. C 708 : 24 M. L T. 209.

Tort.

——S. 20 *Tort—Injury—Forum.*

Where a person purchased a ticket for journey by railway at Agra but fell out of the train and was injured owing to the neglect of the Ry. Co. at B, the cause of action for a suit for damages arises at B and not at Agra 28 Cal 401 (P C.) ref. (*Richards, C. J. and Banerji, J.*) SHIAMNARAIN *v.* B. B. AND C. I. RY. CO., LTD.
41 All. 488 : 50 I. C. 130 : 17 A. L. J. 506

——S 20 (a)—*Tort—Outside jurisdiction—Defendant resident within.*

If tort is committed within the limits of one court and the tort-feaser resides within the limits of another, then both courts have jurisdiction. (*Ayling and Tyabji, JJ.*) GOVINDAN NAIR *v.* ACHUTHA MENON.
39 Mad 433 : 28 M. L. J. 310 : 28 I. C. 394 : 2 L. W. 290.

——Ss. 21 and 17—*Jurisdiction—Objection to—Scheduled district—Land partly situate in—Decree for sale—Objection taken on appeal—Competency of.*

"Courts" in S. 17, C. P. C., means Courts to which the Code applies. The Court of a district subject to the C. P. Code has no jurisdiction under S. 17 to entertain a suit so far as it claims a decree for sale of mortgaged land situated in a scheduled district. That part of a decree which orders a sale of land so situate can be set aside, although no objection to the jurisdiction of the first Court was taken, S. 21, C.P.C., not applying to the circumstances. The objection was not an objection to the place of suing, but an objection going to the nullity of the order on the ground of want of jurisdiction and could be taken at any time. (*Lord Dunedin.*) SRI RAJAH SATRUCHATLA *v.* MAHARAJA OF JEYPORE.
42 Mad. 813 : 46 I. A. 151 : 17 A. L. J. 694 : (1919) M. W. N. 502 : 37 M. L. J. 11 : 26 M. L. T. 127 : 21 Bom. L R 914 : 30 C. L. J. 209 : 23 C. W. N. 1033 : 51 I. C. 185 : 10 L. W. 362 (P. C.)
[Overruling 19 M. L. T. 360 : 34 I. C. 411 : (1918) 1 M. W. N. 354.

——S. 21—*Failure of justice—Conduct of party during the suit.*

An objection as to territorial jurisdiction raised before App. Court must be determined on merits, as without determining it, it is not possible to ascertain whether there has been a failure of justice, in considering which, the conduct of one or other party during the suit itself ought to be considered. (*Walsh and Ryves, JJ.*) LACHHA RAM *v.* VIRJI.
19 A. L. J. 305 : 62 I. C. 399 : 3 U. P. L. R. (All.) 9.

——S. 21—*Forum—Objection to—Appellate Court.*

An order passed by an Appellate court allowing an objection as to the place of suing should consider and decide whether there has been a failure of justice in consequence of the suit having been

C. P. CODE (V OF 1908), S. 21.

instituted in the wrong Court. (*Banerji and Piggott, JJ.*) NAND KISHORE *v.* ABDUL RAHMAN.
42 All. 74 : 52 I C. 801 : 17 A. L. J. 1034

——S. 21—*Interpretation—Consent.*

The provisions of S. 21, C.P. Code, are an exception to the well established rule that where the Court has no inherent jurisdiction over the subject-matter of a suit its decree is a nullity even though the parties may have consented to the jurisdiction of the court. This exception cannot be so interpreted as to have a wider application than what is justified by its terms. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbitrator and be bound by his decision on the merits when these are submitted to him. This however can be accomplished only when the parties have expressly consented to such a procedure. (*Mookerjee and Chotzner, JJ.*) KUNJA MOHAN CHAKRAVARTHY *v.* MANINDRA CHANDRA ROY CHOWDHURY.
27 C. W. N 542 : 1923 Cal. 619.

——S. 21—*Territorial jurisdiction—Objection—Appeal.*

The question whether the trial Court has no territorial jurisdiction, cannot be gone into in second appeal, unless it was raised at the earliest possible moment in the course of the suit. (*Fletcher and Panton, JJ.*) CHANDRA MOY CHOWDHURANI *v.* GREGSON.
48 I C. 465.

——S. 21—*Jurisdiction—Objection to—Revision.*

Although the objection as to jurisdiction was taken at the earliest possible opportunity before issues were settled, yet having regard to S. 21 of the C. P. Code and to the fact that the evidence had been fully taken and there was no prejudice to the parties, the High Court refused to interfere in revision. (*Richardson and Beachcroft, JJ.*) THE BENGAL PROVIDENT AND INSURANCE COMPANY *v.* KAMINI KUMAR CHOUDHURY.
44 I. C. 694 : 22 C. W. N. 517.

——S. 21—*Jurisdiction—Objection to—Waiver.*

A defendant who objects to the jurisdiction of a Court cannot be said to have acquiesced in the trial of the suit if he does not apply for a transfer. (*Coxe and Beachcroft, JJ.*) RATANCHAND DHARAM CHAND *v.* SECRETARY OF STATE.
27 I. C. 232 : 18 C. W. N. 1340.

——S. 21—*Place of suing—Objection not allowable in appeal.*

Where there has been no failure of justice from the trial of a case in a wrong Court the plea as to want of territorial jurisdiction cannot be entertained in appeal. 26 I. C. 548, foll. (*Shadi Lal and Wilberforce, JJ.*) F. A. GREGORY *v.* ALBERT PUECH.
49 I. C. 441 : 21 P. W. R. 1919.

——S. 21—*Judgment without local jurisdiction—Effect of.*

A decision is liable to be set aside owing to the institution of a suit in the wrong Court only

C. P. CODE (V OF 1908), S. 21.

in the event of failure of justice resulting from such institution. (*Rattigan, J.*) BHAG SINGH *v.* LABH SINGH. 37 I. C. 114 : 93 P. R. 1916.

———S. 21—*Retrospective effect—Jurisdiction—Suit in a wrong Court—Failure of justice.*

Where a suit was instituted at a certain place for recovery of dues on account of certain transactions by the defendants, as plaintiff's agents in another place on the allegation that the contract of agency was entered into in the former place. *Held*, that failure to prove the alleged contract by the plaintiff ousted the jurisdiction of the former Court. Under S. 21 alterations in procedure being retrospective in effect, the objection as to place of suing cannot be allowed when there is no failure of justice. (*Johnstone and Shadi Lal, JJ.*) RATTI RAM *v.* KUNDAN LAL.
87 P. R. 1914 : 26 I. C. 543 : 234 P. L. R. 1915.

———S. 21 and O. 41, R. 23—*Remand by appellate Court—Jurisdiction to try.*

The jurisdiction of the Court trying a remanded case depends entirely on the order of remand. Where, therefore, the High Court remanded a case for trial by the Munsif's Court of Madura Town *held*, that the Court of Madura Taluk, which was a different Court altogether had no jurisdiction to deal with it or pass any orders in it. Neither S. 21. C. P. C., in terms nor any principle underlying it is applicable to the case. (*Krishnan, J.*) UTHUMAN AMMAL *v.* NAINA MAHOMED ROWTHER. 44 M. L. J. 238 : 17 L. W. 355 : (1923) M. W. N. 194 : 32 M. L. T. (H. C.) 276 : 72 I. C. 314 : 1923 Mad. 351.

———Ss. 21 and 37—*Execution proceedings—Prosecution in wrong Court—Jurisdiction of Court passing the decree—Objection—Omission.*

S. 21, C. P. C., applies to all objections based on the alleged infringement of the provisions of Ss. 16 to 18 C. P. C. as regards the institution of suits relating to immoveable property, an appellate or revisional Court being precluded by S. 21 from allowing an objection as to the place of suing unless it was taken in the original Court and even then unless there was a consequent failure of justice. A Court executing a decree could not entertain an objection to the decree on the ground of want of territorial jurisdiction. Though S. 21, C. P. C., did not apply, the decree could not be questioned in execution because it was not for the executing Court to go into questions of the jurisdiction of the Court which passed the decree, at any rate when that was an ordinary Court in British India governed by the Code. (*Wallis, C. J., Ayling and Coutts Trotter, JJ.*) ZEMINDAR OF ETTIYAPURAM *v.* CHIDAMBARAM CHETTY. 43 Mad. 675 : 39 M. L. J. 203 : (1920) M. W. N. 460 : 12 L. W. 217 : 58 I. C. 871 : 28 M. L. T. 75 (F. B.).

———Ss. 21 and 39—*Execution proceedings—Transfer of territorial jurisdiction — Execution sale—Objection to validity.*

Semble : The principle underlying S. 21, C. P. C., applies to execution proceedings also. Where a Court in execution of a decree purports to sell property transferred outside its jurisdiction it is

C. P. CODE (V OF 1908), S. 21.

open to a subsequent purchaser of the same property in execution of a decree by a Court having territorial jurisdiction, to dispute the former sale as being void. *Quaere* :—Whether the judgment-debtor himself could set aside the sale on that ground. 37 M.L.J. 284 : 32 Mad. 140: 38 Mad. 101 dist. (*Abdur Rahim, O.C.J. and Seshagiri Aiyar, J.*) VEERAPPA CHETTI *v.* RAMASWAMI CHETTI. 43 Mad. 135 : 11 L. W. 232 : 37 M. L. J. 442 : 53 I. C. 579 : 26 M. L. T. 271.

———S. 21—*Jurisdiction—Submission to—Residence of deft.—Determination of by Court—Decree binding on parties—Subsequent suit to set aside decree, not maintainable.*

In a suit on the original side of the High Court for the recovery of certain jewels or payment of their value, the plaint contained no averment showing that the cause of action or part thereof arose within the local limits of the jurisdiction of the High Court, but alleged that the defendant resided within the local limits of its jurisdiction. The defendant received a summons from High Court while he was in Madras and took no objection to the jurisdiction of that Court but merely asked that another summons should be sent to him. An *ex parte* decree was eventually passed against him. In a suit filed by him in the Court of Tanjore for a declaration that the decree of the High Court was null and void for want of jurisdiction. *Held*, that he must be deemed to have submitted to the jurisdiction of the High Court and could not, therefore, subsequently question its jurisdiction. The principle of S. 21, C.P.C., is applicable to the case. (*Bakewell and Phillips, JJ.*) ANNAMMAL *v.* M. V. SAMBASIVA AIYAR. 37 M. L. J 349 : 26 M. L. T. 186 : 10 L. W. 293 : 53 I. C. 463 : (1919) M. W. N. 636.

———S. 21—*Objection to place of suing not taken in first Court.*

An appellate Court will not allow an objection to the place of suing unless it was taken before the settlement of issues as there has been a failure of justice. (*Phillips and Krishnan, JJ.*) CHOKKALINGHAM CHETTIAR *v.* KURTHAPPAN CHETTIAR. 47 I. C. 764 : (1918) M. W. N. 661.

———S. 21—*Objection to jurisdiction—Appeal.*

An objection to the place of suing not raised in the trial Court could not be taken in appeal. In all cases where objection is taken that the Court taking cognizance of the suit has no jurisdiction to adjudicate on the claim, whether in whole or in part for want of jurisdiction, it is an objection to the place of suing. (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) SETHRUCHERLA RAMACHANDRA *v.* MAHARAJA OF JEYPORE. (1916) 1 M. W. N. 354 : 34 I. C. 411 : 19 M. L. T. 360.

[Overruled by the Privy Council in 51 I. C. 185 : 42 Mad. 813.]

———S. 21— *Execution proceedings — Applicability to.*

An execution sale after confirmation cannot be avoided on the ground that the Court had no territorial jurisdiction over the property. (*Sankaran*

C. P. CODE (V OF 1908), S. 21.

Nair and Sadasiva Aiyar, JJ.) VELAYUTHA MUPPAN *v.* SUBRAHMANIAM CHETTY.
(1913) M. W. N. 136 : 13 M. L. T. 207 : 18 I. C. 498 : 24 M. L. J. 70.

——S. 21—*Local jurisdiction — Waiver of objections to.*

If a plaintiff chooses his own venue for the trial of a suit and the case proceeds to judgment, the High Court will not in the absence of prejudice, entertain an objection on the ground of want of jurisdiction. (*Prideaux, A. J. C.*) GANPATI *v.* DADA. 55 I. C. 442.

——S. 21—*Limits of applicability.*

In order to satisfy the court under S. 21 of the C.P. Code it is necessary to show not merely that the suit was decided wrongly but that its being decided wrongly was in some measure due to its having been instituted in a court of wrong local jurisdiction. (*Daniels, A. J. C.*) BANKE LAL *v.* KANHAIYA LAL. 1922 Oudh 124.

——S. 21—*Objection to jurisdiction—Second appeal.*

No objection as to jurisdiction regarding the place of suing can be taken for the first time in second appeal. (*Mullick, J.*) RAJ KUMAR SINGH *v.* RAJ KESWAR KOERI. 41 I. C. 161.

——S. 21—*Jurisdiction—Objection taken in appeal or revision—Validity.*

Objection as to place of suing cannot be taken in appeal or revision unless it was taken in the Court of first instance at the earliest possible opportunity and unless there has been a consequent failure of justice. (*Twomey and Ormond, JJ.*) MADARI *v.* MISSER. 36 I.C. 431: 9 Bur. L. T. 119

——S. 21 and O. 7, R. 10—*Objection to jurisdiction—Procedure.*

When it is found that a suit ought to have been instituted in some other Court, the Court should return the plaint for proper presentation even if the plea is raised at a later stage but in the original proceedings The question of delay mentioned in S. 21, C.P.C., is only appplicable to appeals and revisions. (*Hayward, A.J.C.*) HAYATHA *v.* GHULAM HUSSAIN SHAH. 10 I. C. 980 : 4 S. L. R. 264.

——Ss. 22 and 23—*Transfer by High Court from one to another subordinate Court—Conditions necessary.*

Both Courts must have jurisdiction in order that an application for transfer can be made under S. 22 or 23 ; where the jurisdiction of one of the Courts is denied, an application for transfer does not lie under this section. (*Bannerji, J.*) PUNNA CHANDRA MUKHERJEE *v.* DHONE KRISTO BISWAS. 24 I. C. 318: 12 A. L. J. 896.

——Ss. 22 and 23—*Balance of convenience.*

Where the dealings all took place at Karachi, the persons from whom goods were bought and to whom goods were sold, by the petitioners were at Karachi, and all the accounts relating to the dealings in question were at Karachi. *Held*, the balance of convenience was greatly in favour of the case being tried at Karachi. (*Martineau, J.*) BANARSI DAS *v.* KISHI LAL. 72 I. C. 592: 1923 Lah. 383.

C. P. CODE (V OF 1908), S. 22.

——Ss. 22 and 23—*Transfer of suit—Choice of forum.*

It is only when a suit may be brought in one or other of two courts, both of which have jurisdiction that an application can be made under Ss. 22 and 23 of the C. P. C. Where the jurisdiction of one Court is denied an application for transfer under these sections cannot lie. 12 A. L. J. 986 followed. (*Abdul Qadir, J.*) THE NATIONAL ENGINEERING CO. *v.* THE RATTAN ENGINEERING CO. 71 I. C. 268: 1923 Lah. 288 (2).

——Ss. 22 and 23—*Transfer of case—Principle guiding*

The plaintiff has always a right to choose his forum with this right. The jurisdiction conferred by Ss. 22 and 23, C.P.C., is of an exceptional character and should be exercised very cautiously and only when a clear cause has been shown. The mere fact that it would add to the defendant's convenience to have a transfer is no ground for transferring a case. (*Shadi Lal, C. J.*) PANDIT ROOP CHAND *v.* GOKAL CHAND. 73 I. C. 860.

——Ss. 22, 23 and 24—*Transfer—Grounds for—Transfer to Original side of the High Court.*

The right of a plaintiff to institute a suit in a court in which the law permits him to sue should not be interfered with by the High Court in the exercise of its extraordinary jurisdiction unless the suit is brought in bad faith for the purpose of working injustice to which the defendant would not be subjected if the suit were brought in another competent court. The mere fact that it would be more convenient to the defendant to have the suit tried in another forum is no ground for the transfer. Ss. 22 and 23, C. P. Code, do not provide for the transfer of a case from a court subordinate to one High Court to the Original side of another High Court. 12 C. W. N. 446 dist. 1 Pat. L. T. 389 Ref. 27 M. L. J. 645 approved. 44 A. 278 Ref. (*Campbell, J.*) PRAGJI SOORJI & Co., BOMBAY *v.* KALU MAL SHORI MAL & Co. 69 I. C. 772.

——Ss. 22 and 23, *Transfer—Grounds for.*

A transfer of a case ought generally to be made only on a strong grounds.

Where it was established that almost all the evidence would be available only at the place to which a transfer is applied for, the convenience and interest of both parties would be secured by ordering a transfer. Such applications should be made as early as possible. (*Abdul Raoof, J.*) RAMJI DAS *v.* THE FIRM BRIJ LAL JAGAN NATH. 69 I. C. 239.

——S. 22—*Transfer of suit—Convenience of deftendant.*

There must be strong reasons for depriving a plff. of the right to bring his suit in any Court in which the law allows and the fact that the deft's evidence in regard to one of the issues is mainly in another place is not a sufficient ground for transferring the case to that place. (*Broadway, J.*) SHIV PRASAD *v.* KANHAYA SHAH. 54 I. C. 935 : 167 P. R. 1919.

——S. 22—*Application for transfer—When to be made.*

C. P. CODE (V OF 1908), S. 22.

Application for transfer must be made before or at the settlement of issues and not after. The words "after notice to the other parties" in S. 22 mean notice prior to the making of application. (*Broadway, J.*) GULAB CHAND *v.* SHER SINGH.
11 P. R. 1917: 150 P. W. R. 1916: 35 I. C. 616: 16 P. L R. 1917.

——— S 22—*Transfer—Objection to jurisdiction—Maintainability—Grounds for transfer.*

A defendant in a suit raising objection to the jurisdiction of the Court trying the suit, cannot apply for its transfer to another Court under S. 22 of the C. P. Code. A plaintiff has a right to choose his own *forum* and he cannot be deprived of it except for very cogent reasons. 13 Bom. 178 ref. The fact that defendant's witnesses would be put to very much inconvenience if the suit continued in the Court chosen by the plaintiff is no ground for taking action under S. 22 of the C. P. Code. (*Lindsay, J. C.*) ASKARAN BAID *v.* BHOLA NATH. 48 I. C. 105: 21 O. C. 217.

———Ss, 22 and 23—*Grounds for transfer—Selection by plff. of* forum.

Plaintiff has a right to bring a suit in any Court allowed to him by law, and to overrule his right of selection of Court, a strong case based on some ground of expense or convenience must be made out, (*Lindsay, J. C.*) SYED HUSSAIN *v.* SAJA DIBEGAM. 34 I.C. 686 : 3 O L J. 200.

———Ss. 22 and 24—*Courts subordinate to different Hight Courts.*

A High Court cannot transfer a suit pending in a subordinate Court to a court subordinate to a different High Court but can only return the plaint for presentation to the proper Court. (*Lindsay J. C. and Kanhaiya Lal, A J. C.*) RABBAN BIBI *v.* SOHADRA BIBI. 20 I. C. 758.

———Ss. 22 and 23 (3)—*Transfer—Objection to jurisdiction of trying Court—Grounds for transfer.*

In an application for transfer under Ss. 22 and 23 of the C. P. Code the question of want of jurisdiction of the trying Court could not be raised, 34 I. C. 707 foll. An application to a High Court to transfer a suit pending in a Subordinate Court to another High Court falls under S. 23 (3) of the Code, S. 24 does not lay down any provision for the transfer of suits from and to Courts subordinate to different High Courts. The High Court can, however, determine whether the suit shall proceed which order shall be final, and it will not be open to another High Court to refuse the suit being tried in the Court subordinate to it, having jurisdiction to try it. 40 I. C. 393, diss. A suit can be transferred only upon two grounds, *viz*; (a) that there will not be an impartial trial by the trying Court or (b) that there is a manifest preponderance of convenience to the petitioner if the suit is transferred to the other Court. The convenience of the plaintiffs, and their witnesses has also to be considered particularly as they have in the first instance the right to choose the venue in which they would prosecute their suit. (*Jwala Prasad, J.*) RAM KUMAR SHEOCHAND RAI *v.* TULA RAMNATHU RAM. 1 Pat. L. T. 277: 56 I. C. 920 : 1920 Pat. 235.

C. P. CODE (V OF 1908), S. 24.

———S. 22—*Suit capable of institution in two Courts—Transfer from one to another—Reasons*

When two Courts have jurisdiction to try a suit and the suit has been instituted in one of them, it cannot be transferred to the other merely on the ground that the defendant has his evidence at the place of the other court. (*Hayward, J. C. and Crouch, A. J. C.*) FIRM OF SHAMSSUDDIN MAHIR BUX *v.* FIRM OF ALI MAHOMED ALIDINA.
25 I. C. 874: 8 S. L. R. 43.

———S. 23—*Transfer—Grounds for.*

The transfer of a case from one Court to another is an extraordinary procedure; and some good cause must be shown before it is granted. (*Knox, J.*) SACHENDRA NATH MITTRA *v.* MUHAMMAD HABIBULLAH 24 I. C. 707.

———S. 23—*First hearing—Transfer—Place of trial.*

The first hearing under S. 23 is when the case is ready to proceed. When materials on record are insufficient to determine the place of residence the case is triable at the place of the cause of action and where at least some of the suit assets are situate, particularly when at that place there are other suits between defendants and suits against the estate, pending. (*Johnstone, J.*) AMIR BEGAM *v.* MUHAMMAD ISMAILKHAN.
65 P. W. R. 1914 : 25 I. C. 723 : 150 P. L. R. 1914.

———S 23—*Applicability of—Court not subordinate to High Court—Transfer and stay.*

Section 23 C. P. C. does not apply to a Court not subordinate to the High Court. Therefore a suit pending on the original side of a High Court cannot be transferred under S. 23, nor can the proceedings be stayed where the cause of action arose within the jurisdiction of the Court (*White C. J. and Tyabji, J.*) THE HINDUSTHAN ASSURANCE MUTUAL BENEFIT SOCIETY *v.* MULRAJ.
27 I. C. 455 : 27 M. L. J. 645.

———S. 23 — *Transfer of suit — From moffusil to original side of the Calcutta High Court.*

The plaintiff has the right to choose the forum of trial, and a case can be transferred from one Court to another, only when the Court is satisfied that the proceedings in the trying Court constitute an abuse of the process of the Court. *Quaere*: —Whether under S. 23 (3) C. P. Code a case can be transferred from the Court at Purnea to the Original side of the Calcutta High Court. 12 C. W. N. 446 Ref. (*Dass, J.*) JAWAHIR KUMARI DEBI *v* NARESH CHANDAR BOSE.
57 I. C. 649 : 1 Pat. L. T. 389.

——— S. 23 (3) "*Subordinate*," *meaning of.*

For the purposes of transfer applications of suits from the original side of the High Court the Judge sitting on the original side is subordinate to the appellate side of the High Court. (*Robinson, C. J. and Duckworth, J.*) V. F. R. N. V. E. RAMANATHAN CHETTY *v.* V. E. R. M. N. R. RAMANATHAN CHETTY.
1923 R. 22 : 1 Bur. L. J. 194 : 11 L. B. R. 446.

———S. 24.

Batch of Suits.
Civil Suit.

C. P. CODE (V OF 1908), S. 24—Batch of Suits.

Competency of Court,
Connected Appeals.
Court of Small Causes.
Delegation of Power.
District Court.
Grounds for Transfer.
High Court.
Jurisdiction.
Notice.
Powers of Appellate Court.
Scope of.
Small Cause Suit.
Subordinate Court.

Batch of Suits.

——S. 24—*Batch of suits—Separate application.*

Where there are numerous suits pending which are sought to be transferred, an application should be made separately in respect of each suit. (*Roe and Coutts, JJ.*) UGRAH SINGH *v.* MOTI HARI CO., LTD. **49 I. C. 208 : 4 Pat. L. J. 13.**

Civil Suit.

——S. 24 (4)—*Civil suit—Transfer of—Small Cause Court.*

A Court of Small Causes under S. 24 (4) of the C. P. Code includes Courts vested with Small Cause Court jurisdiction as well as the special Courts constituted under the Provincial Small Cause Courts Act. (*Teunon and Newbould, JJ.*) MADHUSUDHAN GOPE *v.* BEHARI LAL GOPE. **44 I. C 881 : 27 C. L. J. 461.**

Competency of Court.

——S. 24, Cl. (1) (ii)—*Competency of Court—"Competent to try and dispose of," meaning—Change of territorial jurisdiction.*

A Small Cause Court established on 1st January 1916 at K with power to try Small Cause suits instituted after the 1st January 1916 cannot be said to be the successor of the Subordinate Court of K in its Small Cause jurisdiction in respect of a suit instituted before 1st January 1916, and it is not a Court "comretent to try and dispose of the same". In the circumstances of the case the Small Cause Court of K has no jurisdiction to review the judgment in a Small Cause suit of the K Sub-Court and an order of the District Judge transferring the Case to that Court is *ulira vires.* (*Seshagiri Aiyar, J.*) VAITHILINGAM CHETTY *v.* KALIAPERUMAL MUDALI. **(1918) M. W. N. 291 : 24 M. L. T. 32 : 45 I. C. 13 : 8 L. W. 259.**

Connected Appeals.

——Ss. 24 and 96—*Connected appeals—Forum—Transfer*

Where the point involved in several appeals is the same but only some of those appeals lie as of right to the Chief Court, it is competent to the Chief Court to direct that all the appeals should be heard in the Chief Court without the formality of a transfer from the lower appellate Court. (*Kensington and Rattingan, JJ.*) GHULAM ALI *v.* SHIV NATH. **101 P. R. 1912 : 158 P. W. R. 1912 : 15 I. C. 845 : 189 P. L. R. 1912.**

C. P. CODE (V OF 1908), S. 24—Delegation of Power.

Court of Small Causes.

——S. 24 (4)—*Court of Small Causes—Transfer to a Court without Small Cause jurisdiction.*

S. 24 (4) of the Code includes under "a Court of Small Cause" Courts invested with Small Cause Court jurisdiction as well as Courts constituted under Act IX of 1887 ; and so a transfer, under the above section, by a Dt. Judge, of a Small Cause suit from a competent Small Cause Court to a Court not having Small Cause jurisdiction makes the latter Court for the purpose of the suit a Court of Small Causes, whose decision in the case is not therefore appealable. (*Piggott and Walsh, JJ.*) SUKHA *v.* RAGHU NATH DAS. **39 All. 214 : 37 I. C. 809 : 15 A. L. J. 69.**

——S. 24—*Court of Small Causes—Transfer of suit from Small Causes Court to a Court which had no such powers—Appeal.*

A suit filed in a Small Cause Court does not cease to be a Small Cause suit on account of its transfer to a Court not invested with such powers and no appeal lies. (*Sundar Lal, J.*) UDHO SINGH *v.* MULCHAND. **36 I. C. 317 : 14 A. L. J. 705.**

——S. 24 (4)—*Court of Small Causes—Meaning of*

The words "Court of Small Causes" in this section include Courts vested with powers of Small Causes and their procedure is to be governed by the provisions of the Provincial Small Cause Courts Act. (*Benerji, J.*) CHHOTE LAL *v.* FIRM OF LAKHMI CHAND. **38 All. 425:, 34 I. C 113 : 14 A. L. J. 549.**

——S. 24 (4)—"*Court of Small Causes*".

Court of Small Causes means not only a Court constituted as a Small Cause Court but also a Court invested with Small Cause jurisdiction. Consequently the decision of a suit of a Small Cause nature by a munsif on the regular side owing to an order of transfer is not appealable. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) SANKARAMA AIYER *v.* PADMANABA AIYAR. **38 Mad. 25 : 23 M. L. J. 373 : 17 I. C. 425 : (1912) M W. N. 1086.**

——S. 24 (4)—*Court of Small Causes—Transfer of suit to regular jurisdiction—Appeal.*

Where a suit instituted in a Small Cause Court is transferred for trial by the District Judge to a Court not invested with such powers, there is no appeal from the decision of such court. The suit remains a small cause one in spite of the transfer. 38 M. 25 ; 27 C. L. J. 461 ; 31 B. 314 (F. B.) Foll. (*Coutts and Adami, JJ.*) BHAGWAN DAS *v.* KESHWAR LAL. **1 Pat. 696 : 69 I. C. 681 2) : 4 Pat. L. T. 259 : 1 Pat. L. R. 186 : 1923 P. 49.**

Delegation of Power.

——S. 24—*Delegation of power—Senior sub-judge, if can transfer case to junior sub-Judge—Irregularity—Waiver.*

The power of transfer under S. 24 of the C. P. Code can be delegated by the Dt. Judge but when so delegated, it must be exercised in accordance with law. It can only be exercised in cases pending in a Court subordinate to the Court exercising the power. A senior Subordinate Judge cannot transfer a case from his own court to that of

C. P. CODE (V OF 1908), S. 24—District Court.

the junior Subordinate Judge as the Court of the latter is not subordinate to him. When there is a jurisdiction over the subject-matter but non-compliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived. (*Scott-Smith, J.*) KISHEN LAL *v.* JAI LAL. 62 I C. 302.

District Court.

——S. 24 and O. 41, R. 23 *District Court—Transfer of case—Remand by High Court—Transfer by District Judge—Trial by Sub-Judge with consent of parties—Irregular assumption—Jurisdiction.*

Where a Sub Judge, to whom a suit is on remand from the High Court transferred by the Judge who had originally tried it, tries the suit with the consent of the parties, his decision cannot be questioned, as it is only a case of irregular assumption of jurisdiction by a competent Court. 3 C.W.N. 763, Dist. (*Mookerjee and Beachcroft, JJ.*) PROTAB CHANDRA *v.* JUDHISTER.
19 C.W.N 143 : 23 I.C. 69 : 19 C.L.J. 408.

——— S. 24 (1) (b)—*District Court—Power of withdrawal of transmitted execution.*

S. 24 (1) (b) is comprehensive enough to enable the District Court to withdraw a transmitted execution proceeding to its own file and dispose of it. (*Seshagiri Aiyar and Napier, JJ.*) VELLIAPPA *v.* SUBRAMANIAM. 39 Mad 485 : 29 I.C 119 : 29 M L J. 172.

——— S. 24 (3)—*District Court—Transfer of case by Dt. Judge to Addl. Dt. Judge.*

A Dt. Judge can transfer a case pending before him to the Addl. Dt. Judge. (*Ried, C.J. and Rattigan, J.*) O'BRIEN *v.* ABDUL RAHAMAN.
28 P.W.R. 1912 : 13 I.C. 6 14 P.L.R. 1912

——— S. 24—*District Court—Transfer of case—Remand by High Court—Powers of Dt. Judge*

If a District Judge transfers a case remanded by the High Court to a Sub-Judge who disposes of it without any objection being taken as to his jurisdiction the irregularity would not affect the decision on its merits. 23, I.C. 69 Rel (*Sadasiva Aiyar and Spencer, JJ.*) SINGAMUSETTI VENKATIAH *v.* BAPELLA CHIRANNA (1914) M.W.N. 317: 23 I.C. 425 : 15 M.L.T. 304

——— S. 24—*District Court—Transfer of suit—Remand—Powers of Dt. Judge.*

Where an Appellate Court remands a suit for fresh disposal on the merits by the Court which first decided it, the Dt. Judge is competent to transfer it to his own file and decide it. 21 A. 230 Dist. (*Hallifax, O.A J.C.*) RAZA HUSSAIN *v* SHEO SAHAI. 19 I.C. 552 : 9 N.L.R 40.

——— S. 24 (2)—*District Court—Powers of Dt. Judge to transfer.*

A District Judge cannot transfer a case to a Court whose local jurisdiction does not include an area in which the cause of action arose. The mere fact of a transfer of a case by Dt. Judge from one Subordinate Court to another similar Court does not confer jurisdiction on the latter unless it is competent to try the suit originally (*Miller, C. J. and Das, J.*) JANNAT HUSSAIN *v.* GULAM KUTUBUDDIN AHMED. 5 P L.J. 588 : (1920) Pat. 274 : 57 I.C. 522 : 1 P.L.T. 637.

C. P. CODE (V OF 1908), S. 24—Grounds for transfer.

Grounds for Transfer.

——— S 24— *Grounds for transfer—Transfer of suit from one province to another — Balance of convenience.*

When a litigant applies for the transfer of a case from one province to another the court will insist on his making out a strong case of the balance of convenience. 14 A L.J. 242 Rel. 17 A L.J. 371 not foll. (*Piggott and Walsh, JJ.*) INAYAT-ULLAH KHAN *v* NISAR AHMAD KHAN.
44 A. 278 : 65 I.C. 782 : L.R. 3 A. 97 : 20 A.L.J. 118 : 1922 All. 65.

——— S 24—*Grounds for transfer— Transfer of case without notice—Legality of—Convenience of parties not considered—Defendant not heard.*

The order of transfer of a case, if passed without regard to the convenience of the parties (when the convenience is a question of importance) and without hearing defendants is illegal. (*Chatterje and Chapman, JJ.*) DWARKA NATH SEN *v.* TARA PRASANNA SEN. 33 I.C. 797 : 23 C L.J. 295.

——— S. 24—*Grounds for transfer.*

It is the plaintiff who has to choose where his suit shall be brought, provided he chooses a forum which the law allows him to choose. An extraordinary procedure as the removal of a suit against the plaintiff's will from a court where he had lodged it should be supported by some good cause. (*Knox, J.*) MADHO PRASAD *v.* MOTICHAND. 17 A.L.J. 371 : 50 I.C. 368 : 41 A. 381.

——— Ss. 24 and 16 — *Grounds for transfer—Plff.'s right to choose his forum.*

Strong proof must be given of the balance of convenience in changing the *forum* and the burden lies on the plaintiff-applicant who has therefore the right to begin. (*Walsh, J.*) MUSAMMAT SUBBA *v.* MAGBOOL HUSSAIN. 32 I.C. 613 : 14 A.L.J. 242.

——— S. 24—*Grounds for transfer — Erroneous view of law.*

The fact that a Subordinate Judge took an erroneous view of law in a case analogous to the one is no ground for the District Judge to withdraw the suit and transfer it to his file. The District Judge ought not to withdraw the suit and take it on his file to dispose it off on a preliminary point; he cannot do so under S. 24, if he does not wish to try it finally. (*Mookerjee and Carnduff, JJ.*) BHOJA HARI PARIA *v.* SECRETARY OF STATE. 15 I.C. 569.

——— S. 24—*Grounds for transfer—Reasonable apprehension*

It is true that a reasonable apprehension on the part of a litigant should receive consideration when a transfer is applied for but at the same time the apprehension must be such as a reasonable man might reasonably be expected to have. (*Broadway, J.*) KHWAJA AHAD SHAH *v.* MT. AYSHAN BEGUM. 1923 Lah. 564.

——— S 24—*Grounds for transfer—Adverse decision on a point of law in a connected suit.*

The fact that a judge has decided a point of law arising in one case is not a good ground for transferring from his Court another case in

C. P. CODE (V OF 1908), S. 24—Grounds for transfer

which the same point arises. (*Martineau, J.*) FIRM OF JAI NARAIN BABULAL *v.* THE FIRM OF JOHRI MAL CHUNNA MAL OF DELHI. 67 I C. 228: 1922 Lah. 369.

——S 24—*Grounds for transfer—Injudicious observation.*

Where a plaintiff in the witness box vaunted the merits of his paper and the Judge observed by way of answer that he did not make much of it or him, the observation though injudicious and thoughtlessly made, is not a sufficient ground to entitle the plaintiff to get his case transferred to another Court. (*Wallis, C.J. and Coutts Trotter, J.*) *In re* TANGUTURU SRIRAMULU. 29 I.C. 29.

——S. 24—*Grounds for transfer—Balance of convenience.*

A plaintiff has an undoubted right to bring his suit in any court which has jurisdiction but there is no particular sanctity to be attached to this right. If the defendants can show a clear balance of advantage in the way of convenience and expense they are entitled to have the case transferred. (*Ashworth and Simpson, A J.Cs.*) THAKUR NARINDRA BIKRAM JIT SINGH *v* SHEO RATAN THAKUR. 9 O. L. J. 413 : 69 I. C. 717 : 4 U.P.L.R (O.) 112 : 1923 Oudh 30

High Court.

——S. 24—*High Court—Evidence concluded in one Court.*

In a suit concerning land dispute, a court which really had no territorial jurisdiction went into the case elaborately, made local inspections and recorded evidence fully. when the defect was found out Then the plaint was returned to be presented to the proper Court. *Held*, it was a proper case in which under S. 24, the High Court should send it for disposal to the first Court itself. (*Piggott and Walsh, JJ.*) NAND RAM *v.* HIRA DEVI. 21 A. L. J. 86 : L.R. 4 A 311 : 73 I.C. 495 (2) : 1923 A. 249.

Jurisdiction.

——S. 24 and O. 41, R. 23—*Jurisdiction—Case remanded by High Court to Dt. Court—Power of Dt. Judge to transfer case.*

Under S. 24 a Dt. Court to which an appeal has been remanded by the High Court for disposal has power to transfer it to the Court of the additional Dt. Judge unless the High Court's order was drawn up in express terms so as to disclose a clear intention of limiting those powers. (*Piggott and Walsh, JJ.*) RAJKALI *v.* GOPI NATH NAIK. 44 A 211 : 20 A L J. 44 : 66 I. C. 317 : 1922 All 35

——S 24—*Jurisdiction—Transfer of proceedings.*

Proceedings which are beyond jurisdiction of a Court cannot be transferred by the order of the superior Court. 37 Cal. 574 Foll. (*Holmwood and Imam JJ.*) HIRAMATTI DASSYA *v.* ANNADA PRASAD GHOSH. 32 I. C. 788.

——S. 24—*Jurisdiction—Suit in Court having no jurisdiction Transfer of Validity.*

Where a suit is instituted in a Court not competent to try it, the District Judge has no jurisdiction to transfer the case under S. 24 of the Code so as to confer jurisdiction upon another Court. (*Miller, C. J. and Foster, JJ.*) BIBI SAIRAH *v.* GOLAB KUAR. 53 I. C. 892 : 1919 Pat. 409.

C P. CODE (V OF 1908), S. 24.

Notice.

——S. 24—*Notice to parties.*

A Dt. Judge can transfer a case from one Court to another within his jurisdiction without previous notice to the parties but on an application for the same by the party, he must issue notice to and hear the parties before the transfer under S. 24. (*Banerjee, J.*) FATEMA BEGAM *v.* IMDAD ALI. 2 U P. L. R. (All.) 83 : 58 I. C. 560 : 18 A. L. J. 351.

——S. 24—*Notice—Transfer without notice is ground for setting aside* ex parte *decree.*

It is always usual to issue notices to the parties informing them that a case has been transferred from one court to another and in the absence of such a notice a party may well plead that he did not know in what court he had to appear. (*Moti Sagar, J.*) GANGA RAM *v.* GUJARMAL. 1923 Lah. 414.

——S. 24—*Notice—Effect of, absence of.*

The transfer of a suit under S. 24 without notice to the parties is illegal. (*Broadway, J.*) ALINAKI *v.* DAMODAR DOSS. 33 P. W, R. 1917: 40 I. C. 111.

——S 24 (1)—*Notice—Affidavit—Reasons—Practice—Chief Court—Punjab.*

In transferring a case the Chief Court need not issue notice to the opposite party or state reasons for doing so. It can also dispense with an affidavit. (*Scott-Smith, J.*) BISHEN KUER *v.* AMAR NATH. 143 P. W. R 1912 : 14 I. C. 561 : 162 P. L. R, 1912.

——S. 24—*Notice.*

S. 24 is imperative and notice of transfer must be given to parties when action is taken on the motion of a party It need not be given when the Court acts *suo motu*. "Parties" means parties to the suit, appeal or proceedings, the transfer of which is sought. (*Stanyon, A. J. C.*) BISAN DAYAL SITARAM *v.* BODULAL LADURAM. 42 I. C. 746: 13 N. L. R. 203.

——S. 24—*Notice to opposite party—Transfer of case—Necessary.*

There can be no question that a District Judge should give notice to the other side when dealing with a transfer case on the application of one of the parties and not *suo motu*. His failure to do so is certainly an irregularity. (*Ashworth, A.J.C.*) KARIM BAKHSH *v* ABDUL HUQ 26 O. C 62 : 74 I.C. 299 : 1923 Oudh 240.

Powers of Appellate Court.

——S. 24—*Powers of Appellate Court—Remand to Dt. Judge—Powers to transfer to Sub Judge.*

The terms of S. 24, C P.C., are comprehensive and allow a case remanded to the District Judge to be transferred to the Subordinate Judge under him. 23 I. C 69, 23 I C. 425, ref. (*Sunder Lal, J.*) PARDOHI *v* SHEO BHAROS. 12 A. L. J. 1094 : 25 I.C. 141.

C. P. CODE (V OF 1908), S. 24—Scope of.

——— S. 24—*Powers of Appellate Court—Party deprived of the right of appeal.*

Transfer of a case from Munsif to Sub-Judge, who acts as Small Cause Court, is within the Dt. Judge's power, though a party is deprived of his right of appeal by the case being transferred to a Court with Small Cause powers. (*Fletcher and Richardson, JJ.*) UMA CHARAN SEN GUPTA *v.* CHINTA ROY. 36 I. C 881.

——— S. 24 and O. 47, R. 1—*Transfer of a case for review—Illegality.*

An order, transferring an application for review to a court other than the one which decided the case is illegal. (*Mitra, A. J. C.*) BRIJ LAL *v.* SITARAM. 50 I. C. 910.

Scope of.

———Ss. 24, 23 and 22—*Scope of.*

S. 24 is exhaustive of the judicial power to transfer suits and no Court has jurisdiction to transfer a suit from one Court to another unless both Courts are subordinate to it and even a High Court has no power to compel its institution in any Court beyond its jurisdiction. This power is entirely different in character and legal effect from the one in case of an order returning the plaint with a view to its presentation in the proper Court. (*Stanyon, A. J. C.*) ABU BAKAR ABDUL RAHIMAN & CO. *v.* RAMBUX.
40 I. C 383: 13 N. L. R 81.

Small Cause Suit.

———S. 24 (4)—*Small Cause suit - Transfer to Honarary Munsif—U. P. Act II of* 1896, *S.* 8 (2) *—Proviso.*

An Honorary Munsif acting under the U. P. Honorary Munsif's Acts decides a suit transferred to him from a Court of Small Causes not as Court of Small Causes and his decree is therefore appealable. (*Tudball, J.*) SYED IKHLAQ ALI *v.* LALA BUDH SEN. 54 I. C. 435.

———S. 24 (4)—*Small Cause—Transfer to Honorary Munsif—Appeal.*

S. 24 (4), C.P.C., does not apply to cases transferred from Small Causes to Hony. Munsif's Courts. Decrees passed by latter Courts are appealable as they cease to be decrees in Small Causes. (*Lindsay, J.*) KISHORI LAL *v.* KALEAN KHAN. 50 I. C. 648 : 1 U P. L. R. (H. C.) 27.

——— S. 24 (4)—*Pr. Sm. C. C. Act, S.* 35—*Transfer of Small Cause suit to another Court with no Small Cause powers.*

The Court to which a suit of Small Cause nature is transferred from a Small Cause Court must under S. 24 (4), C.P.C., be deemed to be a Court of Small Causes as regards that suit and its decision is therefore not appealable. (*Banerjee and Tudball, JJ.*) CHATURI SINGH *v.* RAMIA.
40 All. 525 : 46 I. C. 893 : 16 A.L.J. 548.

——— S. 24 (4)—*Small Cause suit—Plaint returned by Small Cause Court—District Judge sending case to Munsif—Decision—If appealable—Pro Sm. C. C. Act, S.* 23.

A Small Cause Court, finding a question of title to immoveable property raised sent the plaint to the District Judge who in his turn sent it to a Munsif, First Class, for disposal. On appeal from the decision of the latter.

Held, that the order of the district judge was in effect one under S. 23 of the Provincial Small Cause Courts Act, and not under S. 24, C P Code. Therefore the case cannot be held to have been tried by the Munsit under S. 24 C. P. C., and an appeal lay from his decision. (*Scott Smith, J.*) AMIR DIN *v* MUST. LACHIA. 64 I. C 335.

C. P. CODE (V OF 1908), S. 27.

——— S. 24 (4)—*Small Cause suit—Transfer of suit by Dist. Judge.*

S. 24, cl. (4), of the C. P. Code is not limited in its application to Courts constituted under the Pro. Sm. Cause Courts Act A Dt. Judge cannot transfer a case of a Small Cause nature to a subordinate Court not invested with the powers of a Small Cause Court, *i. e.*, not competent to try it as such, so long as the Small Cause Court capable of trying it is in existence. (*Stuart and Kanhaiya Lal, A. J. Cs.*) BAIJOO *v.* TULSHA.
43 I. C. 314 : 20 O. C. 350.

Subordinate Court.

———S. 24 (1) (a)—*Subordinate Court—Divisional Court not subordinate to High Court—Transfer of petition for alimony to Divisional Court.*

S. 24 (1) (a) does not make the Divisional Court a subordinate Court to the High Court owing to the nature of latter's jurisdiction, so as to transfer the petition for alimony on a dissolution of marriage to the Divisional Court (*Scott, C. J. and Batchelor, J.*) MIMMIL WALLACE *v.* ARTHUR WALLACE. 40 Bom. 109 : 31 I.C. 331 : 17 Bom. L. R. 948.

———S. 24—*Subordinate Judge—Power to transfer suits under Punjab Courts Act, Ss.* 37 *and* 44.

A Subordinate Judge cannot exercise the powers under S. 24, C.P.C., unless such powers are delegated to him by Dt. Judge under Ss. 37 and 44 of the Punjab Courts Act. (*Broadway, J.*) ALINAKI *v.* DAMODAR DAS. 40 I.C. 111 : 33 P. W. R. 1917.

———S. 25—*Judicial Commissioner of Coorg—Transfer of suit to High Court—Trial on the Original Side—Appeal.*

Where a case is transferred under S. 25, C. P. Code, by the Governor-General in Council from the Court of the Judicial Commissioner of Coorg to the Original Side of the High Court of Madras and the suit is tried by the High Court, an appeal lies. (1913) A. C. 546 applied. (*Schwabe, C. J. and Odgers, J.*) KONGANDRA APPAYYA *v.* KONGANDRA KUTTAPPA. (1922) M. W. N. 830.

——— S. 26—*Plaint—Presentation at private residence of Judge is valid.*

The presentation of a plaint after the usual court hours at the private residence of the Judge is valid. A Judge has jurisdiction to receive the plaint at his residence and after the Court hours, though he is not obliged to do so. 34 A. 482 Relied on (*Dhobley, A.J.C.*) MADHORAO *v.* MANOHAR LAL. 65 I. C, 674 : 1922 Nag. 167.

———S. 27—*Suit duly instituted—Meaning of—Dismissal of suit for non-payment of deficit court-fee—Review without notice to other side not illegal.*

C. P. CODE (V OF 1908), S. 32.

A suit was instituted on the last day for filing the suit under the Limitation Act. The plaint was insufficiently stamped and the deficient court fees not having been put in within the time fixed by the Court, the suit was dismissed. Thereafter on an application for review, the order of dismissal was set aside without any notice to the defendant and time was granted for putting in the deficit court fee :

Held, that at the time the order of dismissal was set aside, there was no opposite party on whom the notice could be served, as the summons in the suit had not yet been issued on the defendant and as, until the suit was registered, the suit could not be said to have been duly instituted. The order of dismissal passed at that stage of the case, can be reviewed without notice to the defendant. 8 W R. 304 and 14 M. L. J. 7 ref. 43 C. 178 appl. (*Newbould, J.*) SURENDRA PRASAD LAHIRI CHOUDHURY *v.* ATTABUDDIN AHMED.

26 C. W. N. 391 : 69 I. C. 43 : 1922 Cal. 234.

——— **S. 32**—*Scope and applicability of.*

S. 32 of the C. P. Code, applies only when a person has failed to comply with a summons to attend Court issued under S. 30 and not to the case of a party who fails to produce documents which he has been ordered to produce. (*Miller C. J. and Mullick, J.*) RAMESWAR NARAYANA SINGH *v.* RIKHANATH KOERI **5 Pat. L. J. 550 : 58 I. C. 281 : 1 P. L. T. 668**

——— **S. 33 and O. 20, R. 1.**—*Judgment without argument.*

Where a case is transferred after hearing arguments but decided without hearing fresh arguments the judgment is not legal. 91 P. R. 1904 Foll. (*Abdul Raoof, J.*) MOHAMED KHAN *v.* GHAZANFAR ALI. **57 I. C. 34 : 2 U.P.L.R. (L) 133.**

——— **S. 33** *Omission or delay in drawing up decree.*

An omission or neglect of Court to draw up a decree following a judgment does not deprive the party of his right to appeal. (*Wilberforce and Martineau, JJ.*) MANOHAR LAL *v.* NAMAK CHAND **52 I. C. 479 : 66 P. R. 1919.**

———**S. 34**—*Discretion of Court—Interest.*

Under S. 34 of the C. P. Code, the Court has a discretion as to the rate of interest to be awarded after the institution of the suit till judgment and where the courts below had awarded 8 per cent the Privy Council refused to interfere. (*Viscount Haldane, JJ.*) PANNAH LAL *v.* NIHAL CHAND.

43 M L. J. 66 : (1922) M W. N. 376 : 26 C. W. N. 737 : 16 L. W. 80 : 36 C. L. J. 5 : 24 Bom I. R. 971 31 M. L. T. 129: 67 I C. 423: 2 P. L. R. (P. C) 1922 : 1922 P. C. 46 (P. C.).

———**S. 34 and O. 34, Rr. 4 and 5**—*Mortgage—Decree—Right to interest.*

The Judicial Committee disallowed interest to the mortgagee from the date of the decree of the Subordinate Judge to the disposal of the appeal by the Privy Council, the case having in its view been hung up by his persistence in asserting an unwarrantable claim of interest from the date of the mortgage. (*Ameer Ali, J.*) MOHAMMED ALI

C. P. CODE (V OF 1908), S. 34.

MOHAMMAD KHAN BAHADHUR *v* QAZI RAMZAN ALI. **24 C. W. N. 977 : 7 0 L. J 350 : 58 I. C. 891 : 23 0. C. 150 P. C.)**

[Reversing 33 I. C. 454 : 3 0. L. J. 746.]

———**S. 34**—*Disallowance of interest after suit—Decree silent.*

Where the trial Court (which had a discretion in the matter) did not provide for the interest on the mortgage money after the date of filing of a suit for redemption. *Held*, that the trial Court must be deemed to have declined to award any interest for the period in question and no weight could be attached to the suggestion that the omission was due to an oversight especially as no application was made to the trial Court to repair the alleged omission. (*Lord Moulton.*) HARALAL ICHHALAL MAJUMDAR *v.* DESAI NARSILAL CHATURBHUJDAS. **37 Bom. 326 : 40 I. A. 68 : 17 C. W N. 573 : 13 M. L. T. 415 : (1913) M. W.N. 428 : 11 A. L J. 432 : 17 C. L J 474 : 15 Bom. L. R. 465 : 18 I. C. 809 : 25 M. L. J. 101 (P.C.).**

[Affirming 2 I. C 469 : 11 Bom L. R. 318.]

———**S. 34**—*Interest—Liability to pay after period fixed for redemption.*

Where in mortgage by conditional sale the mortgagor covenanted to pay interest till the date fixed for payment after which the mortgagee was to become the absolute owner of the property and there was nothing expressed in the document to provide for payment of interest after the due date in case the mortgagee did not institute foreclosure proceedings *held*, that having regard to the terms of the whole document, its general tenor implied an obligation on the part of the borrower on the making of default to be liable for subsequent interest at the rate mentioned in the bond. 19 A, 39; 20 A. 171; 25 C 246 Rel. (*Mears, C. J. and Piggott, J.*) MAHADEO PRASAD *v.* RAJA DHIRAJ SINGH. **44 A 772 : L R. 3 A. 536 : 20 A. L. J. 752 : 1923 A. 7.**

———**S. 34**—*Interest subsequent to date of plaint—Discretion of Court.*

The award of interest after institution of a suit is in the discretion of the Court. Where throughout the dealings between the parties compound interest was charged and the total amount of such interest exceeded one-third of the amount of the claim, *held*, the Court would be justified in refusing future interest. (*Mears, C J and Banerjee, J.*) BHAGWAN BAKSH *v* DAMODARJI JOSHI **42 All. 230 : 59 I. C. 20 : 18 A.L.J 100.**

———**Ss. 34 and 65** *-Interest awarded by decree—How far recoverable—Scale—Confirmation.*

When the decree allows interest until realisation it might be paid during the period after the sale and before its confirmation. (*Piggott and Walsh, JJ.*) KHALIL-UL-RAHMAN *v.* GOKUL CHAND. **50 I. C. 772 : 17 A. L J. 617.**

———**S. 34 and O 34, R 8**—*Mortgage decree—Interest—Right to—Appellate Court extending time—Interest—Contract rate.*

Where in a suit to redeem a mortgage, the lower Court fixed a certain time allowing interest at the contract rate till then, and the High Court

C. P. CODE (V OF 1908), S. 34.

on appeal confirmed the decision of the lower Court but extended the time for redemption fixing another date, *held* that the effect of the extension of time by the Appellate Court was to substitute the date fixed by it for that fixed by the first Court and that the mortgagee was entitled to interest at the contract rate up to the extended date. (*Piggott, J.*) RAM NARAIN *v.* GOBIND PERSHAD. 29 I. C. 289.

———S. 34 and O. 34, Rr. 2 and 4—*Mortgage decree Court's duty to ascertain sum due—Court has discretion to award less than contract rate.*

The date referred to in O. 34, R. 2, is the date fixed by Court for payment of money. The Court must ascertain the amount of interest due on the mortgage up to that date according to the contract rate, unless the Court for some legal reason, sees fit to decrease that rate. (*Richards, C. J. and Banerjee, J.*) RAJWANTA KUAR *v.* SHAM NARAIN SINGH. 36 All 220 : 23 I C. 88 12 A. L J. 283 :

———S. 34—*Hardship—Improvident transaction—Money lender having taken no advantage of his position*

Although a transaction is improvident, mere hardship would not justify a Court in disallowing the contracted rate of interest, unless there is evidence to show that the lender has taken undue advantage of his position. (*N. R. Chatterji and Panton, JJ.*) MADHU MANGAL SADHU *v.* GAUR SUNDAR SWAR NAKAR. 60 I. C 733.

———S. 34—*Contract rate—Rate excessive.*

The mere finding that the rate of interest in a mortgage bond is excessive, is not sufficient reason to refuse interest at the contract rate (*Newbould and Buckland, JJ.*) DINESH CHANDRA SHAH *v.* SAFER ALI MANDAL. 60 I. C. 693.

——S 34 — *Suit for money representing depreciation in value of goods supplied—No interest claimable.*

In a suit for recovery of money representing the depreciation in the value of goods supplied, no interest can be claimed during the pendency of the suit, as the amount is neither 'debt' nor sum certain within S. 1 but only unliquidated damages. (*Mookerjee and Fletcher, JJ.*) CREWDSON *v* GANESH DAS HARI BUX. 60 I. C. 288 : 32 C. L. J. 239.

——S. 34—*Discretion of Court—Interest* post diem.

Though award of interest pending suit is discretionary it should not be refused in the absence of proper reasons. (*Teunon and Richardson, JJ.*) SARAJUBALA DEBI *v* SARADANATH BHATTACHARJI 50 I. C 862 : 23 C W. N. 336.

———S. 34 and O 34, R. 5—*Mortgage decree—Further interest.*

After the period of grace allowed by a preliminary decree in a mortgage suit, the matter passes from the domain of contract to that of judgment and the Court's jurisdiction to grant further interest after the period of grace is under S. 209 of the Code of 1852. The proper period for allowing such further interest is when the decree absolute is made. 34 Cal 150 (P.C.) Foll. (*Chatterjee and Walmsley, JJ.*) UDIT NARAIN *v.* JASODA SAHUM. 46 I. C. 469 : 27 C. L. J. 576.

C. P. CODE (V OF 1908), S. 34.

———S. 34—*Mortgage decree—Interest from date fixed for payment to date of realization.*

A decree-holder in a mortgage suit is entitled to interest at the Court rate for the period between the date fixed for payment and the date of realization of the money and not at the rate stipulated for in the mortgage bond. (*Stephen and Mullick, JJ.*) SAHIBZADA SINGH *v.* HAZARI SAHU. 27 I. C. 522.

———S. 34—Damdupat—*Rule of.*

The rule of *damdupat* applies to a matter of contract and not when it has passed into the realm of a decree of Court. (*Fletcher, J.*) NANDA LAL ROY *v* DHIRENDRA NATH. 21 I. C. 974 : 40 Cal 710.

——S 34—*Mortgage decree—Interest—Contract rate—Appeal.*

A mortgagee is entitled to interest on the principal amount at the contract rate up to the date fixed for the payment in the preliminary decree and the period cannot be enlarged by an unsuccessful appeal by the mortgagor or the mortgagee. (*Mookerjee and Holmwood, JJ.*) TARACHAND MARWARI *v* BROJO GOPAL MOOKERJI. 17 C L J 520 : 18 I. C. 747 : 17 C. W. N 457.

———S. 34—Post diem *interest—Damages—Measure.*

Where there is no express stipulation for the payment of interest after the due date, the mortgagee is entitled to damages on account of the failure of the debtor to pay the debt at the stipulated time. The measure of damages would *prima facie* be the same as the rate of interest stipulated for by the parties. There is no rule of law making the contract rate necessarily the measure of damages, and the Court has discretion to reduce the rate if it is found to be unusual. 17 All. 511 (P.C.) 3 Lah.200, (F.B.) Ref (*Scott Smith and Fforde. JJ.*) BUDHU RAM *v* NIAMAT RAI 4 Lah. 406 : 75 I. C. 375 : 1923 Lah. 632.

———S. 34—*Discretion of Court—Interest—Interest not asked for in the plaint can be awarded—C. P Code, O. 7, R. 7.*

Having regard to the provisions of O. 7, R. 7 of the Code the Court has discretionary power to grant interest under S 34 of the Code in a suit for money, although interest was not specifically asked for in the plaint. (*Broadway and Abdul Qadir, JJ.*) RUP RAM *v* HAKIHUL. 64 I. C 896 : 2 Lah. 256.

———S. 34—*Mortgage—Interest*—Post diem.

A mortgage by conditional sale stipulated that in case of failure payment of the principal and the interest at 15 per cent per annum within 17 months the deed would take effect as an out and out sale. There was no independent covenant for payment of interest. *Held*, in a suit for redemption that plaintiff must pay *post diem* interest at 9 per cent. per annum for 6 years up to date of suit. (*Shadi Lal, J.*) KRISHNA MAL *v.* MUHAMMAD BAKHSH. 52 P L. R. 1915 : 27 I.C. 616 : 131 P. W. R. 1915.

C. P. CODE (V OF 1908), S. 34.

——S 34 - *Discretion of Court.*

A Court has discretion under S. 34 of the Code to award interest *post litem motam* at a reasonable rate (*Rattigan and Le Rossignol, JJ.*) BHAGAT SINGH *v.* JAI RAM. **22 P. R 1915 : 19 P. W. R. 1915 : 26 I. C. 402 : 66 P. L. R 1915.**

——S. 34 -*Discretion—Interest.*

When the delay in the decision of a case is wholly due to plaintiff's erroneous act a Court is justified in not awarding under S. 34 further interest from the date of suit up to realization. (*Scott-Smith and Shadi Lal, JJ.*) HIRA LAL *v.* CHANAN KHAN. **98 P.W.R. 1914 : 25 I.C. 658. 199 P.L.R. 1914.**

——S. 34 and O. 34, Rr 2 and 4—*Mortgage decree—Interest subsequent.*

Where on default of payment within the date fixed by the preliminary decree the mortgaged property is ordered to be sold, subsequent interest is to be calculated on the principal, interest and costs found to be due on the date fixed and not on the principal alone Such further interest is to be calculated at 6 per cent but the Court has a discretion. 34 Cal. 150, 21 Mad. 364, rel. (*Abdur Rahim and Oldfield, JJ.*) VENKATACHALLAPATHI AIYAR *v.* THALASI SERVAI. **42 Mad. 465: 51 I.C. 67 : 36 M.L.J. 288.**

——S. 34 and O. 34, Rr. 4 and 5—*Mortgage decree—Interest—Rate of.*

A mortgage decree should provide for interest at the contract rate till the date fixed therein for repayment, and not at 6 per cent. (*Sadasiva Aiyar and Spencer, JJ.*) SAMANDAN KARAKATETATHIL *v.* MANIKOLH VELLI VA VETTIL. **6 L.W. 296 : 42 I.C. 349 : 33 M.L J. 679.**

——S. 34—*Contract rate—Discretion of Court.*

A plaintiff is not entitled as of right to the contract rate of interest from the date of suit to the date of decree. The question is one for the discretion of the Court, which should not refuse to allow the contract rate without giving reasons for doing so. (*Wallis, C. J. and Seshagiri Iyer, J.*) RAJGOPAL CHETTY *v.* KANDAPPA CHETTY. **28 I. C. 429**

——S. 34—*Mortgage decree—Interest after date fixed for payment.*

Interest after date fixed for payment in a mortgage decree can be allowed only at six per cent. per annum. (*White, C J. and Tyabji, J.*) JOSHYAM NARAYANIAH *v.* UPPU MADHAVA ROW. **13 M.L.T. 212 : 18 I.C. 362 : (1913) M.W.N. 175.**

——S. 34—*Decree for rent—Under proprietor—Future interest.*

The liability to pay future interest under S 34 of the C.P. Code, is not controlled by S. 141 of the Oudh Rent Act. It is within the competence of the trial Court in a suit for arrears of rent against an under-proprietor to award future interest at such rate as it may consider reasonable. (*Kanhaiya Lal, J. C.*) RAJ KUMAR LAL *v.* DARSHAN SINGH. **6 O L J. 362 : 52 I.C. 865 : 22 O.C. 287.**

C. P. CODE (V OF 1908), S. 34.

——S. 34 and O. 34 Rr. 4 and 5—*Mortgage decree—Interest—Contract rate.*

The rate of interest which a Court can allow in a mortgage decree from the date fixed for payment to the date of realization, is in its discretion. In exercising its discretion, however, the Court will ordinarily give the contractual rate, if it be a reasonable one. (*Kendal, A J.C.*) AJODHIA BANK, LTD., FYZABAD *v.* ABDUL GHANI. **47 I.C. 701.**

——S 34—Post diem *interest.*

A Court may in its discretion allow *post diem* interest though not allowed in the mortgage deed. (*Stuart, A.J.C.*) MAHDEO PRASAD *v.* TIKNI. **36 I.C, 685 : 3 O.L.J. 390.**

——S. 34 and O. 34 Rr. 4 and 5—*Mortgage decree- Interest* post diem—*Power of Court to fix interest from date till date of realization—Circumstances to be considered.*

The Court in awarding interest from the date fixed for payment up to the date of realization ought to be guided by the circumstances of each particular case. (*Stuart and Kanhaiya Lal, A. J Cs*) NARENDRA BAHADUR SINGH *v.* OUDH COMMERCIAL BANK. **30 I.C. 323 : 2 O.L.J. 402.**

——S, 34—*Mortgage suit—Interest—Court's powers.*

The Court has power under S. 34 of the C.P.C. to award interest at the contract rate even-after the date fixed for payment to the date of realisation provided the rate is reasonable. 7½ per cent was held to be reasonable in this case. (*Lindsay, J.C.*) ALLAHABAD BANK *v.* SUARJ KUAR **26 I.C. 177 : 1 O.L.J. 544.**

——S, 34—*Damages—Interest for use and occupation.*

Interest on sum claimed for use and occupation may be allowed under S. 34 of the C. P. Code. (*Chamier, J.C.*) MUHAMMAD HUSSAIN *v.* DEPUTY CAMMISSIONER, BEHRAICH. **9 I C. 221.**

——S. 34—*Discretion to be exercised reasonably.*

The Court must use its discretion reasonably in granting interest. (*Jwala Prasad and Ross, JJ.*) MICHU MISSIR *v.* BALBHADRA PRASTI. **62 I.C. 116 : 2 Pat. L.T. 147.**

——S. 34—Damdupat—*Rule of.*

The rule of *damdupat* applies to interest after decree. 1 Bom. 577 : 21 C 840 foll. (*Crouch, A.J.C.*) ASANAND JEYRAMDAS *v.* TULSAN BAI. **15 I. C. 824 : 5 S.L.R. 245.**

——S. 34 (2)—*Decree silent as to interest—Effect.*

Where a decree is silent with respect to interest, the court should be deemed to have refused it (*Spencer and Devadoss, JJ.*) AMBI *v.* PUDIA KOVILAGATH SRIDEVI. **45 M L J. 687: (1923) M.W.N. 753 : 18 L.W. 686 : 33 M L.T. 101 (H.C.) : 75 I.C. 566 : 1924 M. 102.**

——S. 34 (2)—*Interest—Decree silent as to.*

Where a decree is silent with respect to further interest from date of decree to the date

C. P. CODE (V OF 1908), S. 34.

of payment the Court must be deemed to have refused to give interest unless it can be shown that its silence was due to oversight or mistake and a separate suit will not lie for its recovery. 37 Bom 326 (P.C.) Foll. (*Maung Kin, J.*) YAGAPPA CHETTY *v.* MAHOMED. 9 L.B R. 78 : 40 I.C. 858 : 11 Bur, L.T. 132.

——S 34 (3)—*Interest.*

Interest at 6 per cent will be allowed in a restitution suit from the date of withdrawal by decree-holder till date of re-payment to judgment-debtor. (*Mookerjee and Cuming, JJ.*) ASUTOSH GOSWAMY *v.* UPENDRA PRASAD MITRA. 24 C L.J 467 : 38 I.C. 17 : 21 C.W.N. 564.

——S. 35.

Abatement of suit.
Accounts, Suit for.
Administration Proceedings.
Alternative Relief.
Appeal.
Conduct.
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Interest
Maintenance Suit.
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Principles of.
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Remand.
Representative Suit.
Scale of.
Scheme Suits.
Third Party.
Trustee.

Abatement of suit.

——S. 35 and O 22, R 1—*Abatement of suit—Cause of action not surviving—Cost to deft.*

The court has power to award costs to a deft. out of the deceased plff.'s estate even where the suit abates by reason of the cause of action not surviving the death of plff. The power of the Court to award costs in cases of abatement is not restricted to O. 22, R. 3 (2). (*Spencer and Krishnan, JJ.*) DONTU PEDDA CHENCHEYYA *v.* MALLAM BALAYYA. 37 M L. J. 596 : 10 L. W. 656 : 54 I. C. 118 : 43 Mad. 284.

——S. 35 and O. 22, R. 1—*Abatement of suit—Death of deft.—Costs.*

If a suit abates on the ground that no representative of a deceased deft. has been brought on the record, the Court cannot award costs to the heirs of the deceased deft. against the plff. *Quære* whether the representatives of the deceased deft. can institute a separate suit for the purpose of recovering costs? (*Sundara Aiyar, J.*) SIVAPRAKASAM *v.* PALANIAPPA MUDALIAR. (1912) M. W. N. 382 : 11 M. L. T. 202 : 15 I. C. 369 : 22 M.L.J. 439.

C. P. CODE (V OF 1908), S. 35—Appeal.

Accounts, Suit for

——S. 35—*Accounts suit—Costs of pending reference.*

In a suit for accounts, where deft. resisted plff.'s claim for an account the Court awarded costs to the plffs. up to and including the hearing and directed reference for an account. (*Imam, J.*) J. I. J. HYAM *v.* THE BENGAL STONE CO., LD. 35 I. C. 83 : 20 C. W. N. 368.
[On appeal. 45 I. C. 738 : 27 C. L. J. 78.]

Administration Proceedings.

——S. 35—*Administration proceedings—Costs of intervenor.*

Where in an administration suit the intervention of a person did not change the character of the proceeding or alter the scope of the suit and the intervenor voluntarily came into it as a prudent measure not of immediate protection but of possible personal benefit hereafter, it would be clearly unjust to make the claimant pay an additional bill of costs of the intervenor. (*Mookerjee, C. J. and Fletcher, J.*) SURENDRAMOHAN SINHA *v.* MURAHILAL SINHA. 24. C. W. N 888 : 59 I. C 581 : 48 C. 352.

Alternative Relief.

——S. 35—*Alternative relief—Two sets of defts.—Costs.*

Where it was reasonable and proper for the plff. to join in the action for relief against either of two sets of the defts. who were disputing their liability, the unsuccessful deft. should be made to bear the costs of the successful deft. (*Fawcett, A. J. C.*) TAYABJI *v.* SOUTH BRITISH INSURANCE CO. 42 I. C. 636 : 11 S. L R. 1.

Appeal.

——Ss. 35 and 100—*Appeal—Costs—Disallowance of—Second Appeal—Interference.*

As a rule, questions of costs are in the discretion of the trial court and a person who is dissatisfied with an order or part of it as to costs cannot prefer a second appeal in order to set aside or modify that order; but where an important question of principle has been decided, the High Court will look into the decision to see whether it is arbitrary or based on sound principle. The lower Appellate Court having entirely confined itself to matters antecedent to the suit in depriving a successful party of the costs, the High Court interfered in second appeal, (*Piggott and Walsh, JJ.*) LALMAN *v.* CHINTAMANI. 41 All. 254 : 17 A. L. J. 169 : 49 I. C. 696.

——S. 35—*Appeal—Interference by Appellate Court.*

A successful deft. ought not to be deprived of his costs except on proof of any wrongful conduct in connection with the litigation. When the Judge has given his reasons and all the circumstances are before the Court of appeal the latter can, if satisfied that the discretion has not been judicially exercised, interfere with it and make the order which the court below ought to have made. (*Piggott and Walsh, JJ.*) RADHEY SHIAM *v.* BIHARI LAL. 40 All. 558 : 48 I. C. 478 : 16 A L J 592.

C. P. CODE (V OF 1908), S. 35—Appeal.

——S. 35—*Appeal—Discretion of lower Court—Misapprehension.*

The Appellate Court will interfere with an order of the lower Court as to the costs where there has been a misapprehension of the facts on the part of the Judge who makes the order of costs and violation of principle by throwing upon the plff. the costs of the unsuccessful defendant where the plff. has been guilty of no misconduct (*Scott, C. J and Batchelor, J.*) LAXMI BAI *v* RADHA BAI. **42 Bom 327 : 47 I C. 762 : 20 Bom. L R. 905.**

——S. 35—*Appeal—Question of principle.*

When the question is one of principle, a second appeal lies to the High Court on the question of costs only. (*Newbould and Cuming, JJ.*) RAMESH CHANDRA *v* MOHIM CHANDRA **68 I. C. 600 : 35 C L. J. 156.**

——Ss. 35 and 96—*Appeal—Costs—No question of principle involved.*

An appeal raising only a question of costs is incompetent when it does not contain a question of law. (*Fletcher and Cuming, JJ.*) UMESH CHANDRA DUTT *v.* BIBHUTI BHUSHAN PAL CHOWDHURY. **56 I. C 334 : 47 Cal 67.**

——S. 35—*Appeal—Order as to costs.*

The High Court will not interfere in second appeal in a matter of costs except when the lower Court has gone wrong in some matter of principle. (*Fletcher and Smither, JJ.*) MIDNAPORE ZEMINDARI CO., LTD. *v.* KRISTO PRASAD SUKUL. **46 I. C 544.**

——S. 35—*Appeal—Costs—Interference.*

The High Court will not ordinarily interfere with the discretion of the lower Court in the matter of awarding costs unless it finds that the discretion has not been used judiciously. A party who succeeds on a particular issue must ordinarily get his costs of that issue unless there is some special reason to deprive him or the issues are closely and inseparably connected with each other. (*Sanderson, C. J. and Mookerjee, J.*) BENGAL STONE COMPANY, LTD. *v.* JOSEPH ISAAC JOSEPH HYAM. **45 I. C. 738 : 27 C. L. J, 78.**

[On appeal from 35 I.C. 83 : 20 C. W. N. 368.]

——S. 35—*Appeal—Powers of Appellate Court—Error of principle.*

Where the costs are in the discretion of a judge, the Court of appeal will assume that the Judge in the lower Court exercised his discretion unless it is satisfied that he had not exercised it. The Appellate Court will not interfere with an exercise of the discretion of the lower Court unless it has proceeded on a manifestly wrong ground. 2 Bom. L, R. 254. foll. (*Fletcher and Smither, JJ.*) SARADINDU MOKHERJEE *v.* CHARU CHANDRA DUTTA. **44 I. C. 870 : 22 C. W. N. 372**

——S. 35—*Appeal — Discretion of Court—Appellate Court.*

Costs are entirely at the discretion of the Court. An Appellate Court will not lightly vary the order unless it is satisfied that the order is manifestly erroneous or unjust as to call for interference.

C. P. CODE (V OF 1908), S. 35—Appeal.

(*Sanderson, C, J., Woodroffe and Mookerjee, JJ.*) KALI DASSEE *v.* NOBOKUMARI DASSEE. **20 C. W. N. 929 : 36 I. C. 655 : 23 C L J. 606.**

——S. 35 — *Appeal — Compromise — Suit against all defts. except one—Decree against him with costs—Withdrawal—Dismissal with liberty to bring fresh suit—Liability for costs.*

Plff. compromised the suit with all defts. except one which was decreed with costs. On appeal, deft. was allowed to withdraw from the appeal and was dismissed from the suit with liberty to bring a fresh suit against the plff. no order being made as to the costs of the appeal *Held*, that the plff. could execute the decree for costs of the original Court as the effect of the order of the Appellate Court was not to free the deft. from his liability for costs under the decree of the first Court. (*Mookerjee and Beachcroft, JJ.*) BALABHADRA SINGH *v* RADHASHAM SINGH. **16 I. C. 381.**

——S. 35- *Appeal—Costs—Order as to.*

The High Court will not interfere in second appeal with the discretion exercised by an Appellate Court on a question of costs. (*Carnduff, J.*) DWARAKA NATH *v.* PRACHADRAM **13 I. C. 201.**

——S. 35—*Appeal—Costs.*

There is no reason why when the findings on an issue are in favour of the deft. she should not get her costs, which have been disallowed arbitrarily. There lies a second appeal on a question of costs. 12 Cal. 197 ; 12 Cal. 271 ; 45 I. C. 918 ; 51 I. C. 622, foll. (*Martineau, J.*) KARAM KUAR *v.* KIRPA SINGH. **2 Lah. L. J. 310.**

——S. 35—*Appeal—Competency of.*

Though Courts have full discretion in the matter of costs, that discretion is not arbitrary and must be exercised in accordance with general principles. In a pre-emption suit the plaintiff's right of pre-emption was admitted and the only dispute was as to the price payable. The Dt. Judge dissenting from the Lower Court, held that the whole of the price was paid before Sub-Registrar and that there was no proof of the return of any part of the price. He accepted the vendee's appeal as to the price but did not set aside the first Court's decree as to costs against him The vendee filed a second appeal *Held*, that in this case the Court of second appeal should entertain appeal on the question of costs. (*Shadi Lal, C.J.*) GOBIND SAHAI *v* RAM CHAND. **56 I. C. 971.**

—— S 35—*Appeal—Order as to costs.*

Where the lower Appellate Court exercises its discretion as to the award of costs in an arbitrary manner and not according to judicial principles a second appeal lies from its decree for costs only. (*Shah Din, J.*) FAZAL NUR *v* MUHAMMAD HASSAN. **45 I. C 948 : 97 P. W. R. 1918.**

——S. 35—*Appeal—Power of Appellate Court—Interference.*

The usual rule is to allow costs to the succesful party and where they are disallowed without any sufficient reason for doing so, the Appellate

C. P. CODE (V OF 1908), S. 35—Appeal.

Court should rectify the error. (*Shah Din, J.*) CHELARAM *v.* MENGH RAJ. 28 P. W. R. 1915 : 27 I. C. 621 : 65 P L. R. 1915.

——S. 35—*Appeal—Discretion — No interference in second appeal.*

The award of costs is in the discretion of the Court and the High Court will not interfere in second appeal with an order as to costs if it appears to have been made in the exercise of a sound discretion. (*Abdur Rahim and Ayling, JJ.*) DIVIBHASYAM VENKANNA *v.* VENKATA RAMANIAH. 19 M. L. T. 86 : 32 I. C. 579 : 3 L. W. 109.

——S. 35—*Appeal—Order as to costs if and when appealable—Interference of Appellate Court with order for costs—Scope.*

Appeal does not lie against an order relating merely to costs but an appeal would lie when such costs are incidental to a judgment. An Appellate Court will not ordinarily interfere with an order for costs ; but when there is a patently erroneous order it should interfere. (*White, C. J. and Oldfield, J.*) RAO SAHIB NAMBERUMAL *v.* KRISHNAJEE. 26 M. L. J. 356 : 15 M. L. T. 263 22 I.C. 919 : (1914) M. W. N. 310 ;

——S. 35—*Appeal—Interference with order.*

The High Court should interfere if the reasons given by the lower Court for not following the rule in S. 35 find no adequate support in the facts on record. (*Drake Brockman, J.C.*) MEGHRAJ *v* JOHNSON. 31 I. C. 880 : 11 N. L. R. 189.

——S. 35—*Appeal—Order for Costs, when can be questioned in appeal.*

The awarding of costs being discretionary, it cannot be questioned in appeal unless the court has failed to exercise its jurisdiction or has acted in an arbitrary and unjudicial manner. (*Lindsay, J. C.*) IQBAL NARAIN *v.* SURAJ NARAIN. 24 I. C. 673 : 1 O. L. J. 156.

——Ss. 35 and 100—*Appeal—Costs—Second appeal.*

Though a Court does not decide a suit on the merits of the case and merely passes an order as to costs incurred in the suit, the Court in deciding the matter as to costs, exercises a judicial discretion based upon certain principles and as such its order is appealable. Similarly, as the order of the Court of appeal as to costs involves matters of principles, it is subject to second appeal. (*Jwala Prasad, J.*) RAGHUNATH KAHAR *v.* RAM RATAN PANDEY. 52 I. C. 961.

——Ss. 35, and 96— *Appeal-order as to costs.*

An appeal lies against an order of costs alone ; but the Appellate Court will not interfere with this discretionary order unless a matter of principle is involved. (*Saunders, J. C.*) JALLALUDIN *v.* EBRAHIM. 63 I. C. 811 : (1921) 4 U. B. R. 8.

——S. 35—*Appeal—Order for costs.*

The Court will not interfere with an order as to costs, unless the order is illegal. The Court cannot examine in second appeal the reasons and review the exercise of the discretion of the lower Court, (*Twomey, J.*) MA LON MA *v.* MAUNG TUNU. 15 I. C. 429 : 5 Bur. L. T. 104.

C. P. CODE (V OF 1908), S. 35—Disallowance of.

——S. 35—*Appeal—Order as to costs.*

No appeal will lie merely as to costs unless there has been a violation of an established principle. (*Pratt, J. C. and Crouch, A. J. C.*) GURDINO MAL *v.* WADHAMAL. 19 I. C. 611 : 6 S. L. R. 226.

Conduct.

——S. 35—*Conduct of defendant—Accounts, —Suit for.*

Where a defendant is largely responsible for litigation and by his obstructive methods hampers the investigation thereby delaying and lengthening the inquiry, he should be made liable for the whole costs of the suit. If in a suit for accounts defendant alleges nothing is due from him but a balance is found due defendant must pay costs of the suit and accounts. If, however, defendant admits liability for a portion and the suit proceeds only as regards the difference, the costs would depend on the substantial result of the enquiry. (*Mookerjee and Panton, JJ.*) DEBINDRA *v.* NARENDRA. 24 C. W. N. 110: 54 I. C. 636 : 30 C. L. J. 417.

——S. 35—*Conduct.*

A pleader who was in possession of documents belonging to his client, concealed the fact from him. *Held* that (i) his conduct amounted to professional misconduct, (ii) having regard to the vindictive proceedings on the part of client costs were disallowed though pleader's conduct was unjustifiable. (*Schwabe, C.J. Coutts Trotter and Ramesam, JJ.*) A FIRST GRADE PLEADER IN THE MATTER OF. 17 L. W. 308: 24 Cr. L. J. 585: 73 I. C. 329: 1923 M. 485.

——S. 35—Contribution—Costs. *See* CONTRIBUTION.

Damages.

——S. 35—*Damages—Costs of suit.*

When a suit for damages is pursued in a vindictive spirit and with a desire of infliction of punishment, the Appellate Court ought not to interfere with the award of damages by the trial Court, unless the decision appears erroneous ; and also with the discretion of allowing costs unless some misapprehension of facts or violation of principle or absence of the exercise of the discretion is apparent. (*Sanderson, C. J, and Woodroffee, J.*) HULL *v.* PAUL. 58 I. C. 421 : 24 C. W. N. 352.

——S. 35—*Damages—Suit for.*

In a suit for damages for breach of covenant for title plaintiff can claim costs of litigation in which he was damnified. (*Seshagiri Iyer and Moore, JJ.*) KOLAVAKOLANU SEETAMMA *v.* PODDRI NARAYANA MURTHI SOMAYAJULU. 57 I. C. 982: 38 M L. J. 470.

Disallowance of.

——S. 35—*Disallowance of—Suit filed in wrong Court.*

No order as to costs was made in this case as ejectment proceeding could have been taken in the Small Cause Court but were taken in the High Court on the Original Side. (*Macleod C. J.*

and Shah, J.) RUSTOMJI DINSHAN BILLIMRIA *v.* DOSIBAI RUSTOMJI MASTER. **23 Bom. L. R. 850 : 63 I. C. 41: 45 B. 1236.**

——S. 35—*Disallowance of —Pre-emption suit—Defendant allowing plaintiff's claim before suit.*

Though the vendee did not deny before suit, the plaintiff's right to pre-emption, the costs should not be disallowed to plaintiff, if he was compelled to bring the suit for pre-emption. Where there is no misconduct or neglect or omission on the part of the plaintiff the Court has no discretion and cannot take away his right to costs. (*Leslie Jones, J.*) ABDUL RAHMAN *v* ABDUL WAHAB. **62 I. C. 812.**

——S 35—*Disallowance of— Misconduct—Defendant forcing plaintiff into litigation.*

Where a defendant by his fraudalent conduct in inserting terms in a compromise forces a plaintiff into litigation which could have been avoided if the defendant had not acted fraudulently, he is not entitled to his costs even if he is successful in the litigation brought about by him. (*Sir John Edge*) MARY LILIAN HIRA DEVI *v.* KUNWAR DIGBIJAI SINGH. **21 C. W. N, 1137. (1917) M. W. N. 636 : 42 I. C 236 : 7 L W. 133 (P. C.)**

——S. 35—*Disallowance of—Will — Construction—Difficulty.*

In view of the special difficulties in the construction of the will and to the fact that the contentions of the appellant varied in each Court, the respondent was given all her costs from the successful appellants. (*Lord Shaw.*) CHUNILAL PARVATI SHANKAR *v* BAI SAMRATH.

38 Bom. 399: 1 L. W. 762: 26 M. L. J. 647: 18 C.W N 844 : 19 C L. J 563 : 16 Bom. L R. 366 : 12 A. L. J. 742: 16 M. L. T. 59 : 23 I. C. 645 : (1914) M. W. N. 441 (P.C.)

——S. 35—*Disallowance of—Inconsistency*

Raising inconsistent pleas regarding effect of document whose construction was in issue was held sufficient to disentitle successful party to costs. (*Lord Macnaghten*) UMRAO SINGH *v.* LACHMAN SINGH. **33 All. 344: 38 I. A. 104 : 14 O. C. 133: 15 C. W. N. 497: 8 A. L J. 465: 13 C. L. J. 519: 9 M. L T. 507: 13 Bom. L. R. 404 : 21 M. L. J. 637. 10 I. C. 285: (1911) 2 M. W. N. 242 (P.C.).**

——S. 35—*Disallowance of costs — Grounds for—Suit for damages—Excessive claim.*

Per Sanderson, C. J.—Costs are in the discretion of the judge, a judicial discretion to be exercised on legal principles, not by chance nor merely by caprice nor in temper The trial Judge should not take into consideration matters which must involve speculation on his part as to the attitude of the respective parties. Everything which increases the litigation and the costs and which places on the defendant a burden which he ought not to bear in the litigation is a perfectly good cause for depriving the plaintiff of costs. There is nothing wrong in itself in claiming exemplary damages for, Courts themselves award such damages. The ordinary rule is that costs follow the event. The Court may, however,

direct otherwise; but if it does so, it must state its reason in writing. This provision was enacted both to secure a proper exercise of discretion and in order that the Court of appeal may be in a position to control the order and see whether there is good cause for departing from the general rule. The Appellate Court must itself decide whether the order should be sustained, whether the reasons required to be stated are good reasons founded on the facts of the case. There are certain well-known principles on which a successful party may be deprived of his general costs. But where the Court purports to act on these principles it is open to the Appellate Court to enquire whether on the facts these principles have been rightly applied. The mere fact that plaintiff claims more than he gets is no ground for depriving him of costs, unless it is proved that the costs of the action have been increased by his claim. (*Sanderson, C.J. and Woodroffe, J.*) JUSTAIN HULL *v.* ARTHUR FRANCIS PAUL.

58 I. C. 421: 24 C. W. N. 352.

——S. 35—*Disallowance of costs—Misconduct.*

The ordinary rule is that the costs are borne by an unsuccessful party but where the suit has been caused by the conduct of the returning Officer, each party, may, in the discretion of the Court be ordered to pay his own costs. (*Mookerjee and Panton, JJ.*) SHAYAM CHANDBASAK *v.* CHAIRMAN OF THE DACCA MUNICIPALITY

24 C. W. N. 189: 53 I. C. 741 : 30 C. L. J. 270.

——S. 35—*Disallowance of costs—Grounds for.*

Per Beachcroft, J. — (*Mookerjee, J. contra.*) Where a suit is dismissed on the ground that the suit does not lie, the Court should not look at the merits and disallow the costs of the defendant. (*Mookerjee and Beachcroft, JJ.*) RAMDAS HAZRA *v.* SECRETARY OF STATE. **18 C. W. N. 106 : 16 I. C. 922 : 17 C. L. J. 75.**

——S, 35—*Disallowance of,*

Where both parties make false allegations costs may not be allowed to either side. (*Chevis, J.*) MIHAL SINGH *v.* MAL SINGH.

31 I. C. 862 : 160 P. W. R. 1915.

——S. 35—*Disallowance of—Misconduct—Collusion.*

Where the sons set up by the father bring a collusive suit to set aside alienations by the father and the sons do not succeed, heavy costs ought to be awarded. (*Kensington and Chevis, JJ.*) MUHAMMAD ISLAM *v.* HARI LAL.

7 P. W. R. 1914: 21 I. C, 944: 16 P. L. R. 1914.

——S. 35—*Disallowance of—Grounds for—Suit based on pre-existing state of law—Refusal of costs.*

The Court can in its discretion disallow costs to the successful party where the suit was based on a state of law which since has been overruled either by an enactment of the Legislature or by the decisions of superior tribunals. (*Seshagiri Aiyar and Bakewell, JJ.*) RAMASWAMI NAICKEN *v.* VENKATASWAMI NAICKEN. **43 Mad. 61 : 37 M.L.J. 271 : 26 M.L.T. 219 : 10 L W. 326 : 53 I. C 7 : (1919) M. W. N. 792**

C. P. CODE (V OF 1908), S. 35—Disallowance of.

————S. 35— *Disallowance of costs—Difficult question of law.*

The fact that questions of law raised are not easy of solution, is not a good ground for not allowing the costs of a successful litigant. (*Sundara Iyer and Sadasiva Iyer, JJ.*) VEMBU IYER v. SRINIVASA IYENGAR. 23 M L.J. 638 : 17 I.C. 609 : 12 M.L T. 547.

————S. 35—*Disallowance of costs—Exaggerated claim.*

Though a party claimed more than was found owing to him it is not *per se* any sufficient ground for refusing him his costs. The successful party is always entitled to his costs unless he is guilty of some misconduct. (*Lindsay, J.C.*) GAURI SHANKAR v. ABU JAFAR KHAN. 34 I C. 690 : 3 O.L.J. 204.

Discretion.

————S. 35—*Discretion— Interference when can be made.*

S. 35 deals with costs and vests them in the discretion of the Court, with full powers to determine by whom and to what extent such costs are to be paid. It further provides that when the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing. The Court in exercising such a discretion should state the principles upon which that discretion was exercised. Such a discretion of the lower Court may be interfered with where there has been violence of any established principle, misapprehension of facts, or no real exercise of discretion. (*Walsh. J.*) HAKIM ZAHUR AHAMAD v. FATEH ULLAH. 64 I.C. 962 : 3 U.P.L.R. 55 (All.)

————S. 35—*Discretion—Change in the view of law—Successful party when to be deprived of costs.*

The ordinary rule is that costs follow the event and that if the plaintiff finds himself unable to proceed with his suit and asks for leave to withdraw it then the opposite party is entitled to the costs which he has been put to in defending the suit. The granting of leave to withdraw from a suit is a concession because the defendant is ordinarily entitled to ask the Court to decide the suit on the merits, and if he wins, he would be entitled to his costs. In a particular case it may be a sound exercise of discretion to refuse costs where the suit is based on a state of law, which has been afterwards altered either by statute or by the decision of a superior tribunal, and that might be a good ground for the decision in the case provided the Court considers the particular circumstances of the case and also the question as to who is responsible for the litigation. Where the Court below has not considered all the facts which it was bound to consider before exercising its discretion with regard to the award of costs and there was an omission to consider the necessary circumstances, there could not be a sound exercise of discretion and the appellate Court is entitled to interfere. 43 M. 61 explained. (*Macleod, C J. and Crump, J.*) KHIMCHAND v. SOBHAGCHAND. 25 Bom L. R. 242: 72 I.C. 324 : 47 Bom. 559 : 1923 B. 206.

C. P. CODE (V OF 1908), S. 35—Discretion.

————S. 35—*Discretion—Costs.*

Where the court below gave reasons for awarding costs in a particular manner and it is not shown that the principle adopted is wrong the discretion exercised by the court below should not be interfered with in appeal. (*Martin and Pratt, JJ.*) SHRIDHAR LAXMAN v. JANARDHAN. 72 I. C, 993 : 1923 Bom. 37.

————S. 35—*Discretion—Pleader's fees—Opinion of the Taxing Master.*

On a question of pleader's fees, the Court always allows the opinion of the Taxing Master to prevail and it will not interfere with it unless it is wrong in principle or very clearly wrong in detail. (*Pratt, J.*) SADASUKH GAMBHIRCHAND v. BAIJNATH HARNANDRAI. 23 Bom. L R. 854 : 63 I.C. 37 : 45 B. 1234.

————S. 35—*Discretion of Court—Libel.*

Costs are in the discretion of the Court which it must exercise on proper materials. A plaintiff guilty of misconduct in commencing the suit or the course of the trial can be deprived of his costs even if successful. In a suit for damages for libel, plaintiff if he succeeds, is entitled to his costs, though damages are small, but not nominal. (*Scott, C. J. and Chandavarkar, J.*) NADIRSAW HORMUSJI v. PIROJSAW RATANJI. 19 I C. 98 : 15 Bom. L.R. 130,

———— Ss. 35 and 47—*Discretion of award of costs.*

S. 35 gives discretion as to the ordering of costs but the award of costs depends finally on S. 47 and the provisions of S. 35 are supplementary. (*Newbould and Cuming, JJ.*) RAMESH CHANDRA v. MOHIM CHANDRA. 68 I.C. 600 : 35 C.L.J. 156.

————S. 35—*Discretion*—Bona fide *mistake.*

Where a temple committee have acted *bona fide* and in due execution of their powers in instituting proceedings, the fact that the Court comes to a different conclusion should not penalise either the committee or a new trustee. (*Sadasiva Aiyar and Napier, JJ.*) SUNDARA RAMA SASTRI v. ANANTHA KRISHNA NAIDU. 38 I.C. 695 : 5 L.W. 672

————S. 35—*Discretion not absolute.*

S. 35 does not give an absolute discretion for awarding costs, but a discretion that could be interfered with if exercised wrongly and arbitrarily. 26 M.L.J. 356 foll. (*Napier, J.*) INDOOR SUBBARAMI REDDI v. NELATUR SUNDARARAJA. 18 M.L.T. 460 : 31 I.C. 312 : (1915) M.W.N. 1021.

————S. 35—*Discretion— Interference with discretion of—Trial Court on appeal—Power of Second Appellate Court to interfere.*

A Court deciding a case has a discretion vested in it to award costs and where the discretion has been judicially exercised it is improper for an Appellate Court to interfere with the exercise of that discretion. Where however an appellate Court has interfered with an order as to costs passed by the first Court the legality of the order of the first Appellate court can be questioned on second appeal. So far as apportionment of costs is concerned there is no distinction between pleas based on facts and pleas based on law. An

C. P. CODE (V OF 1903), S. 35—Discretion.

omission to provide for costs may be corrected either by review or by appeal. (*Ashworth, J.C.*) RAM KISHAN DAS *v.* JAGANNATH PRASAD.
25 O.C. 385 : 73 I.C. 222 : 10 O.L.J. 20 : 1923 Oudh. 155.

——S. 35—*Discretion — Interference on appeal.*

Where a reasonable discretion has been exercised in the matter of costs the High Court will be slow to interfere. (*Daniels, A.J.C.*) RAJENDRA NARAYAN *v.* GHAFOOR KHAN. 73 I C. 307 : 9 O. & A.L.R. 77.

Dishonest Defence.

——S. 35—*Dishonest defence —Costs—Duty of manager to keep accounts.*

The manager of an estate, who collects and disburses moneys, must keep clear accounts and if a suit is necessary owing to his default, he must pay the costs especially, if he sets up a false defence and keeps back the true accounts. 14 Cal. 147 P. C. ref. (*Imam, J.*) SUKMARI GHOSH *v.* GOHO MOHAN. 43 Cal. 190 : 31 I.C. 662 : 19 C.W.N. 880.

Government Solicitor.

——S. 35—*Govt. Solicitor and Advocate General.*

In suits by or against Government in which costs might be awarded to Govt. the taxation must be without interference with the arrangement which exists between the Govt. and its legal advisors with regard to their remuneration. (*Macleod, J.*) NUSSERWANJI AND CO. *v.* WARTENFELS. 40Bom. 588 : 33 I.C. 362 : 18 Bom. L.R. 118.

——S. 35 — *Government — Subject to same rules as ordinary litigant.*

In an unsuccessful litigation the Secretary of State is liable to pay costs like any other unsuccessful party. (*Mullick and Sultan Ahmed, JJ.*) SECRETARY OF STATE *v.* LOWAN LEHAN MARWARI, 5 Pat. L J 321: 1 Pat. L.T. 451 : 21 Cr. L. J. 475 : 56 I. C. 507 : 1920 Pat. 253

Interest.

——S. 35— *Interest on costs—Judgment silent as to—Decree—Interest on costs if can be included in.*

A Court inserting interest on costs for the first time in the decree is within its jurisdiction, the power of awarding interest on costs being discretionary which may be exercised when framing the decree. Where a pleader signed a decree before the Court signed it and where no objection to insertion of interest on costs was taken in appeal to the High Court, the objection will not be allowed to be raised subsequently. (*Rafique and Piggott, JJ.*) KISHORE LAL *v.* HADRI DAS. 35 I. C. 218.

——S. 35—*Interest on costs—When due—Interpretation of judgment.*

Interest should not be allowed until the costs have actually been incurred. A judgment decreed a certain sum in favour of plaintiff with proportionate costs and future interest from the date of suit till realization at one per cent per month. *Held*

C P. CODE (V OF 1908), S. 35—Order.

the interest was payable only on the principal sum and not on the costs. (*Chevis, J.*) UTTAM CHAND *v.* BILAMAL. 60 I. C. 345.

Maintenance Suit.

——S. 35 —*Maintenance suit*—In forma-pauperis—*Costs.*

In a maintenance suit by a pauper Hindu widow, the plaintiff if she succeeds in getting her right established by the decree alone ought to be given costs in proportion to the amount of her success. (*Sadasiva Aiyar and Burn, JJ.*) VISALAKSHI AMMAL *v.* KALI NARAYANASWAMI AIYAR, 10 L. W. 540 : 53 I. C. 796 : (1919) M. W. N. 878.

Mortgage.

——S. 35—*Mortgage suit—Rule as to cost—Exception.*

The general rule of appeal that an unsuccessful appellant must pay the costs admits of no exception in favour of an unsuccessful appellant mortgagor. The mortgagee is entitled to add to the security the costs of the appeal. (*Piggott and Walsh, JJ.*) AMINA BIBI *v.* RAMA SHANKAR MISER, 41 All. 473 : 50 I. C. 730 . 17 A. L. J. 582.

——S. 35—*Mortgage decree against several defts. —One deft. alone appealing —Appellate decree for costs against that deft.—Nature.*

Where one defendant appeals against a mortgage decree against himself and others, the appeal is dismissed and costs are awarded against the defendant who had preferred the appeal, the decree of costs is of the nature of a simple money decree against him. (*Piggott, J.*) MUHAMMED SIDIQ *v.* GHAOUS MUHAMMAD. 22 I. C. 42 : 11 A. L. J. 975.

——S. 35—*Mortgage—Redemption—Practice.*

A mortgagor is ordinarily entitled to costs in a redemption suit unless he forfeits his right to it by laches. In Malabar, though redemption suits are complicated by questions of compensation for improvements yet where a mortgagor fails to deposit even the mortgage amount in full, the mortgagee is entitled to his costs. (*Oldfield and Phillips, JJ.*) HARIHARA MANGALATH *v.* KATAPRATHA KATH. 38 I. C. 655 : (1917) M. W. N. 275.

——S. 35—*Mortgage suit.*

A mortgagee is ordinarily entitled to his costs of suit unless he is guilty of grave misconduct. (*Sadasiva Iyer, J.*) VADLAMANNATI BALA TRIPURA *v.* DADU SAHEB. 19 I. C. 474 : (1913) M. W. N. 334.

Order.

——S. 35—*Order—Costs to follow result.*

Costs generally abide the result for where a plaintiff's suit is practically decreed in full, costs should be awarded to him. (*Moti Sagar, J.*) AGHA MAHOMED ASLAM *v.* JODH SINGH. 1923 Lah. 513 (2).

——S. 35—*Order—Exceptional cases.*

Costs generally abide the result, if no valid reason has been assigned as to why an exception

C. P. CODE (V OF 1908), S. 35—Order.

should be made in the case. (*Moti Sagar, J.*) DES RAJ SAWHNEY *v.* FRAYS MOTOR WORKS,
75 I. C. 64 : 1923 Lah. 302 (1).

——S. 35 and O. 23, R. 1—*Order as to costs—Remand to lower Court with direction that costs to abide and follow the result—Withdrawal of suit after remand—Order as to costs.*

An order of remand directed the costs of the appeal "to abide and follow the result." After remand the case was withdrawn. *Held*, that the meaning of the direction was that costs should be paid to the party who ultimately succeeded in the litigation. The event was nothing but the outcome or result of proceedings and the withdrawal of the suit is an event within S. 35 cl. (2) of the C. P. Code and if the Court did not order costs it must assign reasons. Where it did not appear that the Court applied its mind as to the costs of the appeal it was a case for revision by the High Court. (*Oldfield, J.*) LAKSHMI VENKAYAMMA RAO *v.* VENKATRAMAPPA RAO. 24 M. L. T. 212 : (1918) M. W. N. 561 : 47 I. C. 862 : 8 L. W. 219.

——S. 35—*Order as to costs*—"*Costs to abide and follow result*"—*Meaning.*

Where the High Court ordered "that the costs shall abide the result," it only implies that the order as to costs is to await till the decision is given in the case. It has not the effect of fettering the discretion of the trying Court as to the awarding of costs to the appellant. The order does not make it incumbent on the Court below to award costs to the person who succeeds But if the words used were "to abide and follow the result," then it may be interpreted as conveying the suggestion that the successful party must be given his costs. The words " abide the result" are equivalent to the words " costs in the costs." (*Seshagiri Aiyar and Napier, JJ.*) GODAVARTHI PERIA *v.* GODAVARTHI LAKSHMI DEVAMMA.
39 Mad. 476 : 28 M. L. J. 441 : 29 I. C. 203 : (1915) M. W. N. 330.
[Affirming on appeal 24 I. C. 476]

——S. 35—*Order as to Costs*—"*Costs would abide the result*"—*Meaning—Discretion of lower Court.*

The words " costs would abide the result" do not mean costs would follow the result and the discretion of the Subordinate Court is not curtailed by the use of the phrase in an order of the Appellate Court. 4 C. W. N. 343 diss. (*Tyabji, J.*) GODAVARTHI PERIA *v.* GODAVARTHI LAKSHMI DEVAMMA. 24 I. C. 96 : 39 Mad. 476 (note).
[Affirmed on appeal 29 I. C. 203 : 39 Mad. 476.]

Partition Suit.

——S. 35—*Partition suit—Costs.*

The general rule is that in partition suits parties should have their own costs except with regard to the institution fee which should be borne proportionately by all the parties. (*Macleod, C. J. and Crump, J.*) KASTURIBAI MANIBAI *v.* BAI MAHALAXMI
1923 Bom. 464.

——S. 35—*Partition—Preliminary decree.*

Costs in a partition suit up to the preliminary decree ought not to be given to plaintiff but to be borne by all the parties. Such an order may be

C. P. CODE (V OF 1908), S. 35—Principles of.

made even though some of the defendants have not appealed from the decree ordering cost to plaintiff as it is to their benefit. (*D. Chatterjee and Walmsley, JJ.*) AMBIKA PRASAD *v.* PARDIP SINGH.
42 Cal. 451 : 28 I. C. 446 : 19 C. W. N. 233.

——S. 35—*Partition suit—Costs—Practice.*

Where a suit has to be brought for effecting a partition between the members of a family and neither party has been guilty of unfair contention the costs till the preliminary decree, should come out of the estate. 34 Cal. 878 and 42 Cal. 451, not foll. (*Sadasiva Aiyar and Burn, JJ.*) VENKATARANGACHARLU *v.* SAMPATH KUMARA AIYANGAR. 11 L. W. 5 : 54 I. C. 382.

——S. 35—*Partition suit—Practice.*

In a suit for partition, the court has a discretion to award costs against a party who raises a vexatious contention and fails. (*Sadasiva Aiyar and Spencer, JJ.*) SHANMUGAM PILLAI *v.* MIRA KANI ROWTHER. 21 I. C. 746.

Pre-emption Suit.

——S. 35—*Pre-emption suit—Costs of.*

Where a vendee opposes the claim of the pre-emptor on several grounds including inadequacy of price, the latter is entitled to get his costs although the former succeeds in getting much more than what was offered by the pre-emptor, (*Johnstone and Shah Din, JJ.*) SHAM SUNDAR *v.* HARBANS SINGH. 71 P. R. 1915 : 13 P. L. R. 1916 : 30 I. C. 517 : 109 P. W. R. 1915.

Principles of.

——S. 35—*Principles of—Third party proceedings—Taxation of costs—Method.*

Where defendant succeeds in third party proceedings, after a decree is passed against him his costs in the suit as against the third party should be taxed as between solicitor and client and the costs of the third party proceedings should be taxed as between party and party. (*Marten, J.*) WELD AND CO *v.* SHER AHMED, EKBAL AHMED. 59 I. C 18 : 21 Bom. L. R. 808 at p. 816.

——S. 35—*Principle of—Rule as to costs—Exception order.*

Ordinarily a litigant who succeeds although he may be deprived of his costs for sufficient reason cannot be ordered to pay the costs of the other side. But in a case where the defendant having tendered the rent due, made an offer of performance under S. 38 of the Contract Act before a suit was instituted for its recovery the Court can direct the plaintiff to pay the defendant his costs of the suit although not twice over. (*Fletcher and Newbould, JJ.*) BHUPERDRA KUMAR SARKAR *v.* RANI KISSORI DASI. 40 I. C. 614.

——S. 35—*Principles governing award of Costs.*

In deciding the question of costs, a Court is entitled to consider not merely the conduct of the parties in the actual litigation but also matters which led up to the litigation. (*Mookerjee and Teunon, JJ.*) RAMSONA *v.* NABAKUMAR SINHA.
13 C. L. J. 404 : 10 I. C. 90 : 16 C. W. N. 805.

C. P. CODE (V OF 1908), S. 35—Probate case.

——— **S. 35**—*Principles of—Appellate decree silent.*

Where the Appellate decree is silent as to costs the decree of the Trial Court is the guide to determine the costs. (*Rigg, J.*) LALL DWARKADAS *v.* BURMA RAILWAY CO. **10 L. B R. 280 : 62 I. C. 299 : 13 Bur. L. T. 173.**

Probate case.

———**S. 35**—*Probate case—Costs—Execution for.*

A decree in a probate case directing that the costs of both the parties should be paid out of the estate and that joint Letters of Administration should be issued to both the parties, cannot be executed by one party against the other, but the proper course is to sell or mortgage a sufficient portion of the estate to pay off the costs of the parties. (*Mookerjee and Beachcroft, J J.*) HARI PADU *v.* KARUNAMOYEE DASI. **24 I. C. 214.**

Reasons.

———**S. 35**—*Reasons—Delay in litigation—Determination of costs.*

The fact that the delay in the final disposal of the suit took place owing to the laches of the plaintiff could be taken into consideration in dealing with the question of costs. (*Chatterjea and Panton, JJ.*) SIBA PRASAD DAS CHOUDHURY *v.* KAZIMUDDIN SARKAR. **65 I. C. 709**

Rejection of plaint.

———**S. 35**—*Rejection of plaint, reasons.*

Excessive costs should not be allowed where a plaint is rejected at an early stage. (*Kensington and Beadon, JJ.*) NANAKCHAND *v.* JIWAN MAL.
35 P. R. 1914 : 25 I. C. 435 : 237 P. L. R. 1914.

Remand.

———**S. 35**—*Reasons—Procedure—Award of Full costs.*

The Court can issue an order awarding full costs in each suit but it should proceed upon reasonable grounds and not infringe any principle of law applicable to such cases. (*Shadilal and Le Rossignol, JJ.*) THE PUNJAB SIND BANK LTD SYALLPUR *v.* RAM KISHEN. **35 I. C. 529 : 156 P. L. R. 1916**

Representative suit.

———**S. 35 and O. 1, R. 8**—*Representative suit—Costs.*

The order for costs in a representative action should clearly specify whether it is the representative party alone or the representative and the party that is to bear the costs. 19 Bom. L. R. 650, Ref. (*Marten, J.*) BHICOOBAI *v.* HARIBAI RAGHUJI.
42 Bom. 566 : 42 I. C. 9 : 19 Bom. L. R. 650.

——— **S. 35**—*Representative suit—Discretion as to costs—Interference of Appellate Court.*

Unless the discretion as to costs is exercised unreasonably by the lower Court, the Appellate Court should not interfere. If a defendant, sued in a representative capacity, raises unnecessary defences the Court can make him personally liable for the plaintiff's costs. (*Chevis, J.*) HANWAR DAS *v.* BODH RAJ. **60 I. C. 362.**

C. P. CODE (V OF 1908), S. 35—Trustee.

Scale of.

——— **S. 35**—*Scale of—Travelling expenses of witnesses.*

Successful party is entitled to recover from his opponent, the expenses properly incurred on account of travelling charges of his witnesses. (*Greaves, J.*) HARA SUNDAR *v.* LAHABAR
67 I. C. 277 : 1923 Cal. 315 (1).

——— **S. 35**—*Scale of—Separate sets for separate defts.*

Different sets of costs can be awarded when there are several defendants raising various defences. (*Napier, J.*) INDOR SUBBARAMI REDDI *v.* NELATUR SUNDARARAJA IYENGAR,
18 M.L.T. 460 : 31 I. C, 312 : (1915) M.W.N. 1021.

———**S. 35**—*Scale of—Part of claim subsequently withdrawn.*

The Court fee paid on part of the claim subsequently withdrawn cannot be granted as costs. (*Kanhaiya Lal and Sabonadiere, A. J. Cs.*) RAM JIYAVAN *v.* MAHOMMED ABDUL HASSAN KHAN.
23 I. C. 231.

Scheme Suit.

———**Ss. 35 and 92**—*Scheme suits—Costs.*

The Privy Council in a scheme suit directed the costs of all the parties to be paid out of the trust funds, the trustees paying them to the other side out of their pocket in the first instance and then recouping themselves out of the trust funds. (*Lord Macnaghten*) SEVAK KIRPA SHANKAR DAJI *v.* GOPAL RAO MANOHAR TAMEEKAR.
12 M. L. T. 448 : (1912) M. W. N. 1106 : 16 C. L. J. 640 : 15 Bom. L. R. 13 : 17 I. C. 441 : 24 M. L. J. 199. (P. C.)

Third Party.

———**S. 35**—*Third party—Liability for costs.*

As a general rule, only the parties to a litigation can be made liable for costs, but in exceptional cases it is open to a court to make a stranger to a suit liable for costs. 7 Bom. 484. Rel. (*Mookerjee and Beachcroft, JJ.*) BALABHADRA SINGH *v.* RADHASHAM SINGH. **16 I. C. 381.**

Trustee.

——— **S. 35**—*Trustee—When costs to come out of trust estate—Right of appeal.*

Persons who are in the position of trustees ought to have their costs out of the trust estate in legal proceedings concerning the estate, unless they have unreasonably carried on or resisted such proceedings. An appeal is entertainable against a decision on the question of costs where a question of principle is involved. (*Sanderson, C.J. and Mookerjee, J.*) AGA MAHOMED SHIRAZI *v.* MAHOMED SHOOSTRY.
39 I. C. 388 : 21 C. W. N. 339.

——— **S. 35**—*Trustee—Construction of will—Costs—By whom to be borne.*

Where a litigation is caused by the language of a will, its costs should be borne by the estate and not by the trustees (*Tyabji, J.*) GODAVARTHI PERIA *v.* GODAVARTHI LAKSHMI DEVAMMA.
39 Mad. 476 (Note) : 24 I. C. 96.

[Affirmed on appeal. 29 I. C. 203 : 39 M. 476.]

C. P. CODE (V OF 1908), S. 37.

———S. 37—*Court of wards—Party to execution—Jurisdiction of Court—Competency of Court to proceed.*

Where after decree the Court of Wards becomes a party in execution proceedings, the Court has jurisdiction to proceed with the execution. (*Beman and Hayward, JJ.*) BANDOO KRISHNA *v.* NARSING RAO.

38 Bom 662 : 25 I. C. 406: 16 Rom. L. R. 527

———Ss.37, 38 and 150—*Mortgage suit—Value of Rs.* 2,000—*Preliminary decree by Munsif—Final decree by Sub-Judge—Execution by Munsif, if competent.*

A preliminary decree for nearly Rs. 2,000 was made in a mortgage suit by a Munsif having power to try suits up to Rs. 2,000. The Munsif being transferred and his successor not being vested with the same power, the final decree was made by the Sub-Judge. Execution was, however, taken out in the Court of the Munsif who in the meantime was vested with jurisdiction. *Held*, that the Munsif's Court could execute the decree under S. 150, C, P. C. though not under Ss. 37 and 38. (*Chatterjee and Panton, JJ.*)AMINUDDIN MULLICK *v.* ATTARMANI DASI.

57 I. C. 879 : 24 C. W. N. 899.

———Ss. 37 and 150—*Execution—Jurisdiction Money-decree—Transfer of area where judgment debtor lived from one court to another.*

Where subsequent to the passing of a money decree the area in which the judgment debtor lived was transferred from the jurisdiction of the court which passed the decree to that of another Court it is open to the latter court to execute the decree. 42 M. 821 · 37 M. 462 Ref. (*Oldfield and Venkatasubba Rao, JJ.*) MUTHUKARUPPA CHETTY *v.* PAIYA KAVUNDAN.

45 M. L. J, 210 : 1923 M. W. N. 406 : 18 L. W. 17 : 73 I. C. 956 (2): 1924 Mad. 32.

———Ss. 37, 38 and 150—*Court passing decree—Loss of territorial jurisdiction—Application for Court passing decree for execution—Proper Court—Lim. Act, Art.* 182 (5).

Per Chief Justice and Ayling J:—The Court which passed the decree is a proper Court for execution within Art. 182 (5) of the Lim. Act even though the property over which it had jurisdiction at the time of the decree was taken away from it and assigned to another Court at the time of the presentation of the application for execution. *Per Sadasiva Aiyar, J.*—Both on principle and on the interperation of Ss. 37, 38, 39 and 150 of the C. P. Code the Court which actually passed the decree had no jurisdiction to execute its decree after it has lost jurisdiction over the immoveable property sought to be pursued in execution. 37 Mad. 462 overruled. (*Wallis, C. J. Ayling and Sadasiva Aiyar, JJ.*) SEFNI NADAN *v.* MUTHU SWAMI PILLAI. 42 Mad. 821 : 37 M. L. J. 284 : 26 M. L. T. 223 : (1919) M. W. N. 640 : 53 I. C. 213 : 11 L. W. 63. (F.B.)

———Ss. 37 and 38—*Mortgage decree passed without jurisdiction.*

A mortgage decree was passed by T. Court though the hypotheca was not within its jurisdiction. Application for execution was made to K Court. On a question arising whether the K Court had jurisdiction to execute the decree when the T. Court had not ceased to exist. *Held*, that the K. Court had no such jurisdiction unless and until the decree was transferred to it for execution. An order transferring a decree for execution should not be made so as to evade the provision of the Lim. Act or to validate an invalid application. (*Ayling and Krishnan, JJ.*) VENKATASAMI NAIK *v.* SIVANU MUDALI. 42 Mad. 461 : 36 M, L. J. 199 : 51 I. C. 102 : 10 L. W. 370.

———Ss. 37 and 39—*Decree of Court having no territorial jurisdiction—Execution.*

Where a temporary Sub Court has no defined local jurisdiction and a decree is passed by that Court in a suit transferred to it by the District Court, it has no power to execute the decree by attachment of properties situate in places that had not yet been subjected to its jurisdiction but should have transferred the decree for execution to the Court having jurisdiction over the property sought to be attached, since S. 150 has no application to such cases and territorial jurisdiction is a condition precedent to the execution of a decree, 22 I. C. 899 and 17 Cal. 699 Foll. (*Sadasiva Iyer and Napier, JJ.*) VENKATACHALAM *v.* SITHAYAMMA. 35 I. C. 296 : 31 M. L. J. 22.

———S. 37—*Transfer of territorial jurisdiction—Execution of decree—court passing decree if entitled to execute.*

A Court which originally passed a decree ceases to have jurisdiction to execute it if the properties comprised in the decree are transferred to another district. Where different Courts have jurisdiction to execute the decree, the question, which Court has to execute the decree, is to be decided on grounds of convenience. (*Olafield and Tyabji, JJ.*) PARTHASARDHI APPA RAO BAHADUR *v.* MAKA VENKATADRI APPA RAO BAHADUR.

27 I. C. 88 : (1914) M.W.N. 896.

———S. 37—*Transfer of territorial Jurisdiction—Jurisdiction of Court passing a decree for sale.*

A Court passing a decree for sale of certain properties cannot entertain an application for sale after the jurisdiction is transferred. 37 Mad. 462 Foll. 30 Mad 537: 27 Mad 118 : 8 M.L.T. 299 Dist. (*Oldfield and Tyabji, JJ.*) VADIVELU PILLAI *v.* MARUDA PILLAI. 26 I. C. 413.

———Ss. 37, 38 and 150—*Transfer of territorial Jurisdiction—Execution—Forum.*

Where the territorial jurisdiction of a Court is transferred to another Court by the Local Government the business of the Court having jurisdiction over the area so transferred is *ipso facto* transferred to the latter Court, unless the authority transferring the area reserves the jurisdiction to the former Court. No formal order of transfer of the business of the Court is necessary. An application for execution of the decree must be made only to the Court which has acquired the new territorial jurisdiction. (*Ayling and Sadasiva Iyer, JJ.*) SUBBIAH NAICKER *v.* RAMANADHAN CHETTIAR. 37 Mad 462 . 26 M. L. J. 189 : 1 L.W. 251 : 22 I.C. 899 : (1914) M. W. N. 205.

C. P. CODE (V OF 1908), S. 37.

———S. 37—*Transfer of territorial jurisdiction—Court which passed decree ceasing to exercise jurisdiction—Execution of decree.*

The power to execute a decree is vested in the Court which passed the decree. But in the event of the Court ceasing to exercise jurisdiction it would be exercised by the Court which would have power at the time when the application was filed to try the suit. (*Jwala Prasad and Imam JJ.*) SARAFAT HUSSIAN *v.* SHEIKH KHURSED ALI. 49 I. C. 958.

———S. 37—*Decree of Calcutta High Court—Execution within limits of Patna jurisdiction.*

Where the decree which was being executed was a decree of the Calcutta High Court in a suit which arose within the present jurisdiction of the Patna High Court, it was the latter court which had power to supervise the execution of the decree. (*Miller, C.J. and Chapman J.*) KULADA PRASAD TEWARI *v.* SADHU CHARAN TEWARI. 48 I.C, 107 : 3 Pat. L.J. 435.

———S. 37 (b)—*Court passing decree ceasing to have jurisdiction.*

Where the Court which passed a decree has ceased to have jurisdiction to execute it, the only Court which can execute the decree is the Court which, at the time of filing the execution application, would have jurisdiction to try the suit in which the decree sought to be executed was passed. (22. I.C. 899 ; 27 I.C. 88 Foll. (*Sadasiva Iyer and Moore, JJ.*) PENUGONDA RATTAM *v.* KORSIKA THATHA. 31 M.L.J. 90 : 35 I.C. 237 : 20 M.L.T. 327.

———S. 37 (b)—*Court passing decree ceasing to exist—Jurisdiction to execute—Concurrent.*

Where the Court by which a decree was passed has ceased to exist, the decree should be executed by the Court which would have jurisdiction to try the suit in which the decree was passed. Where there are two independent Courts within the same territorial limits having concurrent jurisdiction it is open to either of sucb Courts to execute the decree of the other. (*Atkinson and Manuk, JJ.*) RAMESHWAR LAL BHAGAT *v.* JAGADESHWAR DAYAL SINGH. 49 I,C. 94.

———S. 38—*Execution—Jurisdiction of Court.*

The value of the property may greatly exceed the value of the decree, yet the executing Court must decide the objection, 5. I. C. 573. (Ref. *Chevis and Shadi Lal, JJ.*) MUSSAMMAT KHAN DEBI *v.* MUSSAMMAT NITHEL DEBI. 101 P.R. 1915: 32 I.C. 43 : 191 P.W.R. 1915.

———Ss. 38 and 46—*Attachment by precept—Objection against executing Court—Want of transfer of decree.*

An objection to the jurisdiction of an executing Court to order sale of immoveable property based on another Court's decree will not be heard for the first time during the hearing of an appeal. There is nothing in law against a decree being simultaneously executed in more places than one against the property of judgment debtor. (*Sadasiva Aiyar and Moore, JJ.*) SIVAKOLUNDU PILLAI *v.* GANAPATHI AIYAR. 34 I.C. 302 : 3 L.W. 336.

C. P. CODE (V OF 1908), S, 39.

———Ss. 38 and 39—*Property situate partly outside jurisdiction.*

The fact that all the property is not situated within the jurisdiction of the Court which passed the decree does not affect its jurisdiction to sell the property comprised in the decree. (*Wallis, C.J. and Seshagiri Aiyar, J.*) HANSRAJ SOWCAR *v.* MOHIDEEN ROWTHER. 29 I.C. 745.

———Ss. 38, 39 and 41—*Transfer of decree—Application to execute—Forum.*

The Court to which a decree has been transferred can execute the decree simultaneously with the execution proceedings initiated by the executing Court, only under exceptional circumstances when it is necessary in the interest of the execution creditor without putting hardship on the judgment-debtor. A decree-holder can apply to the trying Court for the execution of its decree once transferred to another Court and dismissed by it even before the result of execution is certified if there was order permitting simultaneous execution with the execution proceedings in the executing Court ; otherwise the application is not supposed to be made to the proper Court. A decree was passed by the Dt. Court which sent it for execution to another Court. The executing Court dismissed the petition for execution. The decree-holder after some period applied again to the Dt. Court for execution, but the petition was returned for amendment under S. 235 of 1882 Code. The petition was represented without amendment and was simply recorded by the Dt. Court. Again the decree-holder applied for execution to the same Court. *Held* (i) that the first application after dismissal by the executing Court was a step-in-aid of execution to save limitation, (ii) that that application was not made to the proper Court as the seisin of execution proceedings was with the executing Court. (*Sankaran Nair and Ayling, JJ.*) MAHARAJA OF BOBBILI *v.* NARASARAJU PEDA. 37 Mad. 231 : 12 M.L.T. 119 ; (1912) M.W.N. 721 : 15 I.C. 738 : 23 M.L.J. 236: [Affirmed on appeal 39 Mad. 640. 36 I.C. 682. (P. C.)]

———Ss. 38 and 47—*Execution sale—Suit to set aside.*

Under S. 38, Civil Procedure Code, a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution and where the Trial Court is not the Court to which the decree is sent for execution, this section prevents it from proceeding with the suit as a matter in execution and executing the decree. (*Kotwal, A.J.C.*) BRIJMOHANSINGH *v.* KASTURCHAND. 68 I. C. 693 : 1922 Nag. 189.

———Ss. 38 and 39—*Application to original court after transfer to another is no step-in-aid.*

After a decree is transferred by one court to another for execution any application made to the former court cannot be a step-in-aid. (*Adami and Das. JJ.*) JNANENDRA NATH GHOSH *v.* KUMAR JOGENDRA NARAIN SINHA. 2 P. 247 : 74 I.C. 608 : 1923 P. 384.

———S. 39—*Transfer of decree—Application for execution—Court having local jurisdiction over the properties of judgment debtor.*

C. P. CODE (V OF 1908), S. 39.

An application for execution has to be made to the Court to which decree has been transferred and not to the Court which passed the decree. An application to the latter Court is not a step-in-aid of execution (*Sir John Edge.*) MAHARAJAH OF BOBBILI *v* NARASARAJU PEDA BALIARA
39 Mad 640: 31 M.L J. 300: 18 Bom L.R. 909 : 14 A.L.J. 1129 . 20 M.L.T. 472 : 21 C L J. 478 : 4 L W. 558 : (1916) 2 M.W.N. 541 : 21 C.W N. 162 : 1 Pat L.W. 26 : 36 I. C. 682 : 43 I A. 238 (P.C.)
[Affirming 37 Mad 231 : 23 M.L J. 236 : (1912) M.W.N. 721 : 15 I.C. 738 : 12 M L.T. 119.

———S. 39—*Transfer of decree—Concurrent execution if permissible.*

Where a decree is transferred to another Court for execution, concurrent execution of it is permissible in the Court from which the decree has been transferred ; concurrent execution of decrees is permitted by law. 39 Mad. 640 Dist. (*Knox, J.*) SARASWATI PRASAD *v.* PEOPLE'S INDUSTRIAL BANK, LTD. 39 I.C. 729 : 15 A.L.J. 532.

———S. 39—*Application for transfer—Step-in-aid.*

Application for transfer of a decree for execution is a step-in-aid. (*Rafique, J.*) LARARI *v* HAZARI LAL. 33 I.C. 523 : 14 A.L.J. 415.

———S. 39—*Transfer of decree—Award under the Co-operative Societies Act—Application to enforce award—Co-operative Societies Rules 31 and 34.*

An award was made at Poona under the rules framed under S. 43 of the Co operative Societies Act, 1912, which made it enforceable in the same manner as a decree of the Court. The party to the award next applied to the Judge of the Court of Small Causes at Poona to transfer the decree to the Court of Small Causes at Bombay under S. 39, C. P. Code. *Held*, that inasmuch as the Poona Court could execute the decree as if it had passed it, it could also transfer the decree under S. 39, C. P. Code, Rule 34 of the Co-operative Societies Rules, 1919, framed under S 43 of the Co-operative Societies Act. is not clearly worded. (*Macleod, C J.and Shah, J.*) KRISHNAJI SHRIDHAR BARDE *v.* MAHADEO SAKHARAM PATIL.
24 Bom. L. R. 909 : 64 I. C. 537 (1) : 46 B 128 : 1922 Bom. 377.

——— Ss. 39 and 6—*Execution of decrees sent to another Court—Power to execute decrees of value in excess of pecuniary jurisdiction.*

Where a decree in excess of pecuniary jurisdiction of the Court is passed and sent to another Court having like pecuniary jurisdiction for execution, the latter Court cannot execute it (*Teunon and Beachcroft. JJ.*) RAMA NATH BANERJEE *v.* RAJ NARAYAN CHANDRA. 57 I. C. 722.

———S. 39—*Application for transfer of decree.*

An application to the Court by which was passed the decree, for transfer of the decree for execution is not an application for execution. 16 C. 744, Foll. (*Chitty and Coxe, JJ.*) RAJKUMAR SEN *v.* AMRODA CHARAN SEN. 9 I. C. 246.

C. P. CODE (V OF 1908), S. 39.

———S 39—*Decree of village Munsif's Court transferred or withdrawn to District Munsif's Court for execution—District Munsif cannot transfer decree for execution.*

A District Munsif receiving by transfer a decree of a village Court under S. 66 of Madras Act I of 1889 or withdrawing execution of a decree to his own file under S. 67 has no jurisdiction to transfer it for execution to another District Munsif's Court under S. 39 of the Code of Civil Procedure. (*Oldfield and Devadoss, JJ.*) KANDOTH SANKARAN NAIR *v.* ATCHUTHAN. 46 Mad. 784: 32 M. L. T. (H. C.) 403 : 18 L. W. 19 : 73 I.C. 792: 44 M. L. J. 643.

——— S. 39 and O. 21, R. 8—*Executing Court—Territorial jurisdiction—Absence of—Effect of.*

Territorial jurisdiction though not necessary for the trial of suits is necessary for an executing Court apart from the special and exceptional procedure by precept. A Court cannot in execution sell property situate outside its territorial jurisdiction even though the decree under execution was transferred by a Court having jurisdiction over that property. (*Abdur Rahim and Oldfield, JJ.*) KASI VISWANATHAM CHETTY *v.* MURUGAPPA CHETTY. 33 M. L. J. 750: 23 M. L T. 24: 43 I. C. 79: (1918) M. W. N. 132.

——— S. 39—*Effect of transfer.*

A decree transmitted to another Court does not become a decree of that Court, though it can be executed as if it is its own decree. (*Seshagiri Iyer J.*). SRINIVASA IYENGAR *v.* NARAYANA IYENGAR. (1917) M. W. N. 493: 6 L. W. 361: 40 I. C 670: 33 M. L. J. 639

——— Ss. 39, 42 and O. 21. R. 15—*Transfer of decree for execution Application by legal representatives for substitution.*

A Court to which a decree is transferred for execution has no jurisdiction to entertain an application for bringing on the record the legal representative of a deceased decree-holder. The application must be made to the Court which passed the decree. *Obiter*—The execution of a decree so transferred need not necessarily be stayed because the application for substitution has to go to the Court which passed the decree. (*Prideaux, A. J. C.*) SHRIRAM *v.* DURGA PRASAD. 55 I. C. 156.

——— S. 39—*Transfer of decree—Court to which decree is transferred must be one having jurisdiction.*

A decree cannot be transferred for execution to a court which has no pecuniary jurisdiction to entertain the suit in which decree was passed. The legislative changes introduced in S. 39 (2) i.e. that when the court *suo motu* transfers a decree to a subordinate court the latter court must be " of competent jurisdiction " does not mean that under S. 39 (1) a decree may be transferred to any court for execution, irrespective of its pecuniary jurisdiction. (*Jwala Prasad and Bicknill, JJ.*) AMRIT LAL *v* MURLIDHAR.
3 Pat. L T. 422: 1 Pat. 651 : 67 I C. 538 : (1922) Pat. 22) : 1922 P 188

———S. 39—*Application for transfer and execution— Difference between—Fresh application for execution when necessary.*

C. P. CODE (V OF 1908), S. 39.

There is nothing in law which compels a decree-holder to make a second application for execution to the Court to which a decree has been transferred for execution, when he has already made one application to the Court transferring the decree. (*Mullick and Foster, JJ.*) DUTT *v.* TARAPRASANNA ROY CHAUDHURY.
5 Pat L T. 11 : 2 P. 909 : 1923 Pat. 280 : 74 I. C. 713: 1924 P. 120

——— S. 39—*Execution outside territorial limits—Transfer of decree.*

The jurisdiction of a Court is circumscribed by and co extensive with its territorial limit. Where property sought to be attached is *bona fide* without the jurisdiction of the original Court whose decree is sought to be enforced and is in the hands of a third party who is not amenable to or permanently residing within the jurisdiction of the executing Court, it must be transferred to the Court within the local limits of whose jurisdiction the property sought to be attached is for the time being. (*Atkinson and Mullick, JJ.*) BANK OF BENGAL *v.* SARAT CHANDRA MITRA.
4 Pat, L. J. 141 : 48 I. C 943 . 1919 Pat. 155.

——— Ss. 39 and 42—*Notice to judgment-debtor—Transfer of portion of decree.*

The transfer of a portion of a decree to another Court for execution is irregular and if it is made without notice to the judgment-debtor is not binding on him. (*Chamier, C. J. and Sharfuddin, J.*) PRAKASH CHANDRA SARKAR *v.* PANDE RAMNARAIN. 43 I. C. 186: 3 Pat. L W. 247

——— Ss 39 and 24—*Transfer of decree--Power of Court—Right of decree-holder to execute rent decree as money decree.*

A decree cannot be transferred to another Court for a limited purpose only *i. e.*, to enable the decree-holder to share in the realeable distribution of assets. But the Court to which the case is transferred has jurisdiction to execute it where a whole case for execution, as distinguished from the decree to be executed, is transferred by a District Judge under S. 24. A decree-holder who has once applied to execute a decree as a rent decree seeking to bring the tenure to sale may also execute it as as a money decree if it is ultimately found to be a money decree. (*Chamier, C. J. and Sharfuddin, J.*) CHATTERPAT SINGH *v.* KIRAT CHAND SRIMAL. 39 I. C. 737: 1 Pat. L. W. 582.

———S 39, Cl. (1)—*High Court decree—Transmission to Dt. Munsif's Court for execution on the application of party—Jurisdiction—Value.*

After a decree is sent to another Court for execution on the application of the decree holder himself, the question of competency according to jurisdictional value of the Court to which the decree is transmitted does not arise at all. But the case would be different when the decree is transmitted by the Court on its own motion. (*Sadasiva Aiyar and Spencer, JJ.*) ABDUL SAHIB *v.* AHMED HUSSAIN SAHIB. (1914 M. W. N 97: 22 I. C 275 : 15 M. L T. 148.

———S. 39 (2)—*Presumption under.*

The Court cannot presume when a decree is transmitted for execution to another court, it

C. P. CODE (V OF 1908), S. 41.

intended the decree to be executed even against properties situated within the jurisdiction of the transmitting court. (*Spencer and Devadoss, JJ.*) MAHARAJA OF JEYPORE *v.* RAJA LAKSHMI NARASAMMA GARU. 18 L. W. 747: 76 I. C. 269: 1924 M. 144.

———S. 39 (2)—*Transfer of decree—Pecuniary jurisdiction of executing Court.*

A Court passing a decree cannot send of its own motion to any Court subordinate to it for execution when the value of the subject-matter of the suit of the decree exceeds the pecuniary jurisdiction of that Subordinate Court. (*Parlett, J.*) MAHOMED SASI *v.* MAUNG KIN. 12 I. C. 27: 4 Bur. L. T. 224.

——— S. 41—*Certificate—Execution of decree—Decree sent to another court for execution.*

It does not follow that because one application for execution fails in a Court to which the decree has been sent for execution, that that Court is bound to send a certificate to the Court in which the decree was passed. The judgment-creditor might still be anxious to execute his decree in the former court, and it is only when the Court to which the decree is sent has executed it or has failed to execute it that the Court is bound to send a certificate under S. 41. It was intended that there should be complete failure such as would result in no benefit to the judgment-creditor for one reason or another and not merely a partial failure. (*Macleod, C. J. and Crump, J.*) VITHU DAULATA PATIL *v.* GANESH. 25 Bom L. R 453 : 74 I. C. 149 : 1923 Bom. 396.

———S. 41—*Applicability—What amounts to information.*

S. 41 C. P. Code does not prescribe any particular way in which the court to which a decree is sent for execution should inform the court as regards the result of the same. Where a court has both small cause powers and original jurisdiction and a decree passed under the former is executed under the latter and an entry of satisfaction is made in the Small Cause Register, the section has been complied with

Per *Crump, J.*:— S. 41 contemplates two different courts and cannot be applied strictly to such a case. (*Macleod, C. J. and Crump, J.*) MANIRAM PEERCHAND MARWADI *v.* VITHU RAMJI PATIL PANDE. 76 I. C. 543 : 1923 Bom. 371.

——— Ss. 41, 42 and 39—*Scope of.*

S. 41 requires that a Court to which a decree has been sent for execution shall certify to the Court which sent it that it has completely executed the decree or has failed to do so and is unable to do so any further. The section may also require certificates to be sent of the result of each application for execution that is made to the executing Court, but in any case such certificates have to be sent under the executive orders of the High Court. But the sending of a certificate does not of itself put an end to the jurisdiction of the Court to execute the decree, and the sending of a certificate of the latter class cannot do so at all. 37 Mad 231 distinguished. 21 All. 129 followed. (*Batten, J. C. and Hallifax, A. J. C.*) INDRA RAJ SINGH *v.* MURADKHAN. 18 N L. R. 178 : 68 I. C. 657 : 1922 Nag. 210.

C. P. CODE (V OF 1908), S. 41.

——S. 41—*Certificate—Necessity for—Execution.*

The order of the High Court setting aside an order allowing an objection of limitation taken by the judgment-debtor before the executing Court in a transferred decree, puts the parties in the same position in which they were before the papers were returned by the executing Court to the original trying Court; and so after the order, the executing Court can proceed with the execution application, as if no order of Appellate Court allowing the objection was passed, and no certificate required under S. 41 of the Code was sent. (*Coutts and Sultan Ahmed, JJ.*) UDAIBHAN PARTAB SINGH *v.* SHEO RAMJI. 58 I. C. 987.

—— Ss 42 and 102—*Execution of Small Cause decree—Appeal.*

Although no appeal lies from the orders of a Small Cause Court, still under S. 42 of C. P. C. an appeal lies from an order passed in execution of a Small Cause decree which has been transferred to a Court where it is filed on the original side. (*Rafique, J.*) LARETI *v.* HAZARI LAL.
33 I. C. 523 : 14 A. L. J. 415.

——S 42—*Transfer to one Court—Application for further transfer.*

Where a decree is already transferred for execution by court which passed it, an application for further transfer should be made to the court where execution is pending. (*Macleod and Shah, JJ.*) RANGASWAMI SHETTI *v.* SHESHAPPA MANJAPPA. 47 B. 56 : 68 I. C. 506 : 24 Bom. L. R. 798 : 1922 B. 359.

——Ss. 42, 47, 104 (h) and 145—*Small cause decree—Transfer to Munsif's Court for execution—Order of arrest, if appealable.*

An order directing the arrest of a surety passed by a Munsif in execution of a decree transferred to his Court for execution by the Small Cause Court, is appealable. (*Woodroffe and Chatterjee, JJ.*) ADHAR CHANDRA GOPE *v.* PULIN BEHARY SAHA. 27 I. C. 10 : 20 C. L. J. 129

——S. 42—*Powers of execution of Court to which decree is transferred.*

A decree was obtained in Sonthal Parganas and was transferred to a Court outside the above jurisdiction under S. 39 (1) of C. P. Code. The Sonthal Pargana Courts could not execute the decree by arrest of the judgment debtor. *Held*, still the outside Courts had power to execute it by issuing a warrant of arrest under the powers under S. 42, C. P. C. (*Mookerjee and Casperz, JJ.*) DEOSARAM SINGH *v.* PRAYAG RAM SINGH. 10 I. C. 538

——Ss. 42 and 102—*Execution of small cause decree.*

Only one appeal lies against orders passed in execution of decrees in small cause suits (*Benson and Abdur Rahim, JJ.*) VEERAMATHARAI *v.* SUBRAMANIA IYER. 12 I. C. 959 : (1911) 2 M. W. N. 585.

——S. 42 and O. 21, R. 28—*Power of Court to which decree is transmitted for execution.*

Where the transmitting Court has made no order for execution but has merely transmitted the decree and the certificate of non-satisfaction the executing Court can entertain an objection to the decree-holder's right to proceed against any property other than that charged in the decree. (*Kanhaiya Lal, A.J.C.*) BHADRI PRASAD *v.* GAURI NATH. 27 I. C. 697 : 2 O. L. J. 18.

C. P. CODE (V OF 1908), S. 44.

——S. 42—*Transfer of decree—Order for, effect of—Jurisdiction of Court which passed the decree.*

Where a decree holder obtains an order for the transfer of a decree by the Court which passed it to another Court for purposes of execution, but the decree is not actually sent to that Court the Court which passed the decree has jurisdiction to execute it (*Miller C.J. and Jwala Prasad, J.*) RAM CHANDRA MARWARI *v.* KRISHNA LAL MARWARI. 1 Pat. 328 : 3 Pat. L. T. 298 : 65 I. C. 332 : 1922 P. 301.

——S. 43—*Court of Political Agent at Sikkim if a Court established by authority of Governor-General.*

The Court of the Political Agent at Sikkim is a Court established by the authority of the Governor-General in Council within the meaning of S. 43 C. P. C. (*Coxe and Teunon, JJ.*) ZAMIL AHMED *v.* MAHARAJAH OF SIKKIM. 38 Cal. 859 : 11 I. C. 442 : 15 C. W. N. 992.

——S. 44—*Foreign judgment—Application for execution in British India—Limitation.*

The Law of Limitation governing the execution of foreign decrees in British India is the law in force in British India and not the law in force when the decree was passed. An order for transmission of a decree to British Court cannot be treated as an order for execution. (*Batchelor and Shah, JJ.*) NABHIBHAI VAZIRBAAI *v.* DAYABHAI AMULAKH. 40 Bom. 504 : 36 I. C. 369 : 18 Bom. L. R. 481.

——S. 44 and O. 21, R. 7—*Execution of decree—Decree ex parte by foreign Court—Validity.*

A British Court executing a foreign decree can enquire whether the foreign Court had jurisdiction to pass it. A decree pronounced in absence of a party in a personal action by a Court of a foreign state, is null and void. 23 Cal. 22 (P. C.) foll. (*Batchelor and Shah JJ.*) JIVAPPA *v.* JEERJI. 40 Bom. 501 : 36 I. C. 363 : 18 Bom. L. R. 466.

——S. 44—*Transmission of decree for execution to Native State—Legality of—Practice—Ex parte order for transmission—Right of party aggrieved—Limitation Act, Art.* 182.

S. 44, C. P. C. does not sanction the transmission of a decree of a British India Court to a Court in a Native State. Long practice cannot be relied on to justify such a transmission. An *ex parte* order of transmission is liable to be vacated within the period of limitation under Art. 182 of the Limitation Act. (*Wallis, C. J. and Seshagiri Iyer, J.*) CHIDAMBARAM CHETTY *v.* RAMANATHAN CHETTY. 32 M. L. J. 487 : 41 I. C. 41 : 5 L. W. 616.

——S. 44—*Foreign decree—Small Cause Judge and Registrar.*

A judge of a Presidency Small Cause Court can execute the decree of a foreign Court transmitted

C. P. CODE (V OF 1908), S. 44.

to it under S. 44 C. P. C. but the Registrar of the same Court has no power under S. 13 or 35 of the Presidency Small Cause Courts Act to issue process in execution of a foreign decree. (*Seshagiri Iyer, J.*) SRINIVASA IYENGAR *v.* NARAYANA IYENGAR (1917) M. W. N. 493 : 6 L. W. 361 : 40 I. C 670 : 33 M. L. J. 539

——S. 44—*Objection to execution.*

An application for execution under S. 44 may be resisted on any of the grounds mentioned in S. 13. (*Wallis C.J., Seshagiri Aiyar and Phillips, JJ.*) RAMA AIYAR *v* KRISHNA PATTAR. 39 Mad. 733 : 3 . W. 90 : 19 M. L. T. 68 : 32 I. C. 597 : 30 M L J. 148 : (1916) 1 M. W. N. 83.

——Ss. 44 and 13—*Execution of decree of Native States—Power of British Courts.*

Per Sadasiva Iyer, J (*Contra Sundara Iyer, J.*) A suit does not lie in British India on decrees of the Courts of Native States ; such decrees are made executable by notification by Governor-General in Council under S. 44 C. P. C. *Per Sadasiva Iyer, J.*—(*Sundara Iyer, J.* dissenting) The word "may" in S. 44 is used in the sense of "will" ; when a Court is empowered to do a certain act on the application of a party it is bound to take action unless the Court has been expressly empowered to refuse it. (*Sundara Iyer and Sadasiva Iyer, JJ.*) VEERA RAGHAVA IYER *v.* MUGA SAIT. (1913) M.W.N 605 : 20 I. C. 704 : 14 M. L T. 96 :

[Judgment of *Sadasiva Iyer, J.* affirmed on appeal (*Wallis, C.J., Ayling and Seshagiri Aiyar, JJ.*) VEERARAGAVA AIYAR *v.* MUGA SAIT. 30 Mad. 24 : 27 M L J. 535 : 26 I. C. 287 : 16 M. L T. 479 : 1 L. W. 887 : (1915) M. W. N. 162 : (F. B.)

——Ss. 45 and 39—*Transfer of decree to Travancore Court—Execution—Lim. Act, Arts.* 182 (5) *and* 182 (6).

Courts in British India have no power to send their decrees for execution to the Courts in Travancore but may and should send to those Courts, the documents they require to enable them to execute the decrees under the powers conferred upon them by the Travancore legislature. 32 M L. J. 487, 12 Bom. 230. 29 Cal. 400, 39 Mad. 648, Rel An application for such sending of a decree for execution is neither an execution application nor a step-in-aid o execution within Art. 182 (5), as the C. P. C. and the Lim. Act contemplate execution by British Courts in India on application made to them. The issue of a notice to the judgment-debtor on any such application does not give any fresh starting point. (*Wallis, C. J., Oldfield and Kumaraswami Sastri, JJ.*) PEIRCE LESLIE & Co. *v* PERUMAL. 40 Mad. 1069 : 33 M L. J. 130 : 6 L. W. 203 : 42 I. C 291 : 22 M. L. T. 139 : (1917) M. W. N. 712 (F. B.)

——S. 46—*Order passed after expiry of time—Attachment, whether ineffective.*

An order passed by a Court extending the period of attachment always relates back to the date of the petition and has a retrospective effect even though the order was passed after the expiry of the statutory period of two months. It is enough

C. P. CODE (V OF 1908), S. 47—Appeal—Collector.

if the application for extension was put in before the expiry of that period. (*Sadasiva Aiyar and Moore, JJ.*) SIVAKOLUNDU PILLAI *v.* GANAPATHI AIYAR. 34 I C 302 : 3 L. W. 336.

——Ss. 46 and 136 and O. 38, R. 5—*Attachment before judgment.*

Though the property referred to in O. 38, R. 5 (b) must be property within the Court's jurisdiction, no such restriction is imposed with regard to the property mentioned in clause (a). Property without local limits of the Courts may be attached before judgment. (*Bell, J.*) SOMASUNDARAM CHETTY *v.* MUTHU VEERAPPA CHETTY. 10 I. C. 794 : 4 Bur L. T. 89 :

——S. 47.

Appeal.—
Application under.
Collector
Compromise decree.
Decision of preliminary point.
Dismissal.
Dispossession.
Execution.
Extension of time.
Impeaching satisfaction of decree.
Insolvency Application.
Interlocutory Order.
Objection to attachment.
Order
Pre emption.
Question relating to execution.
Rateable distribution.
Receiver.
Retrospective effect.
Sale proclamation.
Scheme.
Stay of execution.
Applicability.
Application.
Bar of suit.
Compromise decree.
Conversion.
Defence to a suit.
Discretion of court.
Execution sale.
Exonerated defendant.
Foreign decree.
Parties and representatives.
Purchase of decree.
Question relating to execution.
Rateable distribution.
Restitution.
Scope of.

Appeal—Application under.

——Ss. 47 and 73 — *Appeal — Application under S.* 73.

An order under S 73, C. P. Code is not an order under S. 47 and being consequently not a decree within S. 2 (2) is not appealable. 42 Cal. 1 Foll. 36 Cal. 130 Ref. (*Coutts and Adami. JJ.*) MUSSAMAT HARMOOZI BEGUM *v.* MUSSAMMAT AYE SHA. 5 Pat. L. J. 415 : 57 I. C, 421 : 1 Pat. L. T. 296 :

Appeal—Collector.

——S. 47—*Appeal—Collector—Order refusing to appoint.*

C. P. CODE (V OF 1908), S. 47—Appeal—Compromise decree.

An order passed in execution proceedings, refusing to appoint the Collector under S. 22 of the Dekkhan Agriculturists Relief Act falls under S. 47 of the Code and is appealable. (*Fawcett and Raymond, A. J. Cs.*) CHOITH RAM *v.* LACHU X.
63 I. C. 810 : 15 S. L. R. 47 :

Appeal—Compromise Decree.

——Ss. 47 and 96 — *Appeal — Compromise decree—Execution order.*

An order in execution proceedings of compromise passed in appeal from an order confirming the sale is appealable. (*Coxe and Chatterjee, JJ.*) JANAK PROSAD SINGH *v.* NET RAM.
22 I. C. 497.

Appeal—Decision of preliminary point.

——S. 47—*Appeal—Decision of preliminary point.*

Where one of two issues is decided, no appeal lies before the second issue is gone into. 39 Bom. 339: 19 C. W. N. 755 Foll. (*Sharfuddin and Roe, JJ.*) MAHAMAYA PRASAD SINGH *v.* SUKHDIA KUAR.
(1917) Pat. 191 : 40 I. C. 517 : 1 Pat. L. W. 759.

Appeal—Dismissal.

——S. 47 and O. 21, Rr. 28 and 63—*Appeal—Dismissal of objection to attachment on the ground that objector was a party to the suit—Suit by defeated claimant.*

Where a person claiming to be a party to the suit preferred an objection to the attachment of certain property in the capacity of stranger and the objection is dismissed on the ground that he was a party to the suit. *Held* that the remedy of the objector was to file a regular suit to establish his right to the property attached and not to proceed by appeal. The test is whether the claim as laid by the objector is adverse to the claims of the judgment-debtor, and an objector claiming under a paramount title is not deprived of his ordinary remedy of a regular suit merely because his objection is dismissed on the ground that he is held to be a party to the suit. (*Batten, A. J. C.*) GANDELAL *v.* MANJEE SONAR.
47 I. C. 904.

——S. 47 and O. 21, R. 90—*Appeal—Dismissal of application to set aside sale—If second appeal lies.*

A determination of any question within S. 47 is a decree, except a determination against which an appeal lies as an appeal against an order. An order dismissing an application to set aside a sale under O. 21, R. 90 falls under S. 47 but is appealable as an order and is therefore not a decree and no second appeal lies against it. (19 I A. 106 ; 26 Cal. 539 Expl.) (*Mc Coll, J. C.*) MAUNG SHWE MYAT *v.* MAUNG SHWE BAN.
(1916) 2 U. B. R. 139 : 39 I. C. 374 :
11 Bur L. T. 26.

Appeal—Dispossession.

——S. 47 and O. 21. Rr. 100 and 101—*Appeal—Dispossession by auction-purchaser—Application by dispossessed mortgagee disallowed—Appeal.*

No appeal lies from an order disallowing an application made by a dispossessed mortgagee

C. P. CODE (V OF 1908), S. 47—Appeal—Execution.

under O. 21, R. 100. 31 All, 82 (F. B.) Foll. (*Rafique and Piggott, JJ.*) TEJ PAL *v* TORU SINGH.
24 I. C. 93.

Appeal—Execution.

——S. 47—*Appeal—Execution proceedings—Interlocutory order.*

It is not every order made in execution of a decree that is appealable. Interlocutory orders in execution proceedings are not appealable ; the order must relate to the rights and liabilities of the parties concerned which but for the order would have to be determined by a separate suit. An order disallowing the objection of a judgment-debtor that a fresh attachment is necessary is not appealable. 24 Cal. 725; 9 Cal. 773: 18 Cal. 469, Ref. (*Karamat Hussain and Tudball, JJ.*) MUKHTAR AHMED *v.* MUQARRAL HUSSAIN.
34 All. 530: 15 I. C. 50: 10 A. L. J. 56.

——S. 47, 104, O. 43, R. 1 (j)—*Appeal—Execution sales—Second appeal.*

Even if a case for setting aside an execution sale comes under S. 47 an order refusing to set aside a sale, being appealable under S. 104, is outside the definition of a decree and not open to second appeal. (*Fletcher and Huda, JJ.*) JAGADISH NARAIN *v.* MAHAMUDDIN MOHAMED.
46 I. C. 529.

——S. 47—*Appeal—Execution sale—Setting aside—Purchase by decree-holder.*

An application by the assignee of judgment-debtor to set aside a sale on the ground of fraud, collusion and limitation, is one under S. 47 and so appealable to the High Court (*Brett and Sharfuddin, JJ.*) RAMDHANI SHA *v* TOPI BIBI.
21 I. C. 938 : 18 C. L. J. 264.

——S. 47 — *Appeal — Execution— Issuing warrant for arrest.*

An order issuing a warrant for arrest is one falling under S. 47 C. P. C. and is appealable as a decree. (*Scot-Smith, J.*) MEHR CHAND *v.* RAM LAL.
73 I. C. 766.

——S. 47 and O. 21, R 40—*Appeal—Execution—Arrest of judgment-debtor.*

An order of the executing Court refusing to arrest the judgment-debtor in execution of a decree is an order falling within the scope of S. 47 of the C P. Code. Such an order is therefore appealable. (*Martineau, J.*) LALA DAS *v.* MINA MAL.
4 Lah. L. J. 266 : 1922 Lah. 259.

——S. 47 and O. 21, R. 90—*Appeal—Execution sale—Fraud.*

Objections to an execution sale on the ground of fraud can only be made under O. 21, R. 90, C. P. C, prior to confirmation. No second appeal lies from an order under O. 21, R. 92, C. P. C, refusing to set aside the sale. (*Broadway, J.*) BASHI RAM *v.* HASSAN MAHOMED.
51 I. C. 447.

——S. 47—*Appeal—Execution proceedings—Stay.*

An order by which is staved issue of warrant of attachment up to a certain date, is no step in execution of the decree and is not appealable. (*Shah Din, J.*) HAZOORA SINGH *v.* MAYA DVI. :
64 P. W. R. 1911 : 9 I. C. 823 :
101 P. L. R. 1911.

C. P. CODE (V OF 1908), S. 47—Appeal—Execution.

——— Ss. 47 and 2—*Appeal— Execution of decree—Declaratory decree— Execution allowed —Final order directing delivery of land—Appeal against first order, if barred.*

Plaintiff applied for execution of a decree directing that defendant should remain in possession of land yielding a certain amount of rice; the defendant objected alleging that the decree being declaratory cannot be executed. The lower Court allowed the execution and passed later on the final order directing delivery to plaintiff of land other than that which defendant was entitled to retain. The High Court, on appeal against the preliminary order, *held*, that the order appealed against was appealable as it was a decree, that the final order did not affect the the right of appeal against the previous order if the appeal was filed in time as the later order did not supersede the first and that the decree being declaratory could not be executed. (*Sundara Aiyar and Phillips, JJ.*) LAKSHMI *v.* MARUDEVI. 37 Mad. 29: 10 M. L. T. 437: 12 I. C. 664: 21 M L J. 1063.

———S. 47—*Appeal—Execution — Mistake—Order restoring possession to judgment-debtor.*

A conditional decree cannot necessarily be treated as a preliminary decree and the order, restoring possession to the judgment-debtor on the ground that the possession was given to the decree-holder under a misapprehension that the decree holder has satisfied the condition which he had not, is of the nature of a final decree. The order, however, is an order passed in the execution department from which an appeal could be preferred under the provisions of S. 47. C. P. C. (*Daniels, J. C.*) DORI LAL *v.* MT JAMAGA. 72 I. C. 879: 1923 Oudh 16.

———S. 47—*Appeal—Execution sale—Setting aside.*

Where a decree-holder took every proceeding under the Code to give effective power to the Court to sell certain property and on the day fixed for sale he asked the Court to dismiss his execution case, but on rejection of the application and sale of the property appealed to the District Judge and the order of the executing Court was set aside. *Held*, that though the order of the first Court was wrong, it was not appealable and High Court alone could set it aside and that the lower appellate Court having assumed jurisdiction in the matter, a second appeal lay to the High Court. That order of the lower appellate Court must be set aside as being *ultra vires*. (*Das, J.*) MEHESH KANTA CHOWDHURY *v.* RAM PRASAD RAY. 57 I. C. 396.

Appeal—Extension of Time.

———S. 47 and O. 34, R. 8—*Appeal— Extension of time for redemption.*

An order extending the time for redemption of a prior mortgage is within O. 34, R. 8, C P C. and is appealable. (*Tudball and Rafique, JJ.*) KALIAN *v.* SADHO LAL. 35 All. 116: 18 I. C. 14: 11 A. L. J, 62.

Appeal—Impeaching satisfaction of Decree.

———S. 47 and O. 21, R. 2—*Appeal—Impeaching satisfaction of decree.*

C. P. CODE (V OF 1908), S. 47—Appeal—Objection to attachment.

An application to a Munsif questioning the genuineness of a previous petition certifying satisfaction is one under S. 47, C.P.C. and hence the order rejecting it is appealable, though the petitioner mentioned O. 47, R. 1 in the petition. (*Beachcroft and Walmsley, JJ.*) JAGANNATH MONDAL *v.* JALADHAR MONDAL 40 I. C 839: 26 C. L. J. 317.

Appeal—Insolvency Application

———S. 47—*Appeal—Insolvency—Application by receiver to set aside sale.*

An application by a receiver of an insolvent's estate to annul a sale on the ground of a prior adjudication of the debtor is one under S. 47 and a second appeal lies to the High Court from an order in appeal. Only where O. 21, R. 90 and S. 47, C.P.C. both apply to a petition to set aside an auction sale that no second appeal lies under S. 100 but a second appeal will lie when S. 47 alone is applicable (*Sadasiva Aiyar and Moore, JJ.*) ANANTHARAMA IYER *v* VETTATH KUTIMALU: KOVIL AMNAL. 19 M L. T. 307 : 3 L. W. 504. 34 I. C. 829 : 30 M. L. J. 611

Appeal—Interlocutory orders.

———S. 47—*Appeal— Interlocutory order—Question between parties to the proceedings.*

An appeal lies against an interlocutory order passed in execution proceedings, where the order has the effect of reviving an application for execution dismissed for default especially when a fresh application by a decree-holder would be time barred. (*Teunon and Newbould, JJ.*) MOHAN CHANDRA DE *v.* MOHENDRA KUMAR DE SARKAR. 57 I. C. 905.

———S. 47—*Appeal—Interlocutory order.*

It is not every order made in execution which is a decree, and an order granting or refusing a process for the examination of witnesses, or an order merely determining a point of law arising incidentally or otherwise in the course of a proceeding and not refusing or granting relief is not appealable. Where the court of execution finally negatives the right of the decree-holders to proceed against the land of the judgment-debtor, an appeal lies from such an order. (*Shadi Lal and Broadway, JJ.*) SIRDARANI DATAR KAUR *v.* RAM RATAN. 2 U. P. L. R. (Lah.) 96: 115 P. L. R. 1920: 56 I. C. 173: 2 Lah. L. J. 398.

———S. 47 and O. 43, R. 1—*Appeal—Interlocutory order—Order dismissing execution application for default.*

An order dismissing an application for execution for default of the decree-holder is not appealable. (*Jwala Prasad and Bucknill, JJ.*) GOUR CHANDRA ROY *v.* JANARDAN PRASAD THAKUR. 4 Pat. L. T. 204. 68 I. C. 337: 1923 P. 180.

Appeal—Objection to Attachment.

———S 47 and O. 21, R. 58—*Appeal—Objection to attachment.*

Where a person impleaded as a party to the suit but against whom no decree is passed objects to the attachment of the properties in her hands relying on a conveyance executed by the deceased judgment-debtor in her favour, the objection

C. P. CODE (V OF 1903), S. 47—Appeal—Objection to attachment.

falls within S. 47 C.P.C. The decision of such a question operated as a decree under S. 2 of the Code and is appealable in the same manner as other decrees under S. 96. (*Mookerjee and Panton, JJ.*) JAMINIBALA DEBI *v.* KARALI PRASAD MUKHERJEE. 67 I.C. 6 : 34 C.L.J. 477.

——S. 47, O. 21, R. 58—*Appeal—Objection to attachment by judgment-debtor—Appealability.*

A decision on the question whether a property attached in execution forms part of deceased judgment-debtor's property, comes under S. 47 C.P.C. and not under O. 21, R 58 and is appealable. (*Fletcher and Teunon, JJ.*) FAKIR CHANDRA *v.* GIRIBALA DASSAYA. 31 I.C. 321 : 22 C.L.J. 304.

——S. 47 and O. 21, R. 58—*Appeal—Objection to attachment—Claim by legal representative of judgment-debtor.*

The provisions of S. 47 C. P. Code should receive the widest interpretation. Where the legal representative of a deceased judgment-debtor raises an objection to the attachment of certain property in his hands on the ground that it is his own property and not that of the deceased, the question must be investigated under S. 47 C.P.C. and not under O. 21, R 58, C.P.C. There is an appeal against the order of the court on the claim petition. 17 C. 711 : 19 C.W.N. 517 Ref. (*Coutts and Das, JJ.*) NAURATAN LAL *v.* MRS. MARGARET ANNE STEPHEN. 3 Pat. L.T. 613 : 68 I.C. 369 : 1922 P. 572.

——S. 47 and O. 21, R 53—*Appeal—Objection to attachment—Dismissal of—Order not appealable.*

An application put in by a judgment-debtor that the property sought to be attached is *wakf* property and as such is not attachable is one falling under O 21, R. 53 and not under S. 47. No appeal lies from any order passed on such an application. (*Coutts and Das, JJ.*) SHAIKH NAZIR HUSSIN *v.* MAHOMMAD EJAZ HUSSAIN. 3 Pat. L.T. 432 : 67 I.C. 438 : 1922 P. 196.

Appeal—Order accepting security.

——S. 47 and O. 41, R. 5—*Appeal—Order accepting security offered and staying execution.*

An order by which security offered by the decree holder under O. 41, R. 5, C.P.C before executing the decree is accepted and the delivery of possession is directed to be made to the decree holder, is appealable, inasmuch as the order directing delivery of possession is a final order and not an interlocutory or intermediate one. (*Teunon and Newbould, JJ.*) RUDRA NARAIN JANA *v.* NABA KUMAR DAS. 44 I C 156 22 C.W N. 657.

Appeal—Order between parties to suit.

——S. 47—*Appeal—Order between parties to suit.*

It is only such orders as determine questions arising between parties to the suit or their representative that become appealable as decrees passed under S. 47 C.P C. 17 Mad 394 : 1918 M. W. N. 507 referred to. (*Spencer and Odgers, JJ.*) BUDARAJU HANUMANTHA RAO *v.* ALLAMNENI KRISHNAMMA. 70 I C. 329 : 32 M.L.T. (H.C.) 118 (2).

C. P. CODE (V OF 1908), S. 47—Appeal—Order extending time.

Appeal—Order directing execution

——S. 47—*Appeal—Order in execution—When appealable.*

An order in execution can come under S. 47 only when it determines question relating to the rights and liabilities of the parties with reference to the relief granted by the decree, not when it determines merely an incidental question as to the mode of the conduct of the proceedings. Where a Court refuses stay of execution, though certain proceedings to test the validity of the decree were pending, the order does not come within S. 47 and is not appealable. (*Mookerjee and Beachcroft, JJ.*) RAMA PROSAD ROY CHOUDHURY *v.* ANUKAL CHANDRA ROY CHOUDHURY. 27 I C. 444 : 20 C.L J. 512.

——S. 47—*Appeal—Order directing execution.*

An order directing execution to issue against a judgment-debtor is plainly a final order under S. 47 and is essentially a decree determining the rights and liabilities of parties with reference to the relief granted and as such is appealable. (*Mookerjee and Beachcroft, JJ.*) BAISHNAB CHARAN SHAHA *v.* BANK OF BENGAL. 19 C.L J. 581 : 26 I.C. 866 : 19 C.W N. 1008.

Appeal—Order dismissing application.

——S. 47 and S. 104 (h) and O. 21, R. 40—*Appeal—Order dismissing application for arrest of judgment debtor.*

An order under O. 21, R. 40 C. P. Code dismissing the application of a decree-holder for the arrest and imprisonment of judgment-debtor relates to the execution of the decree and is appealable. The concluding words of S. 104 (h) C. P.C. indicate that where an order directing the arrest or detention of the judgment-debtor is made in execution of a decree it is to be treated under section 47. (*Abdul Raoof and Martineau, JJ.*) KAJ KARNI *v.* KARAM ELAHI. 53 I C. 68.

Appeal—Order dismissing application under S. 100.

——S. 47 and O. 21, Rr. 100, 101 and 103—*Appeal—Order dismissing application under* S. 100.

An order dismissing an application under O 21, R 100 is an order made under R. 101 within the meaning of R. 103, and the unsuccessful party though not a judgment-debtor, cannot have an appeal under S. 47, C. P. C. (*Scott, C J. and Batchelor J.*) ZIPRA TARBHOO *v.* HARI SUPDUSHT VANI. 42 Bom. 10 : 42 I C 73 : 19 Bom, L.R 774.

Appeal—Order extending time.

——S. 47 and O. 21. Rr. 89 and 90—*Appeal—Order extending time for payment of money*

Where an application by the judgment-debtor to set aside a sale under O. 21, R. 90 was pending the decree-holder purchaser agreed to restore the property if the decree amount was paid within a fixed time and on non-payment of the money within time, the Dt. Munsiff extended the time for payment against the wishes of the decree-holder *Held*, that the order of the District Munsiff was one under O. 21, Rr. 89 and 90 and

C. P. CODE (V OF 1908), S. 47—Appeal—Order fixing value of property.

therefore an appeal lay to the Dt. Judge. (*Fletcher and Newbould, JJ.*) SHAHSI BHUSHAN BANERJEE *v.* CHARUSHILA DEBI. **36 I. C. 809.**

Appeal—Order fixing value of property.

——**S. 47 and O. 21. R. 66**—*Appeal—Order determining value of property.*

An order determining valuation of immoveable property to be entered in sale proceedings is not a decree and is not appealable. 16 C.W.N. 124 foll. (*Jenkins, C. J. and Chapman, J.*) PANCH DUAR THAKUR *v.* MANI RAUT. **17 I. C. 88 : 16 C.W.N. 970.**

——**S. 47 and O. 21, R. 66**—*Appeal—Order fixing value of property to be sold in execution*

An order to be a decree must conclusively determine the rights of parties. An order assessing the value of property to be sold in an execution proceeding is not a decree or order under Ss. 47 and 2. (*Mookerjee and Teunon, JJ.*) DEOKI NANDAN SINGH *v.* BANSI SINGH. **14 C.L.J. 35 : 10 I C. 371 : 10 C.W.N. 124**

——**S. 47 and O. 21, R. 66**—*Appeal—Order fixing only market value and figure for commencing bidding.*

The rights of parties are not conclusively determined by an order which only fixes the market value and the figure for commencing the bidding at an auction sale; and such an order, not being a decree under S. 2, is not appealable 14 C.L.J 35 foll. (*Ayling and Seshagiri Iyer, JJ.*) RAMANATHAN CHETTY *v.* SOMASUNDARAM CHETTIAR. **37 I. C. 897 : (1917) M.W.N. 141.**

Appeal—Order for arrest.

——**Ss. 47 and 2**—*Appeal—Order for arrest in execution.*

An order deciding the legality of arrest made in execution of a decree falls under Ss. 47 and 2 and is appealable. (*Sadasiva Aiyar and Napier, JJ.*) SUBBARAMA AIYAR *v.* ARUNACHELLAM CHETTIAR. **32 I. C. 731 : 3 L. W. 35.**

Appeal—Order for delivery of possession.

——**S. 47 and O. 21, R. 103**—*Appeal—Order for delivery of possession.*

The question of delivery of possession arising between the decree-holder and defendant against whom no relief is granted is still under S. 47 and the order thereon is appealable. (*Oldfield and Seshagiri Aiyar, JJ.*) SIVASAMBA AIYAR *v.* KUPPAN SAMBAN. **32 I. C. 769 : 29 M.L.J. 629.**

Appeal—Order not open to second appeal.

——**S. 47 and O. 21, R. 92**—*Appeal—Order not open to second appeal.*

No second appeal lies from an order passed under the rule. 18 O.C. 1 Expl. (*Lindsay, J.*) TUNG NATH *v.* KANHAIYA LAL. **41 I C. 121 : 4 O.L.J. 372.**

Appeal—Order on objection.

——**S 47 and O. 21, R. 66**—*Appeal—Order on objection to sale proclamation.*

Order of a Court fixing a valuation under O. 21, R. 66 is not a 'decree' and, therefore not appealable. (*Mullick and Atkinson, JJ.*) DEOKI NANDAN SINGH *v.* DHAKESHWAR PRASAD NARAIN SINGH. **38 I.C 616 : 2 Pat. L. J. 13.**

C. P. CODE (V OF 1908), S. 47—Appeal—Order Settling terms.

Appeal—Order on petition.

——**S. 47 and O. 21, R. 101**—*Appeal—Order on petition under R. 101.*

An order on an application by a judgment-debtor objecting to the sale of certain property in execution of a decree is as between the parties to the suit, an order under S. 47 and is appealable though it disposes of objections made by third parties to the delivery of possession. (*Sadasiva Iyer and Napier, JJ.*) MURUGESA MUDALI *v.* SAMA GOUNDAN. **31 I.C. 102**

Appeal—Order refusing leave to bid.

——**S. 47, and O. 21, R. 72 and O. 43, R. 1 (j)**—*Appeal—Order refusing leave to bid not appealable—C. P. Code* (1882), S. 294.

No appeal lies from an order refusing an application by a decree-holder for permission to bid at a sale in execution of a decree. 13 Cal. 174 appr. (*Lord Macnaughten*) KOTHA HNYIN *v.* HNYINL. **38 Cal. 717 : 15 C.W.N. 862 : (1911) 2 M.W.N 449 : 13 Bom L.R. 694 : 14 C.L.J. 241 : 8 A.L.J. 1117 : 6 L.B.R. 26 : 11 I.C. 845 : 4 Bur L.T. 257. (P.C.)**

Appeal—Order refusing to execute decree.

——**S. 47**—*Appeal—Order refusing to execute decree.*

It is not every order passed in execution proceedings that is a decree. The question whether the appellant is entitled to have the provisions of S. 72 of the C.P. Code carried out for his benefit is one within S. 47 of the Code, and the order is a decree within Sec. 2 of the Code. (*Pelman, J.*) RAM RATTAN *v.* SARDARNI DATAR KUAR. **52 I.C. 356.**

——**S. 47**—*Appeal—Order refusing to execute a decree.*

An order refusing to execute a decree is a decree within the meaning of S. 47, C.P. Code and an appeal lies from such an order. (*Saunders, A.J.C.*) MA ME *v.* MAUNG AUNG MIN. **10 Bur. L T 159 : 36 I C. 10: (1916) II U.B.R. 119.**

Appeal—Order rejecting application.

——**S. 47 and O. 21 R. 66**—*Appeal—Order rejecting judgment-debtor's objection to statement of value in sale proclamation.*

An order rejecting a judgment-debtor's petition in objection to the valuation given by the decree-holders for the purpose of sale proclamation is merely an interlocutory order and not a decree and is therefore, not appealable. 30 Cal. 617, 27 Mad. 259, 16 C.W.N. 124 Rel. (*Miller, C. J. and Coutts, J.*) SURENDRA NATH MITRA *v.* MRITUNJOY. **5 Pat L. J. 270: (1920) Pat. 227 : 56 I. C. 452 : 1 Pat. L. T 645.**

Appeal—Order settling terms.

——**S. 47 and O 21, R. 66**—*Appeal—Order settling terms of sale proclamation.*

The action of a Court in settling the terms of a sale proclamation is judicial and the order is

C. P. CODE (V OF 1908), S. 47—Appeal—Pre-emption.

Appealable. (*Scott Smith, J.*) KANHIA LAL *v.* THE BANK OF UPPER INDIA, LIMITED.
49 I.C. 589: 36 P.W.R. 1919.

Appeal—Pre-emption.

——— S. 47—*Appeal—Pre-emption decree—Question of payment in time.*

The question whether payment was made in time of the money required to be deposited under a pre-emption decree is one affecting the discharge or satisfaction of a decree and as such falls under S. 47, C. P. C. (*Kanhaiza Lal, J.C.*) NILKHANATH *v.* MAHABIR SINGH.
26 O.C. 345 : 74 I.C 558
9 O. & A.L.R. 207

——— S. 47 and O. 20. R. 14—*Appeal—Pre-emption decree—Order for payment.*

An order passed on an application for payment of pre-emption money in compliance with a decree under O. 20, R 14, C.P.C. is not appealable but can be revised under S. 115, C. P. C. (*Stuart, A.J.C.*) GAYA BAKSH SINGH *v.* TILAK SINGH.
28 I.C. 379 : 2 O.L.J. 151.

Appeal—Question Relating to Execution.

——— S. 47—*Appeal—Question relating to execution—Cost of commission—Execution—Nature of order—C. P. Code, S. 151.*

Proceedings in execution of an order concerning costs of a commission are under S 151, C. P. Code and do not fall under S. 47, C.P.C. As such there is no appeal. (*Kanhaiya Lal, J.*) GOPAL DAS *v.* GAURI SHANKER PRASAD.
74 I.C. 196 :
1924 A. 122

———S. 47—*Appeal—Question relating to execution—Withdrawal of execution proceedings—Appeal.*

A decree-holder cannot as a matter of right discontinue execution proceedings at any stage at his option. An order allowing the decree-holder to withdraw execution proceedings does not fall under S. 47 and is not appealable. (*Mookerjee and Beachcroft, JJ.*) KENARAM *v.* KAILASH CHANDRA.
19 I.C 904 : 18 C.L.J. 53.

——— S 47—*Appeal—Question relating to execution—Question as between judgment-debtors.*

An order purporting to be passed under S. 47 of C.P.C. is appealable. Where in a decree for sale on a mortgage against A and B, it was provided that if the mortgage money was paid, possession should be given to the defendant. *Held*, that the singular word 'defendant' included the plural and that possession should be given jointly to both A and B, although one of them has deposited the whole mortgage money. (*Piggott, J.*) MAZAHAR ALI KHAN *v.* HUSSAINI JAN.
18 I.C. 312.

———S 47—*Appeal—Question relating to execution—Mortgage-decree — Execution—Objection as regards payment of court fee.*

Where an executing court disallows an objection as regards insufficiency of court fee and orders the execution to proceed, the question is not purely one of admission of an execution application, but it is a question as to whether the execution can proceed or not and an appeal

C. P. CODE (V OF 1908), S. 47—Appeal—Rate... distribution.

lies against the order. (*Coutts and Ross, JJ.*) RAM BHUJHWAN PRASAD *v.* NATHO RAM.
3 Pat. L.T. 146 : 70 I.C. 463 : 1922 P. 59.

Appeal—Rateable Distribution.

——— Ss. 47 and 73—*Appeal—Rateable distribution—Question relating to execution, discharge and satisfaction.*

Two of the several creditors who obtained decrees against judgment-debtor attached some of his properties; the other creditors merely applied for execution without obtaining attachment. On the date of sale a person on behalf of the judgment-debtor deposited into Court a sum sufficient to discharge the two creditors. The Court ordered rateable distribution and sale of the property to satisfy the claims of the remaining creditor. On appeal by the judgment-debtor against this order; *held*, that the order related to a question in execution within S. 47 and that a second appeal is competent. The sale of the property is invalid as there was no proper attachment, the previous attachment having come to an end by deposit under O. 21, R. 55. (*Scott, C J. and Batchelor, J.*) SORABJI COOVASJI *v.* KALA RAGHUNATH.
36 Bom. 156 : 12 I.C 911 :
13 Bom. L.R. 1193.

———Ss. 47 and 73—*Appeal—Rateable distribution Rights of rival decree-holders.*

An order under S. 73 C. P. C. rejecting an application for rateable distribution of the assets between two rival decree-holders which does not affect or interest the judgment-debtor is an order in execution proceedings but is not a decree unless all the conditions enumerated in S. 47 are present. No appeal therefore lies from such an order. (*Mookerjee and Beachcroft, JJ.*) BALMER LAWRIE & CO *v.* JADUNATH BANERJEE.
42 Cal. 1 : 27 I.C. 644 : 19 C.W.N. 1202.

———Ss. 47 and 73—*Appeal—Rateable distribution.*

An executing Court has jurisdiction to hold a summary inquiry as to whether the decree obtained by one of the decree holders asking for rateable distribution is fraudulent or not. (*Mookerjee and Beachcroft, JJ.*) PEARY LAL DAS *v.* REARY.
18 C.L.J. 646 : 22 I.C. 407 : 19 C.W.N. 903.

———Ss. 47 and 73 *Appeal—Rateable distribution—Claim for—Rejection of claim—Order when appealable.*

Where the claim of certain decree-holders for rateable distribution of the money of the judgment-debtor was rejected on the ground that the amount lying in the Court was not that available to those decree-holders. *Held*, that the order was appealable and that the order so far as it affects each decree-holder was one between him and the judgment-debtor and related to the execution of the decree; and that the order though passed ostensibly under S. 73 was really one under S. 47. If the objection to the order under S. 73 is based on the invalidity of the execution application or on the character of the fund in Court, the question is between the judgment debtor and the individual creditors, not the creditors

C. P. CODE (V OF 1908), S. 47—Appeal—Rateable distribution.

as a body ; the decision on it is one under S. 47. (*Oldfield and Krishnan, JJ.*) VENKATAKRISHNA PATTAR *v.* KRISHNA PATTAR. **31 M. L. J. 820 : 20 M.L.T. 538 : 37 I.C, 900: 5 L.W. 354.**

———**Ss. 47 and 73**—*Appeal—Rateable distribution—Judgment-debtor*

A party, to whom a right of appeal is given if he comes under S. 47, should not be deprived of it. Orders under S. 73 are appealable, if they affect parties to the suit especially when the appeal is by the judgment-debtor who cannot avail himself of the right of suit given by S. 73 (2), C. P. C. (*Seshagiri Iyer and Kumaraswami Sastri, JJ.*) VENKATAPERUMAL *v.* VENKATA REDDI. **39 Mad. 570: 29 M. L. J. 96: (1915) M. W. N. 334 : 29 I. C. 231 : 17 M. L. T. 427.**

Appeal—Receiver.

———**Ss. 47and 51 (b)**—*Appeal—Receiver, appointment of, in execution of decree against* waqf *property.*

In execution of a decree obtained by appellant against respondent as trustee of a *waqf*, payments were made from time to time but a considerable sum was still due. The judgment debtor paid Rs. 100 to the decree-holder and obtained an adjournment on condition that the balance would be paid in the following month and on default of payment he would raise no objection to the appointment of a receiver. He defaulted to pay the money, and the Court accordingly appointed a Receiver. An order appointing a Receiver in execution of a decree against *waqf* property is appealable under S. 47 read with S. 51 of the C. P. Code. (*Mookerjee and Beachcroft, JJ.*) SYED ASAD RAZA *v.* WAHIDUNNISSA BEGUM. **57 I. C. 70: 30 C. L. J. 231.**

———**S. 47**—*Appeal—Receiver—Surety for receiver—Order to pay up moneys.*

An order against a receiver to pay up moneys can be executed against the surety and the order directing execution against such surety is appealable under S. 47 (*Twomey, C. J., and Robinson, J.*) MAUNG PO THEIN *v.* MA WAING. **13 Bur. L. T. 91: 59 I. C. 844 10 L. B. R. 236.**

Appeal—Retrospective Effect.

———**S. 47 and O. 21, Rr. 90 and 92**—*Appeal—Retrospective effect—Execution sale—Application to set aside—Order—Subsequent passing of new Code—Appeal.*

An application to set aside an execution sale on the ground of fraud and material irregularity was dismissed by the first Court on 21-9-1907. *Held*, a second appeal was competent, as the order was a decree under S. 244 of the old code. The new Code could not retrospectively affect the character of the order which under the new code is not a decree under S. 47 but an order under O. 21, Rr. 90 and 92. The grant could not operate retrospectively in favour of the legal representative of the deceased appellant. His application for leave to prosecute the appeal was therefore refused. (*Mookerjee and Beachcroft, JJ.*) LAL BEHARI MITTRA *v.* NAGENDRA NATH CHATTERJEE. **16 I. C. 690 : 22 C. L. J. 266.**

C. P. CODE (V OF 1908), S. 47—Appeal—Sale proclamation.

Appeal—Sale Proclamation.

———**S. 47 and O. 21, R. 66**—*Appeal—Sale proclamation—Order setting out estimate of value of property.*

No appeal lies from an order of a Court estimating the value of a property to be sold in execution proceedings as it is not an order relating to the execution, discharge or satisfaction of decree within S. 47. 27 Mad. 259 (F. B.), Foll (*Richards, C. J. and Banerjee, J.*) AJODHYA PRASAD *v.* GOPINATH. **39 All. 415: 39 I. C. 578: 15 A. L. J. 337.**

———**S. 47 and O. 21, R. 66**—*Appeal—Sale proclamation—Objections of judgment-debtor—Rejection of.*

On a notice issued to the judgment-debtor under O. 21, R. 66 to settle the terms of a sale proclamation in execution of a decree under O. 34, R. 5, he put in various objections one of which being that the properties were under-valued; the objections having been summarily rejected on appeal. *Held* per *Piggott, J.* that, whether all orders passed by an execution Court in proceedings under O 21, R. 66 are appealable as decrees or not, an order refusing to inquire into the valuation which the Court must do if the parties are seriously at issue with regard to it, was an appealable decision. Per *Walsh, J.* Questions raised by the judgment debtor were covered by S. 47 and the decision complained of was a decision under the section from which an express right of appeal was given by the code (*Piggott and Walsh. JJ.*) SHIAM LAL *v.* ROSHAN LAL. **35 I C. 230: 14 A. L. J. 363.**

———**S. 47 and O. 21, R. 66**—*Appeal—Sale proclamation—Order settling terms.*

An order settling the terms of a sale proclamation and directing its issue is not appealable. 16 C. W. N 124: 16 C.W. N. 970 Ref. (*Sanderson, C. J. and Chotzner, J.*) JOGESH CHANDRA CHOUDHRY *v.* HEMENDRA KUMAR ROY. **64 I. C. 547 : 35 C. L. J. 170.**

———**S. 47 and O 21, R. 66**—*Appeal—Sale proclamation—Order rejecting judgment-debtor's valuation.*

An order of the executing Court overruling the judgment debtor's objection to the valuation put on by decree-holder in the sale proclamation and refusing the judgment debtor's prayer for adjournment of the sale and issue of the fresh proclamation is not appealable. 14 C. L. J. 35 ; 16 C. W. N. 970, Rel. (*Fletcher and Huda, JJ.*) BEJOY KRISHNA NANDY *v.* DARENDRA KRISHNA DEB BAHADUR. **47 I. C. 512.**

———**S. 47 and O. 21, Rr. 66 and 90**—*Appeal—Sale proclamation—Settlement without notice—Appealability.*

A complaint on the ground that notice was not given to all the parties concerned before the proclamation was settled is not covered by O. 21, R. 90 and can only be considered under S. 47 and there is an appeal as well as a second appeal against a decision relating there o. (*Oldfield and Seshagiri Aiyar, JJ.*) THEKKEDATH NEELU NEITHIAR *v.* SUBRAMANIA MOOTHAN. **(1919) M. W. N. 897 : 53 I. C. 809 : 11 L. W. 59.**

C. P. CODE (V OF 1908), S. 47—Appeal—Sale proclamation.

——S. 47, and O. 21, R. 66—*Appeal—Sale proclamation—Notification of encumbrances—Objection by judgment-debtor*

On the application of the decree holder encumbrances existing on the property attached were notified in the sale proclamation. The judgment debtor applied under S. 47 for an order that the properties could not be sold subject to encumbrances. The objection was allowed and the decree holders appealed. On a question arising as to whether the order of the court was appealable *held* that the application of the judgment debtor did not raise any question as to the terms on which the sale proclamation should be settled but it raised the question whether the Court could sell the property subject to the encumbrances and that the question was one relating to the execution of the decree and that the order was therefore appealable. (*Das and Adami, JJ.*) WILLIAM MALING GRANT *v.* SURAJ MAL MARWARI.
1 Pat. L. R 53 : 72 I C. 860 : 1923 Pat. 76 : 1923 P. 134

Appeal—Scheme.

——Ss. 47 and 92—*Appeal—Scheme framed by Court—Order as to election of trustees—Appeal.*

An order deciding the question of election of a trustee of a mosque under a scheme framed by the Court is a proceeding in execution of the decree sanctioning the scheme and hence appealable. 24 Bom. 45; 28 Mad. 319. *Foll.* (*Horinoll and Twomey, JJ.*) MAHOMED ESOOF *v.* MAHOMED ESOOF. 24 I. C. 915 : 7 Bur. L. T. 298.

Appeal—Stay of Execution.

——S. 47—*Appeal—Stay of Execution—Order granting.*

An order granting a stay of execution is not a decree and does not fall within S. 47 of the code and is not appealable. (*Macleod, C. J. and Fawcett, J.*) JENARDAN TRIMBAK GODRE *v.* MARTAND TRIMBAK GODRE. 45 Bom. 241 : 59 I. C. 523. 22 Bom. L. R. 1212.

——S. 47—*Appeal—Stay of execution.*

Order staiyng or refusing to stay execution of a decree are not orders determining questions relating to the execution of the decree within S. 47, C. P. C. and therefore no appeal lies. (*Teunon and Beachcroft, JJ.*) RAJENDRA KISHORE *v.* MATHURA MOHAN. 55 I. C. 228: 25 C. W. N. 555.

——S. 47—*Appeal—Stay of execution.*

An order in order that it should amount to a decree, must finally determine the rights between the parties and unless it is such there can be no appeal from such an order. Stay of execution on accepting security in obedience to an order of an Appellate Court is no decree (*Coxe and Ray, JJ.*) SARASVATHI BARMONYA *v.* MOTI BARMONYA.
41 Cal. 160: 20 I. C. 72: 17 C. W. N. 1240.

——S. 47—*Appeal—Stay of execution.*

All orders staying execution of decrees are questions arising between the parties to the suit in which the decree was passed, and relating to the execution thereof, and, as such appealable. (*Scott Smith, J.*) FITZ HOLMES *v.* WARYAM SINGH.
75 I. C. 419 : 1923 Lah. 514.

C. P. CODE (V OF 1908), S. 47—Applicability.

——S. 47—*Appeal—Stay of execution.*

All questions which determine the rights and liabilities of the parties in the matter of the execution of the decree are appealable. A decision that execution shall or shall not take place for the time being is a question relating to execution and is appealable. (*Le Rossignol, J.*) SARDAR KHAN *v.* FATEH DIN. 68 I. C. 701 : 1922 L. 480.

——S. 47 and O. 41, R. 5—*Appeal—Stay of execution—Refusal to stay.*

No appeal lies from an order refusing to stay execution by an appellate court. (*Harrison, J.*) KANHAIYA LAL *v.* RAM GOPAL.
68 I C. 49 : 1922 L. 400.

——S. 47—*Appeal—"Stay of execution."*

The words "stay of execution" found in S 244 old Code are not found in S. 47 (New Code). But the omission does not mean that matters relating to stay of execution are not within S. 47. The words are omitted to avoid surplus matter. (*Seshagiri Aiyar, and Napier, JJ.*) SUBRAMANIA PILLAI *v.* KUMARAVELU AMBALAM.
33 I. C. 66 : 39 Mad. 541.

——S. 47 and O. 41, R. 5—*Appeal—Stay of execution—Refusal to—Appeal.*

An appellate Court is not "a court executing a decree" within S. 47, C. P. C. and no appeal lies from an order of the Lower Appellate Court refusing to stay the execution of a decree, 29 Bom. 71 foll. (*Sankaran Nair and Spencer, JJ.*) MALAMMAL VITTIL KRISHNA NAIR *v.* KAVALAPPARA MOOPPIL NAIR AVERGAL. 25 I. C. 47 : 27 M. L. J. 171.

——S. 47—*Appeal—Stay of execution—Order refusing.*

An order staying or refusing to stay execution of decrees are orders determining questions relating to execution and thus appealable. (*Maung Kin, J.*) KYANKSEMA *v.* APARNA CHARAN.
62 I. C. 342 : 10 L. B. R. 326.

Applicability.

——S. 47—*Applicability—Question relating to execution discharge or satisfaction of the decree—Decree for possession—Waste by judgment-debtor after decree.*

Plaintiff obtained a decree for possession of the property in dispute in the suit. An appeal was filed by the defendant who remained in possession. The appeal was eventually dismissed and the plaintiff thereafter discovered that the defendants while in possession of the property pending the appeal, committed waste by cutting trees. The plaintiff decree holder thereupon applied in execution for ascertaining the damages alleged to have been committed by the respondents. *Held* that the question raised was one relating to the execution, discharge or satisfaction of the decree and that it must be determined in execution and not by separate suit. (*Macleod, C. J. and Crump, J.*) HARI SHRIDHAR *v.* SAKHARAM.
25 Bom L. R. 449 : 73 I. C. 443 : 1923 Bom. 391.

—— S. 47—*Applicability—Question relating to execution—Scheme Suit—Direction in decree for filling up vacancies—Order, if appealable.*

C. P. CODE (V OF 1908), S. 47—Applicability.

On an appeal against an order passed by the Subordinate Judge's Court, Chingleput, on a petition presented to it under Cl. 10 of a scheme sanctioned by a decree for the management of a Hindu temple, it was found that the petition was presented on the assumption that, a vacancy had occurred among the trustees under the scheme and that, as it had not been filled by either of the two agencies primarily responsible for filling it the Lower Court must in accordance with the scheme do so. The lower court held after enquiry that, the point disputed before it, a vacancy had occurred and directed that it should be filled in the manner provided by the rules framed by the High Court. *Held*, that though the Court was in this matter acting judicially, it was still necessary to see whether its order was one, against which under the ordinary law an appeal will lie, and that depended on whether its order was a decree within the meaning of S. 2 (2) of the Code of Civil Procedure, or more particularly whether it was the determination under S. 47 of a question relating to the execution of a decree *Held* that it did not satisfy the above requirements and there was no appeal against the order. (*Oldfield and Venkatasubba Rao, JJ.*) RANGANADHA THATHACHARI *v.* KRISHNASWAMI THATHACHARI.
18 L. W. 237 : 75 I. C. 189 : (1923) M. W. N. 664.

———S. 47 and O. 21, R. 103—*Applicability.*

O. 21, R. 103 of the Code only applies to cases where strangers to the decree are involved; while S. 47 governs cases where the persons concerned are parties to the suit or their representatives. (*Sadasiva Aiyar and Coutts Trotter, JJ.*) RUKMANIAMMAL *v.* NARASIMHA IYER
41 M. L. J. 54 : 14 L. W 85 : 63 I. C. 730 : (1921) M. W. N 487.

———S. 47 *Applicability—Auction-purchaser and judgment debtor—Decision as between, is appealable.*

The questions determined under S. 47 of the Code are those arising between parties opposed in interest in the suit and not between a party and his representative as between a judgment-debtor and an auction purchaser. A decision as between the latter, is not appealable. (*Rahim and Odgers, JJ.*) YAGNASAMI AIYAR *v.* CHIDAMBARANATHA MUDALIAR.
61 I. C. 961 : 13 L. W. 15.

———S. 47 *Applicability of—Agency tracts.*

S. 244 of the C. P. C. (1882) has never been in force in the Ganjam and Vizagapatam Agency tracts. (*Abdur Rahim and Sundara Aiyar, JJ.*) VENKATARAM DEO *v.* RAGHUNATH PATRO.
36 Mad. 128 : 10 M. L. T. 261 : 21 M. L. J. 887 : 12 I. C. 73 : (1911) 2 M. W. N. 237.

———S. 47—*Applicability—Question between party and his own representative.*

A complaint by the judgment debtors that the auction purchaser had taken possession of certain property not covered by the sale, cannot be tried in execution but only in a separate suit. The auction-purchaser is not a party to the suit and even assuming he is the representative of the judgment debtor, S. 47 does not authorise the trial of questions arising between a party and his own representative. 25 B. 631 foll. (*Batten and Kotwal, A.J. C.*) PANDURANG *v.* GOPIKISAN,
64 I. C. 860.

———S. 47—*Applicability—Failure to issue notice under O. 21, R. 22—Execution sale sought to be set aside—Second appeal if lies.*

Where an execution sale is challenged on the ground that no notice was issued under O. 21, R 22 but the court finds that no such notice was necessary, the order is not one under S. 47. (*Mullick and Bucknill, JJ.*) MAHADEO SINGH *v.* DHOBI SINGH. **1923 Pat. 283 : 2 P. 916 : 74 I. C. 838 : 4 P. L. T. 721 : 1924 P. 11.**

Application.

———S. 47 (3)—*Application by assignee of decree—Company—Liquidation.*

Application by transferee of a decree, against a Company in liquidation for substitution of his name must be made to the executing Court and not to the winding up Court. (*Piggott and Walsh JJ.*) KASHI PRASAD *v.* UNION BANK OF INDIA LTD., DELHI. **41 All 432 : 50 I. C 115 : 17 A.L J. 464.**

———S. 47 (2)—*Application for execution converted into suit—Specific performance.*

Where the decree in a suit for specific performance of a contract of sale was satisfied by execution of a sale and the decree holder took out execution for possession. *Held* that under S. 47 (2) C. P. C. the applicant was entitled to sue for possession but not for execution of the same for possession. (*Robertson and Chevis, JJ.*) SHANKAR DAS *v.* DULO MAL. **22 P. W. R. 1913 : 18 I. C. 700 : 40 P. L. R. 1913.**

———S. 47 (3)—*Application to come on record as judgment debtor's representative—Executing Court.*

The proper Court for entertaining an application to bring the petitioner on record as the representative of the judgment-debtor in order that he may raise a question covered by S. 47, C. P. C, is the executing Court and not the Court which passed the decree. (*Abdur Rahim and Oldfield, JJ.*) RAGHAVACHARI *v.* PARAMASAMIPILLAI.
55 I. C. 812 : 11 L. W. 173.

Bar of suit.

———S. 47—*Bar of suit—Suit to set aside decree and sale as fraudulent—Maintainability.*

S. 244 of the C P, C. (1882) S. 47 of C. P. C does not bar a suit to set aside a decree and an execution sale thereunder as having been obtained by fraud. (*Sir John Edge*) BHALAJI THAKUR *v.* JHARULU DAS. **42 Cal 244 : 18 C. W N. 1029 : 27 M. L. J. 100 : 1 L. W. 549 : 16 M. L. T. 210 : (1914) M. W. N. 636 : 12 A. L. J. 1176 : 20 C. L. J. 360 : 24 I. C. 501 : 16 Bom. L. R. 845 (P.C.)**

———S. 47—*Bar of suit—Sale—Agreement by one decree holder to pay others—Failure to do so—Fraud—Suit to set aside sale.*

One of several decree holders agreed to pay the others as a consideration for a sale of land to

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him their share of the decree debt but failed The others executed the decree and sold the judgmen-debtor's property. *Held*, an application to set aside the sale will not lie under S. 47, but as a suit would be maintainable, (*Gokul Prasad. J.*) NARAIN SINGH *v.* ZALIM SINGH.
74 I C. 351 (2) : 1923 A. 573.

——S. 47—*Bar of suit—Claim suit.*
When objections are allowed under O. 21 R. 58 of C. P. C. the decree holder is entitled to bring a suit for declaration that the assets of the deceased debtor are liable to attachment and sale in the execution of the decree, and such a suit is not barred by Section 47 of the C. P. C. (*Banerjee, J.*) BANSIDHAR *v.* SHAMLAL.
71 I.C. 1012 : 1923 A. 292.

——S. 47—*Bar of suit— Plea of sale of property beyond decree.*
Where the purchaser of part of the mortgaged property was a party to the mortgage suit and could have pleaded in execution that the mortgagor had mortgaged property to which he had no title, a separate suit by him for a declaration, that the decree-holder auction purchaser is not entitled to that part does not lie (*Stuart, J.*) RAI BAHADUR PANDIT SADANAND PANDEY *v.* SHEIKH JUFAIL AHMAD, 1923 All. 115.

——S 47—*Bar of suit—Suit against auction purchaser for property sold—Judgment-debtor having no interest.*
Where property is sold in execution of a decree, but the judgment debtor has no interest in the property sold, a suit will lie against the auction purchaser for the recovery of the same. (*Kanhaiya Lal, J.*) BALMANT SINGH *v.* MT. LAIQA BEGAM. 75 I. C. 238 : L. R. 4 A. 526.

——S. 47—*Bar of Suit—Subsequent suit for ejectment on fresh cause of action.*
Plff.'s father obtained a decree for possession against the deft. who admitted his right after the passing of the decree and paid him all costs of the suit. Subsequently deft. set up adverse possession. *Held* that a fresh suit for possession was not barred. (*Gokul Prasad, and Stuart, JJ.*) JETHU MISIR *v.* GODAVARI DUTT.
L.R. 3 A. 404 : 20 A. L. J. 619 : 1922 All. 411.

——S. 47—*Bar of suit—Execution barred, whether fresh suit lies.*
Where plff. failed to recover possession either privately or by execution within time after pre-emption decree in his favour though he deposited the pre-emption money in time, he cannot file a fresh suit on the basis of the former decree. 14 A. L. J 102 overruled. (*Sulaiman and Gokul Prasad, JJ.*) RAMANAND *v.* JAIRAM.
2 U. P. L. R. (All) 379 : 18 A. L J. 1001 : 59 I. C. 632 : 43 All. 170.

——S. 47—*Bar of suit—Objection to sale—Adverse order—Appealability of.*
If an objection to a sale in execution of a decree is allowed, the decree holder if aggrieved thereby has his remedy by way of appeal. Otherwise the order of the executing Court is final and S. 47 of the C.P Code forbids the institution of a regular suit to avoid the consequence of such an order. (*Knox, A. C. J. and Banerji, J.*) PARBU DAYAL *v.* ANANDI DIN.
17 A.L J. 832 : 51 I.C 184 : 1 U.P.L R. (H.C.) 99.

——S. 47—*Bar of suit—Decree not binding—Lunatic—Absence of representation.*
S. 47, C. P. C. does not bar a suit by a person against whom a decree has been passed at a time when he was suffering from unsoundness of mind, to set aside the decree. (*Piggott, and Walsh, JJ.*) SUNDAR BAI *v.* DASA DEO SINGH,
50 I. C. 109 : 17 A. L. J 257.

——S. 47—*Bar of suit—Mortgage by father and son—Simple money decree against father—Execution against son disallowed—Suit to enforce liability.*
A suit was instituted against a Hindu father and his son on a mortgage. The son contended that there was no legal necessity. A simple money decree was granted against the father alone and in the decree it was stated that the son was "exempted" and costs were given to him. The sale of the father's share proved insufficient to pay off the decree and the decreeholder sought to attach and sell the son's share, but upon objection by the son a suit was brought against the son for a declaration that the son's share was liable to be sold in execution on the ground of his pious liability. *Held*, that the suit was barred by S 47 of the C. P. Code, The expression in the decree exempting a particular person was inaccurate and the operation of the decree was to dismiss the suit against the particular deft. (*Richards, C. J. and Tudball, J.*) DATA DIN *v.* NANKU. 47 I. C. 864 : 16 A. D J. 752.

——S. 47—*Bar of suit—Execution time-barred.*
It is doubtful whether a suit on foot of a decree can be maintained when the execution of it has become time barred. (*Richards, C. J. and Rafique, J.*) DHARANJ SINGH *v.* LAKHRANI KUAR.
38 All. 509 : 35 I.C 601 : 14 A.L.J. 709.

——S 47—*Bar of suit—Unexecutable decree—Attachment and sale of profits due to deft.*
If the profits are not ascertained, a fresh suit to ascertain their amount is maintainable. (*Richard, C. J. and Rafique, J.*) MAHMUD HUSSIAN *v.* ENAYAT HUSAIN. 33 I. C. 83

——S. 47—*Bar of suit—Execution proceeding tainted with fraud—Suit to set aside sale—Declaration—Limitation.*
A suit to annul a sale held in execution porceedings tainted with fraud is not barred by S. 47 : such a suit is not to set aside an auction sale but only for a declaration that the rights of the plff. are not affected and therefore not barred, even though brought after the period prescribed by the Limitation Act for the setting aside of auction sales. (*Banerji, J.*) SITA RAM *v* SUBHEDA KUAR. 24 I. C. 695.

——S 47—*Bar of suit—Decree on compromise—Deft. admitting plff.'s title on condition of his being allowed to remain as tenant—Ejectment of such tenant whether by suit or execution of decree.*
Where in an ejectment suit a decree on compromise was passed whereby the plff.'s title as landlord was recognised by the deft. on condition

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of the latter being allowed to be in possession as tenant, an ejectment of such a tenant can be effected only by a separate suit and not by execution of the decree (*Tudball, J.*) MOHUMED NASIRUADIN *v.* BHAGWAN. **22 I. C. 663 : 12 A. L. J. 31.**

——S. 47—*Bar of suit—Objection that decree holder realized certain debts belonging to judgment-debtor—Separate suit.*

A compromise decree was passed in a partition suit by which certain debts were allotted to both parties and a certain sum of money was to be paid by the judgment-debtor. The decree-holder took out execution for this amount to which the judgment-debtor objected stating that the decree holder had realised certain debts which had been allotted to him. The plea could not be raised and the judgment-debtor could sue to recover the money so wrongfully realised but the objection could not be treated as a plaint as objectors have not stated amount collected and had prayed only for dismissal of deft.'s application. (*Tudball and Rafiique, JJ.*) MOHANLAL *v.* JAGANNATH.
35 All. 243 : 19 I. C. 622 : 11 A. L. J. 282 :

——S 47 and O. 21, R. 63—*Bar of suit—Claim proceedings — Objection to execution—Separate suit.*

O. 21, R. 63, C. P. Code refers only to cases in which the claimant or objector was not a party to the decree. If an objector to the execution of a decree was a party to the decree, the case is governed by S. 47 of the Code and no separate suit can be brought to set aside an order overruling the objection. (*Piggott, J.*) JIKARAN SINGH *v.* BUNDAO. **16 I. C. 255 (All.).**

——S. 47—*Bar of suit--Decree-holder auction purchaser :Obstruction to possession by judgment debtor as well as stranger—Remedy—Suit.*

The proper remedy of a decree-holder auction purchaser who is resisted in trying to get possession of the property purchased, by the judgment-debtor as well as a third person claiming to have an interest in the property, is to bring a separate suit for possession both against the judgment-debtor and the stranger. S. 47 of the Code is no bar to such a suit. (*Macleod, C. J and Heaton, J.*) GOBA NATH BAROLA *v.* SAKHARAM TEJU PATIL. **44 Bom 977 : 59 I. C. 366 (2). 22 Bom. L. R. 1101 :**

——S. 47 *and* O. 34, *Rr. 7 and 8—Bar of suit— Mortgage —Decree* nisi *for redemption—Decree barred subsequently—Second suit, if maintainable.*

Held, by the Full Bench, Scott, C. J. and Macleod, J. (*Shah, J. dissenting*). A mortgagor who has brought a suit for redemption and obtained a decree *nisi* which neither the mortgagor nor the mortgagee has applied to be made absolute, can, after the execution of that decree is time barred, bring a fresh suit for redemption. (*Scott, C. J., Macleod and Shah, JJ.*) RAMJI *v.* PANDHARINATH. **43 Bom. 334 ; 477 : 49 I. C. 894 : 21 Bom. L. R. 56.**

——S. 47 and O. 21, R. 96—*Bar of suit—Symbolical possession—Suit by purchaser for actual possession—Whether barred.*

C. P. CODE (V OF 1908) S. 47—Bar of suit.

Delivery of symbolical possession is operative against the judgment debtor who from that date becomes a trespasser and so S. 47 is no bar to a siut for actual possession by a purchaser who obtained only symbolical delivery after confirmation of the execution sale. 25 I. C. 267, Foll. 11 I.C. 987 and 26 Mad. 740. Dis (*Mookerjee and Roe, JJ.*) GIRIJA KANTA CHANDRA BUTY *v.* MOHAN CHANDRA ACHARIA. **20 C. W. N. 675 : 35 I. C. 294 : 23 C. L. J. 587 :**

——S. 47—*Bar of suit—Suit on judgment—Principle of.*

A suit on a judgment obtained against the ostensible representatives can be maintained against the real representatives. The principle on which an action is allowed to be maintained on a judgment is that where the Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained. This principle is subject to the qualification that an action is permissible only where the judgment cannot be enforced in some other way. There is divergence of judicial opinion on this matter. (*Mookerjee and Beachcroft, JJ.*) KALI CHARAN *v.* SUKHADA SUNDARI.
20 C. W. N. 58 : 30 I. C. 824 : 22 C. L. J. 272.

——S. 47—*Bar of suit—Mortgage decree.*

Suit by person not in existence at the date of mortgage decree, the property covered by it being not ancestral, is not maintainable nor can he come in execution proceedings. (*Holmwood and Walmsley, JJ.*) NAGESWAR PERSHAD SINGH *v.* BINDASHWARI PROSAD. **29 I. C. 402.**

——S. 47—*Bar of suit—Possession in execution proceedings—Subsequent dispossession—Remedy.*

Where in the course of execution proceedings the decree holder got possession of the properties though not through the Court officer, and was subsequently dispossessed by the judgment debtor, a suit to recover possession is maintainable. (*Chevis and Harrison, JJ.*) RUP CHAND *v.* ALLAH JAUNAYA. **68 I. C. 744 : 1922 L. 459.**

——S. 47—*Bar of suit.*

The plaintiff had deposited a sum to release from Court sale held under a previous mortgage. The application by the plaintiff to reserve his rights under the hypothecation bond was rejected. *Held* that there was no bar to the institution of the suit. (*Abdul Raoof and Abdul Qadir, JJ.*) RAHIM-UD-DIN *v.* SHAFQAT ULLAH.
1922 Lah. 358.

——S. 47—*Bar of suit—Suit for declaration—Satisfication of the decree.*

A suit for a declaration that a decree is satisfied and for an injunction restraining the decree-holder or his assignee, from executing the decree is barred by S. 47, C. P. C. (*Chevis, Raoof and Qadir JJ.*) RAMLABHAYA *v* FIRM MUKANDA MALKAPUR CHUND. **3 Lah. 319 : 67 I. C. 593: 1922 Lah. 428 (F.B.)**

——S. 47—*Bar of suit—Legal representatives brought on record in execution—Dispute as to property of judgment-debtor—Suit, if lies.*

C. P. CODE (V OF 1908) S. 47—Bar of suit.

Where legal representatives of a deceased judgment debtor are brought on record in execution, the questions which they might raise as to property in their hands not being the assets of the judgment-debtor in their hands, are governed by S. 47, and a separate suit by them to establish their title to the property is barred by the section. (*Abdul Raoof and Harrison, JJ.*) BHAGAT RAM *v.* NIZAM DIN. **63 I. C. 853 : 3 Lah. L. J. 406**

———**S. 47**—*Bar of suit—Execution sale, Validity of.*

The question of irregularity or illegality of notice issued under O. 21, R. 16 and its effect is one arising between the parties to the suit and could be properly determined under S. 47. No separate suit to declare that certain execution proceedings are void for non-compliance with this rule is maintainable. (*Wilberforce, J.*) GUL MUHAMMAD *v.* BANDU. **56 I. C. 461.**

———**S. 47**—*Bar of suit—Sale of share of a member of a joint Hindu family—Decree-holder purchaser—Suit for partition.*

Where a decree-holder purchased in execution sale the share of the judgment debtor who was a member of a joint Hindu family and subsequently brought a suit for partition, *held*, S. 244 C. P. C. did not give the executing Court power to effect a partition and the present suit was therefore necessary and competent. (29 Mad. 294 : 31 All. 82 (F.B.) foll.; 30 All. 72 not foll. (*Broadway and Abdul Raoof, JJ.*) BRIJ LAL *v.* DURGA.
1 Lah. 134 : 56 I. C. 254 : 1 Lah. L. J. 10

———**S. 47**—*Bar of suit—Suit for possession in presence of a decree already existing.*

A decree on a compromise in a declaratory suit for challenging an alienation by a widow to the effect that the plff. is to get immediately a certain portion of the property in dispute is a decree for possession although the word *dakhilyabi* does not occur therein. A second suit for possession of the same property is barred. The only remedy left to the plff, is to execute the first decree. (*Chevis, J.*) FAKIRA *v.* PIR BAKSH.
55 P. L. R. 1917 : 41 I. C 2 : 34 P. W. R. 1917.

———**S. 47**—*Bar of Suit—Mistakes in execution proceedings.*

Mistakes in execution proceedings should be rectified by the executing Court and no separate suit lies. (*Ayling and Krishnan, JJ.*) JAINULABDIN SAHIB *v.* KRISHNA CHETTIAR.
41 M. L. J. 120 : 63 I. C. 200 : (1921) M. W. N. 491 : 14 L. W. 92

———**S. 47 and O. 21, R. 103**—*Bar of suit—Right of suit under R. 103.*

O. 21, R. 103 of the C. P. Code which gives a right of suit to a party who is not a judgment-debtor, is not restricted by the general provisions by S. 47. 23 Mad. 361 Expl. (*Ayling and Krishnan, JJ.*) BADMI SESHIAH *v.* KATTI CHINNA MARIAPPA. **52 I. C. 928.**

———**S. 47**—*Bar of suit — Puisne mortgagee —Decree in prior mortgagee's suit—Effect of.*

Where in a suit by a prior mortgagee impleading the puisne mortgagee also as a deft, a decree is passed in form no. 7, Appendix D, C. P. C. the utmost that the puisne mortgagee can claim is that he can apply for sale, to work out his right to share in the surplus if any, if the prior mortgagee fails to apply for sale. The puisne mortgagee cannot, when the prior mortgagee is satisfied by sale of other properties, bring the mortgaged property to sale on default of payment of the sum declared due to him. He can bring a suit on his own mortgage as plff. (*Phillips and Kumaraswami Sastri, JJ.*) VEDAVYASA AYYAR *v.* MADURA HINDU SABHA NIDHI CO., LTD.
42 Mad. 90 : 35 M. L. J. 639 : (1918) M. W. N. 898 : 24 M. L. T. 473 : 49 I. C. 36 : 9 L. W. 70.

———**S. 47**—*Bar of suit— Partition decree — Execution.*

In an agreement to reserve partition of properties of which partition has been decreed be not enforceable under O. 21, R. 2; or O. 32, R. 7 or S. 48, C P, C. the remedy is to proceed in execution of the same decree and not by a separate suit. 10 C W. N. 839; 37 All. 155; 35 Cal. 961, Diss. (*Sadasiva Iyer and Napier, JJ.*) SETHURAMA SAHIB *v.* CHOTTA RAJAH SAHIB.
40 I. C. 820 : (1917) M. W. N. 327.

———**S. 47**—*Bar of suit—Suit against assignee of decree-holder—Damages.*

Plff. arranged with his bank for the satisfaction of a decree. The bank, however, did not satisfy the decree but got an assignment of it to itself and recouped itself out of the monies paid by Plff. into the Bank. *Held*, that plff.'s suit is one for damages for breach of contract and not barred by S. 47, C. P. C. (*Oldfield and Barewell, JJ.*) CHALAPURAM BANK LTD. *v.* ZAMORIN RAJA AVERGAL.
40 I. C. 549 : (1917) M. W. N. 359.

———**S. 47**—*Bar of suit—Suit for declaration of satisfaction of a decree and for injunction restraining execution—Second appeal—Objection to maintainability of suit.*

A suit for a declaration of satisfaction of a decree obtained by the deft. against the plff. and for an injunction restraining the deft. from its execution is barred by S 47 (1). An objection to the maintainability of a suit may be raised for the first time in a second appeal, if it does not require fresh facts to be ascertained. (*Seshagiri Iyer and Backwell, JJ.*) MANJUNATHA CHETTY *v.* APPAYA. **36 I. C. 988 : 31 M. L. J. 429.**

———**S. 47 (3) and O. 21, R. 16**—*Bar of suit—Transfer of decree—Right to execute.*

Whether a transferee of a decree is entitled to obtain execution of the decree should be determined under S. 47, C. P. C. and no separate suit will lie. (*Sankaran Nair and Spencer, JJ.*) ANNABATTULA VENKATARATNAM *v.* ANNABATTULA NAIDU. **28 I. C. 906.**

———**S. 47**—*Bar of suit—Question relating to execution—Fraudulent execution of decree—Suit for damages.*

A suit for damages for fraudulent execution is not excluded by S. 47 ; the measure of damages would be the amount actually recovered in such

C. P. CODE (V OF 1908) S. 47—Bar of suit.

execution. (*Seshagiri Aiyar, J.*) RAGHAVA AIYANGAR *v.* ATHANAMBALAM.
23 I C. 405 : (1914) M. W. N 174.

——S 47 — *Bar of suit— Representative character of parties.*

Where in a suit to set aside an execution sale, the plaintiffs were the representatives of judgment-debtor and the defendants were the decree-holders in the suit in which the decree was passed and the matter related to execution of a decree. *Held* Sec. 46 applied to the case. (*Kotwal, A J. C.*; BRIJMOHANSINGH *v.* KASTURACHAND **68 I. C. 693 : 1922 Nag. 189.**

——S. 47—*Bar of suit—Decree for possession —Obstruction—Subsequent suit for declaration of title - If maintainable—Remedy of party.*

Where a decree of court awards a person possession of properties, his duty is to proceed under the C. P. Code and if obstructed to proceed under the provisions of O. 21, Rr. 97, 100 ; a subsequent suit for declaration of title is barred by S. 47. (*Das and Adami, JJ.*) SOVANJI JENA *v.* BHIMA RAY. **1 P. 157 : 1922 P. 407.**

——S. 47—*Bar of suit—Suit by stranger to decree—Person not claiming as representative.*

Where a suit in respect of property for which a decree has been obtained is brought by a person, who is not a representative of a judgment-debtor affected by the decree, before the decree is put in execution and there are no proceedings pending in which an application under S. 47, C. P.C. could be made, S. 47 is no bar to the suit. (*Miller, C. J. and Jwala Prasad, J.*) HERAMBA NATH BANDOPADHYA *v.* SURENDRA NATH MITTRA.
53 I C 20 : 1919 Pat. 465.

——S. 47—*Bar of suit—Execution barred by time,*

Where the execution of a decree for possession of a piece of land is time-barred the appellant is entitled to eject the judgment-debtor on the basis of the decree. 11 Cal. 93, Ref. (*Parlet, J.*) ABDUL SHAKAR *v* SHWE YANK KE.
28 I. C. 851.

——S. 47 and O. 21, R, 2—*Bar of suit—Satisfaction of decree —Suit for declaration*

A suit for a declaration that a particular decree has been satisfied by payment out of Court and cannot be executed is not maintainable. the proper remedy in such a case is a suit for damages (*Hortnoll, O. C. J. and Twomey, J.*) PALANIAPPA CHETTY *v.* SOMASUNDARAM.
28 I. C. 468 : 7 L. B. R 367.

——S. 47 and O. 21, R. 2—*Bar of suit—Adjustment out of court certified—Default of decree holder—Separate suit while execution pending, if maintainable.*

No separate suit lies at the instance of a judgment-debtor to stay execution on the ground of fraud or negligence of the decreeholder where the execution proceedings are still pending. But where a decree has been fully executed, S 47, has no application and a separate suit would lie. (*Shah, J. C.*) SAYYID MUHAMMAD NUR *v.* KO LAW PAN. **22 I. C. 963 : (1913) I U. B. R. 191.**

C. P. CODE (V OF 1908) S. 47 Conversion.

——S. 47—*Bar of suit—Execution proceedings.*

If execution proceedings are going on, the party dissatisfied by an order in execution may expressly apply under S 47. C P. C, or bring a regular suit, provided the Court is the same. To admit an application under S. 47. the decree must be capable of execution and must be still in the course of execution. (*Shaw, J. C.*) NGA PO TUN *v.* MI THET PON.
10 I C. 991 : (1910) 1 U. B. R 66.

Compromise Decree.

——S.47—*Compromise decree—Enforcement of—Suit or execution*

Where a compromise decree cannot be executed on account of lapse of time, it is not open to the parties to bring a fresh suit on the same subjectmatter (*Broadway, J.*) BASANT RAM *v.* MAHOMED ALI **2 Lah. L. J. 724.**

Conversion.

——Ss. 47, cl. 2) and 144 —*Conversion--Power of Court.*

Where a suit is brought for restitution in spite of the provision in S. 144 of the C. P Code it is open to the Court to treat the suits as a proceeding in execution in the exercise of its powers under S. 47 cl (2) of the C P. Code, 13 Bom. 485 28 Mad. 355: 45 Bom. 1137, 25 All. 441 foll. (*Prideaux, A. J. C.*) JAMANLAL *v.* RAGHO.
67 I. C. 319 : 1922 Nag. 198.

——S 47 (2 and O. 21, R. 92. Cl 3—*Conversion into application—Different Forum.*

A decree-holder purchased properties attached and sold at auction in execution proceedings transferred to a Collector under S. 68, C. P. C. After confirmation of sale the judgment debtor applied to the Collector to set aside sale for various grounds, one of them being the fraud of the creditor in keeping the judgment debtor in ignorance of execution proceedings. When it was dismissed, instead of filing an appeal to the Commissioner under rule 45 of the Rules of the Local Government, he filed a civil suit to recover the property. *Held*, (a) the suit was barred by O. 21, R. 92 (3) or under the corresponding rule 32 (3) of the Local Governnmet rules. The suit could not be treated as an application under S. 47, C. P. C. as the Court executing the decree was not the same as that in which the suit was instituted at the time of transfer of decree to the Collector. (*Piggott and Lindsay, JJ.*) NAZIR HUSAIN *v.* KANHAIYA. **35 I. C. 473.**

——S. 47 (2) —*Conversion of suit into application.*

A suit can be converted into an application only if the application under S. 47 would not, at the date of suit, be time-barred. (*Sadasiva Aiyar and Moore, JJ.*) GOPISETI NARAYANASWAMI *v.* KUNAPARAJU CHINA VENKATARAJU.
34 I. C. 774 : 4 L. W. 400.

——S. 47 (2) —*Conversion suit—Application —Convertibility.*

The Court can treat an application as a suit or a suit as an application, but cannot treat one

C. P. CODE (V OF 1908), S. 47—Defence to suit.

proceeding as both suit and proceeding. (*Bakewel and Spencer, JJ.*) VENKATA KUMARA MAHIPATI SURYA RAO *v.* SUBHAYAMMA RAO.

24 I. C. 484 : 1 L. W. 443.

Defence to a suit.

——S. 47—*Defence to a suit.*

An objection, which could not have been raised by plaintiff in a suit by him under S. 47, C. P. C., can be made the ground of defence in a suit by another. 26 Cal. 946 followed. (*Walmsley and Suhrawardy, JJ.*) SURADHANI DUTTA *v.* SITTOO SHEIK. **27 C. W. N. 280 : 71 I. C. 378 : 38 C. L. J. 17 : 1922 Cal. 311.**

——S. 47—*Defence to a suit.*

S. 47 is no bar to a defendant setting up by way of defence a matter relating to the execution of a decree though, if he were the plff. he would be debarred from suing on the ground that the plea could only be gone into in execution. (*Ayling and Spencer, JJ.*) CHINA DANDUSI *v.* PEDDA TATIAH. **14 L. W. 424 : 41 M. L. J. 261 : 70 I. C. 303 : (1921) M. W. N. 536.**

Discretion of Court.

——S. 47 (2)—*Discretion of Court.*

It is discretionary with the Court to treat an application under S. 47 as a suit. The applicant is not entitled as of right. (*Stuart, J. C.*) ITRAJ KUAR *v.* RAJARAM. **27 I. C. 570 : 2 O. L. J. 57.**

Execution Sale.

——S. 47—*Execution sale.*

A purchase by decree-holder without obtaining leave to bid or in spite of refusal of leave is not void but voidable. (*Lord Phillimore.*) RADHA-KRISHNA *v.* BISHWESWAR SAHAY. **3 Pat. L. T. 529 : 44 M. L. J. 718 : 37 C. L. J. 430 : 31 M. L. T. 209 : 16 L. W. 190 : 25 Bom. L. R. 680 : 49 I. A. 312 : 1. P. 733 : 21 A. L J. 23 : 27 C. W. N. 294 : 9 O. & A.L.R. 450: 67 I.C. 914: 1922 P.C. 336 (P.C.)**

——S. 47 and O. 21, R. 90—*Execution sale—Setting aside—Property included in decree by mistake and sold in execution—Suit for recovery of—Maintainability.*

Where property outside the suit had been included by a mistake in the decree and was sold in execution and 2 years after the sale and its confirmation the plff. sued for the recovery of the property or its value, *held*, that the suit could not lie until the court sale was set aside, it not being a nullity and that the plff. not having set aside the sale within the period prescribed by Art. 166 of the Limitation Act the suit was barred. (*Macleod, C. J. and Coyajee, J.*) NAGABHATTA *v.* NAGAPPA. **24 Bom. L. R. 423 : 46 B. 914 : 67 I. C. 857 : 1923 Bom. 62.**

——S. 47 and O. 34, R. 14—*Execution sale—Setting aside—Mortgagor in possession under rent note—Decree for arrears of rent—Sale of equity of redemption.*

C. P. CODE (V OF 1908), S. 47—Execution sale.

The plff. mortgaged his house with possession but continued in possession under a rent note passed at the same time. The rent having fallen into arrears, deft. obtained a decree against the plff. for possession of the house and arrears of rent. In execution, the plaintiffs' equity of redemption was sold, the sale was confirmed and plff. brought a suit after one year to set aside the decree and the sale held in execution of it. *Held.* (1) that the sale of the house was in contravention of O. 34, R 14, C.P C., (2) that the sale held in contravention of provisions of rule 14 was not void but voidable at the instance of the mortgagor (plff.), (3) that the proper remedy of the plff. to set aside the sale was an application under S. 47, C. P. C.and not a separate suit. (*Shah and Hayward, JJ.*) BHAICHAND KIRPARAM *v.* RANCHHODDAS MANCHHARAM. **22 Bom. L. R. 670 : 58 I. C. 231 : 45 Bom. 174.**

——S. 47 and O. 21, R 90—*Execution sale—Setting aside—Fraud—Plea of purchaser without notice.*

Judicial sales fraudulently procured will not give a good title to a purchaser who does not take in good faith and without notice. The fact that the Court has been successfully deceived is one which upon the issue as to the purchaser's good faith, must be of a very different value in different circumstances. In all cases the burden of proving that he acted in good faith and without notice of the fraud is in the first instance upon the purchaser. This is an essential feature of the equitable rule. The rule is not that there is a special favour for every one until he is shown to have been dishonest or a volunteer, but that equity where it can will favour those who show that in innocence they have given value. *Per Mookerjee, J.*--The protection given to the *bona fide* purchser had its origin exclusively in equity and is based entirely upon the conception that a Court of equity acts solely upon the conscience of litigant parties by compelling the defendant to do what, and only what, *in foro conscientiæ* he is bound to do. If the relation between the two contestants standing before the Court are such that, in equity and good conscience, the plaintiff ought to obtain the aid which he asks, and the defendant ought to do or suffer what is demanded of him, then the Court will interfere and grant the relief ; if the relations are not of this character then the Court will withhold its hand and will leave the parties where they stand. The protection given to the *bona fide* purchaser, therefore, simply means that from the relations subsisting between the two parties specially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain, because it would be unconscientious and inequitable to do so: the Court will not, in such an event, aid either party against the other. The doctrine of *bona fide* purchase is thus not a rule of property. It does not determine the question of title between parties. It is in most cases available only by way of defence. It is a shield in the hands of a defendant to protect him against the claim of his adversary. It means that equity will refuse to interfere to aid the plaintiff in his suit, because under the circumstances of the case,

it would be unconscionable that the plaintiff should have what he seeks to obtain. It enforces no right, but simply refuses to interfere in the plaintiff's behalf.

An execution sale which has been brought about by the fraud of the decree holder is liable to be set aside on that ground by application to the executing Court even though it is not proved that the auction purchaser, a stranger, has participated in or been cognisant of the fraud Subject to the conditions prescribed by O.21, R. 90, C P. Code an execution sale may be set aside on the ground of fraud precisely in the same manner as on the ground of irregularity and exercise of this power by the Court is not excluded in cases where the purchaser falls within the category of *bona fide* purchaser for value without notice. 6 C. W. N. 383: 4 C W. N. 538: 26 C 539 referred to. (*Mookerjee and Rankin, JJ.*) BIRESWAR GHOSE *v* PANCH' COURI GHOSE. **37 C. L. J. 145: 27 C. W. N. 587: 74 I. C. 975: 1923 Cal. 538.**

———**S. 47**—*Execution Sale—Auction purchaser surrendering land to decree-holder—Suit for possession, if barred.*

Where a Court auction purchaser, surrenders the land to the decree-holder, and the latter brings a suit for possession. *held*, S. 47 of the Code is no bar to the suit as it was not in his capacity as decree-holder but by virtue of the surrender. (*Chatterjea and Panton, JJ.*) DURGAPADA *v.* MANINDRA. **63 I. C. 762.**

——— **S. 47 and O. 21, Rr. 89 and 90**—*Execution sale— Application to set aside—Dismissal for default—Restoration.*

No appeal lies from an order rejecting an application to set aside an order dismissing for default an application to set aside an auction sale. 19 C. W. N. 25 foll. (*Newbould, J.*) AMBICA CHARAN KHESKEL *v.* ESMAIL. **56 I. C. 981.**

———**S. 47, O. 21, Rr. 89—92**—*Execution sale—*

The order of the Courts below dated 31st July 1913, setting aside the sales was set aside by the High Court on 3rd April 1917. The decree-holder on 29th September 1917 applied for confirmation of the sales. The judgment-debtor thereon put in an application to have the sales set aside under section 47 & O 21, R. 90 C. P. Code and also objected to the confirmation of the sale applied for by the decree holder on the ground of limitation.

Held, limitation remained in suspense between 31st July 1913 and 3rd April 1917 and therefore the application is not barred by limitation. (*Woodroffe and Chatterjea, JJ.*) ARIATULLAH *v.* SASHI BHUSAN HAZRAH. **55 I. C. 547: 24 C. W. N. 73.**

——— **S. 47 and O. 21, R. 90**—*Execution sale setting aside—Minor.*

In a case where the ward's right to set aside an execution sale was not allowed to be exercised, because he was unrepresented by a next friend, the Appellate Court will not allow the original application to be continued on account of the mere fact that the ward became a major pending appeal. (*Chatterjee and Beachcroft, JJ.*) UMAKANTA SEN *v.* HIRA LAL ROY. **34 I C. 86: 20 C. W. N. 852.**

——— **S. 47**—*Execution sale—Setting aside—Fraud—Objection by persons having no interest at the date of decree.*

Persons who had no interest in the mortgaged property at the time the decree was passed, the property not being ancestral, could not come in execution to set aside that decree. (5 C. L J. 328 F.) (*Holmwood and Walmsley, JJ.*) NAGESUR PERSHAD *v.* BINDESHWARI PROSAD. **29 I. C. 402.**

——— **S. 47**—*Execution sale—Setting aside—Proceedings against dead man—Purchaser of non-transferable holding—Right to appeal.*

A purchaser of a non-transferable occupancy holding from whom rent was received after his purchase but whose name was not formally entered as tenant is competent under S. 47, C. P. C. to make an application to set aside the sale held in execution proceedings against dead judgment-debtor. In such a case the burden is on the decree-holder to show that the person applying to have the sale set aside had knowledge of the sale before delivery of possession to a decree holder purchaser. (*Mukerjee and Beachcroft, JJ.*) ARJUN DAS *v.* GUNENDRA NATH BASU MALLIK. **18 C. W. N. 1266: 27 I. C. 294: 20 C. L. J. 341.**

———**S. 47**—*Execution sale—Setting aside—Minor—Negligence of guardian.*

An application for reversal of an execution sale was made on behalf of an infant, represented by his mother as his *guardian ad litem*. The petitioner, after attaining majority made the present application on the allegation that the proceedings for reversal of the sale were not properly conducted. *Held*, that as the petitioner sought relief on the ground of gross negligence of his guardian there was a fraud independent of and distinct from the fraud which was stated to vitiate the execution sale. An application for review was not the proper remedy but the proper remedy was a regular suit. This application must be treated as a plaint on terms under S. 47 Sub sec (2) C.P.C. (*Mookerjee and Beachcroft, JJ.*) JOGESHWAR NARAIN SINGH *v.* ROY RADHA RAMAN. **16 I. C. 543.**

———**S. 47 and O. 21, R. 90**—*Execution sale—Fraud.*

The question of decree holder's fraud in not certifying the payment and holding a sale after satisfaction did not fall under R. 90, O. 21 but fell under S. 47. (*Coxe and Teunon, JJ.*) ALKESHI DASI *v.* BIRAJMOHINI DASI. **10 I. C 625.**

——— **S. 47 and O. 21, R. 90**—*Execution sale—Application to set aside—Limitation.*

Under Sec. 47 to an application to set aside an execution sale is applicable under Art. 166, Lim. Act. (*Oldfield and Venkatsubbarao, JJ.*) GANAPATHI MUDALIAR *v.* N. KRISHNAMACHARI. **43 M. L J. 184: 16 L. W. 178: (1922) M. W. N. 514: 70 I. C 743: 31 M. L. T. 135: 1922 M. 417.**

C. P. CODE (V OF 1908), S. 47—Execution sale.

———S. 47—*Execution sale.*

To an application to set aside an execution sale on the ground of illegality or irregularity Art, 166 and not Art. 181 is applicable. (*Spencer and Krishnan, JJ.*) KONIDEVA KANNAYYA *v.* RAMAMMA. **(1922) M. W. N. 176: 74 I, C. 458: 16 L. W. 934: 1922 M. 95.**

———S. 47 and O. 21, Rr. 92 and 103—*Execution sale - Decree holder selling his own properties by mistake—Confirmation of sale—Remedy of decree-holder.*

Where a decree holder under a *bona fide* mistake brought to sale in execution some of his own properties and they were purchased by a stranger and the sale was confirmed, *Held* that, thereafter the decree-holder's only remedy was by a suit under O. 21, R. 103, C. P. C and that an application under S. 47, C. P. C. was incompetent. (*Ayling, O. C. J. and Odgers, J.*) RAMASWAMI KONAN *v* KOLANDAIVELU PILLAI. **15 L. W. 272: 70 I. C 569 : (1922) M. W. N. 121: 1922 Mad. 63**

———S. 47—*Execution sale—Setting aside.*

An executing Court can set aside a sale on an application under S. 47, C. P. C. and no separate suit will lie. (*Sadasiva Aiyar and Moore, JJ.*) ANANTHA RAMA AIYAR *v.* VETTATH KUTTIMALU KOVILAMMA. **19 M. L T. 357: 3 L. W. 504: 34 I. C. 829: 30 M. L. J. 611.**

———S. 47 and O 21, R. 90—*Execution sale—Setting aside.*

Proceedings to set aside Court sales on the ground of irregularity, fraud, in publishing, etc., whether under O. 21, R. 90 or otherwise involve questions relating to executive, etc., and, therefore, also fall under S. 47, C. P. C. (*Sadasiva Iyer and Moore, JJ.*) PALANIAPPA *v.* ARUMUGA. **33 I. C. 692: (1916) 1. M. W. N. 256**

———S. 47 and O. 21, R. 93—*Execution sale—Setting aside—Payment of purchase money to third party.*

An order under O. 21, R. 93 setting aside a Court sale and paying the purchase money to a third party is not a question arising between the parties relating to the execution, discharge or satisfaction of the decree. (*Sadasiva Aiyar and Moore, JJ.*) LINGAM KRISHNA BHUPATI DEVU GARU *v.* JOGANI VENKATASWAMY. **(1916) 1 M. W. N. 109: 33 I. C. 235: 3 L. W. 105.**

———S. 47—*Execution sale—Setting aside—Minor—Court kept in ignorance of minority—Judgment Debtor's legal representatives—Fraud—Cancellation of sale—Limitation.*

Where the plaintiff, a minor, was wrongly impleaded as a major in the execution proceedings and had no guardian *ad litem* for him and the Court auction-sale was brought about by fraud of the decree-holder and Court auction purchaser, *held*, that the plaintiff was entitled to bring a suit to declare that the decree is not binding on her without regard to the provision of S. 47, C P. C. and that the sale was not binding on the plaintiff and did not require to be set aside, since the sale was brought by fraud of the decree-holder and Court-auction-purchaser. Where in execution proceedings a minor was impleaded as a major without any guardian *ad litem* to represent him and the properties were sold for a low value owing to collusion between the decree-holder and the purchaser the minor can sue to declare the sale void within 3 years of majority. (*Wallis and Sadasiva Aiyar, JJ.*) PASUMATI PAYIDANNA *v.* GANTI LAKSHMINARASAMMA. **38 Mad. 1076: 29 I, C. 314: 28 M. L. J. 525.**

———S. 47—*Execution sale—Setting aside—Irregularity.*

Where a judgment debtor impeaches the validity of certain execution proceedings which preceded and led up to the sale of his property and thus seeks to have the sale set aside, his remedy is by application under S. 47 C. P. C. (*Kanhaiya Lal and Daniels, A. J. Cs.*) KANIZ MEHDI BEGUM *v.* RASUL BEG. **48 I. C. 39: 5 O. L J. 551.**

———S. 47 and O 21, R. 90—*Execution sale—Setting aside—Non-transferability of holding—Lim Act, Art.* 166.

O. 21, R. 90, C.P.C. deals only with irregularity and fraud in publishing and conducting a sale and a sale by the Court of a property which is in fact not saleable on the ground of nontransferability, is not a material irregularity in conducting the sale. It is doubtful if an application to set aside a sale on the ground of non-transferability can be made under S. 47, C.P.C. Even if such application comes within the scope of S. 47 it is an application to set aside a sale in execution of a decree and comes within Art. 166 of the Lim Act. (*Coutts and Adami, JJ.*) SAKHI RAI *v* RAMAUTAR RAI. **57 I. C. 261 : 2 U. P. L. R. (Pat)157 : 1 Pat. L. T. 742 : 1920 Pat. 221.**

———S. 47, O 21, R.90—*Execution Sale--Order setting aside—Fraud—Committed after publication of sale proclamation.*

It is not open to a party to impeach a sale under S. 47 of the C, P. Code on the ground of fraud in conducting the sale. If a Court professing to act under S. 47 sets aside a sale on the objection of the judgment debtor, the order setting aside the sale is not a decree O 43, R. 1 (j) provides for an appeal from an order setting aside a sale for irregularity or fraud in publishing or conducting a sale but no second appeal lies from such an order. (*Mullick and Thornhill, JJ.*) SHEIKH MAULA BUX *v.* RAGHUBAR GANJHU. **48 I. C. 560 : 3 Pat. L. J. 645.**

———S. 47 and O.21, Rr. 90 and 92—*Execution sale—Absence of attachment—Suit to set aside—Limitation.*

An objection as to the defect or absence of the necessary attachment before an execution sale involves a substantial question as to the absence of proper notice to the judgment-debtor as to the property attached which does not come within O. 21, R. 90, C. P. Code but comes within S. 47. Consequently where an application is made to set aside an execution sale on the ground of want of attachment, a second appeal lies. An application to set aside the execution sale on the ground of the absence of a proper attachment is governed by Art. 166 of the Limitation Act. The sale does

C. P. CODE (V OF 1908), S: 47—Execution sale.

not become a nullity in the absence of attachment though it may be an irregularity. (*Lentaigne J.*) MA PWA *v.* MAHOMED TAMBI. 1 Rang. 533 : 77 I. C. 368 : 1924 R. 124.

——S. 47, O. 21, R. 90—*Execution sale—Setting aside—Limitation Act, Art.* 166—*Petition objecting to the whole execution procedure may fall under* S. 47.

A petition objecting to the whole execution procedure in a case and not merely to the material irregularity in conducting or publishing the sale may be dealt with under S. 47 of the Code, and is not fettered by the 30 days rule for presentation under O. 21, R. 90 of the Code. (*Fox, C. J. and Ormond, J.*) RAMASWAMI CHETTY *v* MAUNG TAH. 37 I. C. 827 : 10 Bur. L. T. 249.

Exonerated Defendant.

——S. 47—*Exonerated defendant—Objection to attachment in execution—Appeal.*

The first defendant in a suit against whom no decree had been passed filed an application under S. 47, C. P. C. claiming that certain properties in his hands should not be attached in execution. There was no application by the decree-holder for attachhment of the property. *Held* that the application was premature. It was only when his property was actually attached that the first defendant could prefer a claim petition and in such a case S. 47 C. P. Code would be applicable to him. The enquiry should be full as in the trial of a suit and not confined to affidavits. (*Macleod C. J. and Crump, J.*) CHUNI LAL ASHARAM *v.* KASHIBAI. 25 Bom. L. R. 440 : 73 I. C. 419 : 1923 Bom. 381.

——S. 47—*Exonerated defendant.*

Exoneration from suit may be due to various causes and the question whether a party remains on record in spite of such exoneration will depend upon the nature and scope of the order and the reasons which led to exoneration. (*Ayling and Kumaraswami Sastri, JJ.*) KRISHNAPPA MUDALI *v.* PERIASWAMI MUDALI. 40 Mad. 964 : 32 M. L. J. 532 : 21 M. L. T. 121 : 38 I. C. 297 : 5 L. W. 369.

—— Ss. 47 (3), 102 and 115—*Exonerated defendant—Position of.*

A defendant though exonerated from liability to the plaintiff under a Small Cause decree, continues to be a party to the suit until the actual removal of his name and when such a defendant claims property attached in execution against a co-defendant the order passed in an inquiry into his claim is a proceeding under S. 47, C.P.C. and therefore appealable though there is no further right, of appeal to the High Court under S. 102, C. P. C. nor revision under S. 115, C. P. C. (*Oldfield and Krishnan, JJ.*) ABDUL KARIM *v.* THAMBUSAMI PILLAI. (1917) M. W. N. 93 : 37 I. C. 673 : 5 L. W. 701.

Foreign Decree.

——S. 47—*Foreign Decree.*

S. 47 does not apply to a decree of a foreign Court. (*Sundara Iyer and Sadasiva Iyer, JJ.*) VEERA RAGHAVA AIYAR *v.* MUGA SEIT. (1913) M. W. N. 605 : 20 I. C. 704 : 14 M. L. T. 96.

C. P. CODE (V OF 1908). S. 47—Parties and representatives—Attachment.

——S. 47

Parties and representative—

Attachment.
Auction purchaser.
Benamidar.
Bidder at execution sale.
Claim petition.
Collusive purchaser.
Custodian of property.
Decree-holder.
Defaulting purchaser.
Execution.
Exonerated Defendant.
Exparte defendants and decree.
Hindu widow.
Judgment debtors.
Legal Representatives.
Meaning of.
Mortgage suit.
Occupancy holding.
Parties unnecessarily impleaded.
Personal property.
Prior mortgage.
Purchaser.
Receiver in insolvency.
Right of person.
Scope of.
Shebait.
Subsequent mortgage.
Suit by heir.

Parties and Representatives—Attachment.

——S. 47 (3)—*Parties and representatives—Attachment—Objection by person whose name had been removed from the array of defendant—Suit for declaration by decree-holder—Maintainability of.*

A Hindu son was impleaded as one of the defendants in a suit for the recovery of a sum of money but his name was removed from the array of defendant and a decree passed against his father but the decree stated that the son was exempted and was to bear his own costs. In execution his objection that certain property belonged to him was allowed. The decree holder then brought a suit for a declaration that the property was in fact the property of the father. *Held*, that the son having been expressly excluded from the former suit was not a party to the suit, and, therefore not a party to the decree. The suit was therefore competent. (*Walsh and Ryves, JJ.*) JAMNA PERSHAD *v.* RAM DULARE LAL. 52 I. C. 187.

——S. 47 and O. 21, Rr. 2 and 53 (b)—*Parties and representatives—Attachment of decree—Adjustment—Notice to judgment debtor—Attaching creditor on record—Order—Applicability.*

It is not competent to the holder of a decree which has been attached to apply to enter up satisfaction of the decree even though notice of the attachment was not given to the judgment-debtor under sub-rule (6) of O. 21, R. 53. Where the

C. P. CODE (V OF 1908), S. 47—Parties and representatives—Attachment.

attaching creditors have been made parties to the decree holder's application for entering up satisfaction the question that arises between them is one falling under S. 47 of the C. P. Code and an appeal lies from an order thereon. *Quaere.*—Whether the Court of its own motion can make the attaching creditors parties to the decree holder's application. *Abdur Rahim, J.*—The words "either through the Court or otherwise" in O. 21, R. 53, Cl. (6) of C. P. Code refer to "payment or adjustment" and not to notice preceding it. (*Abdur Rahim and Oldfield JJ.*) KUPPUSAMI IYER *v.* KUPPUSAMI IYER. **24 M. L. T. 495 ; (1918) M.W.N. 874 : 48 I. C. 109 : 9 L. W. 32**

———S. 47—*Parties and Representatives—Attachment — Objection by Judgment debtor—Separate suit.*

When the objection of two Hindu widows to the sale of a certain house without reserving rooms for their residence was disallowed they instituted a suit for declaration to establish their right. One of the widows was a party to the decree. The plaintiff who was a party to the decree was not competent to file the suit under S. 47. (*Kensington and Beadon, JJ.*) MATHURA SINGH *v.* MUSSAMMAT KUSHAL DEVI. **19 I. C. 921 (2) : 134 P. L. R. 1913.**

Parties and representatives—Auction purchaser.

———S. 47—*Parties and representatives—Auction purchaser — Execution sale — Setting aside.*

S. 47, C.P.C., applies to a case where the question raised concerns the auction purchaser at an auction sale, as well as parties to the suit, *e.g.*, an application to set aside the sale for irregularity. (*Sir John Edge.*) GANAPATHI MUDALIAR *v.* KRISHNAMACHARIAR. **41 Mad. 403 : 23 M. L. T. 198 : 27 C. L. J. 367 : 34 M. L. J. 463 : 4 Pat. L.W. 310 : (1918) M. W. N. 310 : 22 C. W. N. 553 : 16 A. L. J. 353 : 44 I. C. 855 : 20 Bom. L. R. 580 : 8 L. W. 427 : (P. C.) [Affirming 24 I. C.187 : 27 M. L. J. 213 (P. C.)]**

———S. 47 and O. 21, R. 101—*Parties and Representatives—Auction-purchaser in execution sale—Stranger purchaser.*

An auction purchaser at a sale in court auction in execution of a decree is a stranger to the suit. He is not a representative of any of the parties to the suit. Any question arising between him and the parties to the suit or their representatives must be determined by a separate suit. The question as to the legality of the sale raised by the judgment debtor is one between the parties to the suit (*i.e.*) between the decree-holder and the judgment debtor. Even though the auction purchaser is interested in the result of the case, the judgment-debtor cannot bring a suit to set aside the sale. 34 B. 540, foll. (*Macleod, C. J. and Crump, J.*) BAIMANI *v.* RANCHODLAL. **25 Bom. L. R. 147 ; 72 I. C. 256 : 1923 Bom. 214.**

———S. 47—*Parties and representatives — Auction purchaser—If representative of judgment-debtor.*

An auction purchaser at a sale in execution of decree is not a representative of the judgment

C. P. CODE (V OF 1908), S. 47—Parties and representatives—Auction purchaser.

debtor within S. 47. (*Batchelor, C.J. and Kemp, J.*) NARSINGHBHAT CHINTAMAN BHAT *v.* BANDU KRISHNA. **42 Bom. 411 : 46 I. C. 113 : 20 Bom. L. R. 495.**

———S. 47—*Parties and representatives—Auction purchaser.*

Purchasers of mortgaged property under a Court sale are representatives of the judgment debtor and can execute the decrees for rent obtained by the judgment-debtor against tenants of that property. (*Chatterjee and Panton, JJ.*) ANANDA MOHAN ROY *v.* PROMOTHANATH GANGULI. **57. I. C. 874 : 25 C. W. N. 863.**

———S. 47—*Parties and representatives—Auction purchaser*

An auction purchaser not a party to the suit cannot appeal against an order setting aside the sale on the application of a judgment-debtor under S. 173 of the B. T. Act. 21 Cal. 825 : 3 C. W. N. 184 Rel. on 24 Cal. 707 not Foll. (*Coxe and Roy, JJ.*) JADAB CHANDRA *v.* JOYGOPAL. **19 C. L. J. 81 : 20. I. C. 191.**

———S. 47—*Parties and representatives — Auction purchaser.*

Auction purchasers in execution of a mortgage decree are not representatives within the meaning of S. 47, C. P. C. in subsequent proceedings in execution of other money decrees if antagonistic titles based on their purchase are set up by them. (*Brett and Chitty, JJ.*) MAHADEO LAL *v.* DINKAR PRASAD. **9 I. C. 194 : 15 C. W. N. 542.**

———S. 47—*Parties and representatives — Auction purchaser—Whether representative of the judgment-debtor.*

An auction purchaser who is not a party to the suit is not a representative of the judgment debtor within S. 47 of the C. P. Code. 19 Cal. 683. (*Shah Din, J.*) HUKAM CHAND *v.* GANGA RAM. **49 I. C. 140 : 12 P. R. 1919.**

———S. 47—*Parties and representatives — Auction-purchaser.*

An auction-purchaser is representative of the judgment-debtor and not of the decree-holder. (*Ayling and Krishnan, JJ.*) JAINULABDIN SAHIB *v.* KRISHNA CHETTIAR. **41 M.L. J. 120 : 14 L. W. 92 : 63 I. C. 200 : (1921) M. W. N. 491.**

———S. 47—*Parties and representatives — Auction-purchaser, obstructed—Order refusing to remove obstruction.*

Where the decree-holder auction-purchaser in execution of a decree is obstructed in obtaining possession and the Court refuses to remove the obstruction, *held*, that the order is one under S. 47 of the Code. (*Oldfield and Seshagiri Aiyar, JJ.*) MEYAPPA CHETTY *v.* CHIDAMBARAM CHETTY. **12 L. W. 273 . (1920) M. W. N. 562 61. I. C. 349 : 39 M. L. J. 603.**

———S. 47 and O. 21, Rr. 98 and 99—*Parties and representatives—Court auction purchaser in execution of money decree against mortgagor pending mortgage suit—Resistance to delivery of possession.*

C. P. CODE (V OF 1908), S. 47—Parties and representatives—Auction purchaser.

Pending a suit on a mortgage the mortgaged properties were brought to sale in execution of a money decree against the mortgagor and were purchased by the fourth respondent. The petitioner purchased the property in execution of the mortgage decree and applied for possession but was resisted by the 4th respondent. *Held*, that the 4th respondent was a person claiming under the mortgagor judgment-debtor and against whom proceedings can be taken under S. 146 of the C. P. Code and that the respondent was liable to be removed from possession under O. 21, R. 98 of the C. P. Code. 43 Mad. 107 Ref. (*Abdur Rahim and Napier, JJ.*) MANICKA GRAMANI *v.* PARASURAMA MUDALI.

(1920) M. W. N. 787 : 59 I. C. 894 : 12 L. W. 350.

———S. 47 — *Parties and representatives—Auction purchaser.*

The word 'representative' in S. 47 is not confined to 'legal representative' as defined in in S. 2 (u) of the C. P. Code. Ordinarily a purchaser at a sale held in execution of a money decree is such a representative of judgment debtor. (*Abdur Rahim, O. C. J. Oldfield and Seshagiri Aiyar, JJ.*) VEYINDRA MUTHU PILLAI *v.* MAYA NADAN. 43 Mad. 107 : 38 M. L. J. 32 : (1919) M. W. N. 881 : 26 M. L. T. 391 : 54. I. C. 209 (F. B.)

———S. 47—*Parties and representatives—Auction purchaser.*

An auction purchaser under a money decree is a representative of the judgment-debtor under S. 47, C. P. C. and he can apply under O. 21, R. 2 to record satisfaction of the decree. (1910) 1 M. W. N. 195 Diss. (*Seshagiri Aivar, J.*) MATHARASAPPA CHETTIAR *v.* MUTHU CHETTIAR. 50 I. C. 931 : 9 L. W. 596.

———S. 47—*Parties and representatives—Auction purchaser—Representative of the judgment debtor.*

An auction purchaser is the representative of the judgment debtor and an order passed against him is appealable under S. 47, C. P. C. (*Abdur Rahim and Bakewell, JJ.*) SHENBANGA MUTHU PILLAI *v.* VADUGANATHAM CHETTY. 42 I. C. 552 : (1917) M. W. N. 861.

———S. 47—*Parties and representatives—Auction purchaser does not represent decree-holder.*

It is only under S. 47 of C. P. C. that an auction purchaser is not considered as representing the decree holder, and not under S. 115 of the Evidence Act. (*Spencer and Phillips, JJ.*) SWAMINATHA VELLALA *v.* DARMALINGA CHETTIAR. 37 I. C. 825 : (1917) M. W. N. 88.

———S. 47—*Parties and representatives—Auction purchaser—Judgment debtor.*

A purchaser in Court auction of the property of the judgment-debtor is not a representative of that judgment-debtor, in another suit against the same judgment-debtor when the latter decree is sought to be executed by attachment and sale of the same property and the claim of the auction purchaser is dismissed. Therefore such a defeated claimant cannot come in appeal and second appeal under S. 47, C P. C. 8 I. C. 429. 34 Mad. 417, Ref. (*Sadasiva Aiyar and Moore, JJ.*) THANGAVELU *v.* MAHOMED IBRAHIM SAHIB. 34 I. C. 759 : 3 L. W 377.

C. P. CODE (V OF 1908), S. 47—Parties and representatives—Auction purchaser.

———S. 47—*Parties and representatives—Auction purchaser.*

Purchaser of property not mentioned in and not affected by the decree is not a legal representative of the judgment-debtor and his claim petition is not a petition under S. 47. (*Sadasiva Aiyar and Moore, JJ.*) ARASAYEE AMMAL *v.* SOKKALINGA MUDALI. 3 L. W. 289 : 33 I. C. 84 : (1916) 1 M. W. N. 287.

——— Ss. 47 and 144 (1)—*Parties and representatives—Auction purchaser—Restitution order for—Appeal.*

An auction purchaser is the representative of the decree holder. An appeal lies against an order for restitution passed under S. 583 (1), C. P. C. 8 M. L. J. 276 ; 10 All 166 ; 23 Mad. 306 Foll. (*White, C.J. and Sankaran Nair, J.*) ARTHANARI CHETTIAR *v.* NAGOJI RAO. 14 I. C. 836 : (1912) M. W. N. 513.

———S. 47—*Parties and representatives—Auction purchaser—Not a representative of judgment debtor.*

An auction purchaser is not a representative of the judgment-debtor and he cannot apply under S 47, C. P. Code to set aside an execution sale. 34 M. 417 : 42 B. 411 Ref. (*Prideaux, A. J. C.*) BALWANT *v.* RATAN LAL. 68 I.C. 429 : 1923 Nag. 161 (2).

———S. 47—*Parties and representatives—Suit against decree-holder as depository of attached property.*

Where attached property was placed in charge of the decree-holder as depository and he wrongfully detained the property. *Held*, that a suit against him for damages for wrongful detention is maintainable as no suit was brought against the decree holder as such or against a party to the suit. (*Mittra, Ag. J. C.*) SITARAM *v.* DONGER SINGH. 59 I. C 477.

———S. 47—*Parties and representatives—Auction purchaser— Property wrongly sold in execution- Restoration.*

An auction purchaser is a representative neither of the decree holder nor of the judgment-debtor. 19 Cal, 683. Expl. 28 Mad. 87: 30. Mad. 507, Dis- 30 All. 379 : 25 Bom. 631, Ref. S. 47, C.P.C. does not contemplate an application by a judgment debtor asking as against the auction purchaser possession of the property erroneously sold to him by the executing Court. (*Stuart, J. C.*) ITRAJ KUAR *v.* RAJA RAM. 27 I. C 570 : 2 O. L. J. 57.

———S. 47— *Parties and representatives—Auction purchaser -Representative of judgment debtor— Mortgage decree and money decree.*

Property S. was mortgaged by *A* to *B* in 1877. B obtained a decree absolute on 14th Nov. 1903. *P* obtained a money decree against *A* and purchased the property *S* in execution of his decree at the auction sale and obtained possession in 1905. *B* purchased the property at the execution sale of his mortgage decree and obtained

C. P. CODE (V OF 1908), S. 47—Parties and representatives—Auction purchaser.

symbolical possession in 1909. *B*, then brought a suit against *P* for possession. *Held*, that P represented although not within S. 47 and was bound by the mortgage-decree. (*Evans, A. J. C.*) CHANDI DAYAL *v.* RATAN LAL. **10 I. C. 722: 14 O. C. 89.**

———S. 47—*Parties and representatives—Auction purchaser.*

An application by a judgment debtor to set aside a sale on the ground that he had, previous to the sale, deposited the amount due does not fall under S. 47 as it does not relate to a question arising between the parties to the suit. The auction purchaser, if a stranger, is not a party or his representative. (*Parlett, J.*) MAUNG PO THET *v.* ANNAMALAY CHETTY.
9 I. C. 472: 4 Bur. L. T. 28.

Parties and representatives—Benamidar.

——— S. 47—*Parties and representatives—Benamidar—Purchaser.*

Benamidar purchasing property for mortgagee decree holder at a Court sale under the latter's decree is not the latter's representative. He can therefore, maintain a separate suit for recovery of property and need not apply under S. 47 C. P. C (*Shah and Hayward, JJ.*) RAMCHANDRA BHAT *v.* GAJANAN DESHMUKH. **44 Bom. 352. 56 I. C. 349: 22 Bom. L. R. 296.**

———S. 47—*Parties and representatives—Benamidar of judgment debtor.*

S. 47 of the Code does not apply to the case of a benamidar of the judgment debtor. 3 C. W. N. 184 Foll. (*Fletcher and Newbould, JJ.*) DHIROMOYI DASI *v.* ANANTARAMA CHAKRAVARTY.
46 I. C. 748.

Parties and representatives—Bidder at execution sale.

———Ss. 47 and 115—*Parties and representatives—Bidder at execution sale.*

A bidder at an execution sale who is affected by an illegal order is not a party to the suit or his representative within S. 47 of the C. P. Code and cannot appeal against the order. Such an order is illegal and amounts to a wrong exercise of such jurisdiction and is therefore open to interference by the High Court in revision under S. 115 of the C. P. Code. (*Oldfield and Seshagiri Iyer, JJ.*) RAJA OF BOBBILI *v.* AKKELA SURYANARAYANA RAO. **42 Mad. 776: 37 M. L. J. 274: 51 I. C. 805: (1919) M. W. N. 784.**

Parties and Representatives—Claim petition.

———S. 47 (3) and O. 21, Rr. 58 to 63—*Parties and representatives—Claim petition by an exonerated defendant—Dismissal—Remedies of claimant.*

One of the exonerated defendants in a suit applied under O. 21, R. 58 that the properties attached were his separate properties. The petition was dismissed as too late. *Held* that the defendant not having appealed against the order or filed a separate suit under O. 21, R. 63 C. P. Code, was precluded from claiming the properties, as his separate properties. S 47 of the Code does not prescribe the procedure to be followed in the case of a claim preferred by a party to suit

C. P. CODE (V OF 1908), S. 47—Parties and representatives—Decree holder.

and regard must be had to the provisions of O. 21 which deals with execution of decrees and orders." Rules 58 to 63 of that order which are grouped under the sub-heading, "investigation of claims and objections" regulate the applications made on the ground that any property attached in execution is not liable to attachment (*Bakwell and Odgers, JJ.*) VENKATACHALLA REDDI *v.* MUTHIALU REDDI. **54 I. C. 536: 37 M. L. J. 624.**

Parties and Representatives—Collusive purchaser.

———S. 47—*Parties and representatives—Collusive purchaser from judgment debtor.*

A collusive purchaser from the judgment debtor is not a representative of the judgment debtor and cannot object to the execution of a mortgage decree (*Woodroffe and Cuming, JJ.*) TARANGINI BAI *v.* BAIKUNTHA NATH MANDAL.
42 I C. 1.

Parties and Representatives—Custodian of property.

———S. 47—*Parties and representatives—Custodian of property attached.*

A judgment debtor in an execution proceedings must sue the person in charge of the attached property during the progress of the proceedings to recover the property or its price or damages, at the termination of the proceedings as the executing Court has no jurisdiction to initiate proceedings for his default to account for the property. (*Banerjee, J.*) KALOOKHAN *v.* ABDULLAH KHAN.
42 All. 394: 18 A. L. J. 357: 58 I. C. 448: 2 U. P. L. R. (All.) 145.

Parties and Representatives—Decree holder.

———S. 47—*Parties and representatives—Decree-holder purchaser—Proceedings for delivery of possession if within section.*

A decree holder does not cease to be a party to the suit within S. 47 by becoming a purchaser in a court auction sale in execution of his decree. 27 Cal. 34; 31 Cal. 737; 25 Mad. 429 Foll. 31 All 82, Diss. Proceedings for delivery of possession to auction purchaser fall within the scope of S. 47 of the Code. 27 Cal. 34; 31 Cal. 737 31 All. 82; 26 Mad. 740, 13 Mad 504 Rel. (*Scott, C.J. and Rao, J.*) SADASHIV MAHADU *v.* NARAIN VITHAL.
35 Bom. 452: 11 I. C. 987: 13 Bom. L. R. 661.

———S. 47—*Parties and representatives—Decree-holder purchaser.*

Though the decree holder is auction purchaser he is not bound to apply for recovery of possession but can maintain a separate suit. 1 Pat. L. J. 232 Rel. (*Fletcher and Walmsley, JJ.*) PENCHANAN PAL. *v.* SUKHAMOY SANTRA. **50 I. C. 299.**

———S. 47—*Parties or representatives—Decree-holder purchaser.*

If the auction purchaser is the decree holder himself, an order setting aside the sale under O. 21, Rr. 89, 92 is one within the scope of S. 47 and an appeal lies therefrom; and so no revision will be entertained from such order. (*Mookerjee and Teunon, JJ.*) MOHAMMED AKBAR JAMAN *v.* SUKDEO. **10 I.C. 51. 13 C. L. J. 467.**

———Ss. 47 and O. 21, R. 95—*Parties and Representatives—Decree-holder purchaser—Suit for possession.*

C. P. CODE (V OF 1908), S. 47—Parties and representatives—Decree-holder.

A decree holder purchaser is in the same position as an auction purchaser and can either apply under O. 21, R. 95 or bring a suit for possession. The remedy by suit and that by application under O. 21, R. 95 are concurrent and either the one or the other may be availed of by the aggrieved party. (*Shah Din, C.J. and Le Rossignol, J.*) CHOLHARAM *v.* KARMON BAI. **44 I. C. 169: 8 P. R. 1918.**

———**S. 47**—*Parties and representatives—Decree holder.*

An order in a question arising between the judgment-debtor and the representative of the decree-holder is a decree. (*Sadasiva Aiyar and Moore, JJ.*) SUBARAYADU *v.* SESHASANI.
30 M. L. J. 366 : 19 M. L. T. 235 : (1916) 1 M. W. N. 155 : 33 I. C. 739 : 3 L. W. 236.

———**S. 47 and O. 21, R. 95**—*Parties and representatives—Decree-holder auction purchaser—Suit for possession not maintainable—Remedy in execution.*

When a decree-holder by his own action combines the position of decree holder and auction purchaser by purchasing at the auction sale with the permission of the Court, he does not lose his character of a party to the suit. Proceedings in execution are not terminated until he obtains possession of the property inasmuch as O. 21, R. 95 provides for delivery of possession being enforced in execution of the decree. S. 47 is a bar to a suit for possession by decree holder auction purchaser. (*Batten A. J. C.*) LACHUSA MOTILAL *v.* MAHERIALAL RAHIMALI.
44 I. C. 563.

———**S. 47**—*Parties and representatives—Decree-holder purchaser and judgmeni-debtor.*

Where a decree-holder purchaser sues to recover possession on the basis of his purchase he does so, as the representative of the judgment debtors. Questions that arise in the suit and his own representatives are not covered by S. 47 of the C. P. Code. (*Kanhaiya Lal and Daniels, J. C.*) KANIZ MEHDI BEGAM *v.* RASUL BEG.
48 I. C. 39 : 5 O. L. J. 551.

———**S. 47**—*Parties and representatives—Decree-holder and his transferee—Questions between.*

There is no provision made in S. 47 for parties and that parties' representatives *e. g.*, a decree-holder and his transferee. In such cases the order passed, though made under S. 47, is only an interlocutory order and not a decree and is not appealable. The question of the representative character of a party can be determined only for a limited purpose under S. 47, (*Pratt J, C. and Couch, A. J. C.*) KHAN, MAHOMED *v.* CHELARAM. **43 I. C. 165 : 11 S. L. R. 74.**

Parties and Representatives—Defaulting Purchaser.

———**S. 47**—*Parties and representatives—Defaulting purchaser.*

A defaulting purchaser at an execution sale is not a party to the suit or representative under S. 47, C.P. C. (*Drake Brockman, J.C.*) PARBAT *v.* BINDRAJ. **12 I.C. 360 : 7 N. L. R. 134.**

C. P. CODE (V OF 1908), S. 47—Parties and representatives exparte defendants and decree.

Parties and Representatives—Execution.

———**S. 47 and O. 21, R. 90**—*Parties and representatives—Execution against one judgment debtor—Sale of holding—Application by other Judgment debtor—B. T. Act, S. 174.*

Where a landlord obtained a decree for rent against two tenants but executed against one of the tenants only and brought the entire holding to sale which was purchased by a stranger and the tenant who was not a party to the execution sale applied to set aside the sale. *Held*, as he was a party to the suit in which the decree is passed he was competent to make the application. S. 174 of the B. T. Act and O. 21 R. 90 of the C. P. Code are of limited scope and application which raises questions as to the execution of a decree, clearly beyond their scope ought to be dealt with under S.47 of the Code. (*Jwala Prasad and Adami, JJ.*) SHEIKH ABDUL RAHIM *v.* GUJESHAR MAHTO. **52 I. C. 514.**

Parties and Representatives—Exonerated defendant.

———**S. 47**—*Explanation—Parties and representatives—Exonerated defendant.*

A defendant whose name appears in the decree though he has been exonerated without a proper adjudication is a party with respect to whom a separate suit as contemplated in S. 47 does not lie. 40 Mad. 964, Not Foll. 23 Mad 361 (F.B.) Foll (*Sadasiva Aiyar and Phillips, JJ.*) MEDISETTI VENKATASWAMI *v.* KUNCHALA CHIDAMBARAM.
45 I. C. 671 : 23 M. L. T. 206.

———**S. 47**—*Parties and representatives—Exonerated deft—Procedure.*

Where a party has been properly impleaded as a defendant in a suit but the plaintiff electing to abandon his case against him, the suit is dismissed in consequence as against that defendant he is a party to the suit within the meaning of S.47 expl. C. P. Code. The proper course in such a case is for the Court to exercise its discretion under O. 1, R. 10, Cl (2) of the C. P. Code and to order the name of the defendant to be struck out instead of dismissing the suit as against him. (*Wallis, C. J. Sadasiva Aiyar and Kumaraswami Sastri, JJ.*) *v.* VADDADI SANNAMMA KODUGANTI RADHABHYI.
41 Mad. 418 : 22 M. L. T. 532 : 34 M. L. J. 17 : (1918) M. W. N. 23 : 43 I. C. 935 : 7 L. W. 234. (F.B.).

———**S. 47**—*Parties and representatives—Exonerated deft.*

A party to a suit exonerated on the ground of misjoinder ceases to be a party after such exoneration for the purpose of S. 47 though the name has not been removed from the record. (*Ayling and Kumaraswami Sastri, JJ.*) KRISHNAPPA MUDALY *v.* PERIASWAMI MUDALY.
40 Mad. 964 : 21 M. L. T. 121 : 5 L. W. 369 : 38 I. C. 297 : 32 M. L. J. 582.

See Contra (*Oldfield and Krishnan, JJ.*)
ADDUL KASIM *v.* THAMBUSWAMI PILLAI.
(1917) M. W. N. 93 : 37 I. C. 678 : 5 L. W. 701.

Parties and Representatives—Ex parte Defts. and Decree

———**S. 47**—*Parties and representatives—Ex-parte defts.—Recovery of possession of properties delivered in execution.*

C. P. CODE (V OF 1908), S. 47—Parties & Representatives—Exparte defendants and decree.

A person who is not a party to the decree may apply to the court executing the decree and may, if so advised institute a regular suit, and even if he applies and fails he can still bring a regular suit within one year to establish his right to the property. On the other hand a party to a decree is precluded from filing a separate suit and must apply to the Court of execution for redress. The application of the rule of thirty days may in such a case result in great hardship because the party concerned may not come to know of the delivery of possession to the decree holder until after the expiry of 30 days. Ths hardship should as far as possible be avoided. (*Shadi Lal and Dundas, JJ.*) SHARFU *v.* MIR KHAN. 1 Lah. L. J. 230.

——S. 47—*Parties and representatives*—Exparte *decree in suit by puisne morigagee—Right of prior mortgagee—Application by him to prevent execution.*

Where a prior mortgagee is made a party to a suit on a subsequent mortgage and allows an *exparte* decree to be passed against him, an application by such prior mortgagee to prevent execution being taken out against the mortgaged properties comes under S. 47, being a question between the parties. (*Stephen and Mullick, JJ.*) GADADHAR PROSAD *v.* AULADIN. 27 I.C. 164.

Parties and Representatives—Hindu widow.

——S. 47 *Parties and representatives—Hindu widow—Decree against widow—Reversioners contesting that decree was fraudulent.*

Where a decree was obtained against a widow, and on her re-marriage, the reversioner succeeded to her husband's estate and the decree was sought to be executed by attachment of property in their hands. *Held*, on objection taken by them that there was no necessity for the debt, that decree was obtained fraudulently and that they were not her "representatives" within S. 47, C. P.C. 3) Mad. 402 Ref. (*Shah Din and Scott Smith, JJ.*) ALA SINGH *v.* WAS WA. 14 P. R. 1913 : 175 P W R. 1912 : 15 I C 25 : 228 P. L. R. 1912.

Parties and Representatives—Judgment Debtors.

——S. 47—*Parties and representatives—Judgment dubtors' objection to attachment.*

An improper seizure of a judgment-debtor's property by the decree-holder in excess of his rights is a question arising between the parties and is within the meaning of S. 47. (*Piggott and Walsh, JJ.*) ABDUL KARIM *v.* ISTAMUNNISA BIBI. 38 All. 339 : 34 I. C. 231 : 14 A. L. J. 401.

——S. 47 and O. 21, R. 90—*Parties and representatives—Judgment debtor—No steps taken by him to set aside irregular sale—Transferee, if bound—Estoppel.*

If a judgment debtor does not take appropriate steps to have an irregular sale set aside his transferee also is bound by estoppel and cannot question the sale. (*Mookerjee and Carnduff, JJ.*) HEWAMAL *v.* KARUNAMOY GUPTA. 13 I.C. 542.

——S. 47—*Parties and representatives—Judgment-debtors—Questions between.*

C. P. CODE (V OF 1908), S. 47—Parties & Representatives—Legal representatives.

Questions or disputes between judgment-debtors *inter se* where the decree holder has no interest the decree being satisfied, are not questions between the parties to the suit. An order on such disputes is not, therefore, appealable. (*Sadasiva Iyer and Moore, JJ.*) ANAVARDA KHAN *v.* MISIRI KHAN. 31 M.L.J 44 : 35 I. C. 179 : (1916) 1 M. W. N. 468.

——S. 47—*Parties and representatives—Mortgagee of judgment debtor—Whether representative—Position of mortgagee.*

A mortgagee of judgment-debtor is his representative for the purposes of S. 47 and is bound by all the equities enforceable against judgment debtor so that he cannot take objections which the judgment debtor is incompetent to raise. (*Mullick and Thronhill, JJ.*) SRIKRISHNARAI *v.* RAMSARAN RAI. 56 I.C. 646 : 1 Pat. L. T. 267.

——S. 47—*Parties and representatives—Judgment-debtor—Objection by puisne mortgagee to execution sale—If appeal lies.*

Where an objection of a puisne mortgagee, (a party to the mortgage suit,) to the sale of the mortgaged property in execution is dismissed disallowing his contention that his purchase of one of the mortgaged properties at a revenue sale had annulled the mortgage, there is no appeal open to him against this order in as much as he was not a judgment-debtor so far as the particular property, which he desired should be exempted from sale, was concerned. S. 47 did not apply to this case. (*Chapman and Roe, JJ.*) SHAM LAL SAHU *v.* AMAR PRASAD. 2 Pat. L. J. 219 : 39 I C. 656 : 3 Pat. L. W. 422.

——S. 47—*Parties and representatives—Partner of judgment-debtor—No party to the suit.*

S. 47 does not apply where a question arises between the judgment-debtor and his partner in the subject matter of the suit who was not a party to the suit. (*Roe and Jwala Prasad, JJ.*) RAM KHELAWAN PANDE *v.* ASGAR ALI. 36 I. C 681.

Parties and Representatives—Legal Representatives.

——S. 47—*Parties and representatives—Legal representatives decree against—Separate suit to recover possession of property sold.*

In execution of a decree against two persons as the legal representatives of a deceased person their property was sold. A suit by one of the representatives to recover possession of the property is barred by S. 47. (*Walsh and Sunder Lal JJ.*) DULLA *v.* SAHIB LAL. 39 All. 47 : 36 I. C. 281 : 14 A. L. J. 846

——S. 47—*Parties and representatives—Legal representatives.*

Questions raised by legal representatives as to property which they claim as their own and not liable to be sold as the property of the deceased judgment-debtor fall within S 47 and a separate suit is barred even where the proceedings in execution have come to an end. (*Raoof and Harrison, JJ.*) BHAGAT RAM *v.* NIZAM DIN. 63 I. C. 853 : 3 L. L. J. 406.

C. P. CODE (V OF 1908), S. 47—Parties & Representatives—Legal representatives.

———S. 47 — *Parties and representatives — Legal representative, decree against—Sale of portion of estate in execution—Suit to set aside.*

Where a decree is passed against representatives of a deceased person as such and as being in possession of the estate of the deceased and property forming part of the estate is sold in execution of the decree the judgment-debtor is barred to bring an action for the recovery of the property unless he gets the sale set aside. (*Chevis, J.*) PALA SINGH *v.* HARNAMA.

40 P. L. R. 1918 : 43 I. C. 712 : 30 P. W. R. 1918.

Parties and Representatives—Meaning of.

———S. 47—*Parties and representatives—Meaning of—Legal representative of judgment debtor impleaded—Objection to attachment as trustee—Appeal if lies.*

Objection to attachment on the ground that the objector is a trustee does not make the objector a representative of judgment-debtor, though the trust be created by the judgment-debtor and the objector an heir of his, unless of course the trust is created *pendente lite*. (*Kanhaiya Lal, J.*) BHAGWAN DAS *v.* MT. MAHOMED BANO.

L. R. 4 All. 447 : 75 I. C. 1053 : 1924 A. 183.

———S. 47 and O. 21, R. 100 — *Parties and representatives meaning of—Application under O. 21, R. 100.*

Semble:— A person, who is a representative of the judgment debtor within the meaning of S. 47 of the C. P. Code might maintain an application under O. 21, R. 100 of the C. P. Code. 3 Pat. L. J. 579 doubted. (*Shurawardy and Cuming, JJ.*) GIRIBALA DASI *v.* PRIANATH PAL.

65 I. C. 476.

———S. 47—*Parties and Representatives—Meaning of—Execution proceedings against minor—No representation—Suit to declare sale a nullity—Limitation.*

Proceedings in execution were commenced against a judgment debtor, but on his death his minor sons were brought on record. In appointing a guardian for them, the affidavit under O. 32, R. 3 was not put in. The guardian did not appear on their behalf at any stage and prior to the confirmation of the auction sale though the court specifically sent him notice to appear in court and pay up the small decree amount, the guardian did not pay any attention to the notice but actually purchased the properties himself some months later from the court auction purchaser. In a suit by the minors to set aside the sale : *Held*, (1) the minors not being represented at all, cannot be considered parties to the proceedings and S. 47 of the C.P. Code did not bar the suit; (2) not being parties, the suit was governed by Art. 144 and not Art. 12 of the Lim. Act. (*Harrison, J.*) ALAM DIN *v.* ALLAH DAD.

67 I. C. 547 : 1922 Lah. 447.

———S. 47 — *Parties and Representatives — Meaning of, transferee* pendente lite *in possession —Order of—Court removing obstruction—Appeal.*

Where a transferee *pendente lite* from a defendant obstructs delivery of possession in execution to the decree-holder and the Court orders the obstruction to be removed, *held* that the order was one within S. 47 and is appealable. Per *Ramesam J.*:—The transferee is the representative of the transferor-defendant and hence the order of the Court is a decree. (*Oldfield and Ramesam, JJ.*) MEAYAPPA CHETTY *v.* MEYYAPPAN SERVAI.

66 I. C. 722 : (1921) M. W. N. 698.

C. P. CODE (V OF 1908), S. 47—Parties & Representatives—Occupancy holding.

———S. 47 and O. 21, R. 66—*Parties—Meaning of.*

"Parties" in the expression "between parties" to the suit mean parties opposed to one another and not necessary plff. and deft. (*Benson and Sundara Iyer, JJ.*) SAMALA PALLI MANGAYYA *v.* SAMALAPALLI SHRIRAMULU.

13 M. L. T. 347 : 24 M. L. J. 477 : 19 I. C. 448 : (1913) M. W. N. 382.

Parties and Representatives—Mortgage Suit.

———S. 47— *Parties and Representatives — Mortgage suit—Mortgage decree against father—Execution against sons*

A mortgagee of certain property belonging to a joint Hindu family instituted a suit against the father only to enforce the mortgage. The mortgagee obtained a decree and at a court sale in execution of the decree himself purchased the property. The decree-holder purchaser died before obtaining possession of the property and his surviving brother sued for recovery of possession of the property impleading the judgment debtor and his sons as parties. The defendants pleaded that a separate suit was barred under S. 47 C P. Code. *Held* that the suit was maintainable and that so far as the sons were concerned they were not parties to the prior suit and could not be proceeded against in execution proceedings. 35 B. 452 dist. (*Macleod, C. J. and Crump, J.*) DADA JINAPPA *v.* YESU SAKHOBA.

25 Bom L R. 494 : 73 I. C. 402 : 1923 Bom. 450.

———S. 47 (3) and O. 21, R. 100 — *Parties and representatives—Mortgage suit—Paramount title —Removal of.*

A party to a mortgage suit, who sets up a paramount title and is discharged from the suit, no decree being passed either in his favour or against him, is not a party within S. 47 of the C. P. C. (1908). Such a person can object to a delivery of possession of property under, O. 21, R. 100, and if such objection fails, a regular suit lies at his instance. (*Miltra, A. J. C.*) LAXMAN *v.* GANPAT.

52 I. C. 736 : 15 N. L. R. 146.

Parties and Representatives—Occupancy Holding.

———S. 47—*Parties and representatives—Occupancy holding—Transferee from judgment-debtor—Right to apply to set aside sale.*

A person, who without the landlord's consent purchases from a raiyat a portion of a non-transferable occupancy holding is a person, whose immoveable property has been sold and is a representative of the judgment-debtor within S 47 and can apply to set aside a sale of the holding in execution of a decree for arrears of rent on the ground of fraud. (*Jenkins, C. J., Stephen, Woodroffe Mookerjee and Holmwood, JJ.*) DAYAMOYI *v.* ANANDA MOHAN ROY.

42 Cal. 172: 18 C W. N. 971 : 27 I. C. 61 : 20 C. L. J. 52 (F. B.)

C. P. CODE (V OF 1908), S. 47—Parties & Representatives—Parties unnecessarily impleaded.

Parties and Representatives—Parties unnecessarily impleaded.

——S. 47—*Parties and representatives—Parties unnecessarily impleaded.*

Although a Court passed an opinion that A, the widow of a deceased debtor, was not a proper party in a suit by the creditor against the heirs, because she was not one of the heirs, yet she was treated as a proper party by reason of the allegation against her that she was in possession of the immoveable property of the estate. On this basis the suit was tried against her and she succeeded on the merits: *Held*, that A was a party to the suit within the meaning of S. 47 of the Code of Civil Procedure. (*Mookerjee and Panton, JJ.*) JAMINIBALA DEBI *v.* KARALI PRASAD. 67 I. C. 6: 34 C. L. J. 477.

Parties and Representatives—Personal Property.

——S. 47—*Parties and representatives—Personal property—Sale in execution of decree in representative capacity—Remedy.*

When property claimed by a person in his personal capacity is sold in execution of a decree to which he was a party in a representative capacity he can apply under S. 47 to have the sale set aside and a separate suit will be barred by that section. (*Richardson and Walmsley, JJ.*) KHITISH CHANDRA *v.* THAKOMANI DEBI. 46 I. C. 458: 27 C. L. J. 572.

——S. 47—*Parties and representatives—Person claiming under assignment—Appeal.*

A person who claims the property sought to be attached by virtue of an assignment which has been found to be invalid and against whom the prohibitory order is issued is a necessary party and has right of appeal. (*Jwala Prasad and Adami, JJ.*) BALMAKUND KANUNGO *v.* MADAN CHOTRA. 55 I. C. 175: 1 Pat. L. T. 75.

——S. 47—*Parties and representatives—Person whose property is wrongly attached.*

Where a person pays down money to avoid an attachment of his property which is by mistake identified with the judgment-debtor's property, he cannot claim the money back in proceedings under S. 47 as he is neither a party nor a representative of a party in the suit but must enforce his claim by a separate suit. (*Pratt, J. C.*) JAN MOHAMAD *v.* MANTHAR. 34 I. C. 492: 9 S. L. R. 213.

Parties and Representatives—Prior Mortgagee.

——S. 47 and O. 21, R. 100—*Parties and representatives—Prior mortgagee, if representative of judgment-debtor.*

Mortgagees holding prior to the decree cannot be regarded as representatives of the judgment-debtor but even if they could be so regarded they are bound by the decree. Neither the tenants-at-will are such representatives and no appeal lies against a decree granting possession to the judgment-creditors from a legatee in possession of the property of the judgment-debtor dissallowing the claim put forward by mortgagees or tenants-at will holding prior to the decree. (*Leslie Jones, J.*) DEVI DAS *v.* NATHU MAL. 78 P. W. R. 1917: 39 I. C. 772: 122 P. L. R. 1917.

C. P. CODE (V OF 1908), S. 47—Parties & Representatives.

Parties and Representatives—Purchaser.

——S. 47—*Parties and representatives—Purchaser of occupancy holding*—Locus standi *to object*—Marfatdari *rent receipt, effect of.*

The purchaser of a non-transferable occupancy holding from whom the landlord has accepted rent for a long period as *marfatdar* can, under S. 47, take objection to execution proceedings against the original tenant in respect of his holding. The use of the word '*marfat*' in a rent receipt is not enough to resist the purchaser's claim to object under S. 47. (*Newbould and Cuming, JJ.*) GAGAN CHANDRA MANNA *v.* NAFAR CHANDRA GHOSE. 64 I. C. 124.

——S. 47—*Parties and representatives—Purchaser and the attaching creditor of a decree.*

The question as to the genuineness of purchase of a decree between the purchaser and the creditor attaching the same decree is a question under S. 47, C.P.C. and is appealable. (*Chatterjee and Beachcroft, JJ.*) MOHINI MOHAN *v.* SURENDRA CHANDRA DEY. 32 I. C. 524: 20 C. W. N. 679.

——S. 47—*Parties and representatives—Purchaser of non-transferable holding—Setting aside sale—Appeal.*

A purchaser of a portion of non-transferable occupancy holding is a representative of a judgment debtor within S. 244, C. P. C. (1882). The question whether the sale should be set aside on the ground of fraud etc., is a question between the parties to the suit or their representatives. There is both an appeal and a second appeal. (*Stephens and Mullick, JJ.*) KALI CHARAN MAHATO *v.* GOWRI SHANKAR SINGH. 27 I. C. 431.

——S. 47—*Parties and representatives—Purchaser from judgment-debtor.*

A purchaser from the judgment debtor is not a representative if the suit and the decree therein do not relate to the land purchased. (*Chitty and Chatterjee, JJ.*) KALI KUMAR BIDYARATNA *v.* MISRIJAN. 9 I. C. 307: 15 C. W. N. 711.

——S. 47—*Parties and representatives—Purchaser from judgment debtor—Separate suit.*

A transferee of the property of a Judgment-debtor is not his representative and, therefore, an objection by him to the attachment of the property does not fall within S. 47. A separate suit, therefore, is maintainable by the decree-holder if the objection of the transferee is allowed, 16 All 286 Foll. 24 Cal. 62; 26 Cal. 250; 29 Cal. 813: 32 Cal. 1031 Dist. (*Johnstone and Ratligan, JJ.*) BHAMPLOL DEVI *v.* HARBAKSH SINGH. 64 P. R. 1912: 14 I. C. 40: 113 P. W. R. 1912.

——Ss. 47, 115 and 151—*Parties and representatives—Purchasers—Rival auction purchasers.*

A dispute as to possession between rival auction purchasers of the same property in execution of different decrees does not fall within the scope of S. 47 of the C. P. Code A Court has no inherent power under S. 151 C. P. C. to restrain the purchaser of a property in Court auction from taking possession of the property. (*Spencer and Krishnan, JJ.*) MANDAVILLA RAMARAO *v.* SIVANARAYANA. 25 M. L. T. 153: 49 I. C. 629: 9 L. W. 81.

C. P. CODE (V OF 1908), S. 47—Parties & Representatives—Purchaser.

——S. 47— *Parties and representatives--Purchaser from judgment-debtor—Simple money decree.*

A person purchasing from a discharged defendant prior to the passing of a simple money decree, property against which the decree was sought to be executed though not affected by the decree itself, is not a representative of that defendant within S. 47. (*Prideaux, J.*) KASHI RAO *v.* MOHOMED ALI. **56 I. C. 809.**

——S. 47—*Parties and representatives—Purchaser from judgment debtor—Decree-holder—Suit barred.*

No suit will lie for possession of property by a transferee from the judgment-debtor against the decree holder purchaser in court auction. The question is one relating to execution and arises between the parties or their representatives and must be dealt with in execution. (*Batten, A. J. C.*) DEOBA *v.* LAXMAN. **44 I. C. 978.**

——S. 47—*Parties and representatives—Purchaser—Representation of judgment-debtor*

A purchaser at a revenue sale of the interest of the judgment debtor after a decree for sale on a mortgage had been passed against him is a representative of the judgment-debtor and as such entitled to apply to set aside the sale under O. 21, R. 99, of the C. P. Code. (*Das and Adami, JJ.*) DHAROHAR SINGH *v.* RAM PRASAD NARAYAN SAHAI. **72 I. C. 862: 1 Pat. L. R. 139.**

——S. 47 and O. 21, R. 100—*Parties and representatives—Purchaser of non transferable holding from tenant—Application to set aside sale.*

The purchaser of the whole or part of an occupancy holding not transferable by a custom is not a representative of the judgment-debtor and he is not entitled to object to the sale under S. 47 of the C. P. Code, or maintain proceedings under O. 21, R. 100, C. P. Code. (*Roe and Jwala Prasad, JJ.*) PANCHARATNAN KOERI *v.* RAM SAHAY. **3 Pat. L. J. 579: 43 I. C. 969: 4 Pat. L. W. 129.**

——S. 47—*Parties and representatives—Purchaser—Purchaser from auction purchaser decree holder.*

The purchaser from the decree holder auction purchaser is not a representative of the decree holder *qua* decree-holder. His suit is therefore not barred by S. 47 as he is not a representative of the decree holder and as the question does not relate to execution, discharge and satisfaction of a decree. A purchaser from a decree holder auction purchaser no doubt acquires the interest and the rights of the auction purchaser, but he is not to be deprived of the rights of an ordinary auction purchaser to bring a suit at any time within twelve years to recover possession. (*Robinson C. J. and Heald, J.*) MI AH KOOK *v.* MI HLA MO WAY. **11 L. B. R. 17 : 64 I.C. 68. 1922 L. B. 18.**

Parties and Representatives—Receiver in insolvency.

——S. 47—*Parties and representatives—Receiver in insolvency.*

C. P. CODE (V OF 1908), S. 47—Parties & Representatives—Suit by heir.

An application by a receiver of an insolvent's estate to set aside an execution sale on the ground of a prior adjudication of the debtor is an application under S. 47 of the C.P. C (*Sadasiva Aiyar and Moore. JJ.*) ANANTHARAMA IYER *v.* VELTATH KUTIMALU KOVIIAMMAL. **3 L W. 504: 30 M. L. J. 611 : 34 I.C. 829 : 19 M. L. T. 357.**

Parties and Representatives—Right of Person.

—— — S. 47 — *Parties and representatives—Right of person not party to suit to invoke S. 244.*

A person whose claim has been upheld in execution proceedings is not a party to the suit and cannot invoke the aid of S. 244 to bar plaintiff's claim. (*Abdur Rahim and Sundara Aiyar, JJ.*) VENKATARAMA DEO *v.* RAGHUNATH PATRO. **36 Mad. 128 : 10. M L T. 261 : 21 M.L J. 887 : 12 I.C. 73 : (1911) 2 M W.N. 237.**

Parties and Representatives—Scope of.

——Ss. 47 and 144—*Parties and representatives.*

S 47 must be read with S 144. "Parties" in S, 144 includes their representatives in interest. (33 Cal 857 rel. on). (*Mullick and Thornhill, JJ.*) KAMARUDDIN MANDAL *v*, RAJA THAKUR, **5 Pat. L. W. 141 : 46 I C. 465 : 1918 Pat. 243.**

Parties and Representatives—Shebait.

——S. 47—*Parties and representatives—Shebait—Execution against the successor.*

The question whether or not the decree passed against a *shebait* is capable of execution against the successor is one coming within S 47 of the C. P C. (*Mookerjee and Carnduff, JJ.*) UMESHANANDA DUTT *v.* MOHENDRA PRASAD. **11 I. C. 280 : 14 C L. J. 337.**

Parties and Representatives—Subsequent Mortgage.

——S. 47—*Parties and representatives—Subsequent mortgagee—Appeal.*

A mortgagee whose mortgage was subsequent to a mortgage decree on property is a representative of the judgment-debtor within S. 47 and an order on an application by him to have the first mortgagee satisfied out of properties other than those mortgaged to him, is a decree within S. 2. (*Richardson and Newbould, JJ.*) TARA PRASANNA BOSE *v.* NILMONI KHAN **25 I. C. 118 : 41 Cal. 418.**

Parties and Representatives—Suit by Heir.

——S. 47 and O. 21, R. 61—*Parties and representatives—Suit by heir to establish that property is not attachable.*

Plaintiff was a defendant in a suit impleaded as an heir of a person against whose estate relief was claimed and it was found that he was not the heir and the suit against him was dismissed. In execution, his property was attached. Plaintiff brought a declaratory suit that the property was his. *Held*. S. 47 was no bar to the suit. (*Shah Din, J.*) MUHAMMAD *v.* RAMDIAL. **25 P. L. R. 1915 : 28 I. C 14 : 241 P. W. R. 1915.**

C.P. CODE (V OF 1908), S. 47—Purchaser of decree.

Purchaser of Decree.

——— S. 47 cl. 3) and O. 21, R 16—*Purchase of decree—Question as to genuiness of—Decision.*

An application under O. 21, R. 16 does not prevent S. 47 from being applied for the decision of a question falling within its scope. (*Chatterjee and Beachcroft, JJ.*) MOHINI MOHUN MOZUMDAR *v.* SURENDER CHANDAR DEY.

32 I. C. 524 : 20 C. W. N. 679.

Question relating to Execution.

Adjustment.
Agreement.
Application.
Assessment of Mesne Profits.
Attachment of Property.
Certificate of Payment.
Claim.
Compromise.
Decree.
Decree-holder Purchaser.
Delivery of Possession.
"Determined", Meaning of,
Discharge.
Excess Property.
Execution Sale.
Heir of Judgment-debtor.
Injunction.
Jurisdiction.
Legal Representatives.
Liability.
Mortgage.
Objection
Order Relating to Decree.
Oudh Laws Act, S. 15.
Partition during Suit.
Power of Executing Court.
Preliminary Decree.
Priority.
Recovery of Possession.
Redemption of Mortgage.
Sale Under Public Demands Recovery Act.
Satisfaction of Decree.
Son's liability.
Suit for Declaration.

Question relating to execution—Adjustment.

———S. 47 and O. 21, R. 2—*Question relating to execution—Fraudulent adjustment.*

Whether an adjustment of decree out of Court is fraudulent must be determined by executing Court. (*Piggott and Walsh, JJ.*) MUHAMMAD KAZIM *v.* RUKIA BEGUM. **41 All. 443 : 50 I. C. 65 : 17 A. L. J. 677.**

——— S. 47 and O. 21, R. 2 (2)—*Question relating to execution—Adjustment.*

Where an application under O. 21, R. 2 (2) is barred by limitation the same matter cannot be gone into by an application under S. 47, C. P. Code. (*Woodroffe and Mullick, JJ.*) GOLAM MAJAHAR CHOWDRY *v.* GOLOKE CHARAN DAS. **25 I. C. 884.**

———S. 47—*Question relating to execution—Adjustment—Prior to decree—Effect of*

If a claim is adjusted before decree, no decree ought to be passed but if a decree is subsequently passed in spite of the compromise, it cannot be said to be satisfied by the previous adjustment.

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Application.

(*Chevis, A C. J. and Wilberforce, J.*) HEMRAJ *v.* DOST MUHAMMAD. **1 Lah. 445 : 3 Lah. L.J. 10 : 57 I.C 153 : 2 U P.L. R. (L) 117 : 136 P. L. R. 1920.**

——— S. 47 and O. 21, R. 2—*Question relating to execution—Adjustment prior to decree—Quaere.*

Whether facts of a particular kind though they had taken place before the passing of the decree, could be set up by judgment-debtor as a bar to the execution of the decree. (*Sadasiva Aiyar and Moore, JJ.*) ANNAMALAI CHETTY *v.* KAMASAMI CHETTY, **(1916) 1 M. W. N. 203 : 33 I. C. 67 : 19 M. L T, 228.**

——— S. 47 and O. 21, R. 2—*Question relating to execution—Adjustment after decree.*

The new Code O. 20, R. 11 and S. 47 have altered the old law under S. 257-A of the Old Code and makes it legal for parties to make private arrangements after decree. So where it was arranged that defendant being given time, plaintiff was to get higher interest, and the plaintiff wanted to enforce it after the new Code came into force. *Held*, that the plaintiff could enforce such an agreement. 5 Cal. 27 ; 25 Cal, 86, 20 Cal. 22 Foll. 14 M L. J 359 ; 18 M. L. J. 548 not foll. (*Abdur Rahim and Spencer, JJ.*) SUBBARAYA IYER *v.* RAMASWAMI PILLAI. **11 M. L T. 18 : (1912) M. W. N. 9 and 458 : 13 I. C. 204 : 22 M. L. J. 166.**

Question relating to execution—Agreement.

——— S. 47, O. 21, R. 2—*Question relating to execution—Agreement for stay of execution before decree, if adjustment,*

Per *Abdur Rahim, Offg. C. J.* (*Seshagiri Iyer, J Dubetante, and Phillips, J. dissenting* :—

An agreement between the parties for stay of execution of decree before the decree is passed is a matter to be inquired into and decided by the executing Court under S. 47. The word 'stay of execution' though omitted under new Code in S. 47, does not mean that the question of stay of execution is excluded under it. (*Abdur Rahim, O. C J., Seshagiri Aiyar and Phillips, JJ.*) CHIDAMBARAM CHETTIAR *v.* KRISHNA VATHIYAR. **40 Mad. 233 : 21 M. L. T. 24 : 5 L. W. 132 : 37 I. C. 836 (F. B.) : (1917) M. W. N. 44 : 32 M. L. J. 13.**

Question relating to execution—Application.

———Ss. 47 and 63—*Question relating to execution—Application for sale in execution—Order on, if under* S. 47,

An order of a Subordinate Judge declining in view of S. 63, C. P. C. to proceed with an application in execution for the sale of the property is one relating to execution within S. 47 and is appealable. (*Teunon and Chaudhuri, JJ.*) SURENDRA NATH BISWAS *v* SHYAMA CHARAN MANDAL. **26 C.L.J. 42 : 42 I. C. 466.**

——— S. 47 and O. 21. R 95—*Question relating to execution—Application for possession—Objection—Appeal.*

Where in bar of an application under O. 21, R. 95, the judgment debtor pleaded a contract whereby the auction-purchaser agreed that the delivery of possession should be postponed for a

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Application.

specified period and the Court went into and decided the question, *held*, that the decision was within S. 47 and therefore appealable. 13 Mad. 504, 27 Cal. 31, 27 Cal. 709, 31 Cal. 737. foll. 1 C. W N 658, 6 C.L.J. 749, dist (*Cox and Roy, JJ.*) HARI CHARAN DUTT *v* MANMOHAN NANDEY
20 I.C. 874 : 18 C.W.N. 27.

——S. 47—*Question relating to execution—Application to set aside for want of notice to judgment-debtor.*

An application to set aside an execution sale for want of notice under O. XXI, R. 22 comes under S. 47. (*Mookerjee and Carnduff, JJ.*) LAKSHMI CHARAN SEN *v.* SRIS CHANDRA ROY.
9 I C. 584: 13 C.L.J. 162.

——S. 47 and O. 21, R. 16—*Question relating to execution—Application by decree holders to execute—Assignment—Determination of right of assignee.*

Where a decree holder applying for execution wanted his application to be dismissed only if the assignment was considered to be binding upon the assignee so that the latter could be made liable for the money mentioned in the deed of assignment, it would be wrong to hold that while the assignment should be considered as binding upon the assignor so far as his rights under the decree are concerned the assignee should be able to wriggle out of his liability for the price of the assignment by relying upon fraud. The transaction is an undivided one and must be viewed as a whole. Where the order of the Court dismisses the application for execution, it adversely affects the rights of the decree holder against the judgment debtor and consequently determines a question relating to the execution or discharge or satisfaction of the decree. Such an order is therefore appealable. (*Shadi Lal, C.J.*) HARDITTA *v.* NIGHAHIA MAL. **4 Lah L.J. 259 : 1922 Lah. 396.**

——S. 47 (3)—*Question relating to execution—Application to be brought on record as representative of judgment-debtor.*

Where a person applies to be brought on the record as the representative of the judgment-debtor so that he may raise a question to be decided by the executing Court under S. 47, C.P C. the proper Court to entertain the application is the Court executing the decree. (*Abdur Rahim and Oldfield, JJ.*) RAGHAVACHARI *v.* PARAMASWAMI PILLAI. **55 I.C. 812 : 11 L.W. 173.**

——S. 47—*Question relating to execution—Application by auction purchaser.*

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Attachment of property.

An application by an auction purchaser alleging obstruction by a person claiming to be a prior auction-purchaser, and praying that he might be put in possession, is an application under O. 21, R. 97, C.P.C. and not under S. 47 of the Code. An order made under O. 21, R 97, C.P.C. is not appealable. (*Das, J.*) MEGHU SINGH *v.* BASUDEVA JHA. **52 I.C. 383.**

——S. 47—*Question relating to execution—Application to set aside sale*

The decree holder who wants to set aside the sale on the ground that the decree had been satisfied prior to the sale must apply under S.47. (*Moore J.*) MAUN PO KYIN *v.* ANNAMALAY CHETTY
9 I.C. 452 : 4 Bur. L.T. 12.

Question relating to execution—Assessment of Mesne profits.

——S. 47—*Question relating to execution—Assessment of mesne profits.*

In spite of the direction of clauses (a) and (b) of S. 244 of C.P. Code of 1882 an application for assessment of mesne profits is one in the suit and, therefore, if dismissed for default, no fresh application can be entertained in execution. The remedy is to get it restored. (*Mookerjee and Carnduff, JJ.*) UPENDRA CHANDRA SINGH *v.* SAKHI CHAND. **15 I.C. 709 : 16 C.L.J. 3.**

Question relating to execution—Attachment of Property.

——S. 47 and 115—*Question relating to execution—Attachment—Custodian—Release of attachment—Remedy of judgment-debtor against custodian.*

In execution of a decree the judgment-debtor's crops were attached and placed in charge of a custodian. The judgment-debtor paid up a part of the decretal amount and obtained time to pay off the balance. The Court ordered the attached crops to be released and the execution case was struck off. Subsequently the judgment-debtor applied to the Court complaining that the crops had not been delivered back to him. The Court passed an order directing the custodian to deliver the crops to the judgment-debtor or pay their price, *Held*, that the order was without jurisdiction and that the judgment-debtor's remedy against the custodian was a suit for recovery of the crops or their value. (*Banerji, J.*) KALLU KHAN *v* ABDULLA KHAN. **42 All. 394 : 18 A.L.J. 357 : 58 I.C. 448 : 2 U.P.L.R. (All.) 145.**

——S. 47 and O 21, R. 58—*Question relating to execution—Attachment of property in possession of judgment-debtor—Objection by him as* shebait *—Appeal.*

On attachment of the property in the possession of the judgment-debtor he objected alleging that he was in possession as a *shebait* of a deity to whom the property belonged. It was held that the question raised fell under O. 21, R. 58 and not under Sec. 47 and hence an appeal lay against the decision of the first Court. (*Jenkins, C. J., Woodroffe, Carnduff and Chatterjee, JJ.*) KAREKI CHANDRA *v* ASUTOSH DARA.
39 Cal. 298: 14 C.L.J. 425 : 12 I.C. 163 ; 16 C. W. N, 26 (F.B.)

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Attachment of propr ty.

———S. 47 and O. 21 R, 58—*Question relating to execution—Attachment of property—Judgment debtor's application that his possession is that of a trustee for another.*

The judgment-debtor's application objecting to the attachment of the property in his possession in execution of a decree against him on the ground that he is in possession as trustee for another must be treated as one under O. 21, R 58, C.P.C and not under Section 47. Hence on dismissal of the objection the appeal does not lie against it. (*Chamier, J.C. and Piggott, A J.C.*) SAJID ALI *v.* ALI MUHAMMAD KHAN.
12 I.C. 411

———S. 47—*Question relating to execution--Attachment of moveable—Allegation of misappropriation by decree-holder and Court Amin—Enquiry in execution—Separate suit*

Enquiry of allegations of misappropriation of attached moveables by the decree-holder in collusion with the Court Amin should be made under S. 47, and the complainant should not be referred to a separate suit. (*Chamier, C J. and Sharfuddin, J.*) GAJADHAR PRASAD SINGH *v.* ARJUN DAS.
36 I.C. 280 : 1 Pat. L.J. 558.

———S. 47—*Question relating to execution—Attachment—Objection to.*

It is the function of executing Court to see whether the cattle of an agriculturist sought to be attached, are necessary for him to earn livelihood. (*Kincaid and Raymond, A.J.Cs.*) GUL MAHOMED *v.* FAIZ MAHOMED.
56 I.C. 69 : 13 S.L.R. 210.

Certificate of payment.

———S. 47 and O 21, R. 2—*Question relating to execution—Certificate of payment- Application for certifying payment—Order on—If appealable*

An application by the judgment debtor for certifying payments by him to the decree-holder out of court raises questions as to the execution and satisfaction of the decree, and as such falls under S. 47 C P.C. The dismissal of such an application gives a right of appeal to the judgment-debtor. (*Jwala Prasad and Bucknill, JJ.*) JADUNANDAN SINGH *v.* SHEONANDAN PRASAD.
3 Pat. L.T. 487 : 1 Pat. 644 : 68 I C 645 : 1922 Pat, 200 : 1922 P. 276.

———S. 47 and O. 21, R. 2—*Question relating to execution--Certificate of payment—Non certification—Enquiry—Fraud—Effect of.*

O. 21, R. 2 of the C.P Code does not in any way limit or affect the operation of S. 47 of the C.P. Code and does not prevent the Court from investigating a question of fraud on the part of the decree holder in omitting to certify satisfaction of a decree. (*Robinson and Macgregor, JJ*) P.R.P.L. CHETTY FIRM *v.* GLON POW.
1 Bur. L.J. 43 : 11 L.B R. 363 . 70 I.C. 859 : 1922 L.B 31 : 1923 R. 108.

Question relating to execution—Claim

———S. 47 and O. 21, R 63—*Question relating to execution—Claim—Subsequent suit by judgment-debtor.*

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Compromise.

Where a claim was allowed, the judgment-debtor sued the claimant and obtained a decree for possession. The decree holder kept quiet but re-attached the property and a transferee from the judgment-debtor put in a claim and having failed in it filed a suit for possession. *Held*, that the first attachment was not revived as the result of the judgment-debtor's suit and that the transferee's suit was not barred by limitation, (*Wallis, C.J. and Sadasiva Aiyar, J.*) CHAMPAYIL KOPPON *v.* KOLASERI KELAPPAN NAMBIAR.
44 I C. 864.

Question relating to execution—Compromise.

———S. 47—*Question to relating to execution—Compromise—Suit for declaration of title—Whether maintainable—Limitation.*

Where a revenue sale was sought to be set aside on the ground of fraud and a compromise was effected, a suit on a default of compromise terms, for declaration of title is not maintainable nor could the compromise be executed as neither S. 5 nor S 18 of the Limitation Act has application to cases under S 47 of the C.P.C. (*Holmswood and Sharfuddin, JJ.*) SHEKAMBARI *v.* RAM KUMAR DAS.
23 I.C. 240.

———S. 47—*Question relating to execution of decree— Compromise—Suit for accounts.*

In a suit for accounts the parties entered into a compromise under which they agreed to a preliminary decree in accordance with the terms of the compromise. Under the compromise one of the parties was given a share of the profits of a certain contract, the profits to be determined by competent accountants ; it was also provided that any dispute relating to the share was to be referred to arbitration. On a question arising between the parties to the suit as to the share of profits, *Held* that the proceedings did not relate to the execution of a decree within S. 47, C.P. Code, and the decree in the suit did not relate to the amount now in dispute. (*Broadway and Abdul Qadir, JJ.*) HAJI BAKHSH ILAHI *v.* ABDUL RAHIMAN.
71 I.C. 817.

———S. 47—*Question relating to execution—Compromise -Set off in execution proceedings—Suit.*

Where a compromise decree provided that plaintiff would recover money from defendant, that the latter was entitled to certain cattle and that if plaintiff took any of the cattle he would be responsible therefor, and the plaintiff applied in execution for recovery of the money from the defendant *Held*, that the defendant cannot plead in execution that plaintiff had taken the cattle and was not entitled to the money, because the decree only declared the defendant's right to the cattle and his remedy was to sue the plaintiff therefor. (*Broadway and Moti Sagar, JJ*) JIVAN MAL *v.* NANAK CHAND.
63 I.C. 975

———S. 47 and O 23, R. 3—*Question relating to execution— Compromise —Decree—Objection to validity of—Remedy by suit.*

Where a compromise embraces matters not relating to the suit and the decree following such compromise gives reliefs which are not unlawful but which could not have been given, if the suit

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Decree.

had been decided after trial the remedy is by way of appeal. If the objection could be taken in execution proceedings the legislature would not provide special provisions in O. 43 for an appeal. (*Maung Kin and Rigg, JJ.*) ANA PAKIRI SHA *v.* SOMASUNDARAM SERVAI. **64 I.C. 391 : 10 L.B.R. 349 : 13 Bur. L.T. 170 : 1922 L.B. 22.**

Question relating to execution—Decree.

——S 47—*Question relating to execution—Decree ordering sale of property of judgment-debtor,*

Where a Judge amended a decree by ordering that it could be executed only against the property of the deceased the amended decree operates not being reversed on appeal so as to throw upon the decree holder the burden of proving in the execution proceedings that the property sought to be sold was the property of the deceased and was in the hands of the respondents as legal representatives. (*Piggott and Walsh, JJ.*) GAJADHAR SINGH *v.* BASANTI LAL. **18 A.L.J. 131: 55 I.C. 83 : 2 U.P.L.R. (All.) 34.**

——S. 47—*Question relating to execution—Decree for possession conditional on payment of money within certain time—Payment made beyond time.*

An order disallowing an objection to the execution of a decree is one relating to the execution of the decree within S. 47, C.P.C. and an appeal lies. (*Bannerji, J.*) KAUTA UPADHYA *v.* DWARIKA SINGH. **22 I.C. 926 : 12 A.L.J. 12.**

——S. 47—*Question relating to execution for Decree—Execution of.*

When a suit was decreed in favour of plaintiffs and one of the defendants that defendant cannot sue again for that relief the remaining defendants the proper way for him is to execute the decree. (*Chatterjee and Newbould, JJ.*) KRISTO DAS ROY *v.* BEHARI LAL SIKDAR. **57 I.C. 900.**

——S. 47—*Question relating to execution—Decree—Subsequent suit on same cause of action—Bar.*

When a person has a cause of action and brings a suit upon it that cause of the action merges in the decree and his further remedy is in execution and if he allows execution to be barred, his rights are gone. He cannot institute a fresh suit on the same cause of action. (*Wallis, C.J. and Sadasiva Iyer, J.*) NYNAM VEETILL MAYAN KUTTI *v.* VALAPAPILAKATH KUNHAMMAD. **41 Mad. 641 : 7 L.W. 143 : 34 M.L.J 167 : 23 M.L.T. 156 : 44 I.C. 110 : (1918) M.W.N. 205.**

——S. 47 and O. 21, R. 95—*Question relating to execution—Decree for possession—Delivery of possession—Subsequent dispossession*

Where in pursuance of a decree for possession the judgment debtor amicably hands over possession to the decree-holder but subsequently dispossesses him the remedy of the latter is by way of a fresh suit and not by way of execution of the prior decree for possession. (*Sadasiva Iyer and Napier, JJ.*) IDINE BEARY *v.* UMMATHAMMA. **30 I. C. 606.**

——S. 47—*Question relating to execution—Decree obtained by fraud—If can be questioned in execution.*

C. P. CODE (V OF 1908), S 47—Question relating to execution—Delivery of possession.

The question whether a decree was obtained by fraud or collusion is not one which relates to the execution of the decree ; it can only be raised by a separate suit. 9 Mad. 280 Foll. (*Bakewell, J.*) SUIKURI KATUM SAHIBA *v.* MAHOMED ABDUL AZIZ. **29 I.C. 239 : 38 Mad. 221.**

——S. 47 and O 21, R. 2—*Question relating to execution—Decree for possession of immoveables—Question of satisfaction, if could be gone into in execution,*

Where a decree is one for possession of immoveable property the question of satisfaction having been made to the decree-holder out of Court can be gone into under S. 47, C.P.C., (1908) notwithstanding the absence of certificate of satisfaction. (*Sadasiva Aiyar and Spencer, JJ.*) KELU NAIR *v.* MEENAKSHI. **25 M.L.J. 586 : 21 I.C. 639 : 14 M.L.T. 574.**

——S. 47—*Question relating to execution—Decree, construction—Title to standing crops.*

Where a pre-emption decree was silent as to standing crops *Held* : that the question whether the crops passed with the land cannot be said to have arisen in execution, discharge or satisfaction of the decree. (*Kotwal, A.J.C.*) BAPU *v.* VITHOBA. **76 I.C. 193: 1923 Nag. 327.**

Question relating to execution—Decree-holder Purchaser.

——S 47 and O. 21, R. 97—*Question relating to execution—Decree-holder purchaser—Order allowing or refusing delivery of possession—Appeal.*

An order allowing or refusing delivery of possession after an execution sale is not an order under S 47 of the C. P. Code even when the decree holder is the auction-purchaser and as such no appeal lies 20. C.L.J 433, 1 Pat. L.J. 232, Foll (*Huda and Panton, JJ.*) ADURAM HALDAR *v.* NAKULESWAR RAI CHOWDHURY **49 I. C. 137 : 29 C.L.J. 48.**

——S. 47 and O. 21, R 95—*Question relating to execution—Decree-holder purchaser—Suit for possession,*

A decree-holder purchaser does not lose the character of a party to the suit and until he obtains possession of the property the proceedings in execution are not terminated. S. 47 is a bar to his suit for possession and his only remedy is by an application under O. 21, R. 95 of the C. P. Code (*Batten, A. J. C.*) LACHUSA MOTILAL *v.* MAHERALI RAHIMALI. **44 I. C. 563.**

Question relating to execution—Delivery of possession.

——S 47—*Question relating to execution—Delivery of possession.*

A claim by judgment-debtor to recover property overdelivered to the auction-purchaser who was a stranger to the suit, is one coming under S. 47. (*Ayling and Krishnan, JJ.*) JAINULABDIN SAHIB *v* KRISHNA CHETTIAR. **41 M. L. J. 120 : 14 L. W. 92 : 63 I. C. 200 : (1921) M. W. N 491.**

——S. 47 and O. 21. R 96—*Question relating to execution - Delivery of possession—Purchase of share of judgment debtor—Partition suit.*

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Delivery of possession.

Where a decree-holder purchases his judgment-debtor's rights in a joint property he is entitled to bring a suit for partition against the judgment-debtor and other co-owners without obtaining any formal delivery of possession and his suit is not barred by S. 47. A purchaser at a court sale in order to obtain possession of the property purchased may seek for such possession as he can obtain under the Code, or may ignore the provisions of the Code and stand upon his general rights of prosecuting his claim by instituting a suit. (*Wallis, C. J. and Seshagiri Aiyar, JJ.*) HASSAN AMMAL BIBI *v.* ISMAIL MOIDEEN.

38 M. L. J. 642 : 29 I. C. 976: (1916) M. W. N. 414.

———**S. 47 and O. 21, R. 95**—*Question relating to execution—Delivery of possession.*

A separate suit for possession (apart from a suit under O. 21, R. 95) of property purchased by the decree-holder auction purchaser is not barred as the cause of action which arises after sale does not come under S. 47 as a question relating to the execution, etc. of a decree. Questions relating to the possession of property after sale has taken place are not questions connected with the execution, etc, of a decree within S. 47, C. P. C. (*Kanhaiya Lal, A. J. C.*) KHANJAN SINGH *v.* ANUP.

33 I. C. 367 : 18 O. C. 345.

———**S. 47 and O. 21, R. 96**—*Question relating to execution—Delivery of possession—Review of order—Appeal.*

Proceedings for delivery of possession are not proceedings in connection with the execution of a decree and no appeal lies from an order passed in review cancelling a former order for delivery of possession on the ground that the application for delivery of possession was barred by limitation. (*Roe and Imam, JJ.*) DHANINDAR *v.* BAKSHI HARIHAR PRASAD SINGH.

48 I. C. 129 : 3 Pat. L. J. 571.

Question relating to execution—"Determined" —Meaning of.

———**S. 47**—*Question relating to execution—"Determined"—Meaning of.*

"Determined" in S. 244 of the code (1882) shows that the questions should be finally disposed of by granting appropriate relief. (*Wallis, J.*) GANESH ROW *v.* TULJA RAM ROW.

24 I.C. 696 : 26 M. L. J. 460.

Question relating to execution—Discharge.

———**S. 47 and O. 21, R. 2**—*Question relating to execution—Discharge of decree.*

A vesting of the equity of redemption in a mortgage is tantamount to a discharge or satisfaction of the mortgage debt ; an execution Court is competent to recognise it and can go into the question of the extent to which the decree has been satisfied. (*Tubdall and Sulaiman, JJ.*) SIRJU KUMAR MOOKERJEE *v.* THAKUR PRASAD.

42 All. 514 : 2 U. P. L. R. (All.) 174 : 58 I. C. 743 : 18 A. L. J. 690.

———**S. 47**—*Question relating to execution—Discharge antecedent to decree.*

Questions relating to the execution of a decree and arising between parties to a suit in which the decree was passed or their representatives must be such as have reference to matters arising subsequent to the passing of the decree and not antecedent to it. A claim that the debt on which the decree sought to be executed was obtained had been discharged before suit is not within S 47, C.P. Code. (*Broadway, J.*) RAM DAS *v.* S. P. NETTO.

64 P. L. R 1922 : 67 I. C. 753 : 4 U. P. L. R. (Lah.) 93.

C. P. CODE (V OF 1908), S. 47—Question relating to execution Excess property.

———**S. 47**—*Question relating to execution—Discharge of decree.*

A question whether a decree has been discharged is one relating to the execution, discharge or satisfaction of the decree and to allow one of several joint decree-holders who have already received payment to come in and apply for execution after the other decree holders have certified discharge of the debt would open the door to fraud and defeat the object of O 21, R. 15. A joint decree was transferred after adjustment to the other decree holders to one of the decree-holders. The transfer was recognised after notice to the decree-holders who had satisfied the decree, but there was nothing in the notice sent to them that there was any question raised as regards the validity of the transfer. On a subsequent application for execution of the decree by the transferee, *held* that it was open to the other decree holders to object to the execution on the ground that the decree had been paid off by themselves and that the transferee took the decree with the knowledge thereof. (*Spencer and Odgers, JJ.*) BUDARAJU HANUMANTHA RAO *v.* ALLAMMENI KRISHNAMMA.

70 I. C. 329 : 32 M. L. T. (H. C.) 118 (2).

Question relating to execution—Excess property.

———**S. 47**—*Question relating to execution—Excess property—Refund of money received in excess in execution.*

An application for refund of excess amount levied in execution relates to the execution of the decree and is properly entertained under S.47, C. P. C. by the Court executing the decree. (*Shah and Hayward, JJ.*) GANAPATRAO *v.* ANANDRAO.

44 Bom. 97 : 55 I. C. 967 : 22 Bom. L. R. 238.

———**S. 47 and O. 21, R. 96**—*Question relating to execution—Excess property.*

Where properties not included in a sale certificate are delivered to the purchaser the proper remedy for re-delivery is an application under S. 47 and not a separate suit. A suit cannot be converted or treated as execution application if its effect would be to prejudice the deft. in his plea of limitation. (*Abdur Rahim and Napier, JJ.*) KATHIRAYASAMI NAICKER *v.* RAMABADRA NAIDU.

45 I. C. 608.

———**S. 47**—*Question relating to execution—Excess property taken in execution sale.*

A. Judgment-debtor disputed that the auction-purchaser took possession of property to which he had no title under his sale certificate. *Held*, that the question in dispute should be decided by a separate suit and not under S. 47, C. P. C. (*Chamier, J. C. and Evans, A. J. C.*) MAHARAJ SINGH *v.* JAGANNATH.

10 I. C. 714 : 14 O. C. 70.

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Execution sale.

Question relating to execution—Execution sale.

——S. 47—*Question relating to execution—Execution sale—Decree not in accordance with law—Setting aside—Statute.*

Where a mortgage decree is passed though not in accordance with the provisions of the T. P. Act and the properties are purchased by the mortgagee in execution sale, the sale is not void but irregular. The remedy of the aggrieved party is by application before confirmation under S. 244, C. P. C. 1882. A subsequent suit for redemption treating the execution sale as void is barred by S. 47, C. P. C. (*Sir John Edge.*) GANAPATHY MUDALIAR *v.* KRISHNAMACHARIAR. **41 Mad 403 : 23 M.L.T. 198: 27 C. L. J. 367 : 34 M. L. J. 463 : 4 Pat. L W. 310 : (1918) M. W. N. 310 : 22 C. W. N, 553 : 16 A. L. J. 353 : 45 I. A. 54 : 20 Bom. L. R. 580 : 44 I. C. 855 : 8 L. W. 427 (P.C.).**

[Affirming **24 I. C. 187 : 27 M. L. J. 213.**]

——S. 47—*Question relating to execution—Execution sale—Setting aside sale on ground of fraudulent suppression of sale proceeds—Lim. Act, Art.* 181.

An application to set aside an execution sale on the ground of fraudulent suppression of sale proceeds is governed by S. 47, C.P.C. and the limitation applicable therefore is that provided by Art. 181 of the Lim. Act. (*Mookerjee and Walmsley, JJ.*) RAM KINKER TEWARI *v.* STHITI RAM PANJA. **46 I. C. 221 : 27 C. L. J, 528.**

——S. 47—*Question relating to execution—Execution sale—Setting aside—Minor.*

An application by minor after attaining majority to set aside a sale on the allegation that during his minority his guardian acted recklessly and negligently in an application put in by him to set aside the sale is not maintainable. A regular suit is the proper remedy but a review is not The court treated the application as a suit. (*Mookerjee and Beachcroft, JJ.*) JOGESHWAR NARAYAN SINGH *v.* ROY RADHA RAMAN. **16 I. C. 543.**

——S. 47—*Question relating to execution—Execution sale—Application by auction purchaser for possession.*

An obstruction by the legal representative of a deceased judgment-debtor to delivery of possession of the properties sold in execution is not one relating to "execution, discharge or satisfaction" of the decree in as much as the satisfaction of the decree had taken place already. S. 47 of C. P. C. has no application to the case. 8 P. R, 1918 and 31 All. 82 (F. B), Foll. (*Abdul Raoof, J.*) NUSRAT ALI *v.* SAKINA BEGAM. **53 I. C. 460 : 121 P. R. 1919.**

——S. 47—*Question relating to execution—Execution sale—Construction of decree and validity of sale.*

The question of the validity or otherwise of a sale held in execution of a decree is one relating to execution so also a question whether the actual execution is in excess of the decree itself. (*Sundara Aiyar and Spencer, JJ.*) (GUNNIAH VENKATACHELLAPATHI IYER *v.* PERUMAL AIYAR. **10 M. L. T. 527 : 13 I. C. 133: (1912) M. W. N 44.**

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Jurisdiction.

——S. 47—*Question relating to execution—Execution sale.*

A suit for recovery of possession by auction-purchaser for the recovery of possession of property which he has purchased at an auction sale which has been confirmed is not barred by S. 47 of the C. P. Code. (*Imam, J.*) JAGESHWAR SINGH MAHAPATRA *v.* SRIDHAR SIRDAR. **47 I. C. 844.**

Question relating to execution—Heir of Judgment-debtor.

——S. 47—*Question relating to execution—Heir of judgment-debtor objecting to execution of decree against father—Ground that debt was not for necessity—If can be decided in execution.*

The objection by the heir of a judgment-debtor, against whom a decree had been passed, that the debt was not one incurred for necessity, can be decided in execution without recourse to a separate suit. 11 Mad. 413 : 17 Mad. 122 Dist. 16 All. 449 , 87 P. R 1887 : 147 P. R. 1907 : 34 Cal 642 : 47 P. R. 1887 : 18 W R 185, Rel. on. (*Chevis, J.*) TOTA SINGH *v.* PARTAB SINGH. **13 I. C. 670 : 243 P.W.R. 1912.**

Question relating to execution—Injunction.

——S. 47 and O. 21, R. 32—*Question relating to execution—Injunction—Door closed but re-opened—Remedy whether suit or execution.*

Where in pursuance of a decree directing the judgment-debtor to keep a certain door closed, the latter formally complied with the decree but re-opened it shortly after the remedy of the decree holder is by execution. (*Piggott, J.*) HABIBULLAH *v.* ABDULLA. **23 I. C. 247 : 12 A. L. J. 347.**

——S. 47 and O. 21, R. 32—*Question relating to execution—Injunction—Suit to enforce.*

A suit to enforce an injunction both mandatory and prohibitory is not maintainable. S 47, C.P.C. is a bar to the suit. The remedy of the plaintiff is only by execution under O. 21, R. 32, C. P. C. (*Richardson, and Beachcroft, JJ.*) SACHI PRASAD *v.* AMERNATH RAI. **46 Cal. 103 : 45 I. C. 864 : 27 C. L. J. 506.**

——S 47—*Question relating to execution—Injunction—Confirmation of possession.*

A decree for confirmation of possession obtained out of Court under an uncertified adjustment of another decree is equivalent to granting an injunction restraining execution, and a suit for such declaration is barred by S. 47, C. P. C. 25 Cal. 718, Dist. (*Mittra, A J. C.*) ASARAM *v.* YESHWANTRAO. **50 I.C. 956 : 15 N. L. R. 158.**

Question relating to execution—Jurisdiction.

——Ss. 47 and 151—*Question relating to execution—Jurisdiction—Revoking order for delivery of possession—Inherent power.*

An order by the executing Court recalling a former order for delivery of possession to the transferee is not within S. 47 and not appealable. The Court cannot grant such a relief in the exercise of its inherent powers as it is expressly forbidden by the Code. (*Mookerjee and Beachcroft, JJ.*) SASIBHUSHAN MOOKERJEE *v.* RADHANATH BOSE. **19 C. W. N, 835 : 25 I. C. 267 : 20 C. L. J. 433.**

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Jurisdiction.

——S. 47—*Question relating to execution—Jurisdiction.*

An order relating solely to jurisdiction does not determine any question relating to the execution, discharge or satisfaction of a decree. (*Miller, C. J. and Coutts, J.*) RAJKUMAR GIRWAR PRASAD SINGH *v.* RAMESWAR LAL BHAGAT.

62 I. C 461 : 4 Pat. L. J. 461.

Question relating to execution—Legal Representative.

——S. 47—*Question relating to execution—Legal representative of judgment-debtor—Objection that attached property is not that of the judgment debtor.*

An objection by the legal representative of a judgment-debtor that properties attached are not not assets of the judgment-debtor must be determined under S. 47. (*Mookerjee and Beachcroft, JJ.*) AJO KOER *v.* GORAK NATH.

19 C. W. N. 517 : 27 I. C. 321 : 20 C L.J. 481

——Ss. 47 and O. 21, R. 58—*Question relating to execution—Legal representative—Title of third person set up—Appeal.*

Where on the death of judgment debtor, his legal representative is brought on the record, and such legal representative sets up in execution proceedings, title on behalf of a person not a party to the suit, the order on such a petition is not one coming within S. 47 of the C. P. Code but is within the purview of O. 21, R. 58 and is not appealable. 23 Mad. 195 and 39 C. 298 Foll : 7 Mad. 255, Diss. There seems to be no distinction in principle between this case and the cases in which party to the suit or his legal representative on record claimed the property as trustee for certain other persons or as *shebait* of a temple. (*Abdur Rahim and Spencer, JJ.*) PETTIKAYI LAKATY MAHAMMAD HAJI *v.* ALAM IBRAN HAJI. 31 I. C. 393.

——S. 47—*Question relating to execution—Legal Representative—Dismissal of—Deft. not legal representative—Declaration that the property belongs to deft.—Suit for—Not maintainable.*

Any question arising between the judgment creditor or the legal representative of the judgment-debtor, must be decided in execution. When the Court has dismissed a petition for execution on the ground that the person against whom the execution is sought is not the legal representative of the judgment-debtor, the decree holder cannot maintain a suit praying for declaration that the property attached belongs to the defendant but a suit for a declaration that the deft. is a legal representative of the judgment-debtor is maintainable. (*Abdur Rahim and Sundara Aiyar, JJ.*) CHATHKUTTY NAIR *v.* KUTTI NAIR.

15 I. C. 224 : (1912) M. W. N. 401.

——S. 47—*Question relating to execution—Legal representative — Liability of—Power of Court to decide objection.*

Where on an application to substitute the brother of the deceased judgment-debtor as his legal representative, he pleads that he is not liable to satisfy the decree as being an undivided co-parcener of the deceased, the objection must be decided by the executing Court before an order substituting him as legal representative is made.

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Mortgage.

If the Court leaves the point whether the brother was liable for the decree open and undecided and makes an order of substitution it would be acting illegally. (*Jwala Prasad and Roe, JJ.*) PATAIT DINANATH SAHI *v.* PATAIT MALHIJI BAID.

8 Pat. L. T. 106 : 1923 P. 149.

Question relating to execution—Liability.

——Ss. 47, 145 and O. 41, R. 6—*Question relating to execution—Liability—Security for carrying out decree of the Appellate Court.*

Where a person becomes a surety, not personally but on the hypothecation of the property, for *mesne profits* that might be given against the debtor on appeal, the liability continues up to the stage of appeal to the Privy Council and can be enforced in the suit itself by joining the surety as a party. The ascertainment of *mesne profits* in the suit is binding on the surety. (*Lord Phillimore.*) RAJ RAGHUBUR SINGH *v.* JAI INDUR BAHADUR SINGH. 42 All. 158 : 22 O. C. 212 : 6 O L. J. 682 : 38 M. L. J. 302 : 18 A. L. J. 263 : 22 Bom. L. R. 521 : 55 I. C. 550 : 13 L. W 82 (P.C.).

——Ss. 47 and 145—*Question relating to execution—Liability of surety—No personal liability.*

Security bonds hypothecating immoveable properties as security for the due performance of a decree can be enforced by execution without a separate suit for sale. Where the equity of redemption is held by the surety, the surety is the primary person from whom the amount of security can be recovered and S. 145, C.P. Code is intended to enable the enforcement of such security. 17 A. 99 ; 38 A. 327 ; 42 A. 158 : 41 M 527 Ref. (*Walsh and Kanhaiya Lal, JJ.*) BETI MAHALAKSHMI BAI *v.* CHAUDHARI BADAN SINGH.

45 A. 649 : 21 A. L. J. 604 . L. R. 4 A. 356 : 74 I. C. 927 : 1924 All. 105.

——S. 47—*Question relating to execution—Liability of party or his representative.*

If during the execution of a decree an objection is taken that a certain person was not a party to the suit at the time of decree and therefore it is not open to the executing Court to issue execution process against his legal representative it is a question which is within the competency of the executing Court to determine under S. 47, C. P. C. (*Mullick and Jwala Prasad, JJ.*) MUNA KOER *v.* DURGA PRASAD. 1 Pat. L W. 282 : 39 I. C. 172 : 2 Pat. L. J. 192.

Question relating to execution—Mortgage.

——S. 47—*Question relating to execution—Mortgage—Charge—Execution.*

Where a member of a joint Hindu family sued for declaration that a mortgage of family property effected by another member is not binding on the family and a decree in the suit provided that the share of alienating member should be held liable on the mortgage and the mortgagee then applied for sale of the alienating member's share. *Held*, he could bring the share to sale without bringing a separate suit for the purpose. (*Mookerji and Teunon, JJ.*) RAMSUNDER DAS *v.* NATHUNNI SINGH. 15 C. W. N. 748 : 9 I C. 1034 : 13 C. L. J. 664.

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Mortgage.

——S. 47—*Question relating to execution—Mortgage—Two suits for possession by mortgagee.*

A puisne mortgagee sued the prior mortgagee for redemption and the mortgagor for possession of the mortgaged premises and in 1893 obtained a decree for redemption and possession. In 1908 he again sued the mortgagor for possession alone, dating his cause of action in 1897, the date of payment of the prior mortgage. *Held*, the suit for possession was not a question relating to the execution, discharge or satisfaction of the decree though the plaintiff might have obtained possession by execution and that the cause of action against the mortgagor in both the suits was the same, and that the present suit was barred by S. 11. (*Shah Din and Scott Smith, JJ.*) RAM DAS *v.* MEHR DAD. 12 P. R 1914 : 22 I. C. 896 : 124 P. L. R 1914.

——S. 47—*Question relating to execution—Mortgage decree—Puisne mortgagee's right.*

Where in a suit by a prior mortgagee impleading the puisne mortgagee as party the decree does not provide for the working out of the rights of the puisne mortgagee without additions and qualifications which the executing Court has no power to make the puisne mortgagee can enforce his mortgage by suit of his own unaffected by S. 47 of the C. P. Code. 42 Mad. 90 foll. 24 All. 429 P. C. expl. 40 All. 407 dist. (*Ayling and Krishnan, JJ.*) BRAHMANDAM VENKATA LAKSHMI NARAYAN ROW *v.* ALLAMANENI VENKAYYA. 49 I. C. 466 : (1918) M. W. N. 902.

——S. 47—*Question relating to execution—Mortgage—Application for final decree—Dismissal.*

Rejection of an application for a final decree for sale in a mortgage suit is itself a decree and is appealable under S. 96. It is not an order under S 47, C. P. C, (*Spencer and Krishnan, JJ.*) SUBBALAKSHMI AMMAL *v.* RAMALINGA CHETTY. 42 Mad. 52 : (1918) M. W. N. 792 : 35 M. L. J. 552 : 8 L. W. 526 : 48 I. C. 298 : 24 M. L. T. 486.

Question relating to execution—Objection.

——S. 47—*Question relating to execution—Objection to execution—Suit, maintainability of—Transfer of Property Act*, Ss. 88, 89.

Under ss. 88 and 89 of the T.P. Act, B obtained a decree against F.A., the adopted son of F raised certain objections against the execution of the said decree of B under S. 244, C. P. C. 1882 some of which were disallowed. A then brought a suit raising the same objections as in the execution proceedings making two other persons parties also. *Held*, that the suit was barred by S. 244, C.P.C. 1882, as the questions raised in the suit could have been and were raised in the execution proceeding. (*Sir John Edge*) AMIRCHAND *v.* HARIHAR PRASAD SINGH. 30 M.L.J. 238 : 32 I. C. 354 : 3 L. W. 257 (P.C.).

——S. 47—*Question relating to execution—Objection to sale—Purchaser of portion of the equity of redemption.*

A purchaser of a portion of the mortgaged property joined as a deft. in a mortgage suit, cannot

C. P CODE (V OF 1908), S. 47—Question relating to execution—Order relating to decree.

under S. 47 of the C.P. Code object to the sale of the mortgaged property in execution or the final decree on the ground that he has acquired a new and independent interest in that portion of the property. Any right that he has outside and independent of the mortgage must be enforced by proper proceedings outside the mortgage suit. (*Fletcher and Huda, JJ.*) BINDHU BASINI DASSYA *v.* SRIMANTA SIL. 47 I. C. 374.

——S. 47 and O. 21, R. 60—*Question relating to execution—Objection by legal representative that property attached is not assets.*

Where a judgment-debtor objects that the property attached and sought to be sold is not his, though in his possession and that he is holding the same as *shebait* of a certain deity to whom the properties have been dedicated, the case does not fall within S. 47 but under O. 21, R. 60, C. P. C. If the claim of the objector is really in his own interest as representative of the judgment-debtor, the case comes under S. 47. (*Mookerjee and Beachcroft, JJ.*) UPENDRA NATH KALAMURI *v.* KUSUMKUMARI DASI. 20 C. L. J. 485 : 19 C. W. N. 520 : 27 I. C. 328 : 42 C. 440.

——Ss. 47, 2, 96—*Question relating to execution—Objection to attachment by legal representative.*

A decree-holder attached certain properties in the possession of a judgment debtor's son alleging their descent to him as a part of the deceased's estate. The son claimed an independent title to the same. *Held*, the objection fell under S. 47 as a question between the parties and the decision thereon is a decree under S. 2. Hence the appeal lay from it under S. 96. (*Stephen and Richardson, JJ.*) AHAMED ALI KHAN *v.* NABIN CHANDRA TARKARATNA. 16 I. C. 385 (2).

——S. 47 and O. 21, R. 63—*Question relating to execution—Objection to attachment.*

All objections to attachment in execution of a decree must be raised in execution proceedings. 23 Mad. 361, rel. (*Sundara Iyer and Sadasiva Iyer, JJ.*) JAGADAMBAL AMMAL *v.* RAMASWAMY IYENGAR. 17 I. C. 126.

——S. 47 and O. 21, R. 90—*Question relating to execution—Objection to attachment—Non-transferable occupancy holding.*

No second appeal lies from an order under O. 21, R. 90, C P. C. The objections as to non-transferability of the holding by the judgment-debtor come under S. 47 and a second appeal lay in respect thereof. There being no suppression of the notices the tenant was bound to object as to the non-transferability of the holding at the earliest possible opportunity and when he does not do so, he cannot be heard after the sale has taken place (*Mullick and Thornhill, JJ.*) SRIKRISHNA RAI AND BHAJUNGI MALLAH *v.* RAMASARAN RAJ 56 I C. 646 : 1 Pat. L. T. 267.

Question relating to execution—Order Relating to Decree.

——S. 47—*Question relating to execution—Order for delivery of possession to auction purchaser.*

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Order relating to decree.

It may be disputed whether an order for delivery of possession to an auction-purchaser is an order relating to the execution, discharge or satisfaction of a decree, for so far as the decree holder is concerned his decree is satisfied, and whether the auction-purchaser gets the property or not is a matter with which he is not concerned.

Per Cuming, J.—The delivery of possession is not a part of the satisfaction of the decree. So far as the decree holder is concerned the decree is satisfied when the property is sold and the money paid to decree-holder. Obviously he is not concerned with the property being delivered to the purchaser The question of the delivery of possession to the auction-purchaser is not one relating to the execution of the decree or between the parties to the suit or their representatives. It is immaterial that the auction-purchaser is also the decree-holder. As an auction purchaser he is in an entirely different capacity. (*Woodroffe and Cuming, JJ.*) LAKHI PRIA GUHA *v.* NANDA KUMAR BASU. **1923 Cal. 345.**

———S. 47—*Question relating to execution—Order allowing payment directed by decree.*

An order merely allowing a payment directed by the decree is not one under S. 47, C. P. C. and is not appealable, (*Walmsley and Huda, JJ.*) IMAM ALI SIKDAR *v.* KARIM BUKSH SHEIKH.
52 I. C. 401 : 30 C. L. J. 32.

———S. 47—*Question relating to execution—Order amending decree—If appealable.*

An order in execution amending a decree is not within S. 47 and is not appealable. (*Shah Din, C. J.*) AZIZ BAKSH *v.* SULTAN SINGH.
46 I. C. 9 . 43 P. R. 1918.

———S. 47—*Question relating to execution—Order in which properties to be sold—If within section—Appeal.*

A decision of an executing court as to the order in which properties were to be sold in execution, even though it is a question between judgment-debtors only, is one relating to execution, discharge or satisfaction and as such appealable under S. 47, C. P. Code. It is not applicable only to questions arising between parties who are opposed to each other in the suit (*Oldfield and Devadoss, JJ.*) VEDAVYASA AIYAR *v.* THE MADURA HINDU LABHA NIDHI CO., LTD.
18 L. W. 311 : (1923) M. W. N. 662 : 77 I. C. 148 : 1924 Mad. 365 : 45 M. L. J. 478.

———Ss. 47 and 11, O. 21, Rr. 58 and 63 and O 43—*Question relating to execution Order relating to decree—Madras Civil Rules of Practice, R. 179—Application under R. 179 for payment of money standing to the credit of other suits—Objection by decree-holder in the latter suit—Objection upheld—Remedy—Appeal.*

C, on a mortgage decree against A obtained a decree for sale of mortgaged property. B, who held other decrees against A, attached the profits of mortgaged property deposited in Court to C's creditor and applied for cheque under R, 179 of Madras Civil Rules of Practice. C objected and the objection was upheld. B filed a revision petition. It was held, the remedy of B was by regular suit under O. 21, R. 63 as this objection was one under O. 21, R. 58. The order was not appealable as the question was not under S. 47 of C. P. Code. (*Oldfield and Sadasiva Iyer, JJ.*) PONNU RANGAM PILLAI *v.* LALKHAN SAHIB.
37 I. C. 348.

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Preliminary decree.

———S. 47—*Question relating to execution—Order refusing to discharge a receiver.*

An order refusing to discharge a receiver appointed in an execution proceeding is within S. 47, C. P. C. (*Mullick and Thornhill, JJ.*) RAMESWAR SINGH *v.* HITENDRA SINGH.
3 Pat. L. J. 513 : 46 I. C. 655 : 1919 Pat. 137.

Question relating to execution—Oudh Laws Act, S. 15.

———S. 47, O. 20, R. 14—*Question relating to execution—Oudh Law, (Act XVIII of 1867) S. 15—Non-payment of purchase money within time whether relates to execution of decree.*

The question whether a pre-emptor has paid the amount fixed by the pre-emption decree within time or not is not a question relating to the execution of the decree within the meaning of S. 47 (*Kanhaiya Lal, A. J. C.*) BHARATH SINGH *v.* DHARAM SINGH. **21 I. C. 193 : 17 O. C. 14.**

Question relating to execution—Partition during suit.

———S. 47—*Question relating to execution—Partition during suit by co-sharer—Procedure—Substituted property.*

Where there has been a partition during the pendency of a suit to recover a share decree-holders are entitled under S. 47 to ask the Court to ascertain in execution what estates and interests have been substituted for their original share and give them possession of the same notwithstanding clear instructions in the decree. (*Chamier and Roe, JJ.*) RAMESHWAR PRASAD *v.* BAIJNATH GOENKA. **1 Pat. L. W. 711 : 40 I. C. 508 : 2 Pat. L. J. 496 : (1917) Pat. 205.**

Question relating to execution—Power of executing Court.

———S. 47—*Question relating to execution—Power of executing Court to sell in execution.*

A question as to the legality of an execution Court's procedure or as to its jurisdiction or power to order a sale is a question falling under S. 47, (*Lyle and Ashworth, A. J. C.*) BALDEO DAS *v.* THE BOMBAY MERCANTILE BANK.
54 I. C. 364 : 6 O. L. J. 640.

———S. 47, O. 21, R. 2—*Question relating to execution—Power of Court to decide.*

O. 21, R. 2 does not in any way limit or affect the operation of Sec. 47 and does not prevent the Court from deciding any question arising out of the execution of a decree. (*Rutledge, J.*) CHETTY FIRM *v.* G. LON. POW. **11 L.B.R. 364 : 1 Bur. L.J. 43 : 70 I.C. 859 : 1922 L.B. 31.**

Question relating to execution—Preliminary decree.

———S. 47—*Questions relating to execution—Preliminary decree—Decree for possession of share in Ijmali Mahal—Partition—Enquiry into shares.*

A decree for possession of a share in an Ijmali Mahal can be executed against the specific lands

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Preliminary decree.

which have been allotted in lieu of the share in partition proceedings. An enquiry as to what are the lands thus substitued is one relating to the execution of the decree and falls under S. 47. (*Sir John Edge.*) RAI BAIJNATH GOENKA *v.* RAVANESHWAR PRASAD SINGH. **43 M. L. J. 124 : 1 Pat. 378 : 20 A. L. J. 650 : (1922) M. W. N. 415 : 31 M. L. T. 43 (P. C.) 16 L. W. 128 : 36 C. L. J. 1 : 26 C.W.N. 906 : 3 Pat. L.T. 547 : L.R. 3 P.C. 146 24 Bom. L.R. 974 : 49 I A 139 : 9 O. & A.L.R. 93 : 69 I. C. 180 : (1922) P.C. 54. (P. C.)**

——S. 47—*Question relating to execution—Preliminary decree—Foreclosure suit—No final decree—Subsequent suit for redemption.*

The mere passing of a preliminary decree in any foreclosure suit does not put an end to the relationship of the mortgagor and the mortgagee. If the mortgagor fails to redeem within six months and no final decree is passed he can bring a fresh suit for redemption. (*Scott, C. J. and Beaman, JJ.*) RAMA TULSA MAHAR *v.* BHAGCHAND MOTIRAM. **39 Bom. 41. 27 I.C. 249 : 16 Bom. L.R. 687.**

Question relating to execution— Priority.

——S. 47—*Question relating to execution—Priority—Application for execution by assignee decree-holder.*

All questions of rights of priority, etc., arising in applications for execution by the assignee decree-holder should be determined in execution proceedings. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) ARUMUGHA MUDALIAR *v.* JAGAMBA BAI AMMANI. **17 I. C. 323 : 13 M. L. T. 227.**

Question relating to execution—Recovery of Possession.

——S. 47—*Question relating to execution—Recovery of possession by decree-holder purchaser.*

Questions relating to the possession of the property purchased by decree-holder in execution of a decree are not questions relating to execution, etc., within S. 47, C. P. C., and a suit for recovery of possession is not barred by S. 47. (*Miller, C. J. and Jwala Prasad, J.*) SRIDHAR SIRDAR *v* JAGESHWAR SINGH MAHAPATRA. **52 I. C. 711 : 4 Pat L. J. 716. 1919 Pat. 354.**

Question relating to execution—Redemption of mortgage.

——S. 47—*Question relating to execution—Redemption of mortgage—Decree capable of execution but not executed—Second suit to redeem the mortgage.*

In 1888, the plff. obtained a redemption decree under the Dekhan Ag. Rel Act. 1879. Nothing was done under the decree. The Plff. then filed another suit in 1913 to redeem the mortgage. *Held*, that the second suit could not lie by reason of S 47 of the C. P. Code. The decree in the first suit passed before the T. P. Act came into force in the Bombay Presidency did not require any order absolute under that Act or any final decree under the C. P. Code of 1908 and was capable of execution, and its execution was time barred long before the institution of the second suit. (*Heaton and Shah, JJ.*) DINU YESU DESAI *v.* SHRIPAD BAJI GARWARE. **43 Bom. 703 : 52 I. C. 466 : 21 Bom. L. R. 720.**

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Son's liability.

Question relating to execution—Sale under Public Demands Recovery Act.

——S. 47—*Question relating to execution—Sale under Public Demands Recovery Act.*

A question as to whether the execution proceedings under Public Demands Recovery Act were entirely without jurisdiction is not one under S. 47. (*Mookerjee and Caspersz, JJ.*) NAGENDRA BALA *v.* SECRETARY OF STATE. **14 C. L. J. 83 : 10 I. C. 532.**

Question relating to execution—Satisfaction of decree.

——S. 47—*Question relating to execution—Satisfaction of decree.*

A decree was attached under a decree *exparte* which was executed and satisfaction entered, then the *exparte* decree was set aside at the instance of the debt. who then applied for execution of the decree attached and also for cancellation of satisfaction of the *exparte* decree on the ground that the holder of the *exparte* decree was a fictitious person and that it was obtained by fraud. *Held*, the application related to satisfaction of decree and was maintainable under S. 47 and no separate suit would lie in respect of it (*Chatterjee and Panton, JJ.*) UZIR GAZI *v.* MEHER ALI NASKAR. **57 I. C. 898.**

——S. 47 and O. 21, R. 2—*Question relating to execution—Satisfaction of decree—Fraudulent concealment of.*

The question whether a judgment-debtor satisfied the decree and was fraudulently kept out of all means of exercising his right to apply in Court comes within S. 47 of the C. P. Code. (*N. R. Chatterjee and Duval, JJ.*) KAMINI KUMAR SHAHA CHOUDHURY *v.* ABDUL RAHIM. **30 C. L. J. 248 : 53 I. C. 67.**

——S. 47 and O. 21, R. 2 (3) — *Question relating to execution—Satisfaction not certified.*

An executing Court cannot investigate the fact of receipt of decretal amount by the decree holder which was not certified to the Court by the judgment debtor within the prescribed time. 12 C. W. N. 485, Foll. (*Mookerjee and Beachcroft, JJ.*) JOGENDRA PROSAD MITRA *v.* ASUTOSH GOSWAMI. **24 C. L. J. 462 : 37 I. C. 738.**

——S. 47 — *Question relating to execution—Satisfaction of the decree.*

In an execution proceeding it was contended by he judgment debtor that he was entitled to deduct a larger sum than that allowed by the decree holder on account of the transfer of certain properties by him to the decree-holder and that the interest claimed was at a higher rate than actually due. There was also a dispute as to the date on which orders should be given for the consideration money for the transfer. *Held*, all these come within the scope of S. 47, C. P. C. (*Mookerjee and Teunon, JJ.*) SURENDRA NATH *v.* MANMOTHA NATH **9 I. C. 382.**

Question relating to execution—Son's liability.

——S. 47—*Question relating to execution—Son's liability—Hindu Law.*

Where a Hindu judgment-debtor dies before the decree is satisfied, the decree can be executed

C. P. CODE (V OF 1908), S. 47—Question relating to execution—Suit for declaration.

against his son to the extent of the ancestral property come to his hands. The proper procedure for the decree-holder is to bring the son on the record as a separate suit to determine son's liability is barred. The question whether a decree against a Hindu father is capable of execution, the debt being tainted with immorality is one relating to the execution of decree and should be determined by the executing Court. (*Jwala Prasad and Adami, JJ.*) KAROO *v* RAMESHWAR SAO
62 I. C. 905 : 6 P. L. J. 451.

Question relating to execution—Suit for Declaration.

———S. 47—*Question relating to execution—Suit for declaration—Objections by two out of four representatives.*

Two out of the four representatives of the judgment-debtor filed objections to an execution sale of a house; the objections were dismissed for default and the decree fully satisfied. Subsequently all the representative sued for declaration that the house was not liable to sale. *Held*, that as only two representatives had filed objections and the decree being executed the executing Court had become *functus officio*, the separate suit would lie. (*Martineau, J.*) NIZAM DIN *v.* BHAGAT RAM. 60 I. C. 516.

———S. 47—*Question relating to execution—Suit for declaration that decree is satisfied—If lies.*

A suit for a declaration that a decree has been satisfied is maintainable and S. 47 does not bar it. (5 I. C. 814, (Foll.) (*Reid, C. J. and Kensington, J.*) JAMUN RAM *v.* KISHEN RAM.
42 P. R. 1914 : 79 P. W. R. 1914 : 234 P. L. R. 1914 : 25 I. C. 642.

———S. 47—*Question relating to execution—Suit for declaration.*

Plaintiff sued defendant for a debt and attached before and after judgment, a debt due by a third person to defendant which was the subject of a suit. The suit was dismissed on the ground that the third party could not contract with defendant. The Court refused to allow plaintiff to sell the attached debt. Plaintiff brought a separate suit for a declaration that the attached debt was really due by third party to defendant. The suit is barred under S. 47, as this is a question relating to the execution of the decree of plaintiff against defendant. (*Kanhaiyalal and Kendall, A. J. Cs.*) HARJASMAL *v.* DEPUTY COMMISSIONERS, SITAPUR.
38 I. C 461: 3 O. L. J. 756.

Rateable distribution.

———Ss. 47 and 73—*Appeal—Rateable distribution—Order dismissing application for—Nature of.*

Where the Court below dismisses an application for rateable distribution on the ground that it has not been validly presented before the money was paid out to other creditors the order is not appealable and the aggrieved party can sue. (*Oldfield and Venkatasubba Rao, JJ.*) SOMASUNDARAM CHETTIAR *v.* SUNDARESA RAO.
32 M. L. T. 155 (H. C.); 1924 Mad. 97.

C. P. CODE (V OF 1908), S. 47—Restitution.

———Ss. 47 and 73—*Rateable distribution—Order rejecting application for, whether appealable.*

An order under S 73 rejecting an application for rateable distribution is neither an order under S. 47 determining question between parties to the suit, nor a decree under S. 2 (2) and hence is not appealable (*Coutts and Adami, JJ.*) HURMOOJI BEGUM *v.* AYSHA. 1 Pat. L. T. 296 : 57 I. C. 421 : 5 Pat. L. J. 415.

Restitution.

——— Ss. 47 and 144—*Restitution—Execution sale—Property alleged to have been wrongfully sold in execution.*

Where the Judgment debtors apply for restitution of property purchased by the auction purchaser at an execution sale on the ground that the decree holders had sold certain property not covered by the decree. *Held* that the application was not maintainable under S. 47, C. P. C. (*Stuart and Kanhaiya Lal, JJ.*) MUNNA LAL *v.* THE COLLECTOR OF SHAHJAHANPUR.
45 All. 96 : 74 I. C. 995 : 1923 A. 470.

———Ss. 47 and 144—*Restitution — Auction purchaser—Decree declared to be invalid—Right to apply for refund of purchase money.*

An auction-purchaser of property sold in execution of a decree is not bound to look beyond the decree. When, therefore he purchases property in execution of a decree which subsequently turns out to be invalid, he is entitled ro recover it from the defendants who are in equity bound to refund it. An application for refund of the sale price can be made by the auction-purchaser under S. 47 of the Civil Procedure Code. 40 M. 299 : 43 M. 107 ; 42 Bom 411 , 44 A. 266 referred to. (*Lindsay, Ryves and Daniels, JJ.*) BINDESHRI PRASAD TEWARI *v.* BADAL SINGH.
21 A. L. J. 228 : 45 A. 369 : 74 I. C. 873 : 1923 A. 394.

——— Ss. 47 and 144—*Restitution— Appeal from order.*

In a suit for possession against R. R. died *pendente lite* and K and A applied each to be appointed as legal representative and the Court appointed K. and passed a decree against him and the decree-holder took possession. In the meanwhile A appealed against his exclusion, got the order against him reversed and applied for recovery of possession which had been taken by the decree-holder His application was granted and N. who had previously been in possession was evicted. Thereupon N applied for restoration of the *status quo* and obtained an order in his favour. *Held*, that no apreal lay from the order restoring the *status quo*. (*Johnstone and Shadi Lal, JJ.*) AMIRCHAND *v.* NARASINGH DAS.
222 P L. R. 1914: 24 I. C. 941: 123 P. W. R. 1914.

——— Ss. 47 and 144—*Restitution—Decision on merits essential—Orders relating to collateral matters—If have the force of a decree.*

An application for restitution under S. 144 is not an application for the execution of a decree and a decision on such an application on collateral matter such as a question of limitation has not the force of a decree and is therefore not appealable.

C. P. CODE (V OF 1908), S. 47—Restitution.

Obiter:—The decision of a question of limitation arising in execution proceedings may come within purview of S. 47 and is therefore a decree as defined by the code but the same cannot be said of a question of limitation arising in connection with an application under S. 144. (*Rattigan and Shah Din, JJ.*) RAM CHAND *v.* SHAM PERSHAD. **110 P. R. 1913: 22 I. C. 851: 117 P. L. R. 1914**

——Ss. 47 and 144—*Restitution—Parties and representatives—Auction-purchaser.*

An order refusing to set aside an execution sale was reversed on appeal without the auction purchaser being a party to the proceedings. *Held*, that an order could not be made under S. 144 as no decree had been varied or reversed on appeal and that an order could not be made on the analogy of S. 144 as the auction purchaser was not a party to the proceedings to set aside the sale. (*Sadasiva Aiyar and Bakewell, JJ.*) SUBBAMMA *v.* CHENNAYA. **47 I. C. 628 : 41 Mad. 467.**

——Ss. 47 and 144—*Restitution—Suit.*

An application for restitution is an application in execution and has to be enquired into under S. 47. (*Ayling and Seshagiri Aiyar, JJ.*) SOMASUNDARAM PILLAI *v.* CHOKKALINGA PILLAI. **40 Mad. 780 : 38 I. C. 806 : 5 L. W. 267.**

——S. 47—*Restitution.*

An application for mense profits under S. 144 relates to execution, discharge or satisfaction and the Court fee payable on the memo of first appeal against an order on the application is 8 annas. (*Drake Brockman, J. C.*) GABBA *v.* KANCHEDI LAL. **18 N. L. R. 15: 67 I. C. 225 : 1922 N. 62.**

——Ss. 47 and 144—*Restitution—Suit.*

A regular suit for restitution of property wrongly sold in execution of *ex parte* decree which had been set aside by the trial Court itself, cannot fail simply because, the sale might have been set aside on an application under S. 47, C. P. C. If necessary the plaint could be amended so as to include a prayer that the sale may be set aside or the plaint treated as an application under S. 47. (*Chamier, C.J. and Jwala Prasad, J.*) CHINTAMAN SINGH *v.* CHUNI SAHU. **1 Pat. L. J. 43: 34 I. C. 747: 3 Pat. L. W. 95.**

Scope of.

——S. 47—*Scope of.*

That which should in reality form the basis of an independent suit cannot be introduced as a question to be tried in execution proceedings. (*Lord Phillimore.*) MANINDRA CHANDRA *v.* RAM KUMAR LAL BHAGAT. **49 I. A 220 : 4 P.L.T. 1 : 20 A L.J. 988 : 31 M. L. T. 131 : 16 L.W. 905 : 43 M.L.J. 589 : 1 P. 581 : 24 Bom. L R. 251 : 27 C. W. N. 29 : 36 C.L.J. 542 : 4 U. P L. R. (P. C.) 88 : 68 I. C. 973 : 1922 P. C. 304.**

——S. 47—*Scope of.*

The object of separately numbering the subsections of S. 47 is to make the several subsections independent of each other. 11 C. W. N. 433, dist. (*D. Chatterjee and Beachcroft, JJ.*) MOHINI MOHAN MOZUMDAR *v.* CHANDAR DEY. **32 I C. 524: 20 C. W. N. 679.**

C. P. CODE (V OF 1908), S. 48—Applicability.

——S. 47—*Scope of—Claim nullifying effect of decree, if within section.*

A claim nullifying the effect of a decree cannot be made by the judgment-debtor under S 47 of the Code. (*Stephen and Chatterjee, JJ.*) GANESH PRASAD BHAGAT *v.* SAKHINA BIBI. **14 I. C 7.**

——S. 47—*Scope—Bar of suit—Sale of share of a co-parcener in joint family—Auction purchaser—Suit for partition—Decree-holder an auction purchaser*

S. 244, C. P. Code (1882) does not bar a suit by an auction purchaser for the share of a co-parcener in Hindu joint family for partition and allotment of the share to him: the decree-holder himself being the auction purchaser makes no difference. (*Broadway and Abdul Raoof, JJ.*) BRIJLAL *v.* DURGA. **1 Lah. 134 : 56 I C. 254 : 1 Lah, L. J. 10.**

——S. 47—*Scope of.*

Disputes among co decree-holders as to the right of one to execute a joint decree to the exclusion of the other are not questions arising between parties to a suit. Disputes between judgment-debtors *inter se* as to the possession of the property after satisfaction of a decree would not come under S, 47. To come within the category of S. 47 there must be questions arising between persons opposed in interest in the suit and not between a party to a suit and his own representative. 25 Bom, 631. 31 M. L J, 44 referred to. Persons may be parties opposed to each other without necessarily being arrayed as plaintiff and defendant respectively in the suit. (*Spencer and Odgers, JJ.*) BUDARAJU HANUMANTHA RAO ALLAMNENI KRISHNAMMA. **70 I. C 329: 32 M. L T. (H. C.) 118 (2).**

——S. 48.

Applicability.
Combined decree.
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Continuation of application.
Date of decree.
Deduction of time.
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Fresh application.
Limitation for execution.
Mortgage decree.
Retrospective effect.
Reviver of former application.
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Applicability.

——S 48—*Applicability of—Retrospective effect—Decree on mortgage.*

S. 48, has a retrospective effect, and governs an application for the execution of a mortgage decree passed before the Code came into force: Hence such an application, if presented 12 years after the date of the decree, is barred. 40 Cal. 704. foll. 32 All. 499 diss. (*Macleod, C. J. and Fawcett, J.*) GOPALDAS GANPATDAS *v.* TRIBHOVAN JETHIRAM. **22 Bom L. R. 1420: 59 I. C. 790: 45 B. 365.**

——S. 48—*Applicability of—Mortgage decree—C. P. C. (1882), S. 23—Difference.*

C. P. CODE (V OF 1908), S. 48—Applicability.

An application for the execution of a mortgage decree passed when the old Act was in force filed after the expiration of 12 years from the date of the decree is not admissible after the new Act has come into operation. (*Mookerjee and Beachcroft, JJ.*) JAI MANGAL BATE MISSRAIN *v.* BADAN CHANDA DAS. **19 I. C. 899.**

——**S. 48**—*Applicability — Mortgage decree passed under C. P. C.* 1882.

Where a mortgage decree was passed under the old code but the application for its execution was made after the new code came into operation *Held* that the usual limitation of twelve years is applicable. (*Jenkins, C. J. and Mullick, J.*) BISSHESHUR SANAMAT *v.* JASODA LAL CHOUDHURY. **40 Cal. 704: 19 I C. 391 : 17 C.W.N. 622.**

——**S. 48**—*Applicability — Mortgage decree —Preliminary —Final decree—T. P. Act, Ss.* 88 *and* 89.

A decree-holder will have 12 years to perfect the preliminary decree into an order absolute under S. 89, T. P. Act and another 12 years for executing the order absolute. (*Seshagiri Aiyar and Kumarasami Sastri, JJ.*) MUHAMMAD HUASIN *v.* ABDUL KAREEM. **39 Mad. 544 : 29 I. C. 237 : 17 M. L. T. 424.**

——**S. 48**—*Applicability of.*

Saving decrees granting injunctions, S. 48 applies to all other decrees. A decree directing the execution of a conveyance might come under the expression "directs the delivery of any property" in S. 48, C. P. C. (*Sadasiva Aiyar and Napier, JJ.*) VENKAITAMMA *v.* MANIKKAM NAYANI VARU. **26 I. C. 244 : 16 M. L. T. 399.**

Combined Decree.

——**S. 48 and O. 20, R. 6**—*Combined decree—Execution—Limitation.*

Where a mortgage decree directed that the available proceeds of the sale under the decree were to be paid in satisfaction of the decretal debt but that if the amount due to the plaintiff was not satisfied by sale of the mortgaged property the balance would be realised from other properties and the persons of the defendants. *Held* that the limitation for execution of the latter part of the decree ran from the date of the decree and not from the date of the sale of the mortgaged property under S. 48, C. P. C. (*Lord Dunedin, J.*) KHULNA LOAN CO, *v.* JNANENDRA NATH BOSE. **45 I. C. 436 : 22 C. W. N. 145 (P. C.)**

[This decision in effect overrules. 40 Mad. 989 : 37 I, C. 741 : 31 M. L. J. 513 (F. B.).

Compromise Decree.

——**S. 48**—*Compromise decree.*

S. 48 of the present Code is more extensive than S. 230 of the old Code and covers compromise decrees. (*Scott, C. J. and Hayward, J.*) BALARAM VITHAL CHAND *v.* MARUTI DEOJI. **39 Bom. 256 : 28 I. C. 478 : 17 Bom. L. R. 178.**

——**S. 48 (1) (b)**—*Compromise decree—Order by executing court recording compromise—Effect —Limitation.*

C. P. CODE (V OF 1908), S. 48—Continuation of application.

An order under S. 48 (1) (b), C. P. C, must be made by the court which made the decree and notbv a Court executing the decree. Where a Court executing the decree records a compromise the original decree is not altered and limitation for purposes of execution is still calculated from the date of the decree. (*Broadway, J.*) JIVAN BAKSH *v.* MUBINAL HUQ. **73 I. C. 794 : 1923 Lah. 678.**

Continuation of Application.

——**S. 48**—*Continuation of old applications.*

S. 48. C. P. C. applies to execution applications made after the new code come into operation. Where an application for execution was made 12 years after the passing of the decree but within 3 years from the last application, the application was not barred under S. 48, C. P. C, as it was but a continuation of the previous application. The theory of continuation applies to cases where the previous application was interrupted by circumstances not under the control of the decree-holder. (*Mookerjee and Beachcroft, JJ.*) MUHAMMAD NABI BEZA *v.* WILLIAM ALFRED THOMAS. **21 I. C. 923.**

——**S. 48**—*Continuation of application—Stay owing to orders of court.*

If an application for execution be treated as a fresh application made after 12 years from the date of decree, the decree-holder must bring his case under S. 48 (2) C. P. C. But where the execution was stayed for a period owing to an application by judgment-debtor under S 50 Insolvency Act, an application for execution made after that period, though after 12 years, is deemed as a continuation of the previous application and hence decree-holder need not establish the provisions of S. 48 (2). (*Mookerjee and Beachcroft, JJ.*) CHATRAPAL SINGH *v.* JOY MONGALA MISRAIN. **16 I. C. 541.**

——**Ss. 48 and 63**—*Continuation of application—Property attached by two Courts—Sale by one—Application for rateable distribution more than* 12 *years after decree.*

A and B obtained decrees against X in the District and the Munsif Court respectively and attached the properties of X in execution. They were ordered to be sold under S. 63 of the C. P.C. by the District Court. While B's application was pending in the Munsif's Court he applied to the District Court for rateable distribution 12 years after the date of his decree though his last application was within 12 years. *Held*, that the application to the District Court was only a continuation of the application made to the Munsif's Court. (*Odgers, J.*) RENTALA VEERA RAZU *v.* KURUVELLA SUBBARAYUDU. **41 M. L. J. 378 : (1921) M. W. N. 507 : 64 I. C. 493 : 15 L. W 245 : 1922 Mad. 3.**

——**S. 48**—*Continuation of application.*

If a mortgagee decree holder entitled to proceed against any one of the mortgaged properties is obstructed by some of the judgment-debtors and not by laches on his part, he can revive the proceedings which temporarily abated owing to interruption and continue his proceedings in execution against that property even though there

C. P. CODE (V OF 1908), S. 48—Continuation of application.

are others and he is not bound to enquire whether such property is available. (*Kendall and Muhammad Ali, A. J. Cs*) MUMTAZ UNNISSA BEGAM *v.* AMAR CHAND PAUL. **38 I. C. 411 : 3 O. L. J. 706.**

——S. 48— *Continuation of application — Fresh application.*

In order to entitle a decree holder to claim that an application should be regarded as a continuation of the previous application two conditions must be satisfied, first that the previous application was dismissed for no fault or default on his part and secondly that the present application is similar in scope and character to the previous application. If these conditions are satisfied there is no reason why the court should not regard the present application as a continuation of the previous one. (*Das and Adami, JJ.*) DHAROHAR SINGH *v.* RAM PRASAD NARAYAN SAHAI.
72 I. C. 862 : 1 Pat. L. R. 139.

——S. 48—*Continuation of application.*

An application for execution cannot be treated as a continuation of a prior application where the relief asked for is different and is directed against property not touched by the first application. (*Chamier, C. J. and Jwala Prasad, J.*) KRISHNA DAYAL GIR *v.* SAKINA BIBI.
20 C.W N. 952 : 2 Pat L. W. 370 : 34 I. C. 27 : 1 Pat. L. J. 214.

Date of Decree.

——S. 48 (1) (a) and (b)—*Date of decree—Preliminary decree—Decree absolute.*

For purposes of S. 48 (1), Cl. (a) the preliminary as well as the final decree or decree absolute in the case should be taken as a single and indivisible decree. Therefore the date of decree means the date of the final decree. (*Richardson, and Roe, JJ.*) SHIBA DURGA DEBI *v.* GOPI MOHAN SAHAI. **33 I. C. 180.**

Deduction of Time.

——S. 48—*Deduction of time—Minority—Lim. Act, S. 6—Extension of time.*

S. 6 of the Lim. Act serves only to extend for the benefit of minors, periods of limitation provided by the Act itself ; it does not extend the period provided by S. 48, and makes no exception in favour of minors. (*Chamier, J.*) CHATAR PALMAN *v.* PREMNATH TEWARI.
27. I. C. 865 : 13 A. L. J. 166.

——S. 48 (1)—*Deduction of time—Conciliator's certificate—Deduction of time spent in obtaining—Dekh. Agri. Rel. Act, S. 48.*

The time spent in obtaining the conciliator's certificate under S. 48 of the Dekh Agri. Rel. Act can be deducted in computing the period of limitation under S. 48, C. P. C. (*Batchelor, A. C. J. and Shah, J.*) SHIDAYA VIRABHADRAYA *v.* SATAPPA BHARMAPPA. **42 Bom. 367 : 45 I. C. 494 : 20 Bom. L. R. 360.**

——S. 48—*Deduction of time—Minority.*

The period of 12 years prescribed by S. 48 must be computed form the day on which it begins to run. The running of time of 12 years under S. 48 is not suspended during minority of minor succeeding his deceased father who died after the decree is passed. (*Chandavarkar and Batchelor, JJ.*) BHAGAWANT RAMCHANDRA *v.* HAJI MAHOMED ABAS. **36 Bom. 498 : 15 I. C. 829 : 14 Bom. L. R 387.**

C. P. CODE (V OF 1908), S. 48—Fraud.

——S. 48— *Deduction of time—Limitation Act, S. 15, if applies.*

The provisions of S. 45 of the Madras Court of Wards Act allowing deduction of time during which the estate was under the Court's management will apply only when decrees have been transferred to the Collector for execution, and an amendment of it in execution cannot be permitted to revive a barred claim. 26 M.L.J. 83 foll.; 37 M 186 diss. (*Wallis and Sadasiva Iyer, JJ.*) KUMARA VENKATA PERUMAL RAJU BAHADUR VARU *v.* VELAYUDA REDDI. **24. I. C. 195 : 24 M.L.J. 25.**

——S. 48—*Deduction of time—Minority—Not a ground for extension of period—Interpretation of statutes.*

Cases within S. 48, C. P. C. are exempted from the operation of Art. 182 of the Limitation Act. Minority is no ground for exemption from the operation of S. 48, C. P. C. Nor is it a ground of exemption under the general law apart from the provisions of S. 6 of the Limitation Act. Under S. 48, C.P.C. all decrees except one for injunction will be barred after 12 years. (*Benson and Sundara Aiyar, JJ.*) REBALA RAMANA REDDI *v.* REBALA BABU REDDI. **37 Mad. 186 : 24 M L.J. 96: (1913) M. W. N. 114 : 18 I. C. 586 : 13 M. L. T. 79.**

——S. 48 — *Deduction of time— Execution stayed—Lim. Act, S. 15.*

S. 48, C. P. C. does not contemplate a deduction of any particular period from the prescribed period of 12 years. If force or fraud is proved, it gives a fresh starting point of limitation under S. 48 (2) (a). The period during which execution proceedings have been stayed cannot be deducted from the period of 12 years. (*Mittra, A.J.C.*) GOVINDA *v.* UMRAO SINGH. **54 I. C. 279.**

Fraud.

——S. 48—*Fraud—Frivolous and futile objections to execution.*

"Fraud" in S. 48, C.P. Code should be understood in a large and liberal sense. The delaying of execution by frivolous, futile and dishonest objections on the part of the judgment debtors amounts to fraud. 6 A. L. J 401: 9 A. L. J. 17 foll. 11 Q B. D. 270 ref, (*Piggott and Walsh, JJ.*) LALTA PRASAD *v.* SURAJ KUMAR.
44 All. 319 : L. R 13 A. 111 ; 20 A. L. J. 185 : 65 I. C. 877 : 1922 All. 145.

——S. 48 (2) (a)—*Fraud—Effect on limitation.*

The second proviso of Sect. 48 of the Code has the effect of extending the period of limitation to 12 years from the time when the decree holder was, by fraud of the judgment-debtor, prevented from executing his decree. 7 C. 566 dist. (*Knox and Piggott, JJ.*) MOHSIN ALI *v.* MASOON ALI. **34 All. 20 : 11 I. C. 672 : 8 A. L. J. 1020.**

——S. 48 (2) (a)—*Fraud—Preferring appeal—Limitation.*

Pendency of appeal by judgment-debtor does not cause suspension of execution where there

C.P. CODE (V OF 1908), S. 48—Fraud.

is no fraud or force. (*Holmwood and Imam, JJ.*) KARTIK CHANDRA MANDAL *v.* NILMANI MANDAL. **32 I. C. 931 : 20 C. W. N. 686.**

——S. 48 (2) (a)—*'Fraud'—Interpretation of.*

The term 'fraud' in S. 48 should be interpreted in a wider sense than that in which it is generally used in English law. 6 M. 365, Foll. S. 48 (2) (*a*) requires that there should be fraud on the part of the judgment-debtor and also that the fraud should be such as to prevent the decree holder from executing the 'decree'; so that the mere fact that the judgment-debtor objects to a sale which objection ultimately proves unsuccessful will not amount to fraud. 8 M. L. J. 203, Rel on. (*Mookerjee and Carnduff, JJ.*) RAGHUNATH PRASD *v.* KASHI PRASAD. **13 I. C. 88 : 15 C. L. J. 678.**

——S. 48—*Fraud—Avoiding arrest under a warrant.*

An intentional avoiding by the judgment-debtor of arrest under a warrant by the decree-holder to avoid payment of decretal amount, amounts to fraud and gives a fresh start to the period of limitation. (*Abdur Rahim and Odgers, JJ.*) AYYAVU *v.* SOMASUNDARAM CHETTIAR. **12 L. W. 710: 60 I. C. 630: (1920) M. W. N. 788.**

——S. 48 (2) —*Fraud or force—Execution—Application after 12 years.*

A decree holder applying for execution after 12 years from the date of the decree is not restricted to proving that the fraud or force occurred within three years of the application. He is entitled to the benefit of the proviso even if the fraud or force was long anterior in date. 8 M.L. J. 203. not foll.; 34 All, 20: 22 M. 320; 35 M. 670, foll. (*Seshagiri Aiyar and Burn, JJ.*) MYDEEN ROWTHER *v.* MUHAMMAD ABDUL GAFFUR. **53 I. C. 862 : 10 L. W. 566.**

——S. 48 (2) (a)—*Fraud—Extension of time for execution allowed against the judgment debtor.*

When the execution of a decree is prevented by the fraud of one of several judgment debtors, extension of time will be allowed only against such judgmentdebtor and not against others who are not guilty of fraud. (*White, C J, Sankaran Nair and Tyabji, JJ.*) ABDUL KADIR *v.* AHAMMAD SHAIWA. **30 I. C 423 : 38 Mad. 419:**

[On Appeal from. 35 Mad. 670 : 22 M.L.J. 35: (1911) 2 M. W. N. 434: 12 I. C, 679 : 10 M. L. T. 413.]

——S. 48 (2) (a)—*"Fraud"—Liberal meaning.*

An improper means restored to in order to prevent execution could amount to fraud under S. 48 C. P. C. (*Benson and Sundara Aiyar, JJ.*) NATHURAM *v.* KRISHNA. **(1913) M. W. N. 182: 18 M. L. T. 226: 18 I C 1008: 24 M.L.T. 270.**

——S. 48 (2) (a)—*Fraud—Meaning of.*

The expression "fraud" in S. 48 should be construed in a broad sense. A deliberate evasion of the process of Court to defeat execution of decree amounts to fraud. Continuous diligence during all the time prior to the application is not necessary. *Quære* Has the court any discretion to allow or refuse execution after 12 years, even

C.P. CODE (V OF 1908), S. 48—Limitation for execution.

after fraud has been proved? (*Sundara Aiyar and Phillips, JJ.*) ABDUL KHADAR *v.* AJIYUR AHAMED. **35 Mad. 670 : 22 M. L. J. 35 : 10 M,L.T. 413 : 12 I. C, 679: (1911) 2 M. W. N. 434.**

[On Appeal. *See* 38 Mad. 419: 30 I. C. 423.]

——S. 48 (2) (a)—*Fraud—Fraudulent conduct—Pardanashin lady.*

Keeping the doors closed is *per se* no evidence at all of fraudulent conduct on the part of a pardanashin lady unless there is anything to show that she deliberately does so or attempts to do so against the executing officer. (*Lindsay, J.C.*) SUGHRA BEGAM *v.* LACHMI NARAIN. **40 I. C. 399 : 4 O. L. J. 345.**

——S. 48 (2) (a)—*Fraud of the judgment-debtor—Proof of.*

To get the benefit of S, 48 the decree-holder need not show that the fraud of the judgment debtor extended continuously for 12 years. It is sufficient if he shows that the judgment debtor on various occasions within the period of 12 years prevented the execution of decree by fraud. (*Evans, J.C.*) JAGINDER NATH *v.* MOHAMMAD HUSAIN. **12 I. C, 793: 14 O. C. 238.**

Fresh Application.

——S. 48 (2) (a)—*Fraud—Judgment debtor evading arrest—Successful prevention of execution of decree within twelve years—Fraud.*

Where a judgment-debtor successfully evaded arrest and spent some time pretending to prosecute proceedings in insolvency and successfuly prevented the decree-holder from executing his decree within twelve years, *held*, that the judgment-debtor is guilty of fraud. (*Tudball, J.*) MEWA LAL *v.* AHMAD ALI. **13 I. C. 929: 9 A. L. J. 17.**

——S. 48—*Fresh application—Continuity of application—Application for execution.*

In order that an application should be a continuation of another application, it is necessary that the two applications must be of the same nature. An application for execution cannot be regarded as an application in continuation of an application for transfer of a decree from one court to another. 20 A. 78, foll. (1886) A. W. N. 137 not foll. (*Karamat Husain and Tudball, JJ.*) KETPAL *v.* TIKAM SINGH. **34 All. 396: 14 I. C, 172 : 9 A. L. J. 365.**

——S. 48 (1) (a)—*Fresh applications—Restoration—Application for execution dismissed for want of sufficient process fees.*

The execution of a decree is not barred merely because the application for restoration of an execution petition made within 12 years but struck off on account of insufficient process-fees, is made after 12 years, 18 All. 482, Ref. (*Stanley, C. J, Bannerjee and Griffin, JJ.*) RAM SARUP *v,* DASRATH TEWARI **33 All. 57: 9 I C 817 : 8 A. L. J. 412, (F. B.).**

Limitation for Execution.

—— S. 48—*Limitation for execution—Decree—Execution—Right to apply.*

S. 48 C. P. Code deals with the maximum limit of time prescribed for execution and does not prescribe the period within which each application for execution is to be made. The right of

C. P. CODE (V OF 1908), S. 48—Limitation for execution.

applying for execution in a case where money is payable within 6 months of the decree occurs from the date when default to make the payment occurs. (*Kanhaiya Lal, J.*) SURAJMAN CHAUBE *v.* ANJORE SHUKUL. **21 A. L. J. 861: 46 All. 73: L. R. 4 A. 591: 9 O. & A. L. R. 989: 1924 All. 263.**

——**S. 48, O. 20, R. 11**—*Limitation for execution—Order for payment by instalments upon compromise—Extension of time.*

The parties agreed that the decretal amount should be paid by instalments and it appeared that the Court accepted the compromise and consequently passed an order striking off the execution proceedings. *Held* the Court, when accepting the request of the parties, intended that the decretal amount should be payable by instalments: and the order which was passed was in essence and substance one made under section 210 of the Civ. Pro. Code, which extended the period of limitation. (*Shadi Lal, C. J. and Fforde, J.*) BANARSI DAS *v.* RAMZAN RAJ BIBI.

73 I. C. 671 : (1923) Lah. 381.

On appeal from 72 I. C. 477.

——**S. 48 (1) (b)**—*Limitation for execution—Order directing payment of money on a certain date—Compromise after decree.*

To render S 48 (1) (b) of the C. P. Code applicable there must be an order of court directing the payment of money on a certain date. Where there was a decree for money in a lump sum, the fact that the parties come to some arrangement out of Court for payment in instalments would not attract the operation of this clause or prolong the period of limitation. (*Broadway, J.*) BANARSI DAS *v.* RAMZAN RAJ BIBI.

72 I. C. 477.

——**S. 48**—*Limitation for execution—Limitation Act, Art.* 182.

In considering whether an application for execution of a decree is within time, it is not necessary to examine the previous applications to ascertain whether they in all respects conform with the provisions of law. (*Chevis and Shadi Lal, JJ.*) BALDEO SAHAI *v.* KANHAYALAL.

65 P.L.R. 1916 : 34 I.C. 955 : 202 P.W.R. 1915.

——**S. 48**—*Limitation for execution—Cannot be extended by Court.*

The executing Court can not extend the period of 12 years fixed in Sec 48 of the C. P. C. under Sec. 15 Lim Act. (*Spencer and Ramesam.*) SUBBARAYAN *v.* NATARAJAN. **43 M. L. J. 168 : 45 M. 785 : 70 I.C. 396 : (1922) M. W. N. 424 : 16 L. W. 68 . 31 M. L T. 140 : (H. C.) 1922 M. 268.**

Mortgage Decree.

——**S. 48**—*Mortgage decree under Dekhan Agriculturists' Relief Act—No necessity for decree absolute—Effect of making decree absolute—Limitation*

Where a decree is passed under the Dekkhan Agriculturists' Relief Act, there is no necessity to apply to the court to make it absolute. On default of payment of any instalment, execution can be applied for, and an application to have the decree

C. P. CODE (V OF 1908), S. 48—Retrospective effect.

made absolute would at best be considered as a step-in-aid of execution. Hence when the application for execution is put in more than 12 years from the date when the decree could have been executed though within 12 years from the date of decree absolute, it is barred under S. 48 C. P. Code. (*Macleod, C J and Shah, J.*) HIRACHAND KHEMCHAND GUJAR *v.* ABA LALA PATIL.

46 Bom. 761 : 24 Bom. L. R. 269 : 67 I. C. 153 : 1922 Bom. 95.

——**S. 48**—*Mortgage decree--Personal decree—Execution—Limitation*

The period of limitation provided for in S. 48 of the Code for execution in a personal mortgage decree runs from the date of such decree. (*Mookerjee and Panton, JJ.*) BARANESHI *v.* BHABADEB.

66 I. C. 758 : 34 C. L J. 167.

——**S. 48 (1) (a)**—*Mortgage decree—Combined decree—Decree for sale of properties on default of mortgage amount—Execution—Limitation.*

A decree providing for payment of the mortgage money and for the sale of the properties on default is a decree for payment of money. An application for sale of the non-hypothecated properties made more than 12 years from the date of the decree is barred and cannot be taken to be one in continuation of a prior application for the sale of hypothecated properties. (*Abdur Rahim and Kumaraswami Sastri, JJ.*) THIAGARAYAN *v.* KUNNUSAMI PILLAI. **43 I C 122.**

——**S. 48**—*Mortgage decree—Personal decree—Execution—Limitation.*

The 12 years period of limitation for recovery of the deficiency after a sale under a combined mortgage decree runs not from the date of the decree but from the date when the remedy against the mortgaged property is exhausted *i.e.*, from the date of the confirmation of the sale. (*Abdur Rahim and Kumaraswami Sastri, JJ.*) NARAYANA IYER *v.* SINGARAVELU VANNIAN.

33 M.L.J. 543 : (1917) M. W. N. 845 : 42 I C. 282 : 6 L. W. 675.

[This is no langer law. *See* 45 I. C. 436 : 22 C W. N. 145 : (P. C.)]

——**S. 48**—*Mortgage decree—C.P.C. new and old—Creation of vested right.*

An application for execution of a mortgage decree made more than 12 years after it was passed is barred under S. 48 though the decree was passed under the old Code because no vested right in the procedure prescribed in that code was acquired by the decree-holder within S. 6 of the General Clauses Act, (*Chamier, C. J. and Jwala Prasad, J.*) KRISHNA DAYAL GIR *v.* SAKINA BIBI. **20 C. W. N. 952 : 2 Pat. L W. 370 : 34 I. C. 27 : 1 Pat. L. J. 214.**

Retrospective effect.

——**S. 48**—*Retrospective effect—Mortgage decree passed before* 1909—*Execution—Limitation.*

S. 48 is retrospective and limits the period for the execution even of mortgage decrees passed before the new code came into force. The mere fact that the property charged was in the hands of the collector for six years in the interval could not entitle the decree-holder to the benefit of sch. III

C. P. CODE (V OF 1908), S. 48—Revivor of former application.

para. 2 (3) C. P. C. (*Hallifax, A. J. C.*) SADASHIV v. RUKHMA BAI.

27 I. C. 969 : 11 N. L. R. 25.

Revivor of Former Application.

——S. 48—*Revivor of former application—Limitation Act, Art.* 181.

S. 48 of the C. P. C. has no application to the case of a revival of an antecedent application for execution which has been in suspense by reason of some bar or has been stayed pending the determination of a subsequent litigation. Art. 181 of the Limitation Act applies and the decree-holders has three years from the date of the removal of the bar. (*Mullick and Atkinson, JJ.*) SAKINA BIBI *v.* GANESH PRASAD 3 Pat. L. J. 103 : 44 I. C. 560 : 5 Pat. L. W. 21

Starting Point.

——S. 48 (1) (a) and O. 34, R. 6—*Starting point—Mortgage—Combined decree—Sale of other properties of judgment-debtor if sale proceeds of mortgaged property insufficient—Limitation for execution of latter part of decree.*

Where a mortgage decree after directing that the available proceeds of the sale to be held under the decree was to be paid in satisfaction of the decretal debt but that if the amount due to the plaintiff was not satisfied by the sale of the mortgaged property, the balance would be realised from other properties and the persons of the defendants, *Held*, that limitation for execution of the latter part of the decree did not run from the date of the sale of the mortgaged property, but from the date of the decree as fixed by O. 20, R, 6, C.P.C. (*Lord Dunedin*) KHULNA LOAN COMPANY *v.* JNANENDRA NATH BOSE. 22 C W.N. 145 : 45 I. C. 436 (P.C.) :

[On Appeal from 24 I. C. 35 : 18 C.W.N. 492.]

——S. 48—*Starting point—Appeal—Execution of decree.*

The limitation provided for in S 48 of the Code begins to run in respect of a decree appealed against, from the date of the appellate decree even when it is held that no appeal lies. (*Piggott and Walsh, JJ.*) RUP NARAIN *v.* SHEO PRAKASH. 43 All. 405 : 61 I. C. 129 : 19 A. L. J. 159

——S. 48 (1) (b)—*Starting point—Order giving time for payment to the judgment debtor—Limitation.*

An order of an executing Court granting time to the judgmen debtor is not a subsequent order directing payment of money within S. 48 of the C.P.C. and does not operate to extend the period of limitation for the execution of the decree. S. 48 of the C.P.C. does not strictly provide a period of limitation but merely bars the execution after 12 years. (*Richards, C. J. and Banerjee, J.*) JURAWAN *v.* MAHBIR DUBE. 40 All. 198 : 44 I.C. 24 : 16 A.L.J. 71.

——S. 48—*Starting point—Decree against some defendants—Surety—Decree against on appeal—Execution of original decree—Limitation*

Plaintiff obtained a money decree in 1907 March against defts. 1 to 4 but the trial Court did not pass a decree against the 5th deft. who was impleaded as a surety. On appeal by the plaintiffs the High Court seeking to make the 5th deft. liable dismissed the appeal in 1909. The plaintiffs made several attempts to execute the decree against the defendants 1 to 4. In November 1919 the plaintiffs sought to amend a prior execution application by seeking attachment of certain properties. In 1920 the plaintiffs applied for attachment of another house belonging to defts. 1 to 4. *Held* that the applications were barred by time. As no relief was asked for against defendants Nos. 1 to 4 in the appeal to the High Court, the decree which was being executed was the decree of the trial Court and limitation began to run from the date of the decree of the trial Court and not of the High Court on appeal. (*Macleod, C. J. and Crump, J.*) KALYANCHAND LALACHAND *v.* BHOGILAL JAYACHAND. 25 Bom. L. R. 371 : 73 I. C. 310 : 1923 Bom. 400.

——S. 48 (1) (a) and (b)—*Starting point—Execution of decree—Limitation—Decree capable of execution.*

Before the execution of a decree can be held barred under S. 48 of the C.P. Code the decree should have been in all parts ripe for execution on the date from which the period of twelve years is to be computed. 17 A 39, 18 A. 482, ref. (*Chandavarkar and Batchelor, JJ.*) NARHAR RAGHUNATH NAPHAD *v.* KRISHNAJI GOVINDA NADGAVANDI. 36 Bom. 368 : 15 I. C. 822 : 14 Bom. L. R. 381.

——S. 48 (1) (a)—*Starting point—Fresh start for limitation from a new personal decree in mortgage suit.*

The mortgage decree being combined against mortgaged property and mortgagor personally, a fresh decree under S, 91, Transfer of Property Act could be obtained personally against the mortgagor ; if no objection is taken, it gives a fresh start for limitation from the date of the new decree. Application for execution is within time if made within 12 years from the date of the new decree. (*Chatterjee, and Panton, JJ.*) MURLIDHAR ROY CHOUDHURY *v.* KATHERINA STEPHEN. 57 I C. 507.

——S. 48 (1) (b)—*Starting point—Instalment decree.*

If an instalment decree provides for the payment of the whole sum on default of any instalment and no option is given to the decree-holder time runs from the date of the first default and if execution in respect of one instalment is barred, the whole claim is barred. (*Teunon and Cuming, JJ.*) BAMA SUNDARI DASYA *v.* KIRAN CHANDARA 49 I. C. 497.

——S. 48 (1) (a)—*Starting point—Appellate Court directing payment in instalments—If supersedes original decree—Computation of time—Decree-holder, if can allow himself more time by agreeing not to execute decree for a certain time.*

Where an appellate Court provided for payment of a decretal amount in instalments, *Held* that the act of the Appellate Court did not supersede the original decree so as to entitle the decree holder to execute a decree after twelve years from the date of decree though application for execu-

C. P. CODE (V OF 1908), S. 48—Starting point.

tion is made within twelve years of the appellate order, especially if cl. (*b*) of Sub-section (1) of S. 48 is inapplicable. A decree-holder cannot by binding himself not to execute a decree allow himself more time than the law gives him. (*Mookerjee and Carnduff, JJ.*) RAGHUNATH PRASAD *v.* KASHI PRASAD. **13 I.C. 88 : 15 C.L.J. 678.**

——S. 48(1) (a) and (b)—*Starting point—Mortgage decree—Decree for sale with provision for recovery of balance of decree amount from the other properties of the mortgagor, if sale proceeds are insufficient—Limitation.*

Per Abdur Rahim, Offg. C. J. and Seshagiri Iyer, J. (Phillips, J. dissenting), The period of twelve years limited by S. 48 for execution of the decree against the other properties of the mortgagor begins to run when sale proceeds are found to be insufficient, where a mortgage decree for sale also includes a provisional decree for recovery of any balance from the other properties of the mortgagor in case the sale proceeds are found insufficient. (*Abdur Rahim, Offg. C.J. and Seshagiri Iyer, and Phillips, JJ.*) AIYASAMIER *v.* VENKATACHELA MUDALI.

40 Mad. 989 : 31 M. L. J. 513 : 20 M. L. T. 391 : 4 L. W. 507 : 37 I. C. 741 : (1916) 2 M. W. N. 296. (F. B.)

[This is no longer law *See* 22 C. W. N. 145 : 45 I. C. 436 (P. C.)]

——S. 48 (1) (a)—*Starting point — Amendment of decree.*

An order postponing execution of a decree (old Code) or ordering payment by instalments under S. 210 (old Code) is virtually an order amending the decree and an application for execution made within 12 years of the order, is not barred. (*Sadasiva Aiyar and Moore, JJ.*) PERUMAL NAICKER *v.* DAWOOD ROWTHER. **34 I. C. 393.**

——S. 48 (1) (b)—*Starting point—Mortgage decree—Personal decree—Limitation — Starting point.*

A mortgage-decree directing that the "defendants be personally liable for any balance not obtained by such " sale" is not a decree for payment of money on a certain date under S. 48 (1) (*b*) C. P. C. The period of 12 years under this section must be calculated *from the date of the decree* and not from the date when the sale proceeds proved insufficient and the balance is ascertained. 36 B. 368, Diss ; 19 I. C. 890 ; 24 I. C. 35, Foll. (*Oldfield and Tyabji, JJ.*) VENKATAPERUMAL *v.* PRAYAG DASSJEE. **29 I. C. 556.**

[The F. B. decision in 40 Mad. 989 which dissented from this case is itself no longer law. *See* 22 C. W. N, 145 : 45 I.C, 436 (P. C.).]

——S. 48 (1) (a)—*Starting point—Decree—Meaning of—No change from S. 230 of the old code—Date of appellate decree.*

The omission in S. 48 of the words "or of the decree in appeal affirming the same" in S. 230 of of the old Code is due to its being a mere surplusage and no change has thereby been effected, so that the appellate decree being the only decree capable of execution, limitation runs from the date of the appellate decree even though a portion only of the original decree was appealed against

C. P. CODE (V OF 1908), S. 49.

and an execution application made after 12 years from the original decree but within 12 years from that of the appellate decree is not barred under S. 48, C. P. C. (*Phillips, J.*) NARAYA HEDGE *v.* VETLA PRABHU. **10 M. L. T 281 : (1911) 2 M. W. N. 239 : 12 I. C. 75 : 21 M. L. J. 1020.**

——S. 48 (1) (b)—*Starting point—Decree not capable of execution initially—Computation of period.*

Where a decree in a suit for foreclosure is incapable of execution owing to the absence of a formal order for delivery of possession the twelve years' period runs from the date the decree becomes capable of execution, *i. e.*, from the date of the formal order for delivery of possession. (*Mitra, A. J. C.*) AMIR ALI *v.* GOPAL DAS. **54 I. C. 924.**

——S. 48 (1) (a)—*Starting point—Execution—Limitation—Dismissal of appeal for default.*

Where an appeal is dismissed for default the only decree which could be executed is the decree of the original court and limitation runs from the date of the original decree and not from the date of the order of dismissal for default. (*Lindsay, J. C.*) RAMADIK *v.* RAMLAT. **47 I. C. 125 : 5 O. L. J. 252.**

——S. 48 — *Starting point of limitation—Amendment of decree.*

Where a decree is amended, the date of amendment is the date of decree within S. 48. (*Das, J.*) BALDEO SHUKUL *v.* YUSUF. **60 I. C. 318.**

——S. 48 (1) (b) *and O. 20, R. 11—Starting point — Application for execution — Subsequent order—Lim. Act Art. 175.*

A decree was passed on the 23rd March 1906 and application for execution was filed on the 21st May 1918 ; on objection by the judgment debtor that it was barred under S. 48, C. P. C. it was contended that inasmuch as during a former application for execution, the decree holders and the judgment-debtor filed a petition of adjustment and it was ordered by the executing Court on the 27th July 1912 that the claim be adjusted and the balance of the amount be paid by certain instalments, therefore the said adjustment order was substantially an order under O. 20, R. 11 and it saved limitation. *Held*, that O. 20, R. 11 refers to an order passed by the Court which passed the decree. The subsequent order directing payment in S. 48, Cl. (b) means a subsequent order made by the Court which passed the decree and not an order of a Court executing a decree. 40 All. 198 foll. Even if the order were one under O. 20, R. 11, C. P. C. the application for execution was barred under Art. 175. 14 Cal. 348, Ref. 11 Cal. 143 diss. (*Coutts and Adami, JJ.*) GOBARDHAN PROSAD *v.* BISHU NATH PROSAD. **2P. L. T. 80 : 58 I. C. 393 : 1920 Pat. 229.**

——S. 49—*Effect of.*

S. 49 relates only to the stage of execution and has no application to a suit for damages. A transferee from a decree-holder executing a decree in spite of adjustment, is not inferentially a trustee for the judgment debtor for the decree

C. P. CODE (V OF 1908), S. 49.

amount, (*Abdur Rahim, Oldfield and Seshagiri Aiyar, JJ.*) KRISHNA AIYAR *v.* SAVURIMUTHU PILLAI. **42 Mad 338 : 36 M. L. J. 376 : 9 L. W. 443 : 50 I. C. 584 : (1919) M. W. N. 248.**

——S. 49, O. 21, R.16—*Application for recognition as transferee of a decree—Does not lie without a prayer for execution.*

An application to a court by the transferee of a decree to be substituted in place of the original plaintiff and for recognition of the transfer will not be entertained except on an application for execution. (*Miller and Sadasiva Aiyar, JJ.*) P. SOMAMMA *v.* P. BASAMMA. **14 I. C. 704.**

——S. 49—*Transfer of decree —Judgment debtor if could attach money deposited for a decree against Assignee.*

A decree being assigned the judgment debtor deposited the money in court and in execution of a decree he had against the assignee attached the sum in court, *held* he was entitled to do so. (*Baker, O. J. C.*) CHUNNILAL *v.* GULZARILAL. **19 N. L. R. 164 : 75 I. C. 752 : 1924 Nag. 46.**

——S. 50 and O. 22, R. 12—*Death of judgment-debtor—Execution of decree—Abatement—Heirs of judgment-debtor brought on record.*

When a judgment-debtor dies during the pendency of execution proceedings the decree holder can apply under S. 50, C. P. Code for execution of the decree against the heirs. But there is nothing which lays down that the Court cannot on the decree-holder's application bring the heirs of the judgment-debtor upon the record in execution proceedings nor does the law provide that on the death of the judgment-debtor, pending execution proceedings shall abate. (*Tudball and Sulaiman, JJ.*) BHAGWAN DAS *v.* JOGAL KISHORE. **18 A. L. J. 735 : 2 U. P. L. R. (A.) 236, 57 I. C. 610 : 42 A. 570.**

——S. 50 and O. 22, R. 6—*Death of deft, before decree—Execution against legal representatives, if can be taken.*

A decree cannot be executed against the legal representatives of a person against whom the decree purports to have been passed but who died before the hearing. (*Jenkins, C. J. and Richards,* NARENDARA BAHADUR CHAND *v.* GOPAL SAH. **20 I. C. 506 : 17 C. L. J. 634.**

——S. 50—*Legal representative—Liability—Punjab Colonisation of Government Lands Act, S. 18—Decree against tenant—Crops grown by heirs of tenant deceased.*

A tenancy not being liable for attachment and sale in the hands of an heir of a tenant under S. 18 of the Punjab Act the crops grown and reaped by the heir of a tenant after his death are not the property of the deceased tenant and are not liable for attachment in the hands of the heir under S. 50 of the C. P. C. (*Shadi Lal and Jones, JJ.*) KIDAR NATH *v.* GANESHMALL **33 I.C. 741 : 84 P. W. R. 1916.**

——S. 50—*Assets—Ancestral property.*

The ancestral property ceased to be a part of the assets of a deceased Jat as he did not exercise the right of alienation in his life-time and the heirs were bound to account for its due disposal.

C. P. CODE (V OF 1908), S. 50.

(*Reid, C. J. and Williams, J.*) HANS RAJ *v.* SOCHET SINGH. **79 P. W. R. 1911 : 11 I. C. 375: 182 P. L. R. 1911.**

——S. 50—*Assets—Mesne profits.*

Mesne profits whether accruing in the shape of rent, or interest are for the purpose of discharging debts of the deceased, assets in the hands of the legal representative just as much as the real estate is. 15 W. R. 285, 38 Ch. D. 609 (1888) followed. 19 A. 235 dist. (*Sadasiva Aiyar, and Moore, JJ.*) RAJAH OF KALAHASTI *v.* PRAYAGDOSSIE VARU. **(1916) 2 M. W. N. 92: 35 I. C. 224 : 30 M. L J. 391.**

——Ss. 50 and 53—*Assets--Property obtained by son on partition—Whether "assets"*

The property obtained by a son on partition with his father is not "assets" within Ss 50 and 53, C. P. C. (1908). (*Wallis and Oldfield, JJ.*) DEVAGUPTAPU KAMESWARAMMA *v.* VADDADI VENKATASUBBA RAO. **38 Mad. 1120 : 27 M. L. J 112 : 24 I. C 474: (1914) M. W. N. 742.**

——S. 50—*Legal representative—Execution --Procedure.*

The legal representative could not be proceeded against in execution till he has been brought on record and the court which passed the decree only has the power to bring him in as the legal representative. (*Wallis, J.*) NACHIAPPA GOVINDAN *v.* PONNUSAMY NAICKER. **23 M. L. J. 287 : 17 I. C 293 : (1912) M. W. N. 888.**

——S. 50—*Decree against dead person—Legal representatives.*

A person who dies *pendente lite* before a decree is passed against him is not a judgment debtor and the decree cannot be enforced against his legal representatives under S. 50, C.P.C. (*Kotval, A. J. C.*) BHANJISINGH *v.* BHAGWATI PRASAD. **55 I. C 449 : 16 N. L. R. 138.**

——S. 50—*Liability of legal representative—Extent of.*

Under S. 50 (2) C. P. C. the liability is not confined to the property which has come to hands of the legal representative. To fasten liability on the legal representative, the right which has devolved must be properly capable of disposal for satisfying the debt. (*Mittra, A. J. C.*) NATHMAL *v.* MUSAMMAT MATTO. **21. I. C. 272 : 9 N. L. R. 137.**

——S. 50—*Dekkan Agriculturists Relief Act, Ss. 74 and 22—Legal representative of deceased agrioulturist—Liability of.*

Under S, 50 of the Code read with S. 74 of the Act the legal representative of deceased agriculturist, is liable for his debts to the extent which has come to his hands and has not been disposed of and S. 22 of the Act is no bar to the appointment of a Collector to manage the property in the hands of such legal representative. (*Fawcett and Raymond, A. J. Cs.*) SHOITRAM *v.* LALBUX. **63. I. C. 310 : 15 S. L. R. 47.**

——Ss. 50 and 51 and O. 21, R. 23 (2)—*Execution against legal representative—Objection to —Power of court.*

C. P. CODE (V OF 1908), S. 51.

Where execution is sought against a legal representative of a deceased judgment-debtor and the legal representative offers objection to the execution, the matter is left to the discretion of the Court. The court can under O. 21, R. 23 (1) make such orders as it thinks fit. The court will in a proper case exercise its equitable jurisdiction and consider the equities between the several legal representatives. (*Fawcett, J. C. and Kemp. A J. C.*) KEWAL RAM *v.* MUSSAMAT ISARBAI. **52 I. C. 906 : 13 S. L. R. 138.**

——— **S. 51**—*Execution—Mode of, not to be prescribed in decree.*

Where a court decrees a suit for rent it should pass a decree for rent simply, without any limitation on the right of the landlord to execute a decree in any legal method open to him, (*Fletcher and Huda, JJ.*) DWARAKA NATH DE *v.* SAILAJA KANAT MULLICK. **45 I. C. 702.**

——— **S. 51**—*Application—Inference.*

An application under S. 51 C. P. C. may be inferred from an act of the court. (*Petman, J.*) RAM RATTAN *v.* DATAR KAUR. **52 I. C. 356.**

——— **S. 51**—*Personal decree—Right to arrest Judgment-debtor does not exist in every case.*

Every personal decree does not carry with it a right to arrest the Judgment-debtor in execution. There are exceptions as in the case of minors, legal representatives, and females against whom a decree has been passed or is sought to be executed. (*Halifax and Dhobby, A. J. C.*) JIWANDAS *v.* JANKI. **18 N. L. R. 145 : 5 N. L. J. 49 : 65 I. C. 53 : 1922 Nag. 98.**

——— **S. 51 and O. 21, R. 10**—*Right to apply—Stranger.*

It is only the holder of a decree that can apply for execution, and in the case of a compromise decree granting allowances to parties to a suit and also to a stranger the latter, being no party to the suit or decree cannot apply for execution, though he can sue separately for his claim. 17 M. 343, 11 B. 153 dist. (*Stuart, J. C. and Kanhaiya Lal, A. J. C*) DIL AFZA BEGAM *v.* DEPUTY COMMISSIONER, BAHARAICH **37 I. C. 133 : 3 O. L. J. 570.**

——— **S. 51 (d)**—*Receiver—Execution of decree—Ghatwali Property—Receiver of rents.*

A Receiver can be appointed to realise the rents and profits, in execution of a decree against a Ghatwal, though the Ghatwali property cannot be attached and sold. 28 C. 483 foll. (*Coxe and Imam, JJ.*) KESHAVATI KOERI *v.* MOHON CHANDRA MONDAL. **39 Cal. 1010 : 14 I. C. 227 : 16 C. W. N. 802.**

——— **S. 51 (d) and O. 40, R. 1**—*Receiver—Decree against legal representatives — Personal decree against one—Execution.*

S. 51 entitles the Court to appoint a Receiver of rents of the estate of a deceased person for the purpose of liquidating debts against that estate, and there is nothing in the code to limit the appointment of Receiver of rents to a case where the debt to be discharged was a debt against the heirs and not against the deceased holder of the estate. (*Lyle and Ashworth, A. J. Cs.*) MUNSHI LAL *v.* MOHAMMAD AMIR MIRZA BEG. **52 I. C. 305 : 22 O. C. 194.**

C. P. CODE (V OF 1908), S. 52.

——— **S. 51 (d) and O. 40, R. 1**—*Receiver—Appointment of—Mortgage decree — Objection of decree-holder—Effect.*

It would be stretching too far the discretion of the court under O. 40, R, 1 in the matter of appointment of receivers, if it thereby deprives the decree-holder of his right to sell the mortgaged property under the decree. S. 51 does not apply to the case : for it merely prescribes the mode in which the decree-holder may execute his decree, one of them being by the appointment of a receiver. The section does not give any right to the judgment-debtor to apply for the appointment of a receiver. (*Jwala Prusad and Bucknill, JJ.*) MALIK MOKHTAR AHMED *v.* MR. BIBI RAHIMUNNISSA BEGUM **67 I. C. 606 : 1922 Pat. 66 : (1922) P. 369.**

——— **S. 51 (e)**—*Construction of decree—Supplementary relief.*

Cl. (E) of S. 51 of the C. P. Code cannot be taken as authorising a Court to read into a decree a supplementary or alternative relief which is not there. (*Ayling, O. C. J. and Odgers, J.*) MARATH SIVARAMAN NAIR *v.* SESHU PATTAR. **42 M. L. J. 356 : 16 L. W. 589 : 70 I. C. 259 : 1922 Mad. 299.**

——— **S. 52**—*Assets—Meaning—Execution of decree.*

A decree is capable of execution against the assets' of judgment-debtor. 'Assets' include those acquired after the decree. (*Walsh and Sundar Lal, JJ.*) COLLECTOR OF JAUNPUR *v.* CHAMPA LAL. **36 I. C. 901 : 14 A. L. J. 899.**

——— **S. 52 (1908), S. 282 (1882)**—*Legal representative—Execution against wrong person.*

Execution of a decree against the holder of an impartible estate, was sought after his death against his widow. The successor to the estate was not made a party to the execution proceedings and a lease of the estate was granted to satisfy the decree, *Held* the lease did not bind the successor to the estate who was entitled to avoid it. (*Richards, C. J. and Banerji, J.*) INDARSEN SINGH *v.* HARPAL SINGH. **34 All. 79 : 12 I. C. 915 : 8 A. L. J. 1251.**

——— **S. 52**—*Assets—Proof of*

A suit under S. 52 is maintainable though there is no proof that assets have come into the hands of the legal representatives. (*Stanley, C. J. and Banerji, J.*) KANTEE CHANDRA *v.* NABI. **33 All. 414 : 9 I. C. 935 : 8 A. L. J. 199.**

——— **S. 52**—*Decree against wrong legal representative.*

A decree passed in a suit in which wrong person was impleaded as an heir does not bind the estate of deceased person in the hands of a true heir. (*Batchelor and Rao, JJ.*) PREMRAJ *v.* JAVARMAL. **18 I. C. 381 : 15 Bom L. R. 41.**

——— **Ss. 52 and 60**—*Assets—Court of Wards Act (IX B. C. of 1879) S. 48—Execution of decree against Ward of Court—Attachment of cash*

C. P. CODE (V OF 1908), S. 52.

balance of estate under Court of Wards in execution of money decree, if legal.

A decree against a ward of Court may under the general law be executed like any other decree and in execution of a simple money decree against the ward, the cash balance of an estate under the Court of Wards, that is the amount to the credit of the estate in the personal ledger of the Collector, may be attached. (*Carnduff and Richardson, JJ.*) UPENDRA NATH *v.* UMALLAT CHOWDHARI. 19 C. L. J. 406 : 22 I. C. 684 : 18 C. W. N 1055.

——— S. 52—*Decree—Form of suit for refund of proportionate consideration of the sale while previous suit by sons for possession of proportionate share of property sold was allowed.*

A decree making the assets of the father and the joint properties of sons liable for the amount due by the father is perfectly legitimate even though the sale was held not binding on the sons in respect of their shares. (*Seshagiri Aiyar and Napier, JJ.*) RAMAN PANDITHAN *v.* SATHA KUDUMBAN. (1916) 2 M. W. N. 217 : 31 M. L. J. 502 : 20 M. L. T. 320 : 36 I. C. 387 : 4 L. W. 366.

———S. 52—*Legal representative—Extent of liability.*

Where a plaintiff after having exhausted the mortgaged property under a mortgage decree he had obtained against the legal representative of a deceased mortgagor, sought to execute a personal decree he had subsequently obtained against him, the legal representative was held to be personally liable to the extent of the property he had failed to duly account for. 26 M. 792, Dist. (*Sadasiva Aiyar and Moore, JJ.*) RAJAH OF KALAHASTI *v.* PRAYAG DOSSJEE VARU. 30 M. L. J. 391 : 35 I. C. 224 : (1916) 2 M W. N 92.

———S. 52—*Scope of.*

S. 52 does not provide for the reservation of property to satisfy debts. (*Oldfield and Sadasiva Iyer, JJ.*) GADI LAKSHMA NARASIMHAM *v.* PILLALAMARI JAGANADHA ROW. 30 I. C. 256 : 18 M. L. T. 147.

———Ss. 52 and 53—*Decree against assets of father—Execution—Death of son—Property in the hands of son's legal representative.*

Where a decree was against the assets of the father in the hands of his son, held that the property did not cease to be "the property of the deceased father" merely because the son died and it passed into the hands of his heir or legal representative. (*Wallis and Ayling, JJ.*) KASTURI RANGA AIYAR *v.* VENKATARAMA AIYAR. 24 I. C. 280 : (1914) M. W. N. 354.

———S. 52—*Devolution of interest on two persons—Proceedings against one—Binding nature—Estoppel.*

Where a *Cowldar* bequeathed 1/8 of his interest to A and 7/8 to B and on default in payment of rent due on B's share the zamindar took proceedings under Act VIII of 1865 against B, without knowledge of the rights of A and sold A's share also, *held*, that the sale did not bind A, as he was not a party to the proceedings and that there was no estoppel in the case and that the omission to

C. P. CODE (V OF 1908), S. 53.

give notice of his interest to the landlord does not estop him as there is no obligation on him to give it. (*Sankaran Nair and Sadasiva Aiyar, JJ.*) KESAVASAMI IYER *v.* NARAYANAN CHETTY. 13 M.L.T. 95 : (1913) M. W. N. 93 : 18 I. C. 632 : 24 M. L. J. 228.

———S. 52—*Assets—Enquiry into.*

In a suit against the legal representative of a debtor the plaintiff can get a decree on proof that any assets belonging to the deceased debtor exist. He need not prove the extent of such assets. (*Macnair, A. J. C.*) SETH SHEOLAL *v.* CHINDU. 56 I. C. 962.

——— S. 52—*Legal representative—Meaning of.*

An executor *de son tort* is a legal representative for purposes of S. 52. (*Prideaux, A. J. C.*) RAMILAL *v.* CHAMPA BIBI. 50 I. C. 951.

———S. 52—*Appropriation of assets of the deceased—Personal liability.*

Where the defendant along with another person took possession of the assets of the deceased and disposed of a portion thereof without any right and where the property disposed of was sufficient to exceed the debts, a personal decree can be passed against the defendant. 20 Mad. 446 followed. (*Kanhaiya Lal, J. C.*) MIHI LAL *v.* BABU LAL. 1922 Oudh 200.

———S. 52— *Assets—Profits—Attachment—Sequestration of property by attachment—Personal liability of heirs.*

Till sequestration of the estate by attachment or otherwise a creditor is not entitled to seize the rents and profits of the property of the deceased or to make the heirs personally liable to the extent of those profits. Such profits cannot be treated as the estate of the deceased. (*Kanhaiya Lal. A. J. C.*) KISHAN LAL ATAL *v.* UMAT-UL-FATIMA. 25 I. C. 384 : 17 O. C. 207.

———S. 52—*Personal decree against son—Can be executed only against co-parcenary property in his hands.*

A personal decree against the son after the death of his father on a hundi executed by the father in a Mithakshara Hindu family can be executed only against the co-parcenary property in the hands of the son. (*Jwala Prasad and Ross, JJ.*) RAM BHUJAWAN PRASAD SINGH *v.* RAM NARAIN. 65 I. C. 224. 2 Pat. L. T. 396

———S. 53—*Scope of—Section applies only to son or other descendant.*

It is only the son or lineal descendant of a deceased Hindu that comes within the scope of S. 53 of the C. P. Code and there is no obligation on the part of any other coparcener who has acquired rights by survivorship to pay up the decree debts of the deceased co-parcener. 42 B. 54 Ref. (*Walsh and Ryves, JJ.*) JAGARNATH SINGH *v.* MOTILAL. 21 A. L. J. 353 : L. R 4 A. 220 : 45 A. 455 : 73 I. C. 958 : 1923 A. 539.

———S. 53—*Hindu father—Decree debt—Pious obligation—Extent of.*

A Hindu son is liable for the unsatisfied decree debts of his deceased father to the extent of the

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ancestral properties unless he shows that the debt was contracted for an illegal or immoral purpose. This is so even if the son was a party to the decree against the father. (*Piggott and Walsh JJ.*) RAMANAND SHUKUL *v.* CHHOTEY LAL.
71 I. C. 417 : 20 A. L. J. 969 : 1923 A. 124

——S. 53—*Ancestral property—Liability of son—Costs.*

Sons who take the property of their father obtained by him in a partition among them are liable for the decree of costs against him and property in their hands is liable to attachment. (*Banerjee and Ryves, JJ.*) KRISHNA RAO *v.* DINKAR RAO. 19 I. C. 252.

——S. 53—*Personal decree—Liability of ancestral property.*

A personal decree under S. 90 of the T. P. Act against a legal representative to be realised out of the property belonging to the deceased personally cannot be executed against property which passed by survivorship. (*Stanley, C. J. and Banerji, J.*) KALIM DAS *v.* BHAWANI SHANKAR.
9 I. C. 631.

——S. 53—*Ancestral property—Liability of sons.*

The whole of the ancestral property and not merely that part of it in the hands of a Mitakshara son, which upon partition would have represented the interest of the father, if a partition had been effected during his lifetime, is liable for satisfaction of the judgment debt in execution of a decree passed against the deceased Mitakshara father, where the loan was not incurred by the father for immoral purposes. 22 W. R. 56; 13 C. 21 foll. S. 53 provides that a question as to what property would be liable in execution, is to be determined in execution proceedings and not by a separate suit. (*Mookerjee and Carnduff, JJ.*) LACHMI PRASAD SINGH *v.* BASANT LAL.
16 I. C. 970 : 16 C. L. J. 85.

——S. 53—*Ancestral property-Jats—Punjab.*

Ancestral property of a deceased Jat judgment debtor is not an asset in the hands of his heirs for purposes of S. 234, C. P. C. of 1882, unless it is specifically charged in his life time by the original debtor for his debts. (*Williams, J.*) KARTAR SINGH *v.* MUNSHI RAM.
11 I. C. 376 : 80 P. W. R. 1911.

——S. 53—*Decree against assets—Gratuity given to heir of deceased employee—Is not part of assets.*

A gratuity granted to the heirs of a deceased employee by a Railway administration is not assets of the employee in the hands of his heirs and cannot be attached in execution of a decree against him. (*Wazir Hasan, J.*) LACHMI NARAIN KAUL *v.* UMAID RAI. 9 O. L. J. 401 : 4 U. P. L. R (O.) 96 : 69 I. C. 893 : 26 O. C. 53 : 1923 O. 21.

——Ss. 53 and 54—*Hindu father—Sons liability—Separate suit.*

Under the present law there is no necessity of any order for attachment of the property in execution of a mortgage decree. Consequently, after father's death the proceedings in execution may

C. P. CODE (V OF 1908), S. 54.

be continued against the son. The sons of a Mitakshara family have been made, by express enactment under S. 53 of the Code of Civil Procedure, legal representatives of their father in respect of the property which descends to them under the Hindu law and which has been made liable for the satisfaction of the decree passed by the Court. (*Jwala Prasad and Adami, JJ.*) SHEIK KAROO *v.* RAMESHWAR RAO.
3 P. L. T. 43 : 1923 P. 143.

——S. 54—*Partition by Collector—Interference by Court.*

A Civil Court referring a case to the Collector under S. 54 has no power to interfere with the Collector's proceedings therein. 15 B. 527 foll. (*Beaman and Heaton, JJ.*) BHIMANGAUDA *v.* HANMAT RANGAPPA. 42 Bom. 689 : 46 I. C 10 : 20 Bom. L. R. 411.

——S. 54—*Final order—Meaning of.*

A final order allotting specified property to each co-sharer should be passed only after the Court has determined the share of each and further proceedings on such a final order will merely lie for delivery of possession. The order passed is analogous to one passed by the Collector under S. 265 of the C. P. C. of 1882. (*Bakewell, J.*) THIRUVENGADATHAN AIYA *v.* MUNGAYYA.
35 Mad. 26 : 12 I. C. 775 : (1911) 2 M. W. N. 516.

——S. 54 and O. 20, R. 18—*Jurisdiction of Civil Court—U. P. Land Revenue Act, S. 233—Consent of parties has no effect.*

A Civil Court is not competent to make a division of revenue paying land even with the consent of the parties. (*Lindsay, J C.*) ABDUS SALAM *v.* ABDUL RAHMAN. 30 I. C. 209 : 2 O. L. J. 321.

——S. 54—*Partition of Revenue paying estate—Finality of decree.*

The decree of a Court is final and a final decree in a partition suit cannot be re-opened unless by way of review. The effect of the final decree of Civil Court for partition is to put an end to co-tenancy and to vest in each person or group a sole estate in a specific property or allotment. (*Chapman and Atkinson, JJ.*) DEBI SARAN SINGH *v.* RAJ BANS NATH DABEY, 5 Pat. L. W. 9 : 4 Pat. L. J. 29 : 45 I.C. 895 : 1918 Pat. 134.

——S. 54—*Partition of a revenue paying estate—If allowable.*

According to the Calcutta view followed in this case by the Patna High Court S. 54, C P.C. does not prevent a Civil Court from decreeing partition of a revenue paying estate where separate allotment of the revenue is not asked for. A different view has been taken by the other High Courts 24 C. 275 Foll. (*Chamier, C. J. and Sharfuddin, J.*) ASMAN SINGH *v.* TULSI SINGH.
1 Pat L. W. 335 : 2 Pat. L. J. 221 : 39 I. C. 173 : 1917 Pat. 131.

——S. 54—*Transfer of decree for partition.*

A decree of a Civil Court on an application to partition the lands of an estate is not a decree under the section and cannot be sent to the Collector for execution under S. 12 (2) of the Estate Partition Act. (*Maude, J.*) THAKUR SINGH *v.* JUGULKISHORE SINGH.
38 I. C. 593 : 1 Pat. L. W. 51.

C. P. CODE (V OF 1908), S. 54.

———S. 54 and O. 21—*Execution of decree—Administration suit, method.*

In an administration suit the execution of a decree cannot be carried out by entrusting the collector under S. 54, to partition the estate but can be correctly carried out by appointing a receiver to get in the debts, collect the moveable property and sell it or collect the proceeds of it, also to sell the immoveable property, if necessary to do so to meet the legal charges and legal expenses payable out of the estate, the proceeds to be distributed amongst the heirs according to their shares. S. 54 only applies where the decree is for partition of land by metes and bounds, that is where land held jointly and assessed to Government Revenue as a whole, is to be divided up into two or more plots between the sharers to be held by them separately. (*Fox C. J. and Parlett. J.*) MAUNG PO WIN *v.* MA TIN. **8 L. B. R. 338: 36 I. C. 385 : 10 Bur. L. T. 206.**

———S. 54—*Execution before Collector—Application to Civil Court.*

An application to a Civil Court to expedite and authorize the Collector to revive and continue old execution proceedings referred to him for execution by that court and still pending before him, is not an application for execution and the limitation bar does not apply to it. A Civil Court is competent to entertain such an application as it has a right of control over the Collector's proceedings in execution. 32 I.A. 102 ; 28 B. 238, Foll. (*Pratt and Crouch, A.J.C.*) HARUN KHAN RAHIM KHAN *v.* TEJUMAL PARIOMAL. **29 I.C. 58: 8 S.L.R. 335.**

———S. 55 (3) and (4)—*Death of judgment-debtor—Sureties' liability.*

A surety gave an undertaking that the judgment-debtor would apply in insolvency within a specific time and would appear when required to do so ; the liability of surety cannot be enforced if the judgment-debtor dies before the time. (*Stephen and Mullick, JJ.*) NABIN CHANDRA HAZARI *v.* MURTUNJOY BARNIK. **41 Cal. 50 : 19 I.C. 981 : 17 C.W.N. 1241.**

———Ss. 55 (3)— *Insolvency application—Provincial Insolvency Act, III of (1907)—Right to adjudication.*

S. 55 (3) C.P.C. does not entitle the debtor to be adjudged an insolvent on an application except in comformity with the provisions of the Insolvency Law. (*Benson and Sundara Aiyar, JJ.*) PONNUSWAMI CHETTY *v.* NARAYANASWAMI CHETTY. **14 M.L T. 305 : 21 I.C. 293 : 25 M.L.J. 545.**

———Ss 55 (3) and 143—*Dismissal of insolvency application.*

When the application of a judgment-debtor to be declared an insolvent has been dismissed and he is re-arrested in execution of a decree, he cannot claim the benefit of S. 55 (3) and (4) of C.P.C. so long as the bar of the previous dismissal is not removed. (*Hayward, J.C.*) ABDUL JABAR *v.* SHEAKH KARIM. **9 I.C. 121.**

———S. 55 (4)—*Security should continue until final order in insolvency petition.*

When a judgment-debtor furnishes security under S. 55 (4) the security should be directed to continue until a final order is made on his petition to be declared an insolvent. (*Macleod, C. J.*) ABDUL HUSSAIN *v.* MISTRAY AND CO. **23 Bom. L.R. 1263: 64 I.C. 648 : 46 Bom. 702 : 1922 Bom 340.**

C. P. CODE (V OF 1908), S. 56.

———Ss. 55 (4)and 145—*Cash Security—Forfeiture—Decree holder to obtain benefit and not Government.*

Where cash security is deposited by a surety for benefit of a decree holder to enable the judgment-debtor to apply in insolvency the cash security must be paid to the decree-holder if the insolvency application fails and the Court is powerless to forfeit the amount to the Government. (*Jenkins, C.J. and Chapman, J.*) BASANT LAL *v.* CHEDDU SINGH. **39 Cal. 1018 : 16 I.C. 118 : 16 C.W.N. 664.**

———S. 55 (4)—*Liability of surety — Filing of insolvency petition.*

The mere filing of an insolvency petition by the judgment debtor or the dismissal of an execution petition does not put an end to the liability of the surety. 14 C. 757 distinguished. A surety bond under S. 55 (4) of the C.P.C. should strictly accord with the provisions of the section and even when the liability is limited in its terms, the extent of the surety's liability is that created by S. 145. (*Sadasiva Aiyar and Moore, JJ.*) SUNDARA REDDI *v.* VARADARAJA PILLAI **34 I.C. 407: (1916) 2 M.W.N. 273.**

———S. 55 Cl. (4)— *Arrest—Application to set aside order of arrest—Abatement on death of person.*

An application to set aside an order of arrest abates on the death of the person against whom the order is made. The liability of a surety on a bond executed by him to produce a judgment debtor, under S. 55, Cl. 4 continues till the appearance of the judgment debtor and not merely till he applies for insolvency. (*Sadasiva Iyer, J.*) KAILAS AIYAR *v.* ARUNACHELLA CHETTIAR. **22 I. C. 953 : 15 M.L.T. 224.**

———Ss. 55 (4) and 145—*Liability of surety.*

A surety, undertaking to pay decretal amount on failure of judgment debtor to file insolvency petition and to produce the judgment-debtor if the filed petition was rejected, was held liable on default of judgment-debtor. A question of the production of judgment-debtor did not arise and the dismissal of the execution case made no difference. (*Mullick and Jwala Prasad, JJ.*) DEDHI RAJ *v.* MAHABIR PRASAD. **5 Pat L.J. 417: 57 I.C. 303 : 1 P L.T. 604 : 1921 Pat. 19.**

———S. 55 (4)—*Order—Appeal.*

An order made under S. 55 (4) rejecting an application for forfeiture of security bond is appealable and therefore no revision lies. 15 A. 183, dist. (*Saunders, A.J.C.*) NGA KYE *v.* NGA KYU. **(1916) U.B.R. II. 103: 34 I.C. 247: 10 Bur. L.T. 15.**

———S. 56—*Personal decree—Mode of execution—Arrest.*

A money decree does not necessarily carry with it a right to execute it by arrest of the judgment-debtor *e. g.* minor or a female, or a legal

C. P. CODE (V OF 1908), S. 58.

representative. (*Hallifax and Dhobley, A.J.C.*) JIWANDAS *v.* JANKI. **5 N.L J. 49 : 65 I C. 53 : 18 N.L R. 145 : 1922 Nag. 98.**

——— S. 58 (1) (iv) —*Subsistence allowance.*

The cost of clothing etc. required under S. 33, Prisons Act is not "subsistence allowance" under S. 58 which includes only the monthly allowance fixed by scale under S. 57. (*Twomey, J.*) DURAI RAJAH MUDALIAR *v* VADIVELU.

5 Bur. L. T. 159 : 17 I. C. 911 : 6 L. B. R. 61.

———S. 58 (2)— *Period of imprisonment—Re-arrest.*

A person could be re-arrested, but while calculating the period of imprisonment under the new warrant the time of imprisonment suffered by him under the former warrant should be deducted. (*Twomey, J.*) DURAI RAJAH MUDALIAR *v*, VADIVELU. **5 Bur. L. T. 159 : 17 I. C. 911 : 6 L. B. R 61.**

———S. 58 (b) (iv)—*Omission to pay.*

The words "omission to pay" in S. 58 (b) (iv) include cases where the subsistence allowance though sent sufficiently early by money order does not reach the officer before first day of the month for which it is payable ; a payment is not made to the officer until the officer actually receives the money. (*Miller, J.*) ARUKASTHANATH MOIDEEN KUTTI *v*. PARAMBATH KUNDI MAMU. **22 I. C. 25.**

———S. 60—*Hindu widow—Life interest in lands—Maintenance—T. P. Act, Ss. 6 and 10.*

A compromise under which a Hindu widow was allotted certain lands for her maintenance ran as follows. "I (the widow) have taken for myself the property for the period of my life-time. I alone shall pay jodi.....and I shall go on making vahivat. I shall not sell or mortgage or give it on self-reducing mortgage or give it as present or in any manner give it into the possession of others. If I do so, it will not be valid. After my death, the said minor alone is owner of the said property." *Held* that this restriction on alienation prevented the judgment debtor from having disposing power within the meaning of S. 60 C. P. Code and the restriction being valid, the property could not be attached. 10 B. 342 ; 15 M. L. J. 7 Ref. (*Marten and Fawcett, JJ*) BASANGOWDA *v*. IRGOWDATI. **24 Bom. L. R. 293 : 47 Bom. 597 : 73 I. C. 196 : 1923 Bom. 276.**

———S. 60—*Agriculturist, meaning of.*

The party alleging that he is an agriculturist must prove that he earns his livelihood wholly or principally by agriculture or that he ordinarily engages personally in agricultural labour. (*Macleod, C. J. and Coyajee, J.*) RUBINE *v*. BALWANT RAI. **1923 Bom. 12.**

——— S. 60—*Liability to attachment— Limits of.*

A decree-holder can attach all the properties of the judgment debtor as S. 60 or other provisions do not limit the extent of the properties to be attached. He can also attach property for mesne profits even before they are assessed. (*Mookerji and Beachcroft, JJ.*) KALI SHANKER SAHAI *v*. PRATAP UDAI NATH SAHAI. **16 I. C. 708.**

C. P. CODE (V OF 1908), S. 60.

———S. 60—*House of agriculturist—Panchotra Money—No attachment.*

The only house of an agriculturist is not liable to be attached and sold in insolvency. The income of *panchotra* is not covered by S. 60 of the C. P. Code. (*Broadway, J.*) NAND SINGH *v*. LACHMI NARAIN SINGH. **73 I. C. 928.**

———S. 60—*Crops grown by heir of tenant cannot be attached.*

Where crops are grown on a tenancy by the heir of deceased tenant, after his death such crops cannot be said to be his crops and cannot be as such liable to attachment and sale in the hands of the heir under S. 60, C. P. Code. 84 P. W. R. 1916 followed. (*Scott Smith, J.*) ABDUL AZIZ *v*. SARAB DAYAL. **69 I. C. 520.**

———S. 60—*Interpretation—Strict.*

The provision of S. 60, C. P. C. which restrict the right of the decree-holder to realise the decretal amount from the property of the debtor should be strictly construed, 47 P. R. 1897 Ref. (*Shadi Lal, J.*) JAHANGYR SINGH *v*. HIRA. **4 P. W. R. 1917 : 39 I. C. 375 : 21 P. L. R. 1917.**

———S. 60—*Inam —Service inam—Swasthiwhachakam service—Grant burdened with public service—Not liable to attachment and sale in execution.*

To do swasthiwachakam service an inam of land is granted, which is always burdened with public service and is not liable to attachment and sale in execution. (*Schwabe, C. J. Coutts Trotter and Kumarasami Sastri, JJ.*) NETI ANJANEYALU *v*. SRI VENUGOPAL RICE MILL. **42 M.L.J. 477 : 15 L. W. 513 : 30 M. L. T. 255 : 70 I C. 466 : (1922) M W. N. 307 : 45 M. 680 : 1922 M. 197.**

———S. 60—*Tools of artisans—Sewing machine cannot be attached.*

Under S. 60, C. P. C. a sewing machine owned by a tailor is a tool of an artisan and therefore exempt from attachment. (*Macnair, A. J. C.*) VITHOBA *v*. BABU LAL. **65 I. C. 416.**

———S. 60—*Agriculturist.*

An agriculturist who makes a transfer of his land by lease or mortgage does not cease to be an agriculturist. (*Kotwal, A. J. C.*) AMOLAKSAO *v*. EKNATH. **55 I. C. 481 : 16 N. L. R. 89.**

———S. 60—*Decree against assets—Gratuity given to heir of deceased employee if not part of assets.*

A gratuity granted to the heirs of a deceased employee by a Railway administration is not assets of the employee in the hands of his heirs and cannot be attached in execution of a decree against him. (*Wazir Hasan, J.*) LACHMI NARAIN KALU *v*. UMAID RAI **26 O. C. 53 : 69 I. C. 893 : 9 O. L. J. 401 : 1923 Oudh 21.**

———S. 60, O. 21, R. 30—*Asthan property—Liability to attachment and sale.*

The *Asthan* property is not liable to be attached and sold in execution of a personal decree obtained against a *Mahant*. (*Lindsay, J. C.*) GOBIND DAS *v*. NARINDRA BAHADUR SINGH. **61 I. C. 757 : 8 O. L. J. 210.**

C. P. CODE (V OF 1908), S. 60.

——S. 60—*Attachment—Objection to.*

A Civil Court has jurisdiction to determine claims and objections in respect of attachments of standing crops. A claim to the ownership of crops is a claim to something yielded by the land and is not the same thing which might be excluded from the jurisdiction of the civil court as a claim to the land itself, (*Twomey, J.*) HLA DUN *v.* M. L. R. M. CHETTY FIRM.
26 I. C. 684 : 7 L. B. R 294.

——S. 60 (1)—*Insurance Policy—Wife named as beneficiary—Attachment.*

A policy of insurance for the benefit of one's wife to be to paid to her or to trustees fails on assured's death without appointing any trustee or making an assignment. It becomes part of the estate of the deceased, the right of action against the company being in his executors or other representative untrammelled by any trust in favour of his wife. He could divest himself of his beneficial interest under the policy only by assignment in writing as provided by S. 130 of the Transfer of Property Act or by signed declaration of trust as provided in S. 5 of the Trust Act. In the absence of such writing it remained the property of the assured and was attachable. (*Scott, C.J. and Chandavarkar, J.*) SHANKER VISVANATH WAGH *v.* UMABAI SADASHIV WAGLE.
37 Bom. 471 : 19 I. C. 736 : 15 Bom. L. R. 320.

——S. 60 (1)—"*Saleable*" — *Permanent lease—Immunity from Court sale.*

The word "saleable" in S. 60 means saleable by auction at a compulsory sale under the order of the Court and not transferable by act of parties. When a permanent lease did not forbid a Court sale, the tenant cannot complain if the land is sold by Court. (*Chatterjee and Chapman, JJ.*) KESHAB CHANDRA *v.* AZALAR ALI BISWAS. 19 C. W. N. 1182 : 28 I. C. 837: 23 C. L. J. 428.

——S. 60 (1)—*Fine paid into Court.*

The amount of the fine paid into Court is the payer's money as owner and as his own money, can be attached in the execution of a decree against him. (*Chevis, J.*) HARNAM SINGH *v.* SALIGRAM 89 P. R. 1912 : 220 P. L. R. 1912 : 16 I.C. 779 (2) : 227 P.W.R. 1912.

——S. 60 (1) *Moveable property—Belonging to judgment debtor in the hands of another—Attachment.*

The jurisdiction of an executing court to attach moveables belonging to a judgment debtor in the hands of another or under his control or a debt due by him is correlative and co-extensive with the right which the judgment-debtor himself would have had to sue for the recovery of the property against his debtor or his trustee. (*Atkinson and Mannk, JJ.*) THE BANK OF BENGAL *v.* SARAT CHANDRA MITRA. 4 Pat. L.J. 141 : 48 I. C. 943 : 1919 Pat. 155.

——S. 60 (1) and O. 21, R. 46—*Debt—Attachment of— Security —Money not immediately payable.*

An attaching creditor can attach any debt due though not immediately payable; he can also attach money deposited by a judgment debtor as security for due performance and completion of a contract as money due or owing to a judgment debtor though it is not payable to the judgment debtor till the completion of contract and may even be forfeited. (*Ormond and Maung Kin, JJ.*) S. B. DAS. *v.* MUTHIA CHETTY.
56 I. C. 948 : 12 Bur. L. T. 247.

——S. 60 (1)—*Buddhist law—Joint property—Wife's interest after divorce.*

According to the Buddhist law, the wife ceases to have any interest in the joint property of her husband and herself, from the time of divorce and so attachment of the property after divorce is futile. (*Maung Kin, J.*) MAUNG PYA GYI *v.* MAUNG PO KA. 33 I.C. 118 : 9 Bur. L. T. 74.

——S. 60 (1) (b)—*Cattle of agriculturist—Attachment—Exemption.*

Where an agriculturist claims exemption of his cattle from attachment, the Court must inquire if they are necessary to enable him to earn his livelihood as an agriculturist. The fact that the cattle have been pledged as security for a debt will not prevent the operation of S 60 (*b*) of the Code. (*Tudball, J.*) GHUREY *v.* SANWALIA. 61 I. C. 777.

——S. 60 (1) (b)—*Article for making jaggery—Exempted from attachment.*

Article used for making jaggery are implements of husbandry and hence are not subject to attachment. (*Shah, A. C. J. and Crump, J.*) LAKSHMAN MHASU BHAGAT *v.* NARHARI DADASA GUJAR.
25 Bom. L. R. 1211 : 1924 Bom. 294.

——S. 60 (1) (b)—*Artisan—Meaning of.*

Musical instruments are not "tools of artisans" within the section and are therefore not exempt from attachment. 'Artisan' is not defined in this or any other Act. The popular meaning is one engaged in a mechanical employment. Musicians and washermen are not artisans. (*Oldfield and Krishnan, JJ.*) LOKASIKMANI MUDALIAR *v.* THIAGAROYA CHETTIAR.
5 L. W. 596 : 38 I. C. 415 : (1917) M. W. N. 420.

——S. 60 (1) (b)—*Musical Instruments.*

Under S. 60 (b) musical instruments are not exempt from attachment as tools of artisans. (*Saunders, A. J. C.*) MAUNG THAN *v.* MAUNG HLA
(1916) 2 U. B. R. 133 : 38 I. C. 414.

——S. 60 (1) (b) — *Cattle of agriculturist—When exempt from attachment.*

In the case of attachment of the cattle of an agriculturist, the court has to see whether the cattle are necessary to enable an agriculturist to earn his livelihood. (*Kaincaid and Raimond, A. J. C.*) GUL MAHOMED *v.* FAIZ MAHOMED.
13 S. L. R. 210 : 56 I. C. 69.

——S. 60 (1) (c)—*House of agriculturist—Execution sale.*

The house of an agriculturist, which is appurtenant to his holding, is not liable to sale in execution of a decree obtained upon a mortgage of the house made by him. (*Banerji and Rafique, JJ.*) NIADAR SINGH *v.* SABIT KHAN.
51 I. C. 553.

C. P. CODE (V OF 1908), S. 60

———S. 60 (1) (c)—*Agriculturist—House — Transferability of.*

A house in a town belonging to a family which lived by cultivation could not be said to be appurtenant to the agricultural holding and is liable to be sold for a mortgage decree. (*Tudball, J.*) NIRBHAY LAL *v.* KALLAN. 45 I. C. 546.

———S. 60 (1) (c) — *Agriculturist — House whether can be sold.*

Where the chief source of income of insolvent at the time of his application is his Zamindari, he is not an agriculturist in the true meaning of the word and his house is not therefore property exempt from sale under S. 60 (c) of the C. P. C. (*Tudball and Walsh, JJ.*) TEJ SINGH *v.* BANWARI LAL. 15 A. L. J. 540 : 40 I. C. 544.

———S. 60 (1) (c)—*Attachment—Exemption.*

A house of an agriculturist is exempt from attachment and sale in execution of a decree. (*Richards, C. J. and Rafique, J.*) SAGARMAL *v.* GIRRAJ. 39 All. 120 : 38 I. C. 171 : 14 A.L.J. 1031.

———S. 60 (1) (c)—*'Agriculturist"—Zamindari land—Exemption of house from attachment.*

A person who is a tenant of 50 bighas of land but who also owns 20 bighas of Zamindari land, and whose chief occupation and means of livelihood is agriculture, is an agriculturist within the meaning of S. 60 (I) (c) and his Zamindari house is not liable to attachment. (*Tudball, J.*) SHAFIAN *v.* HAMIDUL-LAH KHAN.
14 A. L. J. 240 : 33 I. C. 727.

———S. 60 (1) (c)—*Agriculturist — Burden of proof—Attachment.*

Where a person is both a zamindar and an agriculturist, the onus lies on him to show what his main source of income is and that he is an agriculturist within the strict sense of the term and occupies the house as such when he claims exemption for the house from attachment. (*Tudball and Rafique, JJ.*) JANINA PRASAD *v.* RAGHUNATH PRASAD.
35 All. 307 : 11 A. L. J. 437 . 19 I. C. 125.

———S. 60 (1) (c)—*House of an agriculturist—Mortgage validity of—Decree for sale.*

Per Full Bench (*Banerjee, J.*) *dissenting.*—The house of an agriculturist is not appurtenant to his holding and it can be validly mortgaged and in spite of S. 60 (1) (c), a decree for sale capable of execution can be passed on foot of such mortgage. S. 60, C. P. C. does not apply to the execution of mortgage decrees. *Per Richards, C. J.*—It would be a strained construction to hold that S. 60 applies to the execution of mortgage decrees. The proviso to S. 60 is not intended to render the sale or mortgage of the house of an agriculturist invalid. Under O. 34, Rr. 4 and 5 a mortgagee is entitled to a decree for sale, and also to execute such decree notwithstanding S. 60 (1) (c). *Per Banerjee, J.*—No court should sell a house belonging to and occupied by an agriculturist provided it is of the description mentioned in S. 60 (1) (c) and it makes no difference whether the house was or was not mortgaged by the agriculturist for the debt. (*Per Tudball, J.*) S. 60 was never intended to apply to the case of a mortgage decree for the execution of which, provisions are made elsewhere in the Code. (*Richards, C. J. Banerjee and Tudball, JJ.*) BHOLA NATH *v.* KISHORI. 8 A. L. J. 1045 : 11 I. C. 646 : 34 All. 25.

C. P. CODE (V OF 1908), S. 60.

———S. 60(1) (c)—*Decree for sale of agriculturist's house.*

As S. 60 forbids the sale of materials of a dwelling house occupied by an agriculturist, a decree for the sale of such a house is bad even though it be a mortgage decree. (*Stanley, C. J. and Banerji, J.*) RAMDIAL *v.* NARPAT SINGH.
33 All 136 : 9 I. C. 931: 8 A. L. J. 190.

———S. 60 (1) (c)—*"Agriculturist"—Who is.*

The term "agriculturist" in S. 60 (c) not only means persons who cultivate land in which they have a interest as proprietors or tenants but includes persons engaged in the cultivation of land. Therefore a professed cultivator of land earning his wages from another employer and owning a house is entitled to be protected from the attachment of that house under this section. 7 B. 530: 12 B. 363: 28 B 125: 35 A. 307, Ref. (*Scott, C. J. and Beaman, J.*) DEVERA HEGDE *v.* VAIKUNT SUBAYA SONDE. 41 Bom. 475.
39 I. C. 639: 19 Bom. L. R. 281.

———S. 60 (1) Cl. (c)—*Agriculturist, who is.*

A judgment-debtor is not an agriculturist under S. 60 (1) (c) of the Code, where his only source of living is not by cultivation. He is not entitled to any exemption under that section. (*Chatterjea and Newbould, JJ.*) SURANGINI DEBY *v.* KEDAR NATH, 63 I. C. 681.

———S. 60 (1) (c)—*Land of agriculturist.*

Where agriculturist judgment-debtor agreed under a compromise to have immoveable property attached in execution, he cannot at the time of execution be protected by saying that the property is non transferable. (*Chatterjee and Panton, JJ.*) UZIR BISWAS *v.* HARDEB DAS.
57 I. C. 249: 24 C. W. N. 575.

———S. 60 (1) (c)—*Agriculturist—Meaning of.*

An agriculturist whose house is exempt from attachment by S. 60 (c) is one who belongs to the class of common agriculturists who till the field and whose main source of livelihood is cultivation. (*Fletcher and Walmsley, JJ.*) ASHMATALLA SIRCAR *v.* PAN MAHMED CHOWDHURY.
35 I. C. 343 : 20 C. W. N. 874.

———S. 60 (1) (c) - *Vacant site—Not exempt.*

The phrase "houses and other buildings" in Cl. (c) of S. 60 does not include a vacant site used for storing manure and fodder and with no structure over it. (*Shadi Lal, J.*) JAHANGIR SINGH *v.* HIRA. 4 P. W. R. 1917: 39 I. C. 375: 21 P. L. R. 1917.

———S. 60 (1) (c)—*Improvements— Right to compensation— Attachment in execution of a decree.*

The right to improvements of a mulgeni tenant in South Kanara to compensation cannot be attached nor sold in execution,

C. P. CODE (V OF 1908), S. 60.

(*Phillips and Kumaraswami Sastriar, JJ.*) ANANTA BATTA *v.* MAVINAMALE ANANTA BATTA.
(1918) M. W. N. 887: 9 L. W. 78: 48 I. C. 705: 36 M. L. J. 92.

——— — Ss. 60 (1) (C) and 62—*Execution—Exemption from—Cattle and seed—Outer-door closed—Opening by getting over roof.*

S. 60, C P. C. is only intended for the benefit of the indigent agriculturists and not when the judgment-debtor suffers no material inconvenience. An attachment by an amin by entering the house which had been closed after the same had been opened by certain persons who opened it by getting over the roof, is not invalid. (*Oldfield and Napier, JJ.*) CHAKRAVARTI NAINAR *v.* AMMAIAPPA NAINAR. 25 I. C. 117: 1 L. W. 519.

———S. 60 (1) (c)—*Agriculturist—Transfer of land on lease or mortgage.*

A person does not cease to be an agriculturist merely because he transfers his land by lease or mortgage. He still continues to be an agriculturist and his property is protected from attachment. (*Kotval, A. J. C.*) AMOLAK SAO *v.* EKNATH 55 I. C. 481: 16 N. L. R. 89.

———S. 60 (1) (c)—*Agriculturist—House—Exemption.*

The requirements of an agriculturist under S 60 (c) must be judged, not with reference to the number of bullocks which he has kept in recent years, but with reference to the possibility of his cultivating the whole of the area himself and the expansion of his cattle, grain, etc. It is not necessary that the house protected from attachment and sale should be the dwelling house of an agriculturist, provided it is occupied by him for agricultural purposes. There is no connection between cl. (b) and (c) of S. 60 of the C. P. C. (*Mitra, A J. C.*) BHAIYALAL *v.* BALABHADAR. 51 I. C. 129: 15 N. L. R. 83.

———S. 60 (1) (f)—*Birt jijimoni of mahabrahman.*

The birt of a Mahabrahman is a right to personal service and cannot be sold in execution of a money decree. (*Bannerjee and Rafique, JJ.*) DURGA PRASAD *v.* SHAMBHU. 41 All. 656: 17 A. L. J. 842: 51 I. C, 539: 1 U. P. L. R. (H. C.) 101.

——— —S. 60 (1) (f)—*Birt jijimani—Liability to attachment.*

Birt jijimani is a right to personal service within S. 60 (*f*) and cannot be attached and sold in execution of a decree, although Hindu law regards this right as an immoveable property. (*Tudball. J.*) DURGA PRASAD *v.* SHAMBAU. 43 I. C. 650.

———S. 60 (1) (f)—*Temple offerings—Begalies.*

Offerings made at the temple by the worshippers being the personal property of the Begalies (priest) are not liable to be attached in execution of a decree against a deceased Begali. (*Shah Din, C. J.*) RAKHA MAL *v.* BALVANT SINGH. 126 P. L. R. 1917: 42 I. C. 390: 159 P. W. R. 1917.

C. P. CODE (V OF 1908), S. 60.

———S. 60 (1) (f)—*Jatri Bahis of a Gayawal.*

Though Jatribahis of a Gayawal are sold at fancy prices and have got a marketable value, they are not attachable and saleable in execution. They are merely entries as to the names and addresses of the pilgrims who deal with the gayaval and represent the claim of the judgment debtor to personal service. 2 Pat, L. J. 705 Ref. (*Jwala Prasad and Bucknill, JJ.*) LACHMAN LAL PATHAK *v.* BALDEO LAL. 3 Pat. L. T. 603. 1 Pat. 619: 68 I. C. 944: 1922 Pat. 228: 1922 P. 556.

———S. 60 (1) (f)—*Religious office—Endowments—Liability to attachment—Offerings to deity.*

A future perquisite on account of offering or *bhog* to the deity will be an uncertain and indefinite income which cannot be attached, the priestly office with emoluments attached to it, being inalienable. 29 C. 470: 1 C.W,N. 493: 1 M. 235, 23 M. 274, 4 A. 81 foll. (*Jwala Prasad and Adami. JJ.*) BALMAKAND KANUNGO *v.* MADAN CHOTRA. 55 I. C. 175: 1 Pat L. T, 75.

———S. 60 (1) (g)—*Jagir—Maintenance—Political pension—Liability to attachment.*

A Government sannad purported to grant the "taluk" of a certain pargana together with all lands cultivated or uncultivated to one K for life as revenue free jagir for maintenance and stated that after the death of K the said 'ilaka' will continue to stand in the names of his children and grand-children as a permanent zemindari, assessed to a light amount of jama.

Held, that the grant to K was of land rather than of revenue charged on the land and was not a political pension within S. 60 (g). The word "jagir" primarily points to occupancy, though it may be occupancy of an office such as that of Collector of revenue. Where however a jagir held for life only is, as in this sannad, used in contradistinction to an ilaka held as a permanent zemindari, it is an almost necessary inference that the occupancy referred to, is an occupancy of land. Though the grant to K was expressed to be for his maintenance, it was not so in the case of his descendants who became absolute owners of the property. In the hands of the latter the subject-matter of the grant was liable to attachment in execution of a decree. (*Lord Parker*). MURAMMAT SAKINA BAI *v.* KANIZ FATIMA BEGAM. 22 C. W. N. 577: 47 I. C. 632: (1918) M. W. N. 384 (P. C.) [Affirming 36 All. 318: 25 I. C. 120: 12 A. L. J. 437.]

———S. 60 (1) (g)—*Malikhana allowance—Nature of—Pensions Act (XXIII of 1871), S. 11.*

A Malikhana allowance is in the nature of a pension and so cannot be attached in executon of a money decree. (*Knox and Griffin, JJ.*) LALMAN *v.* KALKA PRASAD. 13 I. C. 194: 8 A. L. J. 126.

———S. 60 (1) (g)—*Jagir without power of alienation—Standing crops— Whether attachable—Pension — Meaning of — Pensions Act (XXIII of 1871) S. 11.*

In the case of a jagir without the powers of alienation the standing crops are attachable.

C. P. CODE (V OF 1908), S. 60.

The word 'pension' in S. 60 means the same-thing as in S. 11 Pensions Act. 4 B. 432; 31 A. 382 foll. (*Chatterjee and Beachcroft, JJ.*) BANSI RAM *v.* NARASINGHA SANTRA. **24 I. C 805.**

——S. 60 (1) (g)—*Wasika allowance—Arrears—Attachment.*

Arrears of wasika allowance accrued due in the life-time of the wasikadar and after his death paid to the heirs are not liable to attachment for satisfying the debts of the deceased in the hands of such heirs. (*Daniels, A. J. C.*) MAHOMMAD TAQI *v.* SAKINA BEGAM. **21 O. C. 329: 49 I. C, 511 : 6 O. L. J. 137.**

——S. 60 (1) (i) *and* (2) (*b*)—*Pay of Officer of Indian Army—If attachable.*

Under S. 60, part of the pay of an Officer of the Indian army while serving in this country can be attached. (*Piggott and Walsh, JJ.*) HAY F. B. D. *v.* RAM CHANDRA. **39 All. 308 : 39 I. C. 92 : 15 A. L. J. 264.**

——S. 60 (1) (i) and (2) (b)—*British Officer in India Army.*

A British Officer in Indian Army is liable to have half his salary attached under S. 60 (i). The attachment is a deduction authorised by the Code and is validated by S. 4 of the Army (Amending) Act 1895. S. 60 (2) (b) C. P. C. having been repealed by Act X of 1914 is a dead law and the decisions based thereon are obsolete. (*Marten, J.*) KERING RUPCHAND *v.* MURRAY. **50 I. C. 683 : 21 Bom. L. R. 143.**

[Quaere : Whether the repeal is not due to the fact that S. 60 (2) (b) is redundant]

——S. 60 (1) (i) and S. 2, Cl. (17)—*Honorary Commissioned Officers—Indian Medical Dept—Salaries if attachable--Army Act, Ss.* 190 *and* 144.

The salary of Honorary Commissioned Officers holding an appointment in the Indian Subordinate. Medical Dept. is attachable under S. 60 (1) Cl. (1) of the C. P. C. since they are 'public Officers' as defined in S. 2, Cl. 17, C. P. C. and "Officers" under S. 190 of the Army Act and are not protected by S. 144 of the latter Act. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) PRINS E. G. A. *v.* MURRAY AND CO., LTD. **1 O. L. J. 127 : 23 I. C. 935 : 17 O. C. 99.**

——S. 60 (1) (i)—*Pay of Non-Commissioned Officers if attachable.*

The pay of a Non-Commissioned Officer is exempt under S. 144 of the Army Act from attachment in execution of a decree of a Civil Court. (*Rigg, J. C.*) SANTA *v.* BATTESBY.

(1917) 3 U. B. R. 20: 42 I. C. 90: 11 Bur. L. T. 130.

——S. 60 (1) (i)—*Provincial Insolvency Act, S.* 16 (2)—*Insolvency.*

Under S. 15 (2) Prov. Insolv. Act read with S. 60, C. P. C., half the insolvent's salary vests in the receiver. (*McColl, A. J. C.*) TULSILAL *v.* H. GIRSHAM. **38 I. C. 410 : (1916) 2 U. B. R. 132.**

——S. 60 (1) (j)—*Salary of an officer in Indian army, whether could be attached.*

Under S. 60, the salary of an officer in the Indian army is immune from attachment in execution of a decree : but if wrongly attached, realised and distributed among his creditors, he is not entitled to a refund. (*Macleod, J.*) KING AND CO. *v.* DAVIDSON. **38 Bom. 667 : 23 I. C. 575 : 16 Bom L. R. 233.**

——S. 60 (1) (k)—*Deposit under Provident Funds Act—Not attachable.*

A deposit in a provident fund which so long as the subscriber was in service was a compulsory deposit within the meaning of S. 2 (4) of the Provident Funds Act does not become attachable by a creditor the moment the subscriber retires, irrespective of whether it has been drawn out or not. (*Daniels, J.*) DEVI PRASAD *v.* SECRETARY OF STATE FOR INDIA. **21 A. L. J. 454 : 74 I. C. 746: L. R. 4 A. 256 : 45 A. 554 : 1924 A. 68.**

——S. 60 (1) (k)—*Provident Fund--State Railway—Deposit of railway official— Provident Funds Act S.* 4 *sub S.* (1)—*Railway Code, Vol. II App. I, R.* 30.

Compulsory deposits made in a State Railway Provident Fund by an officer of the Railway during his employment are not liable to attachment in execution of a money decree against him even though he has ceased to be in the service of the Railway at the time of execution. The rules regulating the General Provident Fund do not apply to the State Railway Provident Fund. The fact that the deposits became repayable to the officer after he left the service did not remove them from the category of compulsory deposits, 29 B. 259; 5 Bom L. R. 454, 35 C 641: 46 C. 962, Ref. (*Richardson and Ghose, JJ.*) SECRETARY OF STATE FOR INDIA *v.* RAJ KUMAR MUKHERJEE.

50 Cal. 347 : 27 C. W. N. 472: 1923 Cal. 585.

——S. 60 (1) (n)—*Right to maintenance—Property granted under a compromise.*

Where the younger brother was granted a property for maintenance under a compromise arrived at between the brothers, in a litigation, and the property was not to be sold during the life-time of the elder one. *Held*, that the property was saleable in execution of a decree as it did amount to 'right to maintenance' within S. 60 (n). (*Walsh and Wallach, JJ.*) SUNDAR BIBI *v.* RAJINDAR NARAYAN SINGH. **43 All. 617 : 19 A. L. J, 648: 63 I. C. 181 : 3 U. P. L R. All. 109.**

——S. 60 (1) (n)— *Maintenance— Attachment of right charged on land.*

Where a father transferred to his son all his properties for the consideration of paying off his debts and for a monthly sum to be paid to him which was made a charge on the estate in the hands of the son, the right of the father is an interest in property and is not a right to future maintenance. Such right can be attached and sold out before that event takes place ; an order cannot be obtained for depositing the money in Court (*Mookerjee and Beacheroft, JJ.*) PADMANAND SINGH *v.* RAMA PRASAD MALVI.

16 C. L. J. 354: 17 I. C. 284 : 17 C. W. N. 662.

——S. 60 (1) (n)—*Maintenance— Right to.*

A mere right to maintenance cannot be attached and sold in execution of a decree. 5 I. C. 879 ;

C. P. CODE (V OF 1908), S. 60.

7 I. C. 80, foll. (*Sadasiva Aiyar and Moore, JJ.*) PALAKANDI MAMMAD *v.* CHINOORAN KELOTH VALIA APPA. **40 Mad. 302 : 34 I. C. 381 : 30 M. L. J. 361.**

——S. 60 (1) (n) —*Widow's estate.*

Property assigned to the female members of a Zamindar's household for their enjoyment in common cannot be attached in execution of decree passed against the female personally, as the right of any such member ceases on her death. The case is different when a decree is passed against the estate. (*Sadasiva Aiyar and Moore, JJ.*) NARAYANASAWMY NAIDU *v.* MATHUSRI. **33 I. C. 83.**

——S. 60 (1) (n)—*Interest in property in lieu of maintenance—If attachable.*

S. 60 (1) (*n*) C. P. C. does not exempt from attachment the interest of a member of a Malabar *tarwad* in properties given to him in lieu of maintenance under a *karar* which prohibits alienation of such properties except by way of lease. 30 M. 266 : 7 I. C. 80, Foll. (*Oldfield and Seshagiri Aiyar, JJ.*) KOTHAL MAMMAD HAJI *v.* PYDAL NAIR. **29 I. C. 578.**

——S. 60 (1) (n)—*Right to maintenance of a widow—Standing crops on land in her possession—If can be attached.*

Where land is granted to a widow to be enjoyed by her in lieu of maintenance, the produce of that land is her property and can be attached because what the widow and purchaser get is not a mere right to maintenance but the right to the produce of it. 15 M. L. J. 7 : 10 B. 342 Dist. (*Abdur Rahim and Spencer, JJ.*) GOVINDAPILLAI *v.* MEENATCHI ACHI. **10 M. L. T. 493 : (1911) 2 M.W. N. 563: 13 I.C. 152: 22 M. L. J. 204.**

——S. 60 (1) (n), O. 21, R. 46—*Annuity granted by will—Prohibitory order can be made.*

S. 60 (*n*) contemplates the right of a particular individual to be maintained. It is purely a personal right and does not include an annuity conferred by a will especially where the allowance is not personal but heritable. Future instalments of such an allowance are not therefore exempt from attachment and a prohibitory order can be passed in respect of such allowance under O. 21, R. 46 of the Code. (*Daniels, A. J. C.*) MADAN LAL *v.* LAL AMBIKA BAKSH. **63 I. C. 851: 24 O. C. 250.**

——S. 60 (2) (b)—*Officer of the Army.*

S. 60 does not apply to the case of an officer of His Majesty's Regular Forces and his salary is not liable to attachment under S. 60. 24 Cal. 102, 25 M. 402 ref. (*Knox and Karamat Hussain, JJ.*) LECKY *v.* BANK OF UPPER INDIA. **33 All. 529 : 9 I. C. 1023 : 8 A. L. J. 487.**

——S. 60 (2) (b)—*Army Act, S. 145—Provisions of.*

S. 145 of the Army Act prevails over the C.P. C.; hence Civil Courts cannot interfere with the order made by Commander-in-Chief under S. 165 of Army Act (1881). (*Scott, C.J. and Macleod, J.*) DUCKWORTH *v.* DUCKWORTH. **43 Bom. 368 : 50 I.C. 427 ; 21 Bom. L.R. 137**

C. P. CODE (V OF 1908), S. 63.

——S. 60 (2) (b)—*Proviso—Salary of officer of the Regular Forces.*

The salary of an officer of the regular forces is not liable to attachment. 33 A. 529 Foll. S. 60 C.P.C. does not encroach on the provisions of Army Act. (*Chandavarkar, A.C.J. and Batchelor, J.*) VELCHAND *v.* BOVEHIER. **37 Bom. 26 : 17 I.C. 13 : 14 Bom. L.R. 777.**

——Ss. 60 (2) (b) and 60 (1)—*Scope of—Deduction of the pay of an officer of His Majesty's forces.*

S. 60 (2) (*b*) does not amount to a declaration that S. 60 (1) C.P.C. is not a law passed by the Governor-General of India in Council authorising the deduction from the pay of an Officer of His Majesty's Regular Forces. 33 All. 529 : 37 Bom. 26, Diss. (*Lindsay, J. C. and Kanhaiya Lal, A. J.C.*) PRINS, E.G.A. *v.* MURAY & CO. **10 O.L.J. 127 : 23 I.C, 935 : 17 O.C. 99.**

——S 60 (2) (b)—*Military Surgeon—Salary.*

Military Assistant Surgeons in Indian Subordinate Service are warrant officers and so soldiers and therefore their pay is altogether exempt from attachment under S. 144 of the Army Act. (*Chamier, J.C.*) MURAY & CO., LTD. *v.* E G. A. PRINS. **10 I.C. 719 : 14 O.C. 82.**

——S. 63—*Section applies only as between Civil Courts.*

S. 63 applies only as between Civil Courts—or where the section extended to Revenue Courts, as between Revenue Courts. The omission of the word "Civil" from the old definition of decree has not altered the law with respect to S. 63. Where subsequent to an attachment of property by a Civil Court, the same property was sold by a Revenue Court, the purchaser can maintain a suit for a declaration that the property was his and not liable to be sold in execution of the Civil Court's decree. (*Tudball and Sulaiman, JJ.*) ROSHAN LAL *v.* MASHKUR ALI KHAN. **43 All. 612 : 19 A.L.J 643 : 63 I.C. 909 : 3 U.P.L.R. (All.) 115.**

——S. 63—*Sale by court of lower grade—Not invalid.*

Where property is under attachment by two courts of different grades and the sale is held by the court of lower grade, the sale is not invalid. (*Mookerjee and Walmsley, JJ.*) GIRIS CHANDRA GANGOPADHYA *v.* SRI KRISHNA DE NAG. **38 C.L.J 266 : 75 I.C. 325 : 1924 Cal. 168.**

—— Ss. 63 and 73—*Decree against same judgment-debtor—Courts of different grades—Sale by inferior court—Procedure.*

Where the same property has been attached in execution of two decrees, one passed by a Court of superior grade and the other by a court of inferior grade, the sale should be held by the Court of superior grade. Where however the sale has been held by a Munsif, the Subordinate judge is not to direct the Munsif to transmit the proceeds to his court, but should move the Dt. Judge to have the proceeds so transferred and the sale proceeds should be then rateably distributed in accordance with the provisions of S. 73, C P.C. (*Mookerjee and Beachcroft, JJ.*) NILKANTHA KAI *v.* GOSHO BEHARY CHATTERJEA. **46 Cal. 64 : 44 I.C. 249 : 27 C.L.J. 145.**

C. P. CODE (V OF 1908), S. 63.

——S. 63—*Attachment by superior Court—Attachment and sale by inferior Court — Sale whether invalid.*

An attachment and sale by an inferior court of immoveable property, subsequent to an attachment in execution of a decree of a superior Court is not necessarily illegal and without jurisdiction. 34 C. 836 Dist. (*Ayling and Seshagiri Aiyar, JJ.*) NARAYANAN NAMBUDRIPAD *v.* TAWKER J. MEGAJI SEIT. (1917) M.W.N. 505 : 33 M.L.J. 217: 22 M L.T. 119 : 41 I.C, 612 : 6 L.W. 404.

[On appeal from 32 I.C. 927.]

——S. 63 and O. 21, R. 90—*Property under attachment of superior court— Purchaser not in fault—Sale whether can be impeached— Irregularities.*

The mere fact that the court ordering the sale had notice of an attachment by a superior court, does not oust the jurisdiction of the former court and the sale cannot be treated as a nullity. The title of a purchaser at a judicial sale not himself in fault, cannot be impaired at law or in enquiry by showing any mere error or irregularity in the proceedings. Errors and irregularities must be corrected by a direct proceeding. If not so corrected, they cannot be made available by way of collateral attack on the purchaser's title. There cannot be a collateral impeachment of a judicial sale, and a direct impeachment is possible only to the parties to the proceedings interested therein. Persons not parties to such proceedings cannot impeach a judicial sale on the ground that it was held in contravention of S. 63, C.P.C. A sale held in contravention of S. 63 (1) is not null and void but is irregular. 4 A. 359, not foll. 18 B. 458 : 22 M. 295 foll. (*Srinivasa Iyengar, J.*) NARAYANAN NAMBUDRIPAD *v.* TAWKER J. MEGAJI SEIT. 32 I.C. 927.

——S. 63—*Property under attachment in two Courts—Sale by Court of lower jurisdiction*—Bona fide *purchaser without notice.*

A sale by the Court of lower jurisdiction of property under attachment in execution of the decrees of two separate courts is irregular but not invalid, and a purchaser takes an indefeasible or a defeasible title according as he knows or does not know of the irregularity. The purchaser must show that he made the purchase *bona fide* and without notice of the pre-existing attachment or without being aware whether by direct and formal notice or otherwise, his title was liable to be questioned because of the superior Court's attachment. 22 B. 88 foll. (*Abdur Rahim and Ayling, JJ.*) SUBBIAH IYER *v.* MUTHU KUMARASWAMI PILLAI. 32 I.C. 41.

——S. 63—*Attachment by two Courts—Sale under second attachment—Effect.*

Where there are two successive attachments by two different Courts, it is only the Court which first attached the property that can bring it to sale : a sale by the other is a nullity and need not be set aside in a suit. (*Ayling and Hannay, JJ.*) PEETYAKKAL VATAKKA *v.* MARRAKKARRAKATH AHMAD. 25 I.C. 906: (1914) M.W.N. 796.

C. P. CODE (V OF 1908), S. 64.

——Ss. 63 and 73—*Decree-holders of different courts —Rateable distribution—Highest court —Transfer, if necessary.*

Under Ss. 63 and 73 C. P. C. decree-holders of different courts attaching in execution are entitled to rateable distribution in the court of highest grade without transfer of decree. (*Wallis and Bakewell, JJ.*) NARASIMHACHARIAR *v.* KRISHNAMACHARIAR. 26 M.L.J. 406 : 23 I.C. 909 : 1 L.W. 403.

——Ss. 63 and 73—*Rights of attaching decree-holders of different Courts.*

Where decree-holders of money decrees passed by different Courts attach money due to their judgment-debtor before the actual receipt of the assets by the Court of the highest grade, they are entitled under Ss. 63 and 73 to share in the rateable distribution on application to such Court without getting their decrees transferred to it. 26 M.L.J. 406 Ref. (*Fox, C.J.*) MA NYEIN HLA *v.* MAUNG GYI. 8 Bur. L.T. 201 : 29 I.C. 21 : 8 L.B.R. 204.

——Ss. 63 and 73—*Attachment before judgment.*

Money attached before judgment is liable to rateable distribution in execution of decrees against the same defendant. (*Shaw, J.C.*) RAMACHANDRA *v.* LATCHMAN PILLAY. 26 I C. 941 : 7 Bur. L.T. 277.

——S. 63 (2)—*Sale of property attached under a prior decree—Whether permissible—Effect of the rule.*

The rule protects a sale of property which is already attached under a prior decree, if it takes place without the knowledge of prior decree but does not permit a Court to hold such a sale. If the same property is attached by two Courts, and sold by that one which should not sell it, the party aggrieved should apply to the Dist. Court to have the sale proceeds transferred to that Court which ought to have sold the property. (*Das and Adami, JJ.*) RAMHARI LAL *v.* NATHU RAM. 2 Pat. L.T. 719 : 62 I.C. 33 : 6 P.L.J. 832.

——Ss. 64 and 73—*Right to rateable distribution—Transfer pending attachment Previous attachment under different decree—C.P.C., 1882, Ss. 276 and 295.*

A decree-holder purchased immoveable property at a sale in execution of his decree, but on the day before the attachment, the judgment-debtor had transferred the property to a creditor for good consideration. Five years prior thereto, the decree-holder had attached the same property in execution of another decree against the same judgment-debtor but the execution had not been proceeded with. On a question arising as to who had a valid title, *held*, that the creditor transferee had acquired a good title to the property. The earlier attachment, whether it was subsisting or not, did not affect the title of the transferee under S. 64 (S. 276, C. P. C., 1882), as it was not the attachment under which the execution sale was held. (*Sir Lawrence Jenkins.*) MINA KUMARI BIAI *v.* BEJOY SINGH. 44 Cal. 662 : 1 Pat. L. W. 425 : 5 L. W. 711 : 32 M. L. J. 425 : 21 C. W. N. 585 :

C. P CODE (V OF 1908), S. 64.

21 M. L. T. 344 : 15 A. L. J. 382 : 25 C. L. J. 508 : (1917) M. W. N. 473 : 44 I. A. 172 : 40 I. C. 242 : 19 Bom. L. R. 424 (P. C.)

———S. 64—*Effect of attachment —Insolvency of judgment-debtor—Vesting of property in Official Assignee.*

An attachment of immoveable property in execution of a money decree followed by an order for sale does not confer on the judgment-creditor any charge on the land. An attachment prevents and avoids any private alienation, but does not invalidate an alienation by operation of law such as is effected by a vesting order in the Official Assignee of the insolvent. (*Lord Parker.*) RAGHUNATH DAS *v.* SUNDAR DAS KHETRI. **42 Cal 72: 18 C. W. N. 1038 : 1 L. W. 567 : 27 M. L. J. 150 : 16 M. L. T. 353 : (1914) M. W. N. 747 : 16 Bom. L. R. 814 : 20 C. L. J. 555 : 41 I. A. 251 : 24 I. C. 304 : 13 A L. J. 154 (P. C.) [Reversing 15 I. C. 288.]**

———S. 64—*Attachment —Another decree-holder's application for execution—Sale under first decree set aside—Mortgage by judgment-debtor—Effect.*

A's property was attached on 5—6—'12 in execution of B's decree. C, another decree-holder applied for execution on 12—12—'13. The property was sold on 25—3—'13. On 2—4—'13 A and B applied to have the sale set aside on the ground that B's decree was satisfied out of Court. The application was disallowed but the sale was set aside on 24—5—'13 as the auction-purchaser failed to pay the purchase-money. On 26—5—13, A mortgaged the property to D. C attached it on 20—6—'13 and it was sold to E who sold it on 12—2—'14 to F. D now sued to enforce the mortgage against E *Held*, that the mortgage could be enforced against him. (*Tudball and Rafique, JJ.*) BOHRA BHUPAL *v.* KUNDAN LAL. **43 All. 399 : 19 A. L. J. 221 : 60 I. C, 846 : 3 U. P. L. R. (All.) 25.**

———S. 64—*Restoration of attachment—Sale during interval.*

Where property is attached before judgment and the order of attachment is set aside but the attachment is restored, the parties are restored to the position they occupied, when the property was originally attached. A private sale of the property in the interval is void. (*Stuart and Ryves, JJ.*) GOPAL PRASAD *v.* KASHINATH. **42 All 39 : 52 I. C. 343 : 17 A. L J. 901.**

———S. 64—*Transfer voidable—Private sale of portion of attached property.*

If a portion of the property attached is sold privately by the judgment-debtor after attachment and the decree-holder cannot realise his decretal amount out of the portion left unsold he can under S. 64 proceed against the portions sold. (*Richards, C. J. and Rafique, J.*) BINDESHRI PERSHAD CHAND *v.* GIRDHAR DAS. **34 I. C. 91 (All).**

———Ss. 64 and 73—*Claims enforceable under the attachment—Right to rateable distribution—Liability of transferee pending attachment.*

Where an attachment has been levied on property in execution of a decree, then any attempt by the judgment-debtor to deal thereafter with

C. P. CODE (V OF 1908), S. 64.

the property must be considered as contrary to the attachment and the transferee or mortgagee must be considered as taking the transfer or mortgage subject to all claims which could be made against the property attached which by the law are not confined to claims of creditors attaching before the transfer but will also include the claims of any other execution creditors who may apply for execution before the assets are realised. Plaintiff attached certain properties of defendants 2--10 before judgment and defendants 2—10 subsequently mortgaged the properties. There was a decree in favour of the plaintiff against defendants 2—10. The Defendant No. 1 filed another suit against defendants 2—10 and obtained a money decree. In execution of his decree plaintiff sold the properties free from the mortgage and brought the proceeds into court. Defendant No. I applied for rateable distribution of the money realised by the sale *Held* that 1st defendant was entitled to rateable distribution. Subsequent claims for rateable distribution are claims enforceable under the original attachment within the meaning of S. 64, C. P. Code. (*Macleod C.J. and Coyajee, J.*) CHUNILAL DEVAJI *v.* KARAM CHAND SHRI CHAND. **24 Bom. L R. 364 : 69 I. C. 161 : 46 B. 895 : 1922 Bom. 241.**

———Ss. 64 and 73—*Transfer voidable—Insolvency.*

A attached in execution some property of B, who assigned his interest in the property to C on 6th January 1896. In 1898 D obtained a decree against B who was adjudged an insolvent in 1903. In 1904, D attached the same property. In 1907 A's debt was paid and his attachment was removed. In 1910 C got an order for the removal of D's attachment. *Held* that the assignment by B to C was not void as against D, that there were no assets realised for rateable distribution and D's claim was not enforceable either under S 64 or S. 73. (*Scott, C.J., and Chandavarkar J.*) JETHA BHIMA AND CO *v.* LADY JANBAI. **37 Bom 138 : 17 I. C. 625 : 14 Bom. L. R. 904.**

———S. 64, Expln. and O. 21, R 48 (2)—*Interpretation of.*

There is no conflict between S. 64 Expln. and O. 21, R. 48 (2) C. P. C. (*Chandavarkar and Batchelor, JJ.*) VALCHAND CHANGAN LAL *v.* CAPT. S. R. MUSSON. **16 I. C. 640 : 14 Bom. L. R 633.**

———S. 64— *Rival attachments — Private transfer to satisfy one decree if void.*

A property was attached in execution of two decrees by two decree-holders, the second praying for rateable distribution. The first decree was satisfied by a private sale deed of the same property to the decree-holder. It was certified to the Court. *Held* the private alienation was void as the property was attached by the second decree-holder. (*Chandavarkar and Batchelor, JJ.*) BIBI MIAH KHAN *v.* GULAB CHAND. **12 I. C. 923 : 13 Bom L. R. 1189.**

———S. 64— *Grounds to avoid private transfer.*

To make a private transfer or delivery void under S. 64, as against a claim for rateable dis-

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tribution of assets the claim must be existing when the private transfer is made. The expression "claims enforceable under the attachment" in S.64 apart from the explanation refers to a claim in existence as such on the date of alienation. A private transfer contrary to an attachment is under S. 64 not absolutely void but void only as against claims enforceable under the attachment. (*Mookerjee, A. C. J. and Fletcher, J.*) BARENDRA NATH MITTER *v.* MARTIN CO. 62 I. C. 167 : 33 C. L. J. 7.

——S. 64 and O. 21, R. 54—*Attachment when effective.*

The attachment referred to in S. 64 means one made in the manner prescribed in O. 21, R. 54 and published as there prescribed. The words in S 276 of the old Code of 1882 which have been omitted from the present S. 64 are not material and have been omitted as being surplus. (*Woodroffe and Mookerjee, JJ.*) SIMRIKLAL BHAKAD *v.* RADHARAMAN KALIDAHA. 39 I. C. 857.

——S. 64 and O. 21, Rr. 54 and 89—*Transfer voidable*—Locus standi *for application under O. 21, R. 89.*

The effect of S. 64 is not to invalidate for all purposes the alienation of the property by the judgment-debtor, after it has been attached. The transferee of property from the judgment-debtor after attachment can make an application under R. 89 to cancel the sale. (*Mookerjee and Cuming, JJ.*) GOSTA BEHARI *v.* SANKAR NATH. 36 I. C. 510: 26 C. L. J. 127.

——S. 64—*Scope of--Antecedent transactions.*

S. 64 is meant for the protection of a creditor against transactions subsequent to attachment, but obligations touching the property attached incurred by the debtor prior to the attachment are not affected by the section. (*Woodroffe and Richardson, JJ.*) MADAN MOHAN SARKAR *v.* REBATI MOHAN PODDAR. 23 C. L. J. 115 : 34 I. C 953 : 21 C. W. N. 158.

——S. 64—*Right to avoid transfer—Transfer voidable—Right of decree-holder.*

S. 64 aims at preventing fraud on decree-holders and to secure intact the rights of attaching creditors as well as creditors who have obtained decrees and are entitled to satisfaction out of the assets of the judgment-debtor (without further attachment). It is therefore immaterial whether the plff. decree-holder who questions a transfer under S. 64 obtained a decree before or after the time when the transfer of the property attached took place. A transfer by the judgment-debtor of his property which is under attachment is inoperative as against a judgment-creditor who obtains his decree after the transfer in question and seeks to attach the property in execution of that decree. (*Holmwood and Imam, JJ.*) KALI KUMAR SHAH *v.* KALI PRASANNA MAJUMDAR. 33 I. C. 492.

——S. 64 and O. 21, R. 54—*Attachment when effective.*

An order of attachment of property under the C. P. C takes effect only from the date of its actual promulgation under O. 21, R. 54, C. P. C. and not from the date of the Court's order. (*Roe, J.*) SIMRICK LAL BHAKAT *v.* RADHARAM KALIDAHA. 32 I. C. 276.

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——S. 64—*Transfer—Voidable—Alienation while under attachment.*

A mortgage executed while the property is under an attachment in execution of a decree, is inoperative against the auction-purchaser though the decree-holder was not in any way prejudicially affected. 7 C. 109 : 29 C. 154 Rel. (*Mookerjee and Beachcroft, JJ.*) GIRIJA NATH ROY *v.* UPENDRA NATH PAL. 20 I. C. 241.

——S. 64—*Attachment does not create charge—Rights of creditor.*

An attachment creates no charge on the attached property and confers no title on the attaching creditor but it merely prevents a private alienation of the property. 25 C. 179; 42 C. 72 Rel. (*Martineau and Harrison, JJ.*) RAM BHAJ DATTA *v.* RAM DAS. 3 Lah. 414 : 69 I. C. 720 : 1923 Lah. 261.

——S. 64—*Attachment—Property belonging to Gaddinashin—Mutation in the name of the shrine—Effect of.*

Where property has stood in the name of a Gaddinashin he cannot defeat an attachment of the property by getting it mutated in the name of the shrine. If satisfaction of the decree could not be obtained by sale of the property, the gaddinashin could be arrested and imprisoned in execution. (*Chevis, J.*) FIRM OF GANDA MAL & CO. *v.* GANGA NATH. 4 L. L. J. 49 : 1922 Lah. 147.

——S. 64—*Temporary discontinuance of attachment does not affect decree-holder's rights.*

The temporary discontinuance of the attachment does not affect the decree-holder's rights, 31 A 367: 23 C. 820 Rel. 14 C. L. J. 476 Ref. S. 64 affects the legality of a transfer as only against claims enforceable under an attachment. 7 C. 107 P. C. foll. A decree-holder having no claim enforceable under the attachment cannot obtain any benefit from S. 64. (*Wilberforce, J.*) BUDHU *v.* BARKAT RAM. 2 Lah. L. J. 99.

——S. 64—*Attachment—Private transfer is voidable.*

A private transfer of property under attachment is not absolutely void but is void only as against claims enforceable under attachment. (*Leslie Jones and Wilberforce, JJ.*) NATHU MAL *v.* GANGA RAM. 63 I. C. 108.

——Ss. 64 and 73—*Right to rateable distribution—Non-attaching creditors— Private alienation by judgment-debtor — Attachment raised subsequently.*

A private sale of property pending an attachment by a decree-holder which has subsequently been raised is valid as against a non-attaching decree-holder who had applied for rateable distribution during the continuance of the attachment. 33 M L. J. 707 Foll. (*Rattigan, C. J.*) RANGI RAM *v.* GANGU. 49 I C 134 : 5 P. R. 1919.

——S. 64—*Effect of attachment.*

An attachment of property does not confer title therein, but merely prohibits its transfer. (*Shah Din and Le Rossignol, JJ.*) BHAMBUL DEVI *v.* NARAIN SINGH. 39 P. R. 1915 : 29 I. C. 572 : 103 P. W. R. 1915 : 8 P. L. R. 1916.

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———S. 64 and O. 21, R. 57—*Execution petition —Dismissal when attachment ceases.*

The default of the decree-holder contemplated by O. 21, R. 57 C, P. Code as a ground for dismissal of an execution application must be default in the discharge of some obligation laid on him by the Code or the rules framed under it. The omission of the decree-holder to attend the sale and his failure to bid at the sale does not constitute such default as covered by O. 21, R. 57 C. P, Code and where an application for execution is dismissed on that ground, it does not terminate the attachment. Under a mistaken impression that an attachment of property had ceased by reason of dismissal of a prior execution application the decree-holder put in a fresh execution application and the Court ordered him to pay batta and file a schedule of the immoveable properties required to be attached. Owing to his default in furnishing the said schedule the execution application was dismissed. *Held* that the dismissal of the execution was not one under O, 21, R. 57, C. P. Code and that the attachment already subsisting on the property did not cease. (*Oldfield and Devadoss, JJ.*) VENKATESWARAYYAN *v.* ASWATHA NARAYANAN. **45 M.L.J. 315 : (1923) M. W. N. 529: 75 I. C. 491: 1923 Mad. 703.**

———S. 64—*Applicability—Prohibitory order restraining payee of pro-note—Not an attachment.*

A prohibitory order restraining the payee of of a promissory note from receiving the money under it, has not the effect of an attachment. Such an attachment is invalid and S. 64 C. P. Code does not apply (*Phillips and Devadoss, JJ.*) SUBRAMANIA AIYAR *v.* CHOKKALINGA MUDALIAR. **46 Mad. 415 : 17 L. W. 314 : 44 M. L.J. 206 : 72 I.C. 189 : (1923) M.W.N. 91 : (1923) Mad. 317 (2)**

——— S. 64--*Attachment—Private sale—Agreement by decree-holder to exonerate property sold —Assignee of decree with knowledge of agreement is bound by it.*

A decree-holder after attaching certain items of property entered into an agreement for consideration with a private purchaser of a particular item that he would not bring to sale that item of property. Subsequently an assignee of the decree with knowledge of the aforesaid agreement sought to bring the property alienated to sale in execution. *Held* that the probibition against alienation after an attachment was one for the benefit of the decree-holder which he could waive and that an assignee from him with knowledge of such waiver stood in the same position as his assignor and could not execute the decree against the property alienated. (*Krishnan and Venkatasubba Rao, JJ.*) NANDIGAM GANGAYYA *v.* MADUPALLI VENCATARAMAYYA. **16 L. W. 988 : 31 M. L T. (H. C.) 423 : (1923) M. W. N. 51 : 72 I. C. 839 : 44 M. L. J. 80 : 1923 M. 230.**

———S. 64 and O. 21, R. 63—*Attachment of debt—Claim—Order allowing claim—Suit by defeated decree-holder and decree in his favour—Effect of decree—Revivor of attachment.*

The release from attachment on a claim being allowed is only provisional, and is subject to the result of a suit which is brought under O. 21, R. 63 of the Civ. Pro. Code ; if the suit succeeds the attachment is revived from the beginning against all parties to the suit whether or not they were parties to the claim proceedings. (*Krishnan and Odgers, JJ.*) ANTHAYA HEGADE *v.* MANJAIYA SHETTY. **41 M. L. J. 393 : 45 Mad. 84 : 14 L. W 371 : 69 I.C. 642 : (1921) M. W. N 642 : 1922 M. 176.**

———S. 64, O. 21, R 63—*Decree creating a mortgage during a subsisting attachment—Not void against attaching decree-holder.*

Where pending an attachment of A's properties by C, certain disputes between A and B were referred to arbitration and a decree was passed in terms of the award whereby a mortgage charge in favour of B for 2 lacs of rupees was created, *held*, that the decree which embodied the award was not a private transfer within S. 64 of the Code. (*Oldfield and Ramesam, JJ.*) NARAYANA IYER *v.* BIYARI BIVI. **14 L. W. 524 : 41 M. L. J. 557 : (1921) M. W. N. 808 : 68 I. C. 673 : 45 Mad. 103 : 1922 Mad. 221.**

———Ss. 64 and 65—*Attachment before judgment—Subsequent sale of property in execution of another decree—Application for sale by person who attached before judgment.*

The property in suit was attached before judgment by the plffs. in two suits. Both the suits were decreed but the decree-holder in one suit sold the property in execution and purchased it. *Held*, that the ownership of the property passed at the moment the sale was knocked down to him and the judgment-debtor retained no interest in it which could be attached or sold thereafter, at the instance of the decree-holder in the other suit. (*Spencer and Bakewell, JJ.*) VENKATASWAMI NAIDU *v*, GURUSWAMI IYER. **38 M. L. J. 441 : 55 I. C. 626 : 11 L. W. 349.**

———S. 64 and O. 21, R. 54 (1) and (2)—*Attachment when effective—Notification under O.* 21, *R.* 55 (2)—*Transfer by judgment-debtor, effect on.*

An attachment operates as a valid prohibition against the alienation of the attached property only from the date on which the necessary proclamation is made under O. 21, R, 54 (2) of the C.P.C. 42 M. 365, 41 M. 151 , 39 I.C. 857, 39 I. C. 562 relied on, 42 M. 1 dist (*Abdur Rahim, O. C. J , Oldfield and Seshagiri Aiyar, JJ.*) SINNAPPAN *v* ARUNACHALAM PILLAI. **42 Mad. 844 : 37 M. L. J. 375 : 10 L W. 391 : (1919) M. W. N. 678 : 53 I. C 207 : 26 M. L. T. 281 (F. B.).**

———S. 64 and O. 21, R. 54 (2)—*Attachment when effective—Prohibition against alienation—* Bona fide *purchaser.*

A judgment-debtor prohibited from making alienation must have an opportunity of knowing that he is prohibited, by a proclamation mentioned in O. 21, R. 54 (2) and then only the attachment of his property is effectual to prevent alienation. No question of *bona fides* arises under S. 64, C.P. C. (*Phillips and Krishnan, JJ.*) YUNA RAMANAYA KADU *v.* BOYA PEDDA BASAPPA. **42 Mad. 565 : 36 M. L. J. 284 : 50 I. C. 261 : 26 M. L. T. 45.**

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———S. 64—*Effect of attachment— Award pending attachment— Effect of—Decree—Subsequent purchase by attaching creditor.*

During the pendency of an attachment of a property of the judgment-debtor it was awarded to another person by arbitration. *Held* the award was not a private transfer under S. 64 of the C. P. C. as it only recognised a pre-existing title, and the attachment and the consequent execution sale only take effect subject to the award. (*Spencer and Krishnan, JJ.*) KASI VISHVANATHAN CHETTIAR *v.* RAMASWAMI NADAR. **35 M. L. J. 441 : 24 M. L. T. 477 : 48 I. C. 123 : 8 L. W. 582.**

———Ss. 64 and 73—*Right to rateable distribution—Non-attaching decree-holders—Private alienation—Right to avoid.*

Non-attaching decree-holders, who have applied for rateable distribution of assets that may be realised by a sale to be held in pursuance of a subsisting attachment which has been raised by satisfaction of the decree or otherwise, are not entitled to question a private alienation made during the continuance of such attachment. An alienation by means of which a decree in execution of which the attachment was made, is satisfied, cannot be regarded as an alienation contrary to the attachment within S. 64 of the C. P. C. (*Wallis, C. J., Ayling and Kumaraswami Sastri, JJ.*) ANNAMALAI CHETTIAR *v.* PALAMALAI PILLAI. **41 M. 265: 22 M. L. T. 461 : 33 M. L. J. 707 : (1917) M. W. N. 882 : 43 I. C. 539 : 7 L. W 298 (F. B.)**

———S. 64—*Execution sale — Claim suit— Pendency of.*

Private alienation by a claimant though not strictly within the words of the section must be held to be subject to the result of the claim litigation. The section avoids private transfers contrary to the attachment though the alienation is made between the final decision in any claim proceedings and the subsequent suit thereon. A judgment-debtor who is not a party to claim proceedings or to the subsequent litigation arising therefrom cannot be held to have been represented by his decree-holder. When the right to attach certain property as the property of the judgment-debtor is admitted, a prior attachment in one suit does not affect a sale under a later attachment in another suit and the fact that the right to attach in the first suit is being questioned by a stranger does not make any difference. (*Wallis, C J. and Napier, J.*) PETHU AIYAR *v.* SANKARANARAYAN PILLAI **40 Mad. 955 : 32 M. L. J. 374 : (1917) M. W. N. 284 : 5 L W. 519 : 38 I. C. 778 : 21 M L. T. 377.**

———S. 64—*Antecedent liability—Effect of attachment.*

Where a mortgagee whose rights had been attached, assigned his rights to a third person and directed him to pay the consideration for the assignment to the attaching creditors and the assignee paid them off but not before the money in his hands was attached by the plff. *Held*, that the assignee was entitled to protect himself by paying prior creditors and such payment did not offend the provisions of S. 64 and the plff. was not entitled to impeach the same. 36 M. 348 Fol. (*Sadasiva Iyer and Hannay, JJ.*) GOPALA AIYAR *v.* RAMA VENKATASUBBA IYER. **26 I. C. 223 : 1 L. W. 977.**

C. P. CODE (V OF 1908), S. 64.

———S. 64 and O. 21, R. 57 and O. 38, R. 1—*Abandonment of attachment.*

A re-attachment in execution *ex Majori Cautela* of certain immoveable properties which had been attached before judgment, does not amount to an abandonment of the original attachment. 16 A, 133, 23 A. 114, 20 W. R 133 dist. No fresh attachment is necessary where attachment before judgment has been obtained and the mere dismissal of an execution petition does not cause the attachment before judgment to cease to exist, 18 A. 49. dist. (*Seshagiri Iyer and Kumaraswami Sastri, JJ.*) KOSURI SURAPARAJU *v,* MANDAPAKA NARASIMHAM. **26 I. C. 81 : 1 L. W. 932.**

———S. 64—*Effect of attachment—If creates right in attaching creditor.*

A mere attachment of property creates no right or title in the attaching creditor. Where prior to a decree for maintenance, the property had been attached but was sold after the decree for maintenance, *held* that the decree was binding on the purchaser and created a charge on the estate. 15 C. 202 ; 25 C. 179 P.C. Fol. (*Tyabji and Spencer, JJ.*) KRISHNA PATTER *v.* SINAPONNU. **25 I. C. 759 : 16 M. L. T. 551.**

———S. 64—*Attachment before judgment— Alienation pending, void—Non-compliance with O. 38, R. 5, C. P. Code—Effect of.*

An alienation of property validly attached before judgment is void under S. 64, C P. Code. But where the attachment before judgment is *ultra vires* and has been passed without complying with the formalities prescribed by O. 38, R. 5, C. P. Code, the alienation is not void. (*Kotwal, A. J. C.*) BANSILAL *v.* SITARAM. **68 I. C. 188 : 1922 Nag. 238.**

———S. 64 and O. 21, R. 58—*Attachment— Revival of—Claim suit—Decree—Appeal*

On a decree being made in favour of the plff. in a claim suit, the attachment was raised. But on appeal the decree was reversed and the claim dismissed. The decree-holder then applied for execution. After the raising of the attachment and before the decree on appeal the judgment-debtor alienated the property. *Held* that on the subsequent application for execution the prior attachment was revived and the transfer was void as against the decree-holder. 14 M. I. A. 543 : 20 A. 421 : 35 B. 516 : 15 C. 771 : 25 A. 431 : 16 B. 91: 28 M. 50 ; 37 C. 796 Ref. (*Drake Brockman, J. C.*) BHURIA *v.* BALIRAM. **65 I. C 220 : 1922 Nag. 138.**

———Ss. 64 and 73—*Claim enforceable under attachment—Rateable distribution.*

S. 64 Expln. gives priority to claims under S. 73 C.P. Code only in connection with the attachment under which they are enforceable. If an attachment is withdrawn or ceases to exist there is no right to rateable distribution. S. 64 C.P. C. refers only to claims enforceable under the attachment effected prior to the alienation and not claims enforceable under the decree in exe-

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cution of which the attachment was made. (*Daniels, J.C. and Dalal, A.J.C.*) SHEIKH MAHOMED MUZAFFAR ALI *v.* BHAGWATI PRASAD SINGH.
66 I.C. 642 : 8 O.L.J. 358.

——S. 64 and O. 21, R. 54—*Transfer pending —Attachment—Mortgage subsequent to—Rights of purchasers.*

If after a complete and valid attachment is made by an order passed under O. 21, R. 54 C.P.C. a mortgage is effected of the properties in dispute by the judgment-debtor, the mortgage cannot prevail over the rights acquired by purchasers at the sale of such property effected in pursuance of the attachment. (*Stuart and Kanhaiya Lal, A.J.Cs.*) BISHAMBHAR NATH *v.* GHIRDHARI LAL.
23 O.C. 18 : 7 O.L.J. 1:
55 I.C. 481 : 2 U.P.L.R. (J. C.) 46.

——S. 64 and O. 21, R. 54—*Transfer pending attachment—Decree-holder permitting alienation to be notified in proclamation—Estoppel.*

Attachment is not complete so as to render alienations effected during the attachment void against all claims enforceable thereunder, unless the attachment is duly intimated as under O. 21, R. 54. As between the decree-holder and auction-purchaser, want of such notice may not be an irregularity but as between the decree-holder or auction-purchaser on one side and an alienee on the other, different equities arise if the judgment-debtor is not, by order, prohibited from transferring the property. Where a decree-holder allows an alienation during attachment to be notified at the sale, he cannot afterwards question its validity. (*Stuart and Kanhaiya Lal, A. J. Cs.*) BHASWAN DAS *v.* AHMED JAN.
36 I.C. 732 :
3 O.L.J. 422.

——S. 64 and O. 21, R. 54—*Attachment when effective.*

A private alienation of property after an order for attachment which has not been effected, is valid unless proof is given that all the requirements of O. 21, R. 54 C.P.C. have been complied with and the proclamations have been made. (*Kanhaiya Lal, A.J.C.*) LALJI *v.* GANGA PRASAD.
26 I.C. 204 : 1 O.L.J. 549.

——S. 64 and O. 21, Rr. 57 and 63. *Transfer pending attachment—Cessation of attachment on dismissal of execution petition—Transfer not invalid.*

S. 64, C.P. Code, avoids an alienation made which was made while an attachment remained subsisting and enforceable and not one which might have been enforced under an attachment which has since come to an end; consequently where an attachment ceases to exist consequent on the dismissal of an execution application for default, a mortgage which was made pending such attachment cannot be impeached by the attaching creditor when he attaches the property on a fresh execution application. (*Miller, C.J and Foster, J.*) BHAGWAN LAL *v* RAJENDRA PRASAD SAHI.
4 Pat. L.T. 409 : 1923 P 564.

—— S. 64—*Execution sale—Pending attachment—Execution sale under—Subsequent attachment—Validity.*

C. P. CODE (V OF 1908), S. 65.

If property is sold in execution of a decree, it cannot be sold again at the instance of another decree-holder who may have attached it before the attachment effected by the decree-holder under whose decree it is actually sold. When a judicial sale takes place, all previous attachments effected on the property fall to the ground. (*Coutts, J.*) ABDUL HAKIM *v* ULFAT KULSUM.
55 I. C. 558 : 2 U.P.L.R. (Pat) 106.

——Ss. 64 and O 21, R. 57—*Attachment of decree—Dismissal of execution application for default—Effect on attachment--Rights of transferee.*

Where a decree-holder attaches a decree in execution, the proceedings under the decree which was attached remain in force notwithstanding an improper dismissal of the original execution proceeding. So long as the attachment remained in force, any dealing by the original decree-holder or any transfer or delivery of property comprised in the decree attached, is void as against the claims enforceable under the attachment. (*Miller, C.J. and Mullick, J.*) SYED MUHAMMAD AMIRUL HASAN *v.* MUSSAMMAT WAZIR BIBI.
48 I.C. 786 : 1918 Pat. 353.

——S. 64- *Objection to attachment—Occupancy holding—Non-transferable—Execution sale of—Estoppel.*

A judgment-debtor consented to the attachment of an occupancy holding of his pending the hearing of an application to set aside an *ex parte* decree and subsequently on the decree being confirmed he objected to the sale on the ground of non-transferability of the holding without the landlord's consent. *Held*, the attachment by consent did not estop the judgment-debtor from contending that the property attached shall be maintained intact, for the benefit of any possible purchaser and the consent meant only that he accepted the limitation on alienation. (*Roe and Jwala Prasad, JJ.*) BOCHAI MAHTON *v.* ISRI JAJI.
47 I.C. 29 : 5 Pat. L.W. 185.

——S. 64 and O. 21, R. 54 (2)—*Transfer voidable—Purchaser's rights.*

Purchase made during pendency of an attachment is void and the purchaser does not obtain even a lien on the property even to the extent of the purchase money. (*Sharfuddin and Roe, JJ.*) RAMKHELAWAN SINGH *v.* SUNDER RAUT.
34 I.C. 34.

——Ss. 64 and 73—*Right to rateable distribution.*

Where a judgment-debtor's property was attached in execution and another decree-holder applied for attachment of the same property but the judgment-debtor paid the amount of the first decree-holder into Court and sold the property to a third person, *held*, that the deposit in Court was "assets" and that the second decree-holder was entitled to rateable distribution and the transfer of property was void as against his share. (*Parlett, J.*) MG. HYIN BA *v.* MG PE UXKIN.
26 I.C. 264 : 8 Bur L.T. 14

——S. 65—*Title of purchaser, when accrues —Liability to Govt. revenue.*

Where a mortgagee purchases the mortgaged property in execution of a decree on the mort-

C. P. CODE (V OF 1908), S. 65.

gage, the property becomes his in fact and in law from the date of the sale and if between the date of the sale and the date of the confirmation thereof, there had been accretions to the property, the accretions would belong to him and any obligations which arose in the said period would also be transferred to him. It therefore the property is sold for arrears of revenue accruing between the two dates the execution purchaser will lose it completely and cannot even enforce his mortgage right against the purchaser at the revenue sale (*Lord Shaw.*) BHAWANI KUMAR *v.* MATHURA PRASAD SINGH. **40 Cal. 89 : 39 I.A. 228 : 16 C.W.N. 985 : 23 M.L.J 311 : 12 M.L.T. 352 : (1912) M.W.N. 244 : 14 Bom. L.R. 1046 : 16 I.C. 210 : 16 C.L.J. 606. (P.C.).**

———S. 65—*Auction purchaser—Rent decree—Liability of, for rent after sale.*

The auction purchaser in execution of a rent decree and not the judgment-debtor is liable for rents accruing between the date of the sale and its confirmation, as under S. 65 of C.P.C. the title of the former dates from the date of the sale. (*Jenkins, C.J., and Roy, J.*) BEJOY CHAND *v.* SHASHI BHUSHAN. **23 I.C. 101 : 18 C W.N. 136.**

———S. 65—*Accrual of title—Right to mesne profits.*

The right of an auction-purchaser of a share in a village to mesne profits dates from the date of sale and not from the date of mutation of names in the Revenue Register. (*Lindsay, J.C.*) HASHMAT ALI *v.* MAHEWA ESTATE. **45 I.C. 248 : 5 O.L.J. 31.**

———S. 65 and O. 21, R. 94—*Sale certificate—Not obtained after confirmation—Effect.*

Failure to obtain the sale certificate from Court does not vitiate title of the auction-purchaser. (*Stuart, J. C.*) SANWAL SINGH *v.* PRAG DUTT. **25 I.C. 8.**

———S. 66.

Applicability.
Benami.
Co-Mortgagees.
Estoppel.
Guardian.
Joint Decree-holders.
Manager of Joint Hindu Family.
Not Retrospective.
Object of.
Plea of.
Possession.
Principal and Agent.
Representatives.
Scope of.
Specific Performance.
Suit for declaration.
Third parties.

Applicability of.

———S. 66—*Applicability of.*

Where out of two joint mortgages, one alone sued making the other *pro forma* defendant, and obtained a decree in execution of which he purchased the property in his own name, and the question arose whether the other joint mortgagee can claim a share of the property purchased,

C. P. CODE (V OF 1908), S. 66—Applicability.

Held that S. 66 of the C. P. Code does not apply and he is not entitled to claim a share. 29 All. 557 and 37 All. 545 P. C. Dist. (*Gokul Prasad, J.*) MAKHAN LAL *v.* BADRI PRASAD. **1923 A. 405.**

———S. 66—*Applicability—Suit against benamidar—Old Code and new.*

A suit against a benamidar purchaser at a court auction sale is not maintainable by the real owner under S. 66, C. P. C, (1908) but such suit was not barred under S. 317 C. P. C. (1882). A cause of action against the benamidar which arose under the old Code 1882 is not affected by the new. (*Teunon and Greaves, JJ.*) PROMOTHO NATH PAL *v.* SOURAV *v.* DASI. **50 I. C. 335 : 23 C. W. N. 604.**

———S. 66—*Applicability of—Fictitious execution sale.*

S. 317 of the C. P. C 1882 has in view a real sale in execution of a real decree in a real suit and does not bar a suit by a party to the proceedings for possession of property purchased in a fictitious sale held in execution of a fictitious decree. (*Mookerjee and Beachcroft, JJ.*) AKHIL PRODHAN *v.* MANMATHANATH KAR. **18 C. L. J. 616 : 18 C. W. N. 1331 ; 27 I. C. 230 : 22 I. C. 86.**

———S. 66—*Applicability of—Public Demands Recovery Act* (I *of* 1895), S. 19 (2).

The provisions of S. 66 barring a suit against a certified *benami* purchaser at an execution sale apply to the case of a purchaser at a sale in enforcement and execution of certificate under S. 19 (2) of the Public Demands Recovery Act. (*Carnduff and Chapman, JJ.*) BENGA CHANDRA NANDI *v.* TARA KINKAR PAL. **16 C.W.N. 973 : 15 I. C. 291 : 16 C. L. J. 412.**

———S. 66—*Applicability of — Two persons claiming under a* Benami *purchase.*

Where at an auction, a person purchased property in the name of one and it was alleged by another that it was in trust for him, a suit between these two claimants is not within the prohibition contemplated by S. 66. (*Ayling and Napier, JJ.*) RAMASWAMI AIYAR *v.* VENKAPPAIER. **3 L. W. 233 : 33 I. C. 1000 : (1916) 1 M. W. N. 184.**

———S. 66—*Applicability of—Agreement with auction-purchaser—Specific performance of contract—No bar.*

A suit claiming specific performance of an agreement to sell made by a purchaser, cannot be described as a suit brought on the ground that the purchase was made on behalf of the plaintiff i. e., *benami*. The purchase is made on behalf of the purchaser with whom the title remains until the plaintiff obtains specific performance of the contract. The object of the section appears to be to prevent the executing Court being led to believe that a person who is not the purchaser is the purchaser. If the plaintiff proves the original contract and fails to prove the subsequent contract, he is entitled to fall back on the original contract, 43 Mad. 643 P. C. at 649 and 42 Mad. 615 ref. (*Batten, J. C.*) ABDULLA KHAN *v.* JALAM SINGH. **1923 Nag. 11 (2).**

C. P. CODE (V OF 1908), S. 66—Applicability.

——S. 66—*Applicability of—Benami purchase of a fraction of property.*

The section applies whether the ostensible purchaser at an auction sale purchases the whole or part of the property sold. (*Macnair, A. J. C.*) GOVIND SINGH *v.* MUNGAGI. 57 I. C. 684.

Benami.

——S. 66—*Benami—Auction-purchase—Suit by real purchaser against transferee—Transfer made before but suit brought after the new Code—Effect.*

Where an auction-purchase was made by A *benami* in the name of B who subsequently transferred it to C and after the new Act came into force A sued C for possession on the ground that both the auction-purchase and the transfer to C were *benami* for himself, *held*, that S. 66 of the new Code applied and that the suit was barred. (*Mears, C J, and Knox, J.*) ABDUL JALIL KHAN *v.* UBEDULLAH. 43 All. 416 : 62 I. C. 725 : 19 A. L J. 227.

——S. 66—*Benamidar—Purchase at Court sale—Suit by, for possession—Defendant pleading that plaintiff is benamidar — Plaintiff's right—Fraud.*

A plaintiff, a purchaser, at a court sale is not entitled to recover the property from the defendant of whom he was found to be the benamidar and the benami transaction was found to be free from fraud. (*Benson and Hayward, JJ.*) TANJI DAGADE *v.* SHANKER SAKHARAM. 36 Bom. 116 : 12 I. C. 564 : 13 Bom. L. R. 1002.

——S. 66—*Benamidar—Benamidar not claiming the property—Effect of.*

S. 66 C. P. Code has no application in a case where the benamidar himself does not claim under the sale certificate. (*Walmsley and Suhrawardy, JJ.*) SARADINDU CHAKRAVARTHY *v.* GOSTA BEHARI. 37 C. L. J. 403 : 27 C. W. N. 208 : 75 I. C. 196 : 1923 Cal. 302.

——S. 66—*Benami—Certified purchaser—Possession with real purchase.*

S. 66 of the C. P. C. should not be restricted to benami purchases made by or on behalf of judgment-debtors, 12 B. L. R. 317 : 22 C. L. J. 408 ref. The failure of the alleged benamidar of the certified purchaser to assert his rights against the real purchaser during the latter's possession after the auction purchase cannot be regarded as a waiver or transfer of the right. 11 Mad. 234 not foll. 23 All. 175 foll. (*Teunon and Newbould, JJ.*) HARISH CHANDRA GUHA *v.* NRIPENDRA KUMAR CHUCKRAVARTI. 59 I. C. 719 : 24 C. W. N. 1024.

——S. 66—*Benami.*

A suit is not barred by S. 66 of the C. P. C. unless plaintiff is one who claims to be a beneficial owner or his representative and the defendant must be the certified purchaser or some one claiming through him. The section has to be construed strictly and not extended beyond its express terms. (*Shadi Lal and Broadway, JJ.*) ABDUL HAMID *v.* MOHAMED SHARIF. 2 Lah. L. J. 353.

C. P. CODE (V OF 1908), S. 66—Joint decree-holders.

——S. 66—*Benami—Jurisdiction of Civil Court.*

S. 66 does not avoid *benami* purchases or render them illegal, but when such purchases are made at Court sales, it bars the legal remedies by which they can otherwise be enforced. The section does not bar a Civil Court from dealing with a cause of action based on a contract between the parties on the equities arising out of the contract. The Court is not barred from decreeing specific performance in the case where before an auction purchase a contract is made between the plaintiff and defendant that the property should be purchased by the defendant in his own name, and subsequent to the purchase the defendant should convey a certain share to the plaintiff. (*Das, J.*) BIKRAM AHIR *v.* RAJPATILAL. 62 I. C. 720 : 1921 Pat. 21.

Co mortgagees.

——S. 66—*Co-mortgagees—Purchase by one—Equity of redemption.*

Of three co-mortgagees R. M. and G., G. purchased the equity of redemption. R brought a suit for sale of 2/3 of the property making M. a party *pro forma* and the Court decreed the suit but made no order to safeguard his interest, and M. brought a suit to recover half of the property purchased by R. in execution of his decree. *Held*, that the suit was maintainable and not barred under S. 66 C. P. C. (*Sunder Lal, J.*) RAMJAS DAS *v.* MOHAN LAL. 25 I. C 735.

Estoppel.

——S. 66 — *Estoppel — Benami purchaser attesting sale by true owner.*

If an auction purchaser allowed a stranger to be in possession for a long time and even attested a sale deed executed by him to re-assure the purchaser. *Held*, that he was estopped from claiming the benefit of S. 317 of C. P. C. 1882, and if after such sale, the auction purchaser gets a sale certificate from the Court it is fraud. *Per Sadasiva Iyer, J.* S. 317 of the Code, 1882, applies to suits against representatives and assigns from purchaser. *Obiter*: Though the section should be strictly construed the words of the section should be given effect to if they apply aptly to the plaint. (*Sundara Iyer and Sadasiva, Iyer, JJ.*) KANDASWAMY *v* RANGASWAMI. 36 Mad. 564 : 23 M L. J. 301 : 16 I. C. 30 : 12 M. L. T. 211 : (1912) M. W. N. 882.

Guardian.

——S. 66—*Guardian—Purchase by—Fraud by manager of an infant.*

A manager guilty of fraud cannot take advantage of the section as against the ward. (*Jenkins, C. J. and Chatterjee, J.*) NONI GOPAL BASU *v.* TARESH CHANDRA GHOSH. 30 I. C. 212.

Joint Decree Holders.

——S. 66—*Joint decree-holders — Co-decree-holder purchasing at execution sale — Rights of others.*

S 317 of the C. P. C. of 1882 (S. 66 of the new code) was designed to create some check on the practice of benami purchases, in execution sales for benefit of judgment-debtors. The section in no

C. P. CODE (V OF 1908), S. 66—Joint decree-holders.

way affects the title of persons otherwise beneficially interested in the purchase. 12 B. L. R. 317 ref. Where out of several joint decree-holders one applied for the execution of the decree subject to the rights of others and the properties put up for sale in pursuance thereof were purchased by him the purchase enures to the benefit of all the decree-holders. The purchser could not retain the property as his exclusive property and perpetrate a fraud against his co-decree-holders under cover of S.-317 of the C.P.C. of 1882. (*Mr. Ameer Ali.*) GANG SAHAI *v.* KESRI.

37 All. 545 : 42 I. A. 177 : 19 C. W. N. 1175 : 18 M. L. T. 203 : 29 M. L. J. 329 : 2 L. W. 837 : 13 A. L. J. 999 : 17 Bom. L. R. 998 : 22 C. L. J. 508 : 30 I. C. 265 : (1918) M W. N. 713 (P. C.)

[Affirming 32 All. 541 : 6 I.C. 364 : 7 A.L.J. 560.]

———**S. 66**—*Joint decree-holders—Suit by the other—Maintainability.*

Two persons held a joint money-decree against the judgment-debtor whose property was put up for sale in execution. One of the decree-holders purchased it with permission of the Court in 1902 and was put in possession in 1903. In 1913 the other decree-holder brought a suit claiming a share in the property, on the strengh of an oral agreement whereby the purchase was to be for the benefit of both: *Held*, that the suit was barred under S. 66 C, P. C. 29 A. 557, Dist. (*Piggott, J.*) SALLE *v.* MOHAN LAL. **29 I. C. 447.**

[This is no longer law. *See* **30 I. C. 265 : 37 All. 545 (P. C.)**

Manager of Joint Hindu family.

———**S. 66**—*Manager of Joint family—Purchase in the name of son-in-law—Claim of others.*

Where properties sold in execution of a decree were purchased with the funds of the manager of a joint Hindu family in the name of his son-in law, S. 317 of the C. P. C. 1882 bars the claim of the members of the joint Hindu family to the properties as being really joint family acquisitions. (*Lord Buckmaster*) SURAJ NARAIN *v.* RATAN LAL.

40 All 159 : 21 C. W. N. 1065 : 20 C. C. 211 : 2 Pat. L. W. 160 : 33 M. L. J. 180 : 15 A. L, J. 684 : 19 Bom. L. R. 737 : 22 M. L. T. 121 : 26 C. L J. 267 : 6. L. W. 509 . (1917) M. W. N. 477 : 40 I. C. 988 : 4 O. L J. 762 : 44 I. A. 201 (P. C.)

[*See* ALSO **35 All. 80: 18 I. C. 30 : 40 I. A. 40 : 16 O. C. 129].**

———**S 66**—*Manager of joint Hindu family—Benami-purchase by—Suit by other members for a share—C. P. Code of* 1882, *S.* 317.

In execution of a decree obtained by A the manager of a joint Hindu family, with the aid of joint family funds purchased the property of the judgment debtor himself benami in the name of B. a stranger without obtaining leave of the Court to bid. In a suit for partition by A's son against the other members of the family and B. *Held* that S. 66, C.P.C. was no bar to the plaintiff's claim to a partition of the property purchased in the name

C. P. CODE (V OF 1908), S. 66—Not retrospective.

of B. on the ground that B was only a benamidar for A and that the property was joint family property. The purchase was not one made on behalf of the plaintiff within the meaning of S. 66 (1), C. P. Code. 6 M. 135 : 9 M. L. J. 298 : 20 M. 349: 40 A. 159 Ref. (*Schwabe C. J. and Coutts Trotter, J.*) NATARAJA MUDALIAR *v.* RAMASWAMI MUDALIAR. **43 M. L. J 363 : (1922) M. W. N. 584 : 16 L. W. 358 : 73 I. C. 479 : 45 M. 856 : 1922 Mad. 481.**

———**S. 66**—*Manager of joint Hindu family.*

S. 66 has no application to cases where the manager of a Hindu family or a tenant in common purchases with funds belonging to the joint family or to all the tenants in common. (*Abdur Rahim and Sundara Aiyar, JJ.*) GOPALSWAMI VASTAD *v.* GOVINDASWAMI VASTAD. **17 I.C. 434 : (1912) M. W. N. 1071.**

———**S. 66**—*Manager of Joint Hindu family—Rights of members.*

When a suit is between one member of a joint Hindu family and another the above section is not applicable but it is applicable when the suit is between the separated members of a joint Hindu family, though at the time of this separation certain property of the family was not in fact divided. (*Lindsay, J C.*) RAMADHUN *v.* BISHESHAR DAYAL. **37 I. C. 111 : 3 O. L J. 508.**

Not Retrospective.

———**S. 66**—*Not retrospective—Execution sale under the old code.*

S. 66 C. P. Code has no restrospective operation and does avail an execution purchaser whose title was perfected under the Code of 1882, 47 C. 1108 *Rel.* (*Mookerjee and Chotzner, JJ.*) PROMODE KUMAR ROY *v.* MADAN MOHAN SAHA. **70 I. C. 555 : 36 C. L. J. 396 : 27 C. W. N. 305 : 1923 Cal. 228.**

———**S. 66**—*Not retrospective—Difference between old code and new—Title of purchser under old code—Not affected by new Code.*

S. 66 does not apply to an execution purchaser whose title was perfected when S. 317 C. P. C. (1882) was in force. Hence a real purchaser at an auction sale held in 1903 can sue for a declaration of his title by purchase at a time when the code of 1908 is in force against an assignee of a certified purchaser though not against the certified purchaser himself. Both S. 317 of the Code of 1882 and S. 66 of the Code of 1908 place a limitation upon the title of purchaser: only S. 66 widens the fetter placed upon the title of the purchaser by S.317. S. 66 improves the position of the certified purchaser, and, confers upon him a power of alienation he would not otherwise enjoy and under this section the certified purchaser is enabled to confer a good title on the transferee because the real owner is debarred from impeaching the title not only of the certified purchaser but also of the person deriving title from him. The wider restriction embodied in S. 66 of the Code of 1908 does not apply where the title accrued under the old code. (*Mookerjee, Fletcher and Richardson, JJ.*) PROMOTHA NATH *v.* SARAV DASI. **24 C. W. N. 1011 : 31 C. L. J. 463 : 58 I. C. 327 : 47 C. 1108.**

C. P. CODE (V OF 1908), S. 66—Object of.

Object of.

——S. 66—*Object of.*

The object of S. 66 of C. P. C. is to put an end to purchases at court auction by one person in name of another and the distinction between a purchase on behalf of another and a purchase coupled with an undertaking to sell to another at the price of purchase is somewhat narrow. (*Viscount Cave.*) RAMANTHAI VADIVELU *v.* PERIA MANIKA. **43 Mad. 643 : 47 I A. 108 : 39 M. L. J. 11 : 28 M. L. T. 13 : 12 L. W. 1 : 56 I. C. 395 (1920) M. W. N. 389 : 24 C. W. N. 699 : 18 A. L. J. 584 : 2 U. P. L. R. (P. C.) 90 (P. C.)**

Plea of.

——S. 66—*Plea of bar of suit—May be raised at any stage.*

The plea of legal prohibition of any particular suit, as for example prohibition under S. 66 of the C.P.C. may be put forward and given effect to at any stage of the suit, even in appeal for the first time. (*Lindsay, J. C.*) RAMADHIN *v.* BISHESHER DAYAL. **37 I. C. 111 : 3 O. L. J. 508 :**

Possession.

——S. 66—*Possession—Suit for, against purchaser's heirs.*

Where B's widow purchased in Court auction from out of B's estate, a house in the name of C. and enjoyed it till her death and C during her life time never laid any claim thereto ; *held* that a suit by B's heir against C's heir after the death of B's widow for possession of the house is not covered by S. 66 of C. P. C. (*Richards and Banerji, JJ.*) NARAIN *v.* DURGA. **35 All. 138 : 18 I. C. 246 : 11 A. L. J. 101.**

——S. 66—*Possession—Suit for—Purchaser.*

A plaintiff, a purchaser at a Court sale is not entitled to recover the property from the defendant of whom he was found to be the benamidar and the benami-transaction was found to be free from fraud. (*Beaman and Hayward, JJ.*) TANJI DAGADE *v.* SHANKAR SAKHARAM. **36 Bom. 116 : 12 I. C. 564 : 13 Bom. L. R. 1002.**

——S. 66—*Possession—Suit—Purchaser's duty to enquire.*

S. 66 C.P.C. bars a suit against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claimed. This section is clearly aimed at *benami* purchases in execution sales. A real purchaser cannot base a suit against *benamidar* on the fact of possession. 23 All. 175 Appr., Dist. and Foll. (*Sharfuddin and Coxe, JJ.*) HANUMAN PERSAD THAKUR *v.* JADUNANDAN THAKUR. **43 Cal. 20 : 29 I. C. 787 : 20 C. W. N. 147.**

——S. 66—*Possession—Real owner—Suit against—Trust—Transfer of title.*

A Court auction-purchaser must be treated as the real purchaser for all purposes where the suit is brought against and not by him (or those claiming under him) excepting in the case provided for by S. 66 (2) C.P.C. Mere consent or mere permission to hold possession given after the

C. P. CODE (V OF 1908), S. 66—Representatives.

Transfer of Property Act cannot transfer title from one party to another and the latter cannot sue. The auction purchaser is not a trustee for the real purchaser unless a trust has been created under S. 5 of the Trust Act. (*Sadasiva Iyer and Tyabji, JJ.*) KAMRUDDI *v.* NARENCHAND. **(1915) M. W. N. 204 : 17 M. L. T. 158 : 26 I. C. 205 : 28 M. L. J, 251.**

Principal and Agent.

——S. 66—*Principal and agent—Purchase at execution sale by agent with principal's money—Suit by principal to recover properties—Maintainability.*

S. 66 of the C. P. C, is no bar to a suit brought by the principal against the agent for the recovery of properties purchased by the agent in his own name but with the principal's money and for the principal's benefit in a Court auction though without the knowledge of the principal, 19 W. R. 356 P. C. and 37 All. 545 foll. 17 Mad. 282, and 18 Mad. 436 ref. If the plaintiff does not seek relief on the ground that the certified purchaser is a name lender but relies on a certain state of facts as establishing certain other kinds of legal relations between himself and the certified purchaser and entitling him to the property purchased he can rely on such facts and circumstances notwithstanding S 66 of the C. P. C. (*Sadasiva Aiyar and Napier, JJ.*) PATRACHARIAR *v.* RAMASWAMI CHETTIAR. **(1919) M. W. N. 693 : 49 I. C. 734 : 9 L. W. 276.**

Representatives.

——S. 66—*Representatives—Benami purchaser—Actual purchaser—Defence.*

With the repeal of C. P. C., 1859 and C. P. C., 1882 which contained the provision of a special plea of a certified purchaser against the real purchaser, under sections 260 and 317 respectively, that plea is no longer available by way of defence after the code of 1908, and no one has a vested right in a particular form of procedure. (*Sundar Lal, J.*) GAYA PRASAD *v.* LARETI KUAR. **25 I. C. 821 : 12 A. L. J. 1145.**

——S. 66—*Representatives—Applicability to.*

S. 66 C. P. C. is intended to bar the institution of a suit against the certified purchaser by the beneficial owner or one standing as successor-in-title of the beneficial owner. 29 A. 557, Dist. 11 M. 234 ; 17 M. 282, not appr. (*Knox, J.*) NARAIN DEI *v.* DURGA DEI **16 I. C. 489 : 10 A. L. J. 97.**

——S. 66 — *Representatives — Mortgagees from real purchaser.*

Mortgagee from the real purchaser is precluded from bringing a suit for declaration that the purchase was *benami* on behalf of his mortgagor. 26 A. 82, Foll. (*Stanley, J. C. and Banerji, J.*) SARJU PARSHAD *v* BINDESHARI BAKHSH PAL. **33 All. 382 : 9 I. C. 298 : 8 A. L. J. 184.**

——S. 66—*Representatives—Section applicable.*

The section is applicable to the cases of the persons claiming title under certified purchasers and not the real ones. (*Beachcroft, J.*) EASIN *v.* INTIGERENESSA BIBI. **58 I. C. 745 : 24 C. W. N. 659.**

C. P. CODE (V OF 1908), S. 66—Representatives.

——— **S. 66**—*Representatives—Suit against private transferee of certified purchaser for confirmation of possession, maintainability of.*

S. 66 of the New C. P. C. is more comprehensive than S 317 of the C. P. C. of 1882. 26 C 950; 19 C. L. J. 330 ; 23 C. 699 foll. S. 317 of the C. P. C, 1882, is no bar to maintainability of a suit for confirmation of possession of immoveable property against a private transferee of the certified purchaser as *benamidar* of the plaintiff (*Sharfuddin and Teunon, JJ.*) JOHAN BUKSH *v.* MOHAMMAD TASLIM. **32 I. C. 963**

——— **S. 66** — *Representatives—Section not retrospective.*

Under the Old Code, S. 66 was only applicable to the certified purchaser but as it is now amended, it applies also to persons standing in the shoes of the purchaser. The new Code does not affect rights vested in parties before its enactment. (*Woodroffe and Richardson, JJ.*) ASSAD ALI *v.* BUJRUS MEHER BIBI. **29 I. C. 716.**

——— **S. 66**—*Representatives—"Certified purchaser"—Meaning of.*

The term "certified purchaser" in S. 66 does not include his successor in title *i.e.*, a transferee from him. The judgment-debtor purchased his property sold in execution of a decree against himself obtained by third defendant in the name first defendant who sold it to second defendant. The plaintiff sued for declaration of title and confirmation of possession. The second defendant could plead that the plaintiff could not seek the assistance of the Court as the purchase was made to defraud his creditors which had been accomplished. (*Mookerjee and Beachcroft, JJ.*) NISAKAL DAS *v.* BAI RAGI SAMAL.
19 I. C. 909 : 19 C. L. J. 330.

——— **S. 66**—*Representatives — Successor-in-title of purchaser—Suit for declaration.*

S. 66, C.P. C. applies to the successor-in-title of the certified purchaser. 31 Bom. 61 35 Bom. 342 Ref, A suit is barred under S. 66 C. P. C. although one for a declaration only. 23 Cal. 699 ; 23 All. 175 foll. If the plaintiff was in adverse possession against the certified purchaser for over 12 years his claim for a declaratory decree was not liable to be rejected on the ground that he was a trespasser. (*Kotwal, A. J. C.*) LAXMAN *v.* GOVIND. **55 I. C. 499 : 16 N. L. R. 87.**

——— **S. 66**—*Representatives of purchaser—Applicability to.*

S. 66 C. P. C. applies only to suits against certified purchasers. Hence in a suit by an heir of the certified purchaser to eject the defendant it is open to defendant to set up her own title to show that the certified purchaser was a benamidar for her, (*Drake Brookman, J, C.*) HIRALAL *v.* GOPIKA. **31 I. C. 58 : 11 N. L. R. 130.**

——— **S. 66**—*Representatives—Person claiming under certified purchaser, if within the section.*

The words "certified purchaser" in S. 66 includes persons standing in the shoes of the Court purchaser. (*Lyle and Ashworth, A. J. C.*) ASHFAQ HUSAIN *v.* SYED NAZIR HUSAIN.
22 O. C. 222 : 53 I. C. 961 : 6 O. L. J 563.

C. P. CODE (V OF 1908), S. 66—Specific performance.

Scope of.

——— **S. 66**—*Scope of—Retrospective effect.*

S. 66 operates retrospectively and a suit cannot be maintained against the transferee of a certified *benami* purchaser though the transfer took place when the old Code of 1882 was in force. (*Mears, C. J. and Knox, J.*) ABDUL JALIL KHAN *v.* UBDULLAH KHAN. **43 A. 416 62 I. C. 725 : 19 All. L. J. 227.**

——— **S. 66**—*Scope of—Claim arising prior to sale.*

S. 66 applies only where the plaintiff's claim is based on an auction purchaser and not where it is prior to and independent of the sale. (*Roe and Jwala Prasad, JJ.*) RAM KHELAVAN PANDE *v.* ASGAR ALI. **36 I. C. 681.**

Specific Performance.

——— **S. 66**—*Specific performance—Agreement by purchaser at Court auction to convey property purchased—Enforceability.*

The object of S. 66 C, P. C. is to put an end to purchases by one person in the name of another. An agreement subsequent to a purchase is not affected by that section and is specifically enforceable, 42 Mad. 616 (F. B) appr. (*Viscount Cave*) RAMATHAI VADIVELU MUDALIAR *v.* PERIA MANICKA MUDALIAR.
43 Mad. 643 : 47 I. A. 108 : 39 M. L. J. 11 : 18 A. L. J. 584 : 28 M. L. T 13 : 12 L. W. 1 : 24 C. W. N. 699 : (1920) M. W. N. 389 : 56 I. C. 395 : 2 U. P. L. R. (P. C.) 90 (P. C.).

——— **S. 66**—*Specific performance— Contract for sale.*

Where defendant after having bid for the property and paid the earnest money on his own account entered into an agreement with plaintiffs to buy the property for plaintiffs and himself jointly in certain shares and paid the balance in part out of money taken from the plaintiffs. *Held*, that the case was not covered by the second proviso to S. 66 of the C. P. C. but that the plaintiffs were entitled to sue the defendants for specific performance of the agreement. (*Chatterjea and Newbould, JJ.*) BABURAM MANDAL *v.* DOKHINA SUNDARI NAMASUDRANI.
54 I. C 726 : 24 C. W. N. 27.

——— **S. 66**—*Specific performance—Contract to sell properties purchased.*

S. 66 of the C. P. C. is no bar to a suit to enforce the specific performance of an agreement by the auction-purchaser subsequently to the auction purchase to convey the property purchased to the plaintiff even though the plaint alleged that the certified purchaser was a benamidar for the plaintiff. (*Wallis, C. J., Ayling and Sadasiva Aiyar, JJ.*) ARUTAM VENKATAPPA *v.* VAVILALA JALAYA. **42 Mad. 615 : 37 M. L. J. 98 : 26 M. L. T. 46 : (1919) M. W. N. 355 : 51 I. C. 111 : 9 L W. 598 (F. B.).**

——— **S. 66**—*Specific performance—Benami purchase—Enforceability by real purchaser.*

A suit for execution of a sale deed and for recovery of possession on the ground that defendant's father purchased the properties as *benamidar* for the plaintiff falls within S. 66 C. P. C. and

C.P. CODE (V OF 1908), S. 66—Specific Performance.

is barred. (*Sankaran Nair and Oldfield, JJ.*) SUBRAMANIAM PILLAI *v.* GOPALARAMA SUBRAMANYA.
29 I. C. 138.

——S. 66—*Specific performance — Benami purchase—Suit, if maintainable.*

A suit by a judgment-debtor against an auction purchaser to enforce an agreement before the sale to reconvey the properties to the judgment-debtor is barred by S. 66, C. P. C. (*Atkinson and Das, JJ.*) MUNESHWAR DUTTA *v.* KAILASH PATI.
50 I. C. 546.

Suit for Declaration.

——S. 66—*Suit for declaration of benami nature of purchase does not lie.*

A suit by a son, who with his father constituted a joint Hindu family for a declaration that a Court auction-purchase in the name of his mother, made out of family funds, is *benami*, is not maintainable in view of S. 66 of the Code. (*Tudball and Sulaiman, JJ.*) BAIJNATH DAS *v.* BISHEN DEVI.
19 A. L. J. 787 : 3 U. P. L. R. (All.) 147 : 63 I. C. 676 : 43 A. 711.

——S. 66—*Suit for declaration*— Benami, *purchase—Suit by real owner for declaration of title—Maintainability.*

S. 66 applies to suits for declaration also and even where defendant has recognised plaintiff's title. S. 66 of the C.P.C. (1908), is merely declaratory of the real meaning of S. 317 of the Code of 1882. 28 M. L. J. 251 : 23 A. 34 : 175 : 31 B. 61 : foll. Per *Srinivasa Aiyangar, J. Obiter.*—S. 66 of the C.P.C. is merely a regulation of procedure. It does not purport to take away or affect any right which the real owner had, but like the Limitation Acts prevents a particular person from bringing a suit against the certified purchaser on certain grounds. (*Coutts Trotter and Srinivasa Iyengar, JJ.*) CHIDAMBARAM CHETTIAR *v.* SUBRAMANIA IYER.
(1916) 1 M. W. N. 220 : 32 I. C. 434 : 3 L. W. 86.

——S. 66—*Suit for declaration—Maintainability.*

A suit for declaration that the purchase by certified purchaser is *benami* for plaintiff is barred by S. 66. (*Stuart. A. J. C.*) SITARA BEGAM *v.* MUHAMAD ISHAQ KHAN.
32 I. C 365 : 2 O. L. J, 584.

——S. 66—*Suit for declaration — Benami purchase—Real purchaser in possession—Declaratory suit.*

The real purchaser in a *benami* sale who remains in possession is not precluded by S. 66 C. P C. from suing for declaration that he is the owner. (*Ormond, J.*) MYAT GALE *v.* SANTHA.
25 I. C. 810 : 7 L. B. R. 260.

Third parties.

——S. 66—*Third parties—Suit by beneficiary against the benami certificated purchaser.*

A Muhammadan having bought land at a court sale with his money in the name of one of his sons settled the same with a tenant who attorned to him and paid his heirs rent after his death. *Held*, in a suit brought by the heirs other than the certificated purchaser against the tenant for arrears

C. P. CODE (V OF 1908), S. 67.

of rent making the certificated purchaser a *pro forma* defendant the latter supported him, that the suit was not barred by S. 66 of the C. P. C. (*Chaudhuri and Cuming, JJ.*) MAHAMAD EMARTULLA SIRCAR *v.* MAHAMMAD DIDAR BUX SIRDAR.
54 I. C. 127 : 24 C. W. N. 51.

——S. 66—*Third parties— Rival claimants from purchaser.*

S 317 of the Code does not apply to persons claiming through the certified purchaser. (*Fletcher and Shamsul Huda, JJ.*) JOY GOBINDA CHOWDHURY *v.* DEBENDRA NATH BOSE.
46 I. C. 216.

——S. 66—*Third parties—Property mortgaged by judgment-debtor—Sale in execution—Suit by mortgagee against the judgment-debtor and execution purchaser.*

In execution of a money-decree a decree-holder attached immoveable property of his judgment-debtor. The latter mortgaged it to the plaintiff to pay off the decree amount. The property was sold in execution. Plaintiff brought a suit on his mortgage against the judgment-debtor and the execution purchaser. *Held*, that the suit was not barred by S. 66, C. P. C. 37 A. 545, (P. C.) Ref. (*Seshagiri Iyer and Burn, JJ.*) MONGOLA SWAYI *v.* VISWANATHA SANTASO SINGARO.
54 I. C. 967 : 37 M. L. J. 586.

——S. 66 and O. 21, Rr. 98 to 103—*Third parties—Certified benami purchaser suing in ejectment.*

A person who derives his title from a judgment debtor and who has obstructed a certified benami purchaser at an execution sale in getting possession cannot be successfully sued in ejectment by the certified benami purchaser, and S. 66 of the Code gives no such power of suing, being inapplicable to the case of a purchaser seeking to oust another from possession. 34 M. 143, 22 Bom. 672, Dist. (*Seshagiri Aiyar and Phillips, JJ.*) GULLAPALLI VENKATARAMAYYA *v.* KOONAPRAJU VENKATARAJU.
4 L. W. 609 : 37 I. C. 497 ; 31 M L. J. 877.

——S, 67—*Sanction of Commissioner to sale of agricultural land in execution—Unnecessary.*

The section re-enacts only the first paragraph of S. 327 of the old Code and has omitted the second paragraph. From the date when the Civil Procedure Code came into force, the sanction of the Commissioner of the Division is not required for the sale of agricultural land in execution of a decree for money. (*Batchelor and Rao, JJ.*) JUSAL THARIA *v.* MORRISON.
19 I. C. 480 : 15 Bom L. R. 249.

——S. 67—*Act I of* 1914—*Sanction of Commissioner to sale by Receiver of insolvent's agricultural lands.*

Where the Local Government has not issued notification under S. 3 of Act I of 1914, that special rules under S 327 of the old C. P. Code were in force, the insolvent's land can be sold by the Receiver without the sanction of Commissioner. (*Scott-Smith, J.*) FAKIR MUHAMMED *v.* AMIR CHAND.
66 I. C. 893 : 3 Lah, L. J. 5.

C P. CODE (V OF 1908), S. 67.

——S. 67—*Money decree—Sale of an agricultural land—Sanction of a Commissioner not necessary.*

Under the Code of Civil Procedure of 1908 sanction of a Divisional Commissioner is not necessary for an execution sale of an agricultural landjin enforcement of a money decree. (*Shah Din and Scott Smith, JJ.*) LALA KISHORE CHAND *v.* ISHAR SINGH. **167 P.L.R. 1913 : 123 P.W.R. 1913 : 19 I. C. 479 : 89 P. R. 1913.**

——S. 68 and Sch, III — *Execution sale—Ancestral property sold as non-ancestral property, whether can be set aside.*

Where with the knowledge of the judgment-debtor, ancestral property was sold by the Court in execution of a decree in the manner prescribed for the sale of non-ancestral property a subsequent suit by the judgment-debtor to set aside the execution sale on account of that irregularity is not maintainable. 28 A. 273, 42 A 58 foll. (*Piggott and Walsh, JJ.*) BHATELAY CHUNNI LAL *v.* CHAKKERPAN. **44 A. 383 : 20 A. L. J. 281 : 67 I. C. 934 : L. R. 3 A. 167 : 1922 All. 56.**

——S. 68—*Ancestral property—Sale of grove with houses.*

An ancestral grove with a house which has been assessed by Government can be sold in execution by the Collector only. (*Tudball and Rafique, JJ.*) FATMATUL KUBRA *v.* ACHCHI BEGAM. **36 All. 33 : 21 I. C. 831 : 11 A. L. J. 1009.**

——S. 68—*Rules framed under R. 17—Transfer of decrees for execution.*

R. 17 of the Bombay High Court, which regulates the procedure to be followed when decrees are transferred for execution, provides that if an application to set aside a sale is made to the Collector, within the prescribed time, he shall refer the applicant to a Civil Court. In every proclamation for sale, it should be notified that a person wishing to set aside a sale under O. 21 C. P. Code, must apply to the Court and not to the Collector within 30 days of the date of sale, and if an applicant still applies to the Collector, he should be referred to the Civil Court without a moment's delay. (*Macleod, C. J. and Shah, J.*) SHANTMURTI DEVAPPA *v.* NARAYANA RAMACHANDRA. **45 Bom. 1132 : 62 I. C. 221 : 23 Bom. L. R. 476.**

——Ss. 68 and 69— *Agriculturist— Power of civil court to order temporary alienation.*

A civil Court can order the temporary alienation of the land of an agricultural tribe in satisfaction of a money decree. (*Scott Smith and Dundas, JJ.*) SAIN DITTA *v.* NUR AHMMD. **74 I. C 194 : 4 Lah. L. J. 476.**

——S. 68, Sch. III, Paras. 1 and 2—*Collector—Power of, to execute decree transferred.*

Where a decree is transferred under S. 68 of the Code to the Collector for execution, he may execute it under para. 1 of Sch. III to the Code only with respect to that property of the judgment-debtor or part thereof ordered to be sold or he may do so under para. 2 with respect of the whole of the judgment-debtor's property available. (*Kotwal, A. J. C.*) GANGARAM *v* RAMGOPAL. **61 I. C. 579.**

C. P. CODE (V OF 1908), S. 70.

——Ss. 69 and 70—*Collector—Powers of.*

The Collector must decide the best method of satisfying the decree whether by management by the Collector himself or by sale or by letting. But he has not got the discretion to decide whether the decree has been satisfied. (*Chandavarkar and Batchelor, JJ.*) BHURCHAND HANORAJ DOSHI *v* VIRA CHAMPA KHACHAR. **37 Bom. 32 : 17 I. C. 142 : 14 Bom. L. R. 787.**

——S 70—*Collector's powers.*

A Collector acting under the section is a Revenue Court and can pass order under S. 476 Cr. P. C. (*Knox, J.*) ASHARFILAL *v.* EMPEROR. **14 A. L. J. 1077 : 38 I.C. 419 : 18 Cr. L. J. 307.**

——Ss, 70 and 71— *Execution of decree — Decree sent to Collector—Civil Courts, if can interfere.*

Where a decree is sent to the Collector for execution, a Civil court cannot interfere in matters declared to be in the Collector's jurisdiction, but it is not deprived of its ordinary jurisdiction in regard to other matters because the decree has been sent to the Collector. (*Prideaux, A. J. C.*) JANARDHAN GANESH *v.* RAMCHANDRA. **46 I. C. 885.**

——S. 70—*Execution—Objections to sale of property—Court, power of, to amend application—Date of application.*

On objection being taken to sale of certain properties that the judgment-debtor has no proprietary title to them but only a right to collect and appropriate their revenue the Court acted under S 70 and R 3 framed by U. P. Government and without waiting for the result of the petition to the Local Govt., the Court allowed the objections and amended the decree-holder's application of sale accordingly. It was held that the court acted rightly in not waiting for the result of petition to the local Government and that the court had power to amend under rule 3 and the date of the application must be taken to be the date on which it was filed and not when it was amended. (*Lindsay, J. C. and Stuart, A. J. C.*) SARFARAZ HUSSAIN *v.* AMARCHAND PAL. **37 I. C. 78 : 3 O. L. J. 529.**

——S. 70 (2) and O. 21, R. 72—*Bombay Civil Circulars, Chap II, Cl. 91 sub cl. 16— Decree transferred to Collector—Civil Court's power after transfer.*

Where a decree is transferred to the Collector for execution, a Civil Court cannot entertain an application under O. 21, R. 72 inasmuch as that power has been conferred on the Collector by Bombay Civil Circulars, Chap. II, Cl. 91, sub cl. 16. (*Shah and Martin, JJ.*) SHRINIVAS APPAHARYA *v.* JAGADEOAPPA KALAPPA. **42 Bom. 621 : 46 I. C. 653 : 20 Bom. L. R. 708.**

——S 70 (c)—*Rules made under by Local Govt.—Finality of order confirming sale.*

The Local Govt. has power under S. 70, C. P. C. to confer upon the Collector all or any of the powers which a Civil Court might exercise in the execution of a decree if its execution is not transferred to the Collector's Court. If the Local Govt, makes such rules which give finality to an

order of Revenue Court and the Revnue Court confirms the sale of an ancestral property sold in execution of decree a suit to set aside the sale is not maintainable. (*Tudball and Rafique, JJ.*) FARHAT-UN-NISSA *v.* SUNDARI PRASAD.
18 A. L. J. 124 : 54 I. C. 801 : 2 U. P. L. R. (H C.) 35.

——S. 72—*Action of Collector—Administrative.*

The Collector when acting under S. 72 of the C.P. C. does not perform any judicial function. If he makes any representation under the section he does so as an officer of the Court and it is within the discretion of the Court to accept or decline to accept such representation. 9 Cal. 290 (F. B.) and 25 P. R. 1894 foll. (*Shadi Lal, Le Rossignol and Broadway, JJ.*) SARDARNI DATAR KAUR *v* RAM RATTAN. 1 Lah. 192 : 58 I.C. 603 : 2 Lah L. J. 333 (F. B).

——S. 72— *Attachment — Intervention of Collector—Power of Court.*

The refusal of the Collector to intervene was wrong and the executing Court erred in accepting the position taken by the Collector. Though the land could not be sold in execution. the Court could act under S. 72, C. P. C. (*Petman, J.*) RAM RATTAN *v.* DATAR KAUR. 52 I. C. 356.

——S. 72—*Judgment-debtor member of agricultural tribe—Collector—Power to propose temporary alienation of judgment-debtor's land—Punjab Alienation of Land Act* (XIII *of* 1900), S. 16 (1).

A member of agricultural tribe was a judgment-debtor under a decree of Civil Court and his land was attached in execution. The executing Court asked the Collector to intervene. *Held*, that the Collector had under S. 72 of the C P. C. jurisdiction to make a proposal for temporary alienation of land notwithstanding the provision of S. 16 (1) of the Punjab Alienation of Land Act. (*Maynard, F. C.*) SALEH MAHOMED *v.* MEHAR SINGH,
51 I. C. 399 : 1 P. R. (Rev.) 1919.

——S. 72—*Execution—Sale of Revenue paying land—Collector's sanction, if necessary.*

The sanction of the Revenue authorities is not necessary for the sale of revenue paying land, in execution of a decree. (*Scott Smith, J.*) BARKAT RAI *v.* MISRI KHAN. 69 P. L.R. 1918 : 46 I. C. 864 : 143 P. W. R. 1918.

——S. 72—*Decree for sale of land—Power of execution of Courts.*

Where a District Judge, executing a decree for sale of land, orders its sale, he is not bound to accept the recommendation of a Sub-divisional Officer to the Collector to arrange to have the decree satisfied by a temporary alienation. (*Scott Smith, J.*) GURANDITTAMAL *v.* J. RUSTOMJI.
9 P. L. R. 1915 : 27 I. C. 630 : 34 P. W. R. 1915.

——S. 73.

Appeal.
Applicability.
Application for execution.
Assets.
Attachment.
Dismissal of execution application.

Enquiry into rival claims.
Erroneous distribution.
Fund in Court.
Liquidation.
Mortgage decree.
Priority.
Revision.
Right to rateable distribution.
Rival decree-holders
Sale in execution.
Same judgment-debtor.
Suit for money.

Appeal.

——Ss. 73 and 104—*Appeal.*

No appeal lies from an order passed under S. 73. (*Sankaran Nair and Ayling, JJ.*) PUNGALUR CHENNAMMA *v.* THE MINOR RAJA OF KARVETINAGAR. 23 I. C. 422 : 1 L. W. 234.

——S. 73—*Appeal and revision.*

An application for rateable distribution is maintainable when the sale is going on, as it has been made before receipt of the assets within the meaning of S, 73, C. P. C. An order under S. 73 is not an order under S. 47 inasmuch as the question which arises is not one between the parties to the suit and the order rejecting the application does not otherwise come within the definition of decree in S. 2, because it does not conclusively determine the rights of the parties. So an order under S. 73 is not appealable. (*Coutts and Adami, JJ.*) MUSAMMAT HURMOOZI BEGUM *v.* MUSSAMMAT AYSHA. 5 P. L. J. 415 : 1 P. L. T. 296 : 57 I. C. 421 : 1921 Pat. 204.

Applicability.

——S. 73—*Applicability—Conditions of.*

A case comes under S. 73 only when more persons than one have applied for execution against the same judgment-debtor and their decrees remain unsatisfied till assets whereof rateable distribution is claimed, are received, (*Mookerjee and Newbould, JJ.*) GOPAL CHANDRA BOSE *v.* HARI MOHAN DUTT. 30 I. C. 49 : 21 C. L. J. 624.

——S. 73 (1) (c)—*Applicability of.*

The provisions of Cl. (c) of the proviso to sub-S. 1 of S. 73 operate, only when the litigant concerned has himself obtained a decree and applied for rateable distribution in execution thereof. (*Harrington and Carnduff, JJ.*) NATHAN SAO *v.* MRS. ANNI BESANT. 19 I. C, 226 : 19 C. W, N. 535.

——S. 73 (2)—*Applicability—Assets not liable to be distributed—Section does not apply.*

Where the assets are not liable to be rateably distributed. S. 73 (2) C. P. Code has no application. (*Ayling and Venkatasubba Rao, JJ.*) VARDA RAMASWAMI *v.* UMMA VENKATRATNAM.
42 M. L. J. 473 : 30 M. L. T. 178 : (1922) M. W. N. 184 : 15 L W. 421 : 67 I. C. 546 : 1922 Mad. 99.

——S. 73—*Applicability—Conditions of — Rateable distribution.*

Decree against judgment-debtor and application before receipt of assets are the only things

C. P. CODE (V OF 1908), S. 73—Applicability.

that a Court has to look under S. 73. A decree against the judgment-debtor for assets of his fathers gives no priority over the decrees against him personally. (*Abdur Rahim and Bakewell, JJ.*) VADLAMANYA VENKATESAM *v.* MANGIPUDI VISVANADHAN. 42 I. C. 897 : (1917) M. W. N. 859.

———S. 73—*Applicability—Nature of proceedings—Inquiry into* bona fides *of decree.*

The proceedings under S. 73 C. P. C are of non-judicial character and the court cannot inquire into the validity or otherwise of the decrees under which payments are claimed. (*Kotval, A. J. C.*) SETH MAGENMAL *v.* RAJA RAGHUNATH RAO. 19 N. L. R. 172 : 75 I. C. 749 : 1924 N. 39.

———S. 73—*Applicability—Identity of judgment debtors not necessary.*

S. 73, C.P. Code, is imperative and does not imply that an application for execution is necessary to obtain the benefit of it. It is not necessary that all the judgment-debtors in the several decrees should be identical, and the fact that in one, there is an extra judgment-debtor does not make the section inapplicable. The addition of the word "passed" in 1908 has not restricted the application of the section. (*Jwala Prasad and Ross, JJ.*) MT. INDERBASI KUER *v.* SATNARAYAN SINGH. 4 Pat. L. T. 373 : 74 I. C. 626 : 1923 Pat. 216 : 1923 P. 521.

Application for Execution.

———S. 73—*Application for execution—Order of attachment before judgment.*

A person, by simply obtaining an order for attachment before judgment is not entitled to rateable distribution. The section applies only when application for execution has been made before realization of assets. (*Mookerjee and Newbould, JJ.*) MADHU SUDA PATINTUNDA *v.* RASH MOHAN SEN PEDDAR. 30 I. C. 33 : 21 C. L. J. 614.

———S. 73 and O. 21, R. 11—*Application for execution—Application for rateable distribution is not.*

Before a decree-holder can claim rateable distribution he must, before the receipt of the assets, have applied to the Court by which the assets are held for the execution of his decree, and such application must be in the form prescribed by O. 21, R. 11 (2), C. P. Code.

An application for rateable distribution is not an application for execution. (*Kotval, A. J. C.*) DWARKADAS *v.* GHASI RAM. 64 I. C. 53 : 17 N. L. R. 143.

Assets.

———S. 73—"*Assets*"—*Meaning of.*

In order to constitute realization within the meaning of S. 295, C. P. C. (1882) the sum must be realised either in execution under process of Court or in one of the modes prescribed by the Code, so that a payment made privately by a judgment-debtor to a decree-holder is not "assets" within the meaning of S. 295, C. P. C. 13 C. 225 : 21 C. 809 : 6 B. 588. 8 A. 67 rel. on (*Mookerjee and Carnduff, JJ.*) GOURI DATT *v.* AMAR CHAND. 13 I. C. 907 : 15 A. L. J. 49.

C. P. CODE (V OF 1908), S. 73—Assets.

———S. 73 and Sch. III, cl. 9—*Assets—Sale by Collector.*

In an execution proceeding, when the Collector sells the property and receives whole of the money agreed to be paid at the sale, he holds the proceeds as assets received. *Held*, by the Court under S. 73 any application for its rateable distribution after that date is out of time. (*Macleod, C. J. and Heaton, J.*) DATTATRYA DURGAPPA *v.* PANDIK. 58 I. C. 992 : 22 Bom. L. R. 1001.

———S. 73—*Assets—Realisation in execution—Warrant for attachment of moveable property—Payment by judgment-debtor before levy of attachment—Rateable distribution.*

Money paid to a bailiff under O. 21, R. 55, to avert the levy of an attachment of moveables is payable only to the attaching creditor and is not subject to rateable distribution. 36 B. 156 foll. 28 M. 380; 28 B. 264: 38 M. 221: 27 M. 346, ref. (*Pratt, J.*) NATHMAL *v.* MANIRAM. 53 I. C. 599 : 21 Bom. L. R. 975.

———S. 73—*Assets—If includes money paid by judgment-debtor on arrest.*

As money paid by a judgment-debtor to the officer arresting him to get himself released is not assets held by a Court, they are not liable to rateable distribution under S. 73 among persons who have applied to the Court for execution of decrees against the judgment-debtor. The section was meant to apply to assets realized by the sale of the property attached. (*Macleod, J.*) EBJI UMERSEY *v.* GRAHAM & CO. 39 I. C. 623 : 19 Bom. L. R. 274.

———S. 73—*Assets—Meaning of.*

Assets mean all property of a man, of whatever type, which can be used for satisfying debts or demands against the person. The salary of Government servant attached under the Code is assets. (*Chandavarkar and Batchelor, JJ.*) VELCHAND CHAGAN LAL *v.* CAPT. S. R. MUSSON. 16 I. C. 640 : 14 Bom. L. R. 633.

———S. 73 and O. 21, R. 55—*Assets—Meaning of.*

Assets in S. 73 are assets held in process of execution and do not include money paid into Court under O. 21, R. 55. (*Scott, C. J. and Batchelor, J.*) SORABJI CAOVARJI *v.* KALA RAGHUNATH. 36 Bom. 156 : 12 I. C. 911 ; 13 Bom. L. R. 1193.

———S. 73—*Assets—Meaning of—Change in Code.*

The omission of the words "realized by sale or otherwise in execution" and the substitution of "assets held by the court" must have been deliberate and the intention of the legislature was that the term 'assets' should now include any assets held by the court irrespective of the manner in which they came into possession of the court. The scope of the section has been purposely broadened. (*Cuming, J.*) HARI CHARAN ROY CHAUDHURI *v.* BIRENDRA NATH SAHA. 70 I. C. 541 : 35 C. L. J. 327.

———Ss. 73 and 115—*Assets—Money deposited by sureties for release of an attachment before Judgment—Rateable distribution of such money—Interference in revision.*

C. P. CODE (V OF 1908), S. 73—Assets.

In a money-suit certain property belonging to the defendant was attached before judgment and then released on two persons standing sureties for the amount of the claim. The suit was ultimately decreed and the decree-holder applied for execution, whereupon the sureties deposited the decretal amount in Court. On that very day just before the deposit was made, the petitioner who also held a money-decree against the same judgment-debtor, applied for execution of his decree and prayed for rateable distribution of the amount deposited. The application was refused by the trial Court and the money paid out to the attaching creditor on the latter giving an undertaking to refund the amount in case the High Court reversed the order rejecting the petitioner's application of rateable distribution.

Held, that the amount deposited was subject to rateable distribution under S. 73, C. P. Code. The natural interpretation of the wide language of the section would include any assets in the possession of the Court and at the disposal of the Court for the purpose of satisfying a decree against a judgment-debtor. There is no reason why it should be restricted to what is paid in by virtue of a process taken in execution. Besides, the assets in the present case though not strictly speaking realized in process of execution were realized by a process in the nature of an anticipatory execution. 40 Cal. 619 : 36 Bom. 156 referred to. 41 Mad. 616 discussed.

In cases like these where no appeal is allowed, it has been the practice of the High Court to interfere under the powers conferred by S. 115 of C. P. Code. (*Richardson, J.*) GHISULAL AGARWALLA *v.* TODARMULL AGARWALLA.

26 C. W. N. 169 : 70 I. C. 539 : 1922 Cal. 19.

———S. 73—*Assets—Money paid to Sheriff in execution of a decree—Costs of previous execution—Right to.*

Where a decree-holder applied for execution and money was paid by the judgment-debtor to the Sheriff who paid it into Court and two other creditors who had previously applied for execution asked for rateable distribution. *Held*, that the money so lying in Court was assets available for rateable distribution. The right to rateable distribution is limited to the amount due under the decree and does not apply to costs of a previous application for execution. 36 Bom. 156 diss. 40 Cal. 619, ref. (*Rankin, J.*) NOOR MAHOMED DAWOOD. *v.* BILASIRAM TAKURSIDASS.

59 I. C. 458 : 47 Cal. 515.

———S. 73—*Assets—Sale proceeds in the hands of the decreee-holder purchasers—Refund—Remedy by suit.*

Where one of two decree-holders attaches and buys in execution the property of the judgment-debtor and the other applies for execution. *Held*, that the application came under S. 73 of the C. P. C. and that respondent was entitled to rateable distribution of the proceeds of the sale, inasmuch as although the money remained in the hands of the purchasing decree-holder it was open to the Court to direct him to pay that sum into Court and it was therefore, in the power and at the disposal of the Court and was held by it within the meaning of S. 73. A refund of this kind might be enforced by process in execution (*Teunon and Newbould, JJ.*) BIJOY KUMAR ADDYA *v.* RAMA NATH BARMAN.

43 I. C. 715.

C. P. CODE (V OF 1908), S. 73—Assets.

———S. 73—*Assets—Purchase money.*

The receipt of purchase money by the person nominated by parties and ordered by Courts as auctioneer is money received by Court under S. 73 (1). (*Mookerjee, and Cuming, JJ.*) J. C. GALSTAUN *v.* WOOMESH CHANDRA BANNERJI.

44 Cal. 789 : 35 I. C. 850 : 25 C. L. J. 303.

———S. 73 and O. 21, R. 89—*Assets—Deposit for setting aside sale.*

There can be no rateable distribution, under S7 .3 of the amount deposited under O. 21, R. 89, for payment to the decree-holder. (*Stephen and Chatterjee, JJ.*) HARISAHA *v.* FAIZLAR RAHAMAN.

40 Cal. 619 : 19 C. W. N. 1125 : 18 C. L. J. 144 : 18 I.C. 839 : 17 C. W. N. 636.

———S. 73—*Assets—Date of receipt.*

Till the whole purchase money is deposited in Court it cannot be held that the assets are held by the Court so as to admit of rateable distribution under S. 73 of the C. P. C. and a decree-holder can apply for execution and rateable distribution under S. 73, till then. (*Mookerjee and Caspersz, JJ.*) MAHARAJA OF BURDWAN *v.* APARVA KRISHNA RAY.

14 C. L J. 50 : 10 I. C. 527 : 15 C. W. N. 872.

———S. 73—*Assets—Money not paid in Court—Rival decree-holders—Attachment in execution of one decree.*

Where money is not paid into Court in execution of a decree the proceeds are not liable to rateable distribution and a decree-holder who has not applied for execution before the receipt of assets in Court is not entitled to rateable distribution. (*Rattigan, C. J.*) JADU RAI *v.* MISRI.

3 P. W. R. 1920 : 54 I. C. 41 : 11 P. L. R. 1920.

———S. 73—*Assets -Sale-proceeds of moveables realized by Nazir.*

An order for rateable distribution of the sale-proceeds of moveable property realized by sale by the Civil Nazir takes effect only in respect of the sale-proceeds realized after the date of such application. 26 M. 17, Dist. (*Shah Din, C. J.*) SURJAN SINGH, BUDH SINGH *v.* PRAGDAS MANGAL SINGH.

45 I. C. 108 : 33 P. R. 1918.

———S. 73—*Assets—Prohibitory order--Money-paid under—If property of creditor.*

Money paid into Court under a prohibitory order does not become the property of the creditor at whose instance it was issued without a further order directing payment to him. 7 B. 167 R. Till then it is assets available for rateable distribution. (*Scott Smith, J.*) AMBA *v.* BAIJINATH.

42 I. C. 436 : 167 P. W. R. 1917.

———S. 73 and O. 41, R. 5—*Assets—Money paid as security—Rateable distribution.*

Where money as of a judgment debtor is paid into Court as security for the performance of an appellate decree under O. 41, R. 5, C. P. C., it is not liable to be rateably distributed among other

C. P. CODE (V OF 1903), S. 73—Assets.

attaching creditors of the same debtor (*Chevis and Shadi, Lal, JJ.*) MISS HAMILTON *v.* SHANKER DAS.
36 P. L. R. 1916 : 29 I. C. 791.
120 P. W. R. 1915.

——S. 73—'*Assets held in Court*'—*Meaning of.*

'Assets held by a Court' mean assets levied in execution or paid into Court in satisfaction of the decree under execution. A mere order of attachment does not of itself effect a transfer of the money standing to the credit of another suit from that credit to the credit of the suit in which the attachment took place. S.A. No. 662 of 1919 (F.B.) Foll. (*Sadasiva Iyer and Coutts-Trotter, JJ.*) SUBBIER *v* NACHIAPPA CHETTIAR.
14 L. W. 582 : 70 I. C. 20 (2) : (1921) M. W. N. 817.

——S. 73 and O. 21, Rr. 55 and 83—*Assets—Permission of Court to raise money by private alienation—Money paid into Court—Rateable distribution.*

A Court should not grant permission to raise money by private alienation to satisfy only one of the decrees against the judgment-debtor when there are more decrees than one against him and all the decree-holders have attached and seek to sell the judgment debtor's property in execution. When the permission is granted under O. 21, R. 83 to raise money by private alienation such money if paid into Court is assets. Money paid into Court by one of the modes mentioned in O. 21, R. 55 of the C. P. C. is assets held by the Court within S. 73 of the Code. 36 B. 156, not foll. Unless there is something clear in the language of the Code to exempt a payment from being applied to the benefit of all the creditors, Courts should incline to the view that moneys in the hands of the Court should be shared by the decree-holders rateably.

Semble:—The language of S. 73 of the Code is wide enough to cover cases where moneys are in the hands of the courts by whatever process the same has been realised. (*Seshagiri Aiyar and Napier, JJ.*) THIRAVIAM PILLAI *v.* LAXMANA PILLAI.
41 M. 616 : 35 M. L. J. 150 : 47 I. C. 538 : (1918) M. W. N. 524.

——S. 73—*Assets—Date of receipt—Application for rateable distribution made on same day—Priority—Same judgment debtor.*

Where payment into Court of assets realised and the application for rateable distribution are made on the same day, there is no presumption as to the order of events and the officer distributing the assets should have ascertained which act was prior in time. If the fund in Court is the joint property of two persons, one of whom is the judgment-debtor under one decree and both of them are judgment-debtors in another decree the former decree-holder is not entitled to rateable distribution. 33 M. 465; 12 C. 294; 16 B. 683. 22 M. 241 rel. (*Bakewll and Krishnan, JJ.*) MUTHIAH CHETTY *v.* ALAGAPPA CHETTY.
24 M. L. T. 179 : 47 I. C. 296 : (1918) M. W. N. 520.

——S. 73 and O. 21, R. 89—*Assets—Right to rateable distribution—Sale set aside.*

Where a sale is set aside under O. 21, R. 89, C. P. C., the result is there are no assets realised

C. P. CODE (V OF 1908), S. 73—Assets.

under which other creditors of the judgment-debtor can claim rateable distribution under S. 64. The attaching decreeholder cannot use the attachment for the satisfaction of other decrees obtained by him. 44 C. 662 fol. (*Wallis, C. J. and Kumaraswami Sastri, J.*) GOTATAI VIGNESWARUDU *v.* VEKANTA SURYANARAYANAMURTHY.
45 I. C. 782 : 7 L. W. 573.

——S. 73 and O. 41, R. 5, cl. (3)—*Assets—Property given as security under O. 41, R. 5 (3)—Realisation—Rateable distribution.*

The effect of immoveable property being given as security is something more than an attachment. Property given as security under O. 41, R. 5 (3) of the C. P. C. by the judgment-debtor is applicable solely in discharge of the judgment debt, and is not liable to rateable distribution though the mode of realisation of the security is by sale in execution. (*Wallis, C, J. and Kumaraswami Sastri, J.*) SUBRAMANIA CHETTIAR *v.* RAJESWARA SETHUPATHI.
41 Mad. 327 : 6 L. W. 762 : (1917) M. W. N. 872 : 43 I. C. 187 : 34 M. L. J. 84.

——S. 73 and O. 21, R. 89—*Assets—Money paid under.*

Money paid into Court under O, 21, R. 89, C. P. C. is not assets realised in execution available for rateable disribution under S. 73, C. P. C. 40 C. 619; (1916) M. W. N. 195 Rel. (*Phillips, J.*) MURUGAPPA CHETTIAR *v.* PALANIYAPPA CHETTY.
42 I. C. 507.

——S. 73—*Assets—Money paid into court by judgment-debtor—No process issued—Whether money is one realised by application.*

Payment into court by a judgment-debtor of the decree amount without any process having been issued on the execution petition is money "realised by application" though not coming within S. 295, C.P.C. of 1882 (28 Mad. 380 Dist.) (*Sadasiva Iyer and Spencer, JJ.*) UTHAMI CHETTIAR *v.* JUTT NAGASWAMI IYER.
23 I. C. 241 : (1914) M. W. N. 309.

[S. 73 of the new C. P. C is clear to the same effect.]

——S. 73—*Assets—Execution of personal decree.*

Where moneys are realised in execution of a personal decree they are assets realised under S. 73 C. P. C. (*Benson and Bakewell, JJ.*) SEETHARAMA CHETTIAR *v.* KRISTNA ROW.
15 I. C 406 : (1912) M. W. N. 407.

——S. 73—*Assets—Same judgment debtor—Rents realised by receiver—Decree against one of the heirs.*

Rents realised by a reciever can be the subject of rateable distribution, 26 C. 772. But where a decree that is executed by appointment of a receiver is one against the three heirs of a deceased debtor as representing his estate, a decree-holder against one of the heirs in his personal capacity cannot claim rateable distribution. 26 A. 23 Ref. (*Lyle and Ashworth, A.J.Cs.*) MUNSH LALE *v.* MUHAMMAD AMER MIRZA.
52 I. C. 305 : 22 O. C. 194.

C. P. CODE (V OF 1908), S. 73—Assets.

———S. 73 and O. 38, R. 2—*Assets—Money paid for specific purpose—Availability for other crediors—Money paid on arrest before judgment.*

Where money is deposited in Court under O. 38, R. 2 on the arrest of the deft. before judgment, a lien is created on it in favour of the plff. from the time it was deposited and no other creditors could claim rateable distribution of the same, as it was money paid for a specific purpose. (*Mc Coll, A. J. C.*) DOST MUHAMMAD *v.* SUBRAMANIAM CHETTY. 29 I. C. 714 : 8 Bur. L. T. 22.

———S. 73, O. 38, R. 1—*Assets—Arrest before judgment—Money deposited to avoid arrest—Attachment by other decree-holders.*

Payment into Court by a judgment-debtor to avoid arrest is payment for a specific purpose, *viz.*, the satisfaction of the plaintiff's decree and is therefore not attachable by other judgment-creditors. (*Raymond, A. J. C.*) MAHBUBBUX *v.* BUKSH ELAHI. 61 I. C. 424 : 14 S. L. R. 164.

Attachment.

———S. 73, and O. 21, Rr. 52 and 63. O. 38, Rr. 5 and 10—*Attachment before judgment—Money paid into court—Priority of attaching decree-holders.*

An attachment before judgment confers no right on the party who obtains the order of attachment. Defendants attached before judgment some perishable property which was sold and the proceeds deposited in Court. Plaintiffs obtained a decree against the same debtor and applied for execution by attachment of the money in court to which defendants objected. Plaintiffs then sued for a declaration that they were entitled to the amount of their decree out of the deposit in court. *Held*, that priority of attachment gave no priority of title to the defendants and that the plaintiffs were entitled to a decree in the declaratory suit. (*Richards, C. J. and Banerji, J.*) BISHESHAR DAS *v.* AMBIKA PERSHAD. 37 All. 578 : 29 I. C. 622: 13 A. L. J. 732.

———S. 73 and O. 21, R. 55 (O. Ss. 295, 275 and 276)—*Attachment—Private alienation after subsequent attachment by another creditor—Debtor insolvent—First attachment raised by satisfaction of decree—Claim enforceable under attachment.*

A obtained a decree against B and attached B's interest in certain property. On 6th January 1896, B assigned the whole of his right, title and interest in the property to C. In 1898 D obtained a decree against B. In 1903, B was adjudged an insolvent and in 1904, B levied an attachment on the same property as was already attached by A. In 1907, the judgment-debt due to A, was paid and his attachment raised. In 1910, C got an order raising the attachment by D. *Held*, that the assignment to C was not void as against D. As no assets were realized by sale or otherwise in execution of decree which could be divided rateably between the creditors. D was not the possessor of a claim enforceable under S. 73, C. P. C. or enforceable under the attachment within S. 64. (*Scott, C. J. and Chandavarkar, J.*) JETHA BHIMA AND CO. *v.* LADY JANBAI.

37 Bom. 138 : 14 Bom. L. R. 904 : 17 I.C. 625.

[On appeal from 14 Bom L. R. 511 : 15 I. C. 950.]

C. P. CODE (V OF 1908), S. 73—Enquiry into rival claims.

———S. 73 and O. 38, R. 10—*Attachment before judgment—Attachment of sale proceeds by puisne mortgagee, after sale of property—No application for execution prior to realization.*

An attachment before judgment does not by itself give a simple creditor priority over a mortgagee nor can the former get any benefit under S. 73 when not only is there no application by him for the execution of the decree but the money is realized before attachment. A pusine mortgagee's rights are not lost under the mortgage simply by attaching the sale proceeds in Court after the sale of the mortgaged property at the instance of the prior mortgagee. 34 M. 25 : 19 M. 72 foll. (*Kumaraswami Sastri, J.*) PRABHALA NARASIMHA SOMAYAJULU *v.* MUTTRY SOMAPPA. 32 I. C. 944.

Dismissal of Execution Application.

———S. 73—*Dismissal of execution.*

A decree-holder is not entitled to rateable distribution if the application for execution is dismissed or time barred or the decree is satisfied. (*Mookerjee and Newbould, JJ.*) GOPAL CHANDRA BOSE *v.* HARI MOHAN DUTT. 30 I. C. 49 : 21 C. L. J. 624.

———S. 73 and O. 21, R. 90—*Dismissal of execution—Right to apply to set aside sale and also for rateable distribution.*

Dismissal for non-prosecution of a decree-holder's application for execution does not affect his right to a share in rateable distribution under S. 73 ; he is therefore entitled to apply under O 21, R: 90, to set aside the sale. (*Mookerjee and Beachcroft, JJ.*) BYOMKESH CHAKRABUTTY *v.* BOMANTA KUMAR BISWAS. 24 I. C. 83 : 18 C. W. N. 1311.

Enquiry into Rival Claims.

———S. 73 (2)—*Enquiry into rival claims—Suit by one decree-holder for refund of moneys awarded to others before actual distribution does not lie.*

A suit by a decree holder for refund of sums improperly awarded to other decree holders of the same judgment-debtor, before they have been actually paid, is premature and does not lie. Where plaintiffs, and defendants obtained decrees against the estate of F, and the judgment-debtors in the plaintiff's decree represented only ¾ths of the estate of F, *Held*, only the ¾ of the amount recovered in execution of defendant's decree is liable to rateable distribution. (*Tudball and Abdul Raoof, JJ.*) RAMACHANDRA NAIK *v.* RAGHUNATH SARAN SINGH. 46 I. C. 101 : 16 A. L. J. 530.

———S. 73—*Enquiry into rival claims.*

The Court is competent under S. 73 to investigate the title of a rival decree-holder whether *bona fide* or *benamidar* for judgment-debtor when they apply for rateable distribution of assets. (*Mookerjee and Beachcroft, JJ.*) PURAN CHAND BOID *v.* SURENDRA NARAYAN SINGH. 16 C. L. J. 582 : 16 I. C. 795 : 17 C. W. N. 326.

———S. 73—*Enquiry—Rival claims.*

The inquiry by the court under this section is non-judicial. A court under this section cannot

C. P. CODE (V OF 1908), S. 73—Enquiry into rival claims.

inquire into the *bona fides* or otherwise of a decree brought to its notice. *Quære* whether an executing Court can inquire into the validity of a decree under any circumstances. (*Ayling and Seshagiri Aiyar, JJ.*) SARAVAN PILLAI *v.* ARUNACHALAM CHETTIAR.

40 Mad. 341 : 21 M. L. T. 225 .
(1917) M. W. N. 280 : 5 L. W. 538 :
38 I. C. 117 : 32 M. L, J. 553.

——S. 73—*Enquiry—Rival claims*—Bona fides—*Applications for rateable distribution.*

Under S. 73 C. P. C. when rival decree-holders apply for rateable distribution of assets the Court can investigate whether any of the decree-holders is a *bona fide* decree-holder or is a *benamidar* for the judgment-debtor : 11 C. 42 ; 13 B. 154 Foll. (*Mookerjee and Beachcroft, JJ.*) PURAN CHAND BOID *v.* SURENDRA NARAIN SINGH.

17 C. W. N. 326 : 16 C. L. J. 582 : 16 I. C. 795
[also 23 M. L. J. 699 : 17 I. C. 940 :
12 M. L. T. 660.]

Erroneous Distribution.

——S. 73 (2)—*Erroneous distribution—Money paid to wrong person—Suit.*

A suit lies to recover money paid to a wrong person under a valid judgment or equitable distribution under S. 73, C. P. C. (*Piggott and Walsh, JJ.*) RAM NARAYAN *v.* BRIJ BANKEY LAL.

39 All. 322 : 39 I. C. 532 : 15 A. L. J. 295.

——Ss. 73 (2) & 115—*Erroneous distribution—Revision—Suit.*

Petition under S. 115 is not the best way to settle questions coming under S. 73 where money is paid to third parties after the application and they are not parties to the application. Regular suit is the proper way. (*Spencer and Seshagiri Iyer, JJ.*) SOMASUNDARAM CHETTY *v.* THIRUNARAYAN PILLAI. 25 I. C. 592 ?
(1914) M. W. N. 738.

——S. 73 (2)—*Erroneous distribution—Suit for recovery of money wrongly distributed.*

S. 73 (2) C.P.C., does not contain any indication that an execution sale by virtue of which assets have been made available for rateable distribution can be attacked in a separate suit. The cause of action under the section arises out of a wrong distribution of assets and is entirely without relation to the manner in which those assets were obtained. (*Drake Brockman, J. C.*) LAKHMICHAND *v.* CHATURBHUJ. 65 I. C. 230.

Fund in Court.

——S. 73—*Fund in Court—Priority of attachment.*

If a fund in Court has been attached by several creditors, none can claim preferential treatment owing to priority of attachment. (*Mookerjee, A. C. J. and Fletcher, J.*) BARENDRA NATH MITTIR *v.* MARTIN & Co. 33 C. L J. 7 : 62 I. C. 167.

——S. 73—*Fund in court—Transfer of—Application for transfer of fund should accompany certificate of registrar—Practice.*

An applicant on the original side of the Calcutta High Court for the transfer of a fund to which the provisions of S. 73 (1) prov. (c) C. P. C. may

C. P. CODE (V OF 1908), S. 73—Fund in Court.

possibly apply, should be required to produce in addition to the certificate of the Accountant-General a certificate of the Registrar. (*Chitty, J.*) KUMAR KRISHAN *v.* AMULYA CHARAN.

31 I. C. 616 : 19 C. W. N. 345.

——S. 73—*Fund in Court—Order for rateable distribution—Payment not made—Ownership of the fund.*

Where moneys have been allowed to various decree-holders by an order for rateable distribution and stand to the credit of their respective suits, those moneys are no longer the property of the judgment debtor, but they remain the properties of the various decree-holders even though the amounts have not been paid out to them. (*Ayling, O.C J. and Odgers, J.*) OFFICIAL RECEIVER OF TANJORE *v.* M. R. VENKATARAMA IYER.

42 M. L. J. 361 : (1922) M. W. N. 51:
15 L. W. 37 : 68 I. C. 512 : 1922 Mad. 31.

——S. 73 and O. 21, R. 52—*Fund in Court—Attachment—Rival decree-holders — Priority — Receipt of assets.*

When a Court in execution of a decree attaches a fund in the Court the latter court holds the fund subject to the direction of the executing court and to transfer it to that court. The fund as soon as it is transferred to the execution Court becomes "assets held by that Court" within S. 73 of the C. P. C. All decree-holders who have applied for execution to the executing Court before the receipt of such assets are entitled to rateable distribution. If the executing Court and the custody Court are the same, the fund becomes the assets within S. 73 of the C. P. C. by an order of attachment coupled with a formal order of transfer of the fund to the credit of the suit in which the execution is sought. (*Wallis. C. J., Ayling, Sadasiva Aiyar, Napier and Krishnan, JJ.*) VISVANATHAN CHETTI *v.* ARUNACHELLAM CHETTI. 44 Mad. 100 : 39 M. L. J. 608 :
(1921) M. W. N. 14 : 12 L. W. 744 :
60 I. C. 302 : 28 M. L. T. 412 (F. B.).

——S. 73 and O. 21, R. 52—*Fund in Court—Attachment—Distribution—Priority.*

A decree-holder who has attached a fund in court belonging to the judgment-debtor should not be made to wait for other creditors, who have not obtained a decree. The decree-holder who first attaches the fund has to be paid first out of fund in priority. 38 M. 221, not foll. 26 M. L. J. 364 foll. A fund in court requires no realisation and the moment it is attached it can be paid to the attaching creditor. (*Oldfield and Sehagiri Aiyar, JJ.*) UMMA VENKATARATNAM & Co. *v.* METHAVALA ADAMJI USMAN & Co.

42 Mad. 692 : 26 M. L. T. 82 : 50 I. C. 925 :
(1919) M. W. N. 623.
[Dissented from in 44 Mad. 100 :
39 M. L. J. 608 : (1921) M. W. N. 14 :
12 L. W. 744 (F. B.)]

——S. 73 and O 21, R. 52—*Fund in Court—Attachment—Priority—Rateable distribution.*

An applicant for execution of his decree does not acquire any priority by virtue of his attachment and the fund in the Court must be distributed on the principle followed by the court in

C. P. CODE (V OF 1908), S. 73—Fund in Court.

the administration of the assets of a deceased person or an insolvent (*i.e.*) rateably amongst the creditors who have put in claims thereto. S. 73 applies where a judgment creditor makes an application in the prescribed form under O. 21, R 10 to the court by which assets of the judgment-debtor are held, for the execution of his decree before the receipt of those assets by the court. (*Bakewell, J.*) SUIKEENA KATUM SAHIBA *v.* MAHOMED ABDUL AZIZ.
29 I. C. 239 : 38 Mad. 221.

——S. 73 and O. 21, R. 52—*Fund in court — Attachment by several decree-holders — Applicability.*

Where the fund in court was the surplus sale proceeds payable to the defendant mortgagor after sale under a mortgage decree. *Held*, S. 73 was inapplicable and the fund was not available for rateable distribution and the attaching decree holders were to be paid fully in the order of their attachment, (*Wallis, J.*) TIRUVENGADIAH *v.* THIRUVENGADIAH.
24 I. C. 617 : 26 M. L. J. 364.

Liquidation.

——S. 73— *Liquidation — Company — Distribution of proceeds.*

The proceeds of a sale held in pursuance of an attachment of a company before its liquidation, must be distributed in accordance with the provisions of C. P. C. (*Jenkins, C. J. and Holmwood, J.*) AMRIT LAL KUNDOO *v.* ANUKUL CHANDRA DAS.
43 Cal. 586 : 34 I. C. 253 : 20 C. W. N. 358.

Mortgage Decree.

——S. 73—*Mortgage decree— Rival decree-holders—Collusion—Effect.*

A decree for sale of the mortgaged property, expressly exempting the defendant from personal liability is not a money decree. 28 M. 473 (F. B.) Dist. The Court will not grant rateable distribution, if collusion or corrupt bargain is proved A decree-holder can show that a decree obtained by another decree-holder was obtained by collusion with the judgment-debtor. (*Sankaran Nair and Napier, JJ.*) SURYA NARAYANA JAGAPATI RAJU *v.* GOPALA SURYA RAO.
23 M. L. J. 699: 12 M. L. T. 660 : 17. I. C. 940.

——S. 73 (1) (b)—*Mortgage decree—Rights of mortgagee—Interest.*

If under S. 295 (b) of the C.P.C. 1882, property is sold free of mortgage the plaintiff is entitled to recover interest on the sale proceeds and there is no duty on him to draw the amount out of court and apply it in part satisfaction of the mortgage debt. (*Wallis and Munro, JJ.*) KATTIPALAPUDI *v.* MAGANTI SEETHAYA.
10. I. C. 552.

——S. 73 and O. 34, R. 14—*Mortgage decree—Interest due on mortgage—Rateable distribution—C P. C., O. 34, R. 14.*

Where a mortgagee under a mortgage executed during attachment claimed rateable distribution under S. 73 of the C. P. C. in respect of a simple money decree for interest due on his mortgage, *Held* that the disability imposed by O. 34, R. 14

C. P. CODE (V OF 1908), S. 73—Right to rateable distribution.

of the Code did not apply and he was entitled to a rateable distribution. (*Kanhaiyalal, J. C. and Ashworth, A. J. C.*) RADHE KISHAN *v.* BIKARMOJIT SINGH.
22 O. C. 150 : 6 O. L. J. 558 : 52 I C. 645 : 1 U. P. L. R. (J. C.) 67.

Priority.

——S. 73—*Priority—Points to be determined.*

To determine the question of priority the material point of time is not the date of sale of the mortgaged property but the date of receipt of assets by the Court. Where a subsequent encumbrancer claims the benefit of S. 73 (1) (c), the Court must satisfy itself that he is lawfully entitled to priority over the holders of decrees for the payment of money mentioned in the fourth category. (*Mookerjee, A. C. J. and Fletcher, J.*) BARENDRA NATH MITTER *v.* MARTIN & CO.
62 I. C. 167 : 33 C. L. J. 7.

——S. 73—*Priority— Attachment whether confers preferential treatment.*

Per *Mookerjee, J.*—The applications for execution must be made before the receipt of assets under S. 73 (1). The date of receipt of assets is the date of the sale of the property. The creditors are not entitled to preferential treatment by reason of priority of attachment. The Court will apply the rules of justice, equity and good conscience in the determination of the relative claims of the creditors and will rateably distribute the assets amongst them if the fund is insufficient. (*Sanderson, C.J. and Mookerjee, J.*) THAKUR DAS MOTI LAL *v.* JOSEPH ISKENDER.
44 Cal. 1072: 25 C. L. J. 595 : 41 I. C. 516 : 21 C. W. N. 887.

Revision.

——S. 73—*Revision.*

The High Court will not interfere in revision with orders disallowing or allowing claim for rateable distribution except in very exceptional circumstances. (*Chevis, J.*) BHAGAT RAM KALYAN DAS *v.* MANGAT RAM SHIBBU RAM.
60 I. C. 371.

——S. 73 (2)—*Revision—Suit.*

An order deciding the right of a decree-holder to rateable distribution is not revisable whether it is executed or not. The remedy is by suit. 65 P. R. 1905; 82 P. R. 1905; 128 P. R. 1906 Fol. (*Chevis, J.*) RADHA KISHEN *v.* BHOLU MAL.
171 P. W. R. 1912 : 17 I. C. 254 : 176 P. L. R. 1912.

Right to Rateable Distribution.

——S. 73 and Sch. III—*Right to Rateable distribution—Execution before Collector.*

A Collector to whom a decree is transferred for execution, holds the amount realised, at the disposal of the Court passing the decree. A creditor of such decree-holder can apply for rateable distribution under S. 295 to the Court passing the the decree which can be allowed under S. 324 A. (*Chandavarkar and Russell, JJ.*) GOVINDJI VERAMJI *v.* SAKHARAM GOBIND.
36 Bom. 519 : 16 I. C. 59 :-74 Bom. L. R. 527.

——S. 73—*Right to rateable distribution—Application in two Courts for execution—Assets realised by Superior Court.*

C. P. CODE (V OF 1908), S. 73—Right to rateable distribution.

A held two decrees against D obtained on different dates and under both, attached his goods before judgment. B also held a decree against him and attached his goods between the dates of the two attachments by A. All the three decrees were passed by the Sm. C. Court, Calcutta. A applied to the Munsiff at N and B applied to the Sub-Judge at D for execution by whom the goods were sold. A applied for rateable distribution to the Sub-Judge at D but the application was disallowed. *Held*, that as regards the decree, the attachment due to which was prior to that of B, he was entitled to rateable distribution and as regards the other, he had no right. (*N. R. Chatterji and Newbould, JJ.*) KRISHNA KUMAR GHOSE *v.* MAKHANLAL BANNERJI. **63 I C. 11 : 25 C. W. N. 740.**

——— S. 73—*Right to rateable distribution—Duty of creditor.*

A creditor, to get a right to rateable distribution, must have applied to the Court which holds the assets, before the receipt of such assets, for the execution of an unsatisfied decree for the payment of money passed against the same judgment-debtor. (*Mookerjee, A. C. J. and Fletcher, J.*) BARENDRA NATH MITTER *v.* MARTIN & CO. **62 I. C. 167 : 33 C. L. J. 7.**

———S. 73—*Right to rateable distribution—Decree charging properties—Money decree-holders.*

The holder of a decree which provides for the hypothecation of certain properties cannot claim rateable distribution with simple money decree-holders against the owner of the properties. The Court in which money is deposited by a person for a specified purpose, is bound to apply it for that purpose. (*Kensington, J.*) JHANDU MAL *v.* FAIZ ALI KHAN. **42 P. W. R. 1913 : 18 I. C. 55 : 55 P. L. R. 1913.**

———S. 73—*Right to Rateable distribution—Conditions to be satisfied.*

In a suit by S against defendant in the Court of the District Munsif certain properties were attached before judgment and their sale proceeds were deposited in Court to the credit of the suit on 11—4—1917. Subsequently N brought a suit against the same defendant in the same Court and attached the money in court deposit to the credit of the prior suit. N obtained a decree on 19—4—1917 and on 7—6—1917 he applied in S's suit for payment out to him of the money in Court. While this application was pending S got a decree on 2--7--1917 and on the next day applied for payment out to him. In the meantime one R had brought a suit in the same Court against the same defendant, obtained a decree and applied for payment of the money in Court on 29-6-1917. On a question arising as to which of the plaintiffs. S. N. and R. was entitled to be paid the sum in Court, *held*, that under S. 73, C. P. Code the money in Court, was liable to be rateably distributed among the three decree-holders S. N, and R. 44 M. 100 : 39 M. L. J. 608 Relied on. 42 M. 692 diss. (*Schwabe, C.J. Krishnan and Wallace, JJ.*) NACHIAPPA CHETTIAR *v.* SUBBIER.

46 Mad. 506 : 44 M L. J. 413 : 17 L. W. 390 : 72 I.C. 820: 32 M.L.T. (H. C.) 198 : 1923 Mad. 505.

[On appeal from 70 I. C. 20. (2).]

C. P. CODE (V OF 1908), S. 73—Right to rateable distribution.

———S. 73—*Right to Rateable distribution—Deposit in Court to the credit of judgment-debtor.*

Money paid in Court to the credit of judgment debtor before any decree-holder applies to have it paid in satisfaction of his decree, is liable to rateable distribution among decree-holders who apply for execution either before or after such money is paid into Court. (*Wallis, C. J. Ayling, Sadasiva Aiyar Napier, and Krishnan, JJ.*) VISVANADHAN CHETTY *v.* ARUNACHELUM CHETTY. **44 Mad. 100 : 39 M L. J. 608 : 12 L. W. 744 : 28 M. L. T. 412: 60 I. C. 302 : (1921) M. W. N. 14. (F. B.)**

———S. 73—*Right to rateable distribution—Mortgage decree—Personal decree for deficiency—Right of decree-holders.*

Mortgage decrees which provide for recovery of the deficiency of the decree after sale of hypotheca from the person and other properties of the mortgagor are decrees "for the payment of money" within the meaning of S. 73 and entitle the mortgagee to apply for rateable distribution under that section. (*Seshagiri Aiyar and Kumaraswami Sastri, JJ.*) VENKATAPFRUMAL *v.* VENKATA REDDI. **39 Mad. 570: 29 M. L. J. 96 : (1915) M. W. N. 334 : 29 I. C. 231 : 17 M. L. T. 427.**

———S. 73—*Right to rateable distribution—Attaching decree-holder.*

As between two attaching decree-holders one executing his own decree and the other executing the attached decree, the one who had applied for execution of the attached decree was entitled to rateable distribution since in effect he was executing his own decree. (*Sankaran Nair and Oldfield, JJ.*) VENKATAYA HEGGADE *v.* KUPPANNA *alias* RAGHAVANDRA RAO. **(1913) M. W. N. 1021: 21 I. C. 611 : 14 M. L. T. 533.**

———S. 73—*Right to rateable distribution.*

Claims enforceable under the attachment cease to have effect on withdrawal of attachment. (*Daniels and Dalal, A. J. C.*) MAHOMED MUZAFFAR ALI *v.* BHAGWATI PRASAD SINGH. **66 I. C. 642 : 8 O. L. J. 358.**

———S. 73 (1) (b)—*Right to rateable distribution—Mortgagee holding money decree.*

S. 73 (1) (b) applies only to a mortgagee whose charge is valid against the executing decree holder. When he holds a money decree apart from his mortgage, he can apply for rateable distribution. (*Mullick and Bucknill, JJ.*) BABU BISHUN MOHAN SAHAY *v.* NARAYAN PRASAD ASTHANA. **74 I. C. 140.**

———S. 73—*Right to rateable distribution—Property sold free of mortgage—Rights of mortgagee.*

When property liable to be sold in execution of a decree is sold free from mortgage under S. 73 (1) of the Code of Civil Procedure the mortgagee has that same interest in the proceeds of the sale as he had in the property sold. But to enforce his interest he must proceed by way of suit, and he cannot obtain an order for payment of the amount alleged to be due on the mortgage until he had obtained a decree. (*Robinson, Offg, C. J.*

C. P. CODE (V OF 1908), S. 73—Right to rateable distribution.

V. P. T. REDDYAR *v.* V. R. M. ARUNACHALAM CHETTY. **13 Bur. L. T. 210 : 64 I. C. 417 : 10 L. B. R. 398.**

——S. 73 *Right to Rateable distribution—Mortgagee decree holder — No personal decree against mortgagor.*

A mortgagee of a judgment debtor who has obtained no decree against the latter, and has not made any application under S. 73 of the C. P. C., cannot claim the assets realised by the sale of the judgment debtor's property in execution of a decree which another creditor holds. (*Rigg, J.*) PO SO *v.* BA ZAN. **51 I. C. 580 : 12 Bur. L. T. 43.**

——S. 73 (1) (b)—*Rights to rateable distribution.*

A mortgagee not obtaining a decree or charge cannot obtain by order in execution or by a miscellaneous application any part of the sale proceeds of the mortgaged property and a suit will lie against him for refund of any such money paid to him. 2 U. B. R. 276 foll. (*Parlett, J.*) MAUNG TA TE *v.* MAUNG NYIN. **26 I. C. 273.**

——S. 73, O. 38, R. 1—*Right to rateable distribution — Arrest before judgment—Money paid to avoid arrest—Whether other judgment creditors can attach it.*

Money paid into Court by a defendant under S. 73, O. 38, C.P.C. to avoid his arrest in a suit, is money paid for specific purposeand as it is inteded to satisfy the plaintiff who has been instrumental in compelling the deposit and he acquires a lien over it consequently other judgment creditors of the defendant cannot attach such money. (*Raymond, A.J.C.*) HAJI MAHBUBBUX *v.* BUKSH ELLAHI. **14 S. L. R. 164 : 61 I. C. 424.**

Rival Decree-holders.

——S. 73—*Rival decree-holders—Right of one decree-holder to impeach his rival's decree as being fraudulent.*

An executing Court, when rateably distributing the proceeds of a sale in execution, cannot go into the question whether the decree under which distribution is claimed has been obtained by fraud. 13 Bom. 154, overruled. (*Macleod, C. J., Shah and Fawcett, JJ.*) DATTATRAYA GOVINDSETH LUBRI *v.* PURSHOTTAM NARAYANSETH DALI. **65 I. C. 600 : 46 Bom. 635 : 24 Bom. L. R. 1 : 1922 Bom. 31.**

——S. 73—*Rival decree-holders—Application for rateable distribution whether maintainable after realization of assets by executing Court.*

In execution of a decree in the Court of the Subordinate Judge a property was sold on 22—11—'20 and purchased by the decree-holder, who applied for set off between the purchase money and the amount due. The application was to be heard on 9—12—20 but on 30—11—20 another decree-holder informed the Court that he has already applied for execution to the District Judge and so the prayer for set-off should not be granted. The execution proceedings before the District Judge were transferred to the Sub Judge, to whom an application was made by the second decree-holder for rateable distribution on 4—1—21. *Held*, the application for rateable distribution must be considered to have been made for the first time on 4—1—21 and so it should not be granted. (*N. R. Chatterjee and Panton, JJ.*) SURENDRA MOHAN SINHA *v.* KARTICK CHANDRA SEN. **62 I. C. 857.**

C. P. CODE (V OF 1908), S. 35—Rival decree-holders.

——S. 73—*Rival decree-holders—Objection by judgment-debtor.*

When there are two decree-holders of one judgment debtor and the objection of the judgment-debtor that the property was non-transferable against one is disallowed and against the other it is allowed, the latter is entitled to rateable distribution of the sale proceeds on execution by the former. (*Mookerjee and Newbould, JJ.*) GOPAL CHANDRA BOSE *v.* HARI MOHAN DUTT. **30 I. C. 49 : 21 C. L. J. 624.**

——S. 73—*Rival decree-holders—Several attachments—Attachment before judgment—Effect of.*

Where there are several attachments before judgment and the moneys are realised before any of the plaintiffs obtains a decree, the moneys should be held to the credit of all the suits and distributed between all the attaching creditors who subsequently obtained decrees. (*Kumaraswami, Sastri, J.*) SUBRAMANIAM CHETTY *v.* SANKARA AIYAR. **15 L W 531 : (1922) M. W. N. 262 : 31 M. L. T. 70 (H. C.) 68 I. C. 714 : 1922 Mad. 236.**

——Ss. 73 and 47—*Rival decree-holder—Order for rateable distribution.*

Where an order for rateable distribution is made among rival decree-holders on a decision of the disputes among them without any objection on the part of the judgment-debtor or without in any way affecting his rights, the order is not one under S. 47 C. P. C. or a decree within the meaning of S 144 C. P. Code. If the order for rateable distribution is set aside on appeal, there is no power to order restitution under S. 144 C. P. Code. (*Ayling and Venkatasubba Row, JJ.*) VARADA RAMASWAMI *v.* UMMA VENKATRATNAM. **42 M. L. J. 473 : 30 M. L. T. 178 (H. C.) (1922) M. W. N. 184 : 15 L. W. 421 : 67 I. C. 546 : 1922 Mad. 99.**

——S. 73 and O. 21, R. 72—*Rival decree-holders—Permission to one to bid and to set off—Right of the other decree-holders to rateable distribution not affected.*

One of two decree-holders against a common judgment debtor got permission to bid at the auction sale and to set off his claim against the purchase-money, and purchased one item of the property but did not deposit the purchase-money. Another item was sold to a stranger who deposited the purchase-money whereupon the other decree-holder applied for rateable distribution, *Held*, that he was entitled to rateable distribution in respect of both the purchases as the permission to set off granted to the other decree-holder did not affect the right to such distribution. (*Seshagiri Iyer, J.*) ARUNACHALAM CHETTY *v.* SOMASUNDARAM CHETTY. **59 I. C. 86 : 12 L. W. 328.**

——S. 73—*Rival decree-holders— Right of one decree-holder to impeach decree of rival decree-holder—Fraud and collusion—Suit for declaration and injunction before distribution of assets.*

In the absence of fraud on court or collusion as between the decree-holder and judgment-debtor

C. P. CODE (V OF 1908), S. 73—Rival decree-holders.

it is not open to one decree-holder to attack a decree obtained by another decree-holder against the same judgment-debtor seeking rateable distribution as not creating a valid debt and entitling the decree-holder to share in the distribution of the assets under S. 73, C. P. C. The mere fact the decree was obtained *ex parte* or on perjured evidence is not enough to vitiate it. The action of the Court under S. 73 is materially different from that of a court in insolvency proceedings. A rival decree-holder need not wait for the distribution of the assets before bringing a suit for a declaration that the decree of one of the decree holders was obtained by fraud and collusion and that he was not entitled to share in the rateable distribution. (*Sadasiva Iyer and Burn, JJ.*) VENKATARAMA IYER *v.* THE SOUTH INDIAN BANK, LTD. **43 Mad. 381 : 38 M. L. J. 108 : 27 M. L. T. 66 : (1920) M. W. N. 92 : 55 I. C. 452 : 11 L. W. 81.**

——S. 73—*Rival decree-holders—Assets held by Munsiff—Power to order rateable distribution—Small Cause decree.*

A District Munsiff cannot order rateable distribution of assets held by him in his ordinary jurisdiction to a person holding a small cause decree and applying to execute it without transferring the decree to his Court. (*Tyabji, J.*) CHELLA NARASIAH *v.* SONTAN OHAYYA. **21 I. C. 869 : 25 M. L. J. 601.**

Sale in Execution.

——S. 73 and O. 21, R. 83 and O. 34, R. 6—*Sale in execution—Sale free from mortgage—Sale postponed to enable Judgment-debtor to raise money by private alienation.*

Under Section 73 of the Civil Procedure Code where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold. But it is not so in the case of a private alienation where there is absolutely no necessity to refer to the prior incumbrancer. For a private alienation all that is necessary under O. 21, R. 83 Civil Procedure Code, is that the Court should be satisfied that the application is made in good faith and that the decree amount may be raised by the mortgage or sale of a part or whole of the attached property. In the present case it was represented to the Court that the decretal amount could be raised by private alienation. The decree holder consented to time being given to the judgment-debtors for raising money by private alienation. The plaintiff was not asked to give up his mortgage lien, nor did he or his agent make any statement in court to the effect that he would give up his mortgage lien if the judgment debtors would satisfy the decree by private alienation. *Held* that in the absence of any express consent on the part of the plaintiff it could not be held that plaintiffs had given up his mortgage security and that his rights as a mortgagee had come to an end. (*Martineau and Molisagar, JJ.*) BENARSI DAS *v.* GOPI CHAND. **5 Lah. L J. 279 : 76 I. C. 529 : 1924 Lah. 132.**

C. P. CODE (V OF 1908), S 73—Same Judgment-debtor.

——S 73 (1) (b) and O. 21, R. 66 (4)—*Sale in execution free of mortgage—Procedure—Distribution of assets.*

Property subject to a usufructuary mortgage may be attached and sold in execution of a decree against the mortgagor. Unless the mortgagee consents, the decree-holder has no right to bring the property itself to sale and all he can sell is the residual right of the mortgagor, that is, the right to recover the property on payment of the mortgage money. If either the fact of the mortgage or the amount of the mortgage money be disputed, the Court is to make a summary enquiry under O. 21, R. 66 (4) and to state the result of the enquiry in the proclamation of sale. (*Heald, A. J. C.*) OVANNA PERUMAL CHETTY *v.* MAUNG MYIN. **51 I. C. 750: (1919) 3 U. B. R, 139.**

Same Judgment Debtor.

——S. 73 and O 21, R. 2—*Same judgment-debtor—Decree against estate of deceased—Represented by same representatives - Effect of.*

Two decrees were obtained against the estate of the deceased testator, each obtained against two out of three executors. One of those two executors was common to two suits. Each decree was *prima facie* capable of execution against the estate, *Held*, that the decree-bolders were entitled to rateable distribution of the assets under S. 73 of the C. P. C. (*Mookerjee and Beachcroft, JJ.*) NILMANI DEY *v.* HIRALAL DAS. **43 I. C, 452 : 27 C. L J. 100.**

——S. 73—*Same judgment-debtor—Necessary.*

It is essential for an application under S. 73, C. P. C. that the decree should have been passed against the same judgment-debtor. 36 C. 130 foll 36 B. 156 Dist. (*Mookerjee and Beachcroft, JJ.*) BALMER LAWRIE AND CO. *v.* JADUNATH BANERJEE. **42 Cal. 1: 27 I. C. 644: 19 C. W. N. 1202.**

——S. 73—*Same Judgment-debtor.*

Where the judgment debtors against whom, one decree holder has obtained decree are all judgment debtors under the decrees held by another, there is no bar to rateable distribution under S. 73 of the C. P. C. (*Mookerjee and Caspersz, JJ.*) MAHARAJA OF BURDWAN *v.* APURBA KRISHNA ROY. **14 C. L, J. 50 : 10 I, C. 527 : 15 C, W. N. 872.**

——S. 73—*Same judgment-debtor—Several judgment-debtors—Some common in more than one decree—Rateable distribution—How awarded.*

Where there are several defendants in one decree and some of them only in another, rateable distribution is to be allowed so far as the interests of those in both decrees are concerned, S. 73 is inapplicable to the case of a judgment-debtor unless he occupies the same character in both decrees; so, when there is a decree against a judgment-debtor personally and another as heir, he is not the same "judgment-debtor" within S. 73. (*Robinson, J.*) TOOLA RAM *v.* ABDUL GAFUR. **24 I. C, 476: 7 Bur, L. T. 67,**

C. P. CODE (V OF 1908), S. 73—Suit for money.

Suit for money.

——S. 73 (2)—*Suit for money—Limitation—Limitation Act, Sch. I, Arts. 62 and 120.*

A suit to recover money paid to a defendant under S. 73 of the C. P. C. is a suit for money paid to him for plaintiff's use and must be brought within three years from the date of payment and not within six years under Art. 120. 37 M. 381 Foll. (*Ayling and Hannay, JJ.*) **BAIZANATH LALA** *v.* **RAMADOSS. 39 Mad. 62: 16 M. L. T. 509: 27 M. L. J. 640: 26 I. C. 219: 1 L. W. 952.**

——S. 75—*Judicial functions of Court—Not to be delegated.*

The judicial functions, of a Court cannot be delegated to a commissioner and the powers of Court to issue a commission is strictly defined in S. 75. (*Mookerjee and Carnduff, JJ.*) **RAM NARAIN SINGH** *v.* **ODINDRA NATH MOOKERJEE. 15 C. L. J. 17: 13 I. C: 440: 17 C. W. N. 369.**

——S. 75 and O. 26—*Commission—Issue of—Judge cannot delegate trial of material issues to commissioner.*

S. 75, C. P. Code defines clearly the circumstances under which a commission may be issued and does not authorize a court to delegate to a commissioner the trial of any material issue which the Judge is bound to try. 16 Mad. 350 foll. O. 26 does not in any way amplify the scope of S. 75. (*Abdul Raoof and Harrison, JJ.*) **SAWAN MAL** *v.* **RAUNAQ MAL CHUNI LAL. 3 Lah 209: 68 I. C. 802 : 1922 Lah. 47.**

——S. 80—*Official Receiver in Insolvency proceedings—Notice necessary.*

The utmost that can be said is that an Official Receiver is a public officer within S. 2 sub-clause 17 (d) C. P. C. and notice under S. 80 is necessary before filing a suit against him. (*Lindsay and Sulaiman, JJ.*) **MAHRANA** *v.* **DAVID. 21 A. L. J. 737 : L. R. 4 A. 483 : 46 A. 16: 77 I. C. 57: 1924 A 40.**

——S. 80—*Public officer—Damages—Police Officer.*

A notice under S. 80 is necessary, before suing a police officer for damages when he acts under the powers conferred by Cr P. C. and S. 42 of the Police Act, will not apply. (*Tudball, J.*) **BACHICHA SINGH** *v.* **JAFAR BEG. 30 I. C. 173: 13 A. L. J. 788.**

——S. 80—*Suit against Official Assignee—Notice not necessary.*

Plaintiff purchased certain property from the defendant who was soon after adjudged an insolvent. The Official Assignee objected to an application by the plaintiff to have his name entered as owner in the Record of Rights. Plaintiff thereupon sued for declaration of title without giving notice under S. 80, C. P. Code to the official Assignee. *Held* **that the suit was maintainable without notice.** (*Macleod, C. J. and Crump, J.*) **DAMODAR JAGJIVEN** *v.* **GOVINDJE. 25 Bom. L. R. 378: 73 I. C. 240: 1923 Bom. 392.**

——S. 80—*Injunction—Notice.*

A suit for injunction to restrain a threatened and imminent injury is maintainable against a

C. P. CODE (V OF 1908), S. 80.

public officer even in the absence of notice under S. 80 of the C. P. C, 14 Bom. L. R. 1148. Foll. (*Pratt, J.*) **MURADALLY SHAMJAE** *v.* **LANG. 53 I. C. 627 : 21 Bom L. R. 980.**

——S. 80—*Injunction—Notice.*

The right of suit which is expressly granted by the legislature under S. 80 of the C. P. C. cannot in reason be deferred until its exercise has become illusory by insisting on strict observance of the rule regarding notice. 10 I. C. 639. Foll. A suit under S. 80 can be filed before the expiry of the period of notice where the agents of the Secretary of State during the currency of the notice threaten to destroy the property which is the very subject-matter of the intended suit. The object of S. 80, C. P. C., is to enable the Secretary of State who necessarily acts through agents, time and opportunity to reconsider his legal position when that position is challenged by persons alleging that official order has been illegally made to their prejudice. (*Batchelor and Shah, JJ.*) **SECRETARY OF STATE** *v.* **GULAM RUSUL. 40 Bom. 392: 34 I. C. 535 : 18 Bom. L. R, 243.**

——S. 80—*Injunction—Suit against a public officer—Bom. Land Rev. Code Ss. 79-A and 202—Talukdari settlement officer.*

For a suit for an injunction to restrain a public officer from performing an act purported to be done by him in his public capacity a notice under S. 80 is necessary. A Taluqdari settlement officer is public servant. (*Scott C. J. and Hayward, JJ.*) **BHAVANI SHANKAR** *v.* **TALUQDARI SETTLEMENT OFFICER. 26 I. C. 749: 16 Bom. L. R. 766.**

——S. 80—*Injunction.*

No notice is required for a suit for injunction against a public officer and no Secretary of State, for restraining an irreparable injury. (*Batchelor and Rao, JJ.*) **NAGINLAL** *v.* **OFFICIAL ASSIGNEE, 37 Bom. 243: 17 I. C. 876: 14 Bom. L. R. 1148.**

——S. 80—*Notice—Requisites of—Bom Land Rev. Code (1879), S. 79 A.*

Where a Collector issued notice under S. 79 A on a person asking him to vacate a certain land within a certain time, which notice by implication, declared that the sale and mortgage under which he held the land were void, a suit against the Collector must be instituted after a notice under S. 80, C. P. C. Mere letter by plaintiff to the Collector that he cannot be evicted except by a suit and that if he were evicted he would sued in his turn. is not a sufficient notice. (*Chandavarkar and Batchelor, JJ.*) **TALUKADARI SETTLEMENT OFFICER** *v.* **BHAIGIBHAI ISWARDAS. 16 I. C. 445 : 14 Bom, L, R. 577.**

——S. 80—*Notice—When dispensed with.*

Where a person takes steps before Revenue authorities against an order of a Revenue authority, he cannot be exempted from the obligation of giving notice to the Govt, under S. 80 before bringing a declaratory suit against the Secretary of State unless it appears that it was impossible for him to serve the Government with a notice and comply with the provisions of S. 80. (*Chandavarkar and Russel, JJ.*) **SAKHARAM** *v.* **SECRETARY OF STATE. 15 I. C. 539: 14 Bom. L. R. 353.**

C. P. CODE (V OF 1908), S. 80.

———S. 80—*Injunction—Notice.*

Where there is serious and imminent injury requiring immediate injunction, a court can entertain the suit and issue the injunction without a previous notice. The repetition of the word "against" in S. 424 (S. 80 new Code) shows that the 'act' described in the section relates only to the public officers and not to the Secretary of State. (*Chandavarkar and Heaton, JJ.*) SECRETARY OF STATE *v.* GAJANAN KRISHNA MAVLANKAR.
35 Bom. 362 : 10 I. C. 639 : 13 Bom. L. R. 273.

———S. 80—*Interpretation—Public Officer—Discharge of duty--Notice—Mala fides.*

It is not permissible to read the words in S 80, C. P, Code as if they were "in respect of any act purporting to be done by such public officer *bona-fide* in his official capacity." It is not legitimate to construe the section by importing into the section words which do not appear in the section. A public officer is entitled to notice of suit under section 80 of the Civil Procedure Code, even if in the discharge of bis duty he has acted *mala fide*. (*Sanderson, C. J. and Richardson, J.*) DAKSHINA RANJAN GHOSE *v.* OMAR CHAND OSWAL. **50 Cal. 992 : 28 C. W. N. 10 : 75 I. C. 173 : 38 C. L. J. 104 : 1924 Cal. 145.**

———S. 80—*Suit under special Law—Period of notice—Cannot be deducted.*

Where a special law of limitation applies a party is not entitled to deduct the period of two months for service of notice under S. 80 of the Code. (*Woodroffe and Cuming, JJ.*) SECRETARY OF STATE *v.* ANANDA MOHAN ROY.
66 I. C. 287 : 34 C. L. J. 205.

———S. 80—*Public Officer—B. T. Act, S. 95—Common manager.*

A suit for accounts against a common manager appointed under S. 95 of the B. T. Act cannot be maintained without service of the notice under S. 80 of the C. P. C. and without leave obtained from the Court appointing him. Acts of officers *de facto*, performed in the scope of their assumed official authority in the interests of public or third persons and not for their own benefit are valid and binding as if they were acts of officers *de jure* and cannot be collaterally impeached. (*Mookerjee and Panton, JJ.*) BENI MADHAB *v.* UPENDRACHANDRA SINGHA. **24 C. W. N. 138 : 53 I. C. 747 : 30 C. L. J. 279.**

———S. 80—*Suit under Bengal Tenancy Act, S 104 H—Exclusion of time of notice—Limitation.*

The period of two month of notice under S. 80 C.P.C. cannot be excluded in reckoning the limitation for a suit under S. 104 H. of the B. T. Act. (*Fletcher and Huda, JJ.*) SECRETARY OF STATE *v.* LAKKI NARAIN DAS. **46 I. C. 899.**

———S. 80—*Notice—Defects in—Plaint, variance in effect of.*

Where plots mentioned in the notice comprised all the plots mentioned in the plaint, the variance between the notice and the plaint does not justify dismissal of the suit. (*Chatterjee and Newbould, JJ.*) GANGA DAS SIL *v.* THE SECRETARY OF STATE. **32 I. C. 752 : 20 C. W. N. 636.**

———S. 80—*Notice—Defective—Suit against Secretary of State.*

C. P. CODE (V OF 1908), S. 80.

A notice under S. 80 is not a proper notice if the case set up in the plaint is different from the case stated in the notice. A suit instituted upon such a notice cannot be maintained. (*N. R. Chatterjee and Newbould, JJ.*) ABDUL WAHAB *v.* SECRETARY OF STATE. **32 I. C. 235.**

———S. 80—*Notice—If necessary in all suits against Secretary of State—District—Meaning of.*

Notice under S. 80 C. P. C. is necessary in every case instituted against the Secretary of State including one arising on a contract. The term 'District' in S. 80 means the district in which the suit is instituted and the notice must be served on the Collector or one of the Collectors of that District and not on the Collector of another District where the cause of action partly arises. (*Coxe and Beachcroft, JJ.*) RATTANCHAND DARAMCHAND *v.* SECRETARY OF STATE FOR INDIA.
27 I. C. 232 : 18 C. W. N. 1340.

———S. 80—*Suits under S. 104 H of the Bengal Tenancy Act,*

Notice under S. 80 of the C. P. C. is necessary for suits under S. 104 H. of the Bengal Tenancy Act by plaintiffs as tenure-holders against the Secretary of State as landlord. (*Stephen and Mullick, JJ.*) HARI MOHAN MISRA *v.* SECRETARY OF STATE. **22 I. C. 36 : 18 C. L. J. 566.**

———S. 80—*Notice—Requisites of—Suit against the Secretary of State.*

A notice which does not contain all the names, descriptions and places of residence of the plffs. in a suit against the Secy. of State etc., is an invalid notice. A notice though invalid may be waived by the Secy. of State and would be deemed to have been waived if no issue is joined at the time of settlement of issues. No other deft. can raise the question of validity of notice under S. 80. (*Mookerjee and Beachcroft, JJ.*) BOLA NATH ROY *v.* SECRETARY OF STATE.
40 Cal. 503 : 16 I. C. 849 : 17 C. W. N. 64.

———S. 80—*Public Officer—Act done in bad faith—Notice not necessary.*

A Public Officer who is sued in respect of an act done in bad faith is not entitled to notice under S. 80 of the C. P. C. (*Fletcher, J.*) PEARY MOHANDAS *v.* WESTON. **16 C. W. N. 145 : 13 I. C. 721 : 13 Cr. L. J. 65.**

———S. 80—*Deduction of time—Notice—Limitation Act, S. 15 (2).*

Where notice to Government is necessary under S. 80 C. P. C. the period of two months is excluded from the prescribed limitation. (*Johnstone, C. J. and Shah Din, J.*) N. W. RLY *v.* RAMDHAN MALSHEB LAL. **52 P. R. 1917 : 38 I. C. 600 : 42 P. W. R. 1917.**

———S. 80—*Injunction—Notice of suit—Public officer—Irreparable damage.*

The notice prescribed by S. 80 of the C.P.C. is essential in all suits against the Secretary of State or against a public officer in respect of any act purported to be done by the said public officer in his official capacity, even though the relief claimed is an injunction and irreparable injury likely to be caused if a rule *nisi* for an injunctions is not at once granted and though the act com-

C. P. CODE (V OF 1908), S. 80.

plained of is a threat to do a future injury provided the threat is conveyed through an act, such as speech, writing, etc. 41 M. 792 foll,; 37 M. 113 Expl. (*Sadasiva Aiyar and Spencer, JJ.*) THE SUPERINTENDING ENGINEER, BEZWADA *v*, RAMA KRISHNA IYER. **39 M. L. J. 151 : 28 M. L. T. 163 : 12 L. W. 193 : 58 I. C. 885 : (1920) M W. N. 495.**

——S. 80—"*Purporting to be*" *done—Public officer acting* mala fide—*Notice before suit—*"*Purporting.*"

A public officer is entitled to notice under S. 80 before suit, though he acts *mala fide* in the discharge of his duties : The word "purporting" covers a profession by acts, by words or by appearance of what is true as well as of what is untrue. 24 C. 584 approved : 7 C. 499 : 26 A. 220 Diss. (*Wallis, C. J. Sadasiva Aiyar and Spencer, JJ.*) SAMANTHALA KOTI REDDI *v.* POTHURI SUBBIAH.

7 L. W. 586 : 34 M. L J 494 : 23 M. L. T. 357 : (1918) M. W. N. 414 : 46 I. C. 86 : 41 M. 792.

——S. 80—*Injunction—Suit for—Notice.*

S. 424 of the Old Code makes notice necessary in all suits against the Secretary of State including suits for injunction. 25 C. 239; 25 A. 187: 35 B 362: 14 Bom. L, R, 353, foll. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) SECRETARY OF STATE *v.* KALEKHAN **37 Mad. 113 : 23 M. L. J. 181 : (1912) M, W. N. 786 : 16 I. C. 947 , 12 M, L, T. 224.**

——S. 80—*Action against village Headman —Notice is necessary.*

No action for damages can lie against a village headman for an act done in his official capacity unless the requirements of S. 80 are fulfilled. A report to the S.D.O. or D. C. is not notice. (*Heald J.*) MAUNG SAN YA *v.* MAUNG NGWE HLA.

2 Bur. L. J. 29 : 1923 R. 250.

——S. 80—*Public officer—Bench clerk—Loss of document.*

A suit against a Bench clerkf or damages resulting from the loss of a record in Court through his negligence cannot be brought without giving notice prescribed by S. 80, C. P. C. (*Rigg, J. C.*) NGA MEIK *v.* NGA GYI. **(1917) 3 U.B.R. 1 : 40 I. C. 677 : 11 Bur. L. T. 95.**

——S. 80—*Injunction—Past cause of action.*

By this section notice of a suit is necessary for injunction when the cause of action for the injunction is an act detrimental to the plff.'s interests and already done by the Public Officer. (*Pratt, J. C. and Crouch, A.J.C.*) ABDUL WAHID *v.* MANAGER, ENCUMBERED ESTATES.

19 I. C. 838 : 6 S. L. R. 250.

——S. 80—*Cause of action—Notice.*

Notice by a plff. under the section cannot constitute a cause of action. The right to sue can accrue when the order of the Collector interfering with the plff's. right is passed. (*Pratt, J. C. and Fawcett, A. J. C.*) FAKIB SHAH BALDIN *v.* SECRETARY OF STATE.

19 I. C. 565 : 6 S. L. R. 210.

——S. 80—*Injunction—Suit against Secretary of State—Notice.*

C. P. CODE (V OF 1908), S. 83.

A suit for injunction against the Secretary of State must be rejected, if no notice has been given under the section. (*Hayward, A, J. C.*) SABRO *v.* SECRETARY OF STATE.

19 I. C. 361 : 6 S. L. R. 123.

——S. 83—*See also* ALIEN ENEMY.

——S. 83—*Alien enemy—Suit by—Service of summons in foreign enemy country.*

Under S. 83 an alien enemy residing in British India may sue in British Courts with the permission of the Governor-General in Council. An application by an alien enemy for summons of a suit for judicial separation filed in British India by him to be sent to the Probate, Divorce and Admiralty Division of the High Court of judicature in England for transmission to the Foreign office for service upon the respondent residing in enemy country should not be refused though the respondent is the subject of a country which is at war with Great Britain. (*Walsh, J.*) REIEFFSTOCK *v.* REIFFSTOCK.

39 I. C. 862 : 39 All. 377.

——S. 83—*Alien enemy—Cause of action arising upon contract made after war—Internment, effect of.*

Whether the cause of action arose before or after war, an alien enemy can be sued in British Indian Courts and would have every right to prosecute his case before the Courts in accordance with the laws of procedure, and it makes no difference that he was interned at the time, *Halsey* v. *Lowenfield*, (1916) 1 K. B. 143. ref. (*D. Chatterji and Beachcroft, JJ.*) ABDUL QUADER KHALIFA *v.* FRITZ KAPP. **40 Cal. 1140 : 20 C. W. N. 691 : 35 I. C. 951 : 23 C. L J. 493.**

——S. 83—*Alien enemy—Residence in hostile country firm—Alien enemy partner—Right to sue.*

Nationality is not the test for determining the status for the purposes of civil rights and liabilities of a person who is an "alien enemy" within S. 83, C.P. C. A British subject voluntarily residing or carrying on business in enemy country will be treated as an alien enemy. Residence need not amount to what is called domicile (*i. e.,*) permanent residence *sine animo revertendi*. A much less permanent residence is sufficient to make a man an alien enemy provided it is not of a temporary character. If a person resides in a hostile country for a substantial period of time,he acquires, the disability attaching to an enemy during that period unless such residence is with the consent of the Crown. If one of the partners in a firm is an alien enemy, neither he nor his partner who does not bear an enemy character can recover money owing to the firm in the English Courts. (*Shadi Lal and Martineau, JJ.*) FIRM HAJI ALI JAN *v.* ABDUL JALILKHAN. **55 I. C 324 : 1 Lah. 276 : 2 Lah. L. J. 275.**

——S. 83—*Alien enemy—Contracts and commercial dealings.*

It is not all contracts, whatever but only all dealings of a commercial nature between hostile aliens that are tainted with illegality. A contract whose tendency is to increase the enemy's

C. P. CODE (V OF 1908), S. 83.

resources is prohibited, but not an agreement for payment of money from funds accruing there. (*Srinivasa Iyengar, J.*) WUTHRICK *v.* DAVID
31 M. L. J. 860 : (1917) M. W. N. 73 : 37 I. C. 957 : 5 L. W. 275

——S. 83—*Alien enemy—License to trade—Right of suit.*

An alien enemy who has been licensed to trade in British India has a right to bring suits in Indian Courts. (*Ormond and Twomey, JJ.*) M. MEYER *v.* MRS. C. LEA. 31 I. C. 888 : 9 Bur. L. T. 51.

——S. 83 — *Alien enemy — Jurisdiction of British Courts.*

An alien enemy is amenable to all local laws in consideration of the protection he enjoys while residing in a foreign country. That being so there is no reason why an alien enemy should not be sued or proceeded against in the Courts of India. The decree would be effective against the defendant's property subject to any rights of the Crown. (*Hayward, A. J. C.*) HUSSEINI NANDOO *v.* WEICHERS AND LEVY, LTD.
29 I. C. 22 : 8 S. L. R. 329.

——S. 86—*Ruling Chief — Suit against — Consent of Governor-General in Council.*

A suit against a Ruling chief cannot be maintained without the consent of the Governor-General-in-Council. (*Knox, J.*) RAMNATH VYAS *v.* SRI THAKUR RASH BEHARJI MAHARAJ.
25 I C. 271

——S. 86—*Ruling Chief—Kurundwad Jagirdar.*

The Kurundwad Jagirdars are Ruling Chiefs who cannot be sued without the consent of the Governor General under S. 66 of the C. P. C. (*Scott, C. J. and Shah, J.*) KRISHNAJI *v.* THE SECRETARY OF STATE FOR INDIA.
51 I. C. 228 : 21 Bom. L. R. 376.

——S. 86—*Suit against Ruling Prince—Consent of Governor-General—Submission to jurisdiction—Effect.*

Where a Ruling Prince having sovereign powers submits to the jurisdiction of a British Court, no objection can be raised by him, in the Appellate Court on the ground that the consent of the Governor-General had not been obtained prior to the institution of the suit. (*Fletcher and Smither, J.*) BIRENDRA KISHORE *v.* HASHMAT ALI.
46 I. C. 558.

——S. 86—*Consent—Declaratory suit against Ruling Chief with consent of Governor-General—Plaint amended by adding prayer for possession—Consent for suit for recovery of possession subsequently obtained—Effect.*

Where a suit was filed against a Ruling Chief with the previous permission of the Governor General in Council under S. 86 of the C. P. C. for declaration of title and the plaint was allowed to be amended by the adding of a prayer for possession, the consent of the Governor General for instituting a suit for possession having been obtained subsequently. *Held* that it would be safer for the plff. to withdraw the whole suit and file a fresh suit for possession. (*Chitty and Chatterjee, JJ.*) NRIPENDRA NARAIN *v.* MANINDRA CHANDRA NANDI.
22 I. C. 889 : 17 C. W. N. 1242.

C. P. CODE (V OF 1908), S. 86.

——S. 86—*Defence of—Set off—Section not applicable.*

The section does not apply to a defence put forth as set off. Such a defence can be put forward in answer to a claim by a Ruling Chief without the consent of the Governor-General. (*Abdul Raoof and Martineau, JJ.*) SUKHDEV SINGH HAZURA MAL GOBIND RAO. 62 I.C. 778.

——S. 86—*Ruling Chief—Consent of Governor-General-in-Council—Privilege—Pleading to merits of—Waiver of privilege—Submission.*

No suit can be maintained against a Ruling Chief without the consent of a Governor-General-in-Council. The mere fact that the deft. after claiming the privilege pleaded also on the merits, does not amount to a waiver of privilege and submission to jurisdiction. 21 B. 351; 1 L. W 887; 2 M. 407, foll. *Per Oldfield, J:*— The recognition of cases of waiver as excepted from the ordinary provision of international law as understood in England cannot be imported into the clear language of the C. P. C. (*Oldfield and Sadasiva Iyer, J.*) NARAYANA MOOTHAD *v.* DEWAN OF COCHIN. 39 Mad. 661 : 29 M.L.J, 667 : (1915) M, W. N. 534 : 30 I. C. 511 : 2 L. W 637.
[Confirming the judgment of Tyabji, J. in 38 M. 535].

——S. 86—*Ruling Prince when can be made party.*

S. 86, C. P. C. is exhaustive and lays down the cases where a prince or chief can be brought on record whether he is suing or sued as such or in any other capacity. (*Tyabji, J.*) KUTHALIDATH NARAYAN MOOTHA *v.* THE COCHIN SIRKAR. 38 Mad. 635 : (1913) M. W. N 977 : 21 I, C. 930 : 14 M. L. T. 486 : 25 M L.J. 621.

——Ss. 86 and 87—*Sovereign prince.*

A suit will not lie against a sovereign prince without the consent of the Governor General in Council, A state cannot be sued apart from its Ruling Chief. 9 C. 535 *Foll*). (*Benson, O. C J. and Napier, J.*) GILMORE *v.* STATE OF TRAVANCORE.
12 M. L, T. 496: 17 I. C. 444 : 23 M. L. J. 605.

——S. 86—*Applicability—Acquiescence by defendant bars him from questioning validity of decree.*

S. 86 of the Code becomes applicable to a suit where the defendant attains the dignity of a Ruling Chief and the suit cannot be continued without the requisite sanction. The bar is on the plaintiff and not on the Court. If the defendant acquiesces in the failure of the plaintiff to obtain the sanction he cannot after judgment question the validity of the judgment on the ground that the bar was not removed. (*Das and Ross, JJ.*) MAHARAJAH OF REWA *v.* SIVA SARAN LAL.
2 P. L. T. 180 : 6 P. L. J. 185 : 61 I. C. 989 : 1921 Pat. 136.

C. P. CODE (V OF 1908), S. 86.

———S. 86 (5)—*Tenancy—Ruling Chief.*

Plaintiff held certain lands of the Ruling Chief (defendant) without rent. The chief resumed the *muafi* through Court which assessed rent against plaintiff who sued for declaration of his heritable right to hold the land free of rent. *Held* that the suit being brought without the Governor-General's sanction as required by law, is not maintainable. because it does not fall under proviso 5 to S. 86. (*Kanhaiya Lal and Stuart, A.J.Cs.*) AMIR SINGH v. JAGAT SINGH. 58 I. C, 912.

———S. 88 and O. 35 R. 5—*Interpleader suit—Nature of.*

Where the defendants do not claim adversely to one another, nor is the plaintiff admitting the title of one of the defendants or is willing to pay or deliver the property to him, the suit is not an interpleader suit. (*Chatterji and Pearson, JJ.*) ASAN ALI v. SARADA CHARAN HASTAGIR. 1922 Cal. 138.

———S. 89 and Sch. II—*Arbitration without Court's order.*

Arbitration between the parties to a suit without the Court's order is an arbitration without the intervention of the Court under the Code, and all applications for a decree based on an award, in cases not coming under the Indian Arbitration Act of 1889 should be under Sch. II of the Code only. (*Macleod, J.*) SHAVAKSHA DINSHA DAVAR v. TYAB HAJI AYUB. 40 Bom. 386. 37 I.C. 140 : 18 Bom. L. R. 559.

———S. 89—*Save in.....in force.*

The words "save in...in force" in S. 89 do not let in O. 23,R. 3 of the Code and the words " any other law for the time being in force " refer to amendments of, or substitutions for, the Arbitration Act or other prices of legislation on that subject-matter. (*Rankin, J.*) DECKARI TEA CO. v. ASSAM BENGAL RAILWAY. 25 C. W. N. 127 : 61 I. C. 919 : 47 Cal. 6.

———S. 89 and Sch II para 22—*Sp. Rel. Act, S. 21—Arbitration proceedings.*

S. 89 (1) C. P. C. read with Sch. II. para. 22 makes the concluding provision of S. 21 of the Sp. Rel. Act inapplicable to all arbitration agreements and awards governed by Sch II. (*Mookerjee, Chitty and Walmsley, JJ.*) DINA BANDAUJANA v. DURGA PRASAD. 46 Cal 1041 : 29 C. L. J. 399 : 51 I, C. 80 : 23 C. W. N. 716.

———S. 89—*Award without intervention during pendency of suit cannot be recorded as adjustment.*

An award made without the intervention of the Court during the pendency of a litigation cannot be recorded as an adjustment under O. 23 R 3 of the C P Code and cannot be enforced under S. 89 of the C. P. Code. 37 Bom 639 : 26 Bom. 76 diss. (*Shadi Lal C. J. and Leslie Jones, J.*) HARI-PERSAD v. SOOGAN DEVI. 67 I, C. 123 : 3 Lah L. J. 162.

———Ss. 89 and 96—*Award — Compromise modifying—Decree—Appeal.*

A court is competent on an application under Sch. II, para. 20 C. P. Code to pass a decree on an award as modified by a lawful compromise

C. P. CODE (V OF 1908), S. 91.

filed by the parties and from a decree so passed no appeal lies except in so far as the decree is in excess of or not in accordance with the award so modified. (*Kanhaiya Lal J.C. and Daniels, A J.C.*) HAKIM FASAL AHMED v. ENAYAT AHMED 9 O. L. J. 219 : 68 I. C. 209 : 25 O. C, 213 : 1922 Oudh 189.

———S. 89—*Scope of.*

S. 89 excepts the procedure of the Code from being applicable to arbitrations under the Arbitration Act and S 4 does the same generally. (*Fox C J. and Hartnoll J.*) RIPLEY v. NAHAPIET. 5 Bur, L. T. 155 : 17 I. C. 902 : 6 L. B.R 88.

———S. 91—*Village pathway—Obstruction—If public nuisance*

The public at large are not affected by the obstruction of a village pathway which only the villagers can use so that a suit for a declaration of their rights in respect of the pathway is not governed by S. 91 C.P.C. (*Fletcher and Huda, JJ.*) NAGENDRA NATH MAZUMDAR v. BANWARI LAL DAS, 46 I. C. 970.

———S 91—*Scope of—S. 33 of Calcutta Municipal Act, if controls.*

S. 33 of the Calcutta Municipal Act does not control S. 91 of C P.C. and any two persons may, under the latter section, sue for the removal of a public nuisance, though situated within a Municipality. (*Chatterjee and Walmsley, JJ.*) SURAJ MAL KHRAD v. AKSHOY KAMAR ROY. 40 I. C. 74 : 21 C. W. N. 595.

——— S. 91—*Relief not claimed in respect of public nuisance cannot be granted.*

No relief was sought in respect of the public nuisance and there was no claim *held* there can be no declaration that the place in suit is a public thoroughfare and has been obstructed as such. (*Abdul Raoof and Campbell, JJ.*) TIRATA RAM v. MD ABDUL RAHIM. 73 I C. 616 : 1923 Lah 546.

———S. 91—*Highway—Obstruction—Damage—Cause of action.*

Obstruction of a way without any special damage can afford no cause of action to a member of the public. Per *Sundara Aiyar, J*—Special damage need not always be only pecuniary, 22 C. 551 : 14 M. 177 ref. 8 A. L. J. 19 not appr. Per *Sadasiva Aiyar, J.*—Special damage should be something substantial and not mere pecuniary damage to the extent of four annas or eight annas. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) KAJI SAYED HUSSAIN SAIB v. EDIGY NARASIMHAPPA. 23 M. L. J. 539 : 12 M L. T. 491 : 16 I. C. 962: (1913) M.W.N. 991,

——— S. 91—*Public nuisance—Damage—Proof.*

In a suit by a private person for the removal of public nuisance, he must prove special damage to himself. Special degree of inconvenience suffered by him cannot be said to cause him damages. (*Kotwal, A. J. C.*) RUKHMI v. KRISAN. 48 I. C. 88.(Nag.)

———S. 91—*Nuisance—Public and private—Difference between—Right of suit—Obstruction to procession of Hindu idol by Mahomedans—Individual right of suit.*

C. P. CODE (V OF 1908), S. 92.

A private action is not allowed for a public injury. The civil remedy against it, is a suit under S. 91 but a private nuisance is actionable by the person injured by it. The general obstruction of a public thoroughfare, unless authorised by law, custom or contract, is a public nuisance for which a private suit is not allowed but to obstruct, annoy or endanger a particular person or body of persons only in his or their use of a public thoroughfare may be a private nuisance, for which a private action may lie. Every class or community has a right to use the public streets for religious and musical processions subject to the law against nuisances and any wrongful attack on that right will give rise to a cause of action. 30 M 15 Foll. The procession of a certain Hindu Idol along a particular road was obstructed by the members of a certain Mussalman mosque built on the road side. It was alleged on behalf of the idol that the procession was customary and lawful and the obstruction illegal. It was alleged on behalf of the mosque that the music, noice and disturbance caused by the procession was a nuisance to the worshippers in the mosque at the hour of prayer: *Held*, that on his allegation each party was competent to bring a private suit for an injunction against the other. 32 M 478, 20 M. L. J. 119 ref (*Stanyon, A.J.C.*) SAEIKH CHAND *v.* LAXMAN. **36 I. C. 534 : 12 N. L. R. 130.**

——S. 92.—

Abatement of suit.
Accounts.
Addition of parties.
Alienation of trust property.
Amendment of plaint.
Charitable trust.
Compromise of suit.
Costs.
Co-trustees.
Court fee.
De facto trustee.
Forum.
Mandatory provision.
Object of.
Parties.
Private trusts.
Public trusts
Reliefs.
Religious trust.
Removal of trustee.
Right to sue.
Sanction.
Scheme.
Scope of.
Trespasser.
Trustee De Son Tort.

Abatement of Suit.

——S. 92—*Abatement of suit—Death of one plff.*

A suit under this section is prosecuted by individuals not for their own interest but as representing general public, and so it does not abate on the death of the original plffs. (*Lord Dunedin*) RAJA ANAND RAO *v.* RAM-DAS DADURAM. **48 Cal. 493 : 13 L. W. 318 . (1921) M. W. N. 24 : 17 N. L. R. 37 : 48 I. A. 12 : 25 C. W. N. 794 : 62 I. C. 737 : 30 M. L. T. 194. (P. C.).**

C. P. CODE (V OF 1908), S. 92—Addition of Parties.

——S. 92—*Abatement of suit—Suit against trustee—Death of one plaintiff—Fresh sanction.*

S. 92 is not mandatory but is permissive and directory. It is necessary for the continuance of the suit that there should be at least two plaintiffs. If one representative dies, it is open to another member of the public interested in the trust to take his place after obtaining necessary sanction. In a suit under the section one of the plffs. died. Another applied to be brought on record. The Court dismissed the suit as the applicant was not the legal representative of the deceased. *Held*, the Court ought to have given the applicant time to get the sanction required and for showing that he was a person interested in the trust and on proof of these two qualifications, the Court should make him a co-plaintiff. (*Rafique, J.*) CHHABILA RAM *v.* DURGA PRASAD **37 All. 296 : 28 I. C 681 : 13 A. L J. 379.**

——S. 92—*Abatement of suit—Death of plff.*

The death of one of the plaintiffs who have obtained sanction in a scheme suit does not cause abatement of the suit. (*Scott-Smith, J.*) GOPI DAS *v.* LAL DAS. **97 P. R. 1918 : 47 I. C. 983 : 173 P. W. R. 1918.**

——S. 92—*Abatement of suit—Death of defendant.*

Where during the pendency of the suit against a trustee for his removal on the ground of mismanagement, breach of trust, for settlement of a scheme and appointment of committee of supervision, the deft. died. *Held* that the cause of action survived against the successor in office of the deceased trustee in asmuch as the plaint contained among various averments, certain specific allegations of misfeasance and breach of trust against the petitioner, while acting as agent of the deceased trustee. (*Spencer and Seshagiri Aiyar, JJ.*) SIVAGNANA *v.* ADVOCATE-GENERAL OF MADRAS. **28 M. L. J. 174 : 2 L. W. 148 : 27 I. C. 874 : (1915) M. W. N. 185.**

[The same view was taken in (1921) M.W.N 24 : 13 L. W. 318.]

Accounts.

——S. 92—*Accounts — Trustee — Power to order.*

S. 92. C. P. C. is quite wide enough to entitle the Court to direct an account against a trustee and to order him to pay the amount found due upon taking those accounts. (*Richards, C. J. and Banerjee, J.*) NATHOO MAL *v.* KISHORI LAL SINGH. **28 I. C. 886.**

Addition of Parties.

——S. 92 and O. 1, R. 10—*Addition of parties—Power of Court — Addition of Advocate-General as plaintiff—Frame of scheme.*

In a suit for the protection of a trust under S. 92, C. P. C. the most important questions to be settled are those which relate to the administration of the trust and the Court has power under O. 1, R. 10 to add parties for the effectual adjudication of those questions. Under S. 92 a suit may be brought by the Advocate-General himself or by two worshippers to whom he has given his consent in writing to sue or by the

C. P. CODE (V OF 1908), S. 92 — Addition of parties.

Advocate-General in conjunction with those persons. The right of each to sue in his own name is not exclusive of the right of the other. (*Spencer and Krishnan, JJ.*) AMBALAVANA PANDARA SANNADHI *v.* THE ADVOCATE-GENERAL OF MADRAS.
43 Mad. 707: 38 M. L. J. 201 : 27 M. L. T. 100 : 55 I. C. 546 : 11 L. W. 219

———S. 92—*Addition of parties—Scheme suit—Jurisdiction of Court to add others as parties.*

A suit under S. 92 by two worshippers for removal of trustees and for framing a scheme is a representative suit and such a character is not changed by the fact that sanction is given by the Advocate-General and the Court can add other worshippers if the suit is not properly prosecuted. (*Bakewell, J.*) VARADAYYA CHETTY *v.* MUNNSWAMI CHETTY. **13 I. C. 232 : 10 M. L. T. 514.**

Alienation of trust property.

———S. 92 (h)—*Alienation of trust property—Suit for declaration of invalidity—Maintainability—When granted—Scope of section.*

S. 92, C. P. Code is intended to be an exhaustive statement of the law applicable to suits based upon any alleged breach of any express or constructive trust, created for public purposes of a charitable or religious nature.

A declaration regarding the validity of an alienation by a trustee comes within S. 92 (h). If the result of a declaration is not to produce any effect on the parties, but will only be a stepping stone for further litigation, the Court ought not to exercise its discretion and grant a declaration of such a nature. (*Piggott and Walsh, JJ.*) MUFTI ALI JAFAR *v.* FAZAL HUSAIN KHAN.
20 A. L. J. 557 : L. R. 3 A. 352 : 4 U. P. L. R. (A.) 131 : 67 I. C. 658 : 44 A. 622 : 1922 A. 349.

———S. 92—*Alienation of property—Transferee of* wakf *property made a party to suit under—Transferee whether bound by decision.*

The transferee of a *wakf* property who is made a party to a suit under S. 92 of the C. P. C. is bound by decision in the suit and he is barred from going behind it, in a subsequent suit. (*Richards, C. J. and Banerjee, JJ.*) MAHOHARI *v.* MUHAMMAD ISMAIL. **33 All. 762 : 11 I. C. 218 : 8 A L. J. 896.**

———S. 92 and O. 1, R. 8—*Alienation of trustee—Suit by worshippers to set aside.*

A suit under S. 92 of the C. P. C. is primarily a suit against a trustee and can only be instituted either on the ground that there has been a breach of trust or that direction of the Court is necessary for the administration of the trust. A suit under O. 1, R. 8, C. P. C. by the worshipper to set aside an alienation of mosque property by the *mutwalli* is maintainable without sanction. The mere fact that the trustee was a defendant in the suit did not attract the application of S. 92 of the C. P. C. since no relief was claimed against him, nor was the court asked to give any direction for the administration of the trust. (*N. R. Chatterjea and Huda, JJ.*) ASHRAF ALI *v.* MUHAMMAD NURRAJJAMA. **49 I. C. 355 : 23 C. W. N. 115.**

C. P. CODE (V OF 1908), S. 92—Alienation of trust property.

———S. 92 and O. 1, R. 10 (2)—*Alienation of trust property—Setting aside.*

A suit against a trespasser or alienee for recovery of possession of trust properties is not within the scope of S. 92 of the C. P. C. 2 C. L. J. 431 and 24 Cal. 418, diss. It is outside the power of a judge to make use of. O. 1, R. 3 or O. 1, R. 10 of the C. P. C. for joining a purchaser of trust property as a party to the proceedings under S. 92. (*Sanderson C.J., Woodroffe and Mookerjee, JJ.*) MUNSHI GULAM *v.* MOLLAH ALI HAFFIZ, **47 I. C. 111 : 28 C. L. J. 4.**

———S. 92—*Alienation of trust property—Suit by worshippers to set aside.*

It is only where the suit is for one or more of the reliefs in S. 92 (1) that it must be brought under that section : S. 92 is only an enabling section and has not taken away the general power of suit. A suit by the worshippers of temple for a declaration that certain land is temple land and for an injunction restraining deft's alienation of the same is not within S. 92, C. P. C. (*Chitty and Beachcroft, JJ.*) GIRIDUTTA SARMA *v.* DURGA DUTTA SARMA. **42 I. C. 260.**

———S. 92—*Alienation of trust property—Suit by worshipper.*

S. 92 of the C. P. C. is not applicable to a suit by the worshippers at a mosque to set aside an alienation of the wakf property by the trustee as the relief claimed is not one of the reliefs mentioned in the section. (*Dundas, J.*) MUSSAMMAT AFIMAN *v.* HAMIDUDDIN. **51 I. C. 799 : 58 P. W. R. 1919.**

———S. 92 and O. 1, R. 8—*Alienation of trust property—Suit by disciples for setting aside alienation.*

A suit by the disciples of a mutt in a representative capacity to set aside an alienation of mutt properties by the Head of the mutt and for delivery of possession of the properties to persons lawfully entitled to manage the mutt, is maintainable without sanction under S. 92 C. P. C. 28 M. L. J. 410. Rel. (*Wallis, C. J. and Seshagiri Aiyar, J.*) CHIDAMBARATHAMBIRAN *v.* NALLASIVA MUDALIAR. **41 Mad. 124 : 33 M. L. J. 357 : 6 L. W. 666 : 42 I. C 366 : 22 M. L. T. 218.**

———S. 92— *Alienation of trust property—Hindu temple—Offerings by worshippers—Appropriation by Archakas—Illegal custom—Permanent alienation of offerings by Temple Committee in favour of Archakas—Suit for declaration that alienation is invalid by worshippers without sanction.*

The Devasthanam Committee of a Hindu Temple granted a permanent lease of the offerings in money made by the worshipers to the Archakas in 1893, reserving Rs. 300 a year to the temple. About the year 1825 the Archakas of the temple used to appropriate the small money offerings of the worshippers to their own use as remuneration for their services but subsequently the offerings increased in value and the Devasthanam Committee in 1882 laid claim to the same on behalf of the deity. The Archakas thereupon claimed the offerings as their own property relying on the settled usage of nearly a century and finally an

C. P. CODE (V OF 1908), S. 92—Amendment of Plaint.

arrangement was made between the Archakas and the committee by which the permanent lease of 1898 was granted. In 1911, two worshippers, acting on behalf of themselves and the others but without sanction of the Advocate-General by S 92, C. P. C. or of the Court under S. 18 of the Rel. Endowments Act, brought a suit against the Devasthanam Committee and the Archakas for a declaration that the permanent lease of 1893 was void and beyond the powers of the committee and for a direction that the trustee of the temple should retain the right of collecting the offerings. *Held*, by the Full Bench, that the suit was maintainable. Suits against strangers to a trust whether alienees from trustees or trespassers are not governed by S. 92. A permanent alienation of the offerings to a deity is illegal. The expression 'granting further or more relief' must be read along with the specified reliefs and those that should be granted under this clause should be of the character, as those expressly mentioned. (*Abdur Rahim, Offg. C. J., Seshagiri Aiyar and Phillips, JJ.*) KALYAN VENKATRAMANA AIYANGAR *v.* KASTURI RANGA AIYANGAR.

40 Mad. 212 : 31 M. L. J. 777 : 20 M. L. T. 490 : 5 L. W. 625 : 38 I. C. 73 : (1917) M. W. N. 400.

Amendment of Plaint.

——S. 92—*Amendment of plaint—Suit relating to public charity—Consent of Advocate-General obtained for institution— Amendment of plaint by addition of new parties—Fresh sanction if necessary.*

The sanction of the Advocate-General which is a condition precedent to the institution of a suit under S. 92 of the Code is equally a condition precedent to the amendment of the same plaint especially where such amendment relates to a cause of action arising after the institution of the suit and fresh parties are added in consequence, with a claim for fresh reliefs against them. 21 B. 257 : 26 A. 162 rel. (*Davar, J.*) ABDUL RAHIMAN *v.* CASSUM EBRAHIM. **36 Bom. 168 : 11 I. C, 726 : 13 Bom. L. R 583.**

Charitable Trust.

——S. 92— *Charitable trust — Hereditary trustee—Advisory Board—Creation of a new body -Inexpediency of.*

Where a hereditary trustee has been appointed and the control of the charity left in him and the legislature has not thought fit to take away from the control or administration of the trust, it is not for the court because it may think that it is undesirable that charitable funds should be administered by one man without control or even without audit to impose a control which was not part of the original trust. But the Court has very wide powers under S. 92, C. P. Code and the circumstances under which those powers should be exercised are clearly stated by the Privy Council in 43 C. 1085, 1101 (P. C.) (*Schwabe, C. J. and Odgers, J.*) DORAIVELU MUDALIAR *v.* ADIKESAVALU NAIDU. **(1922) M.W N. 620 : 70 I. C. 87 : 1922 Mad. 409.**

——S. 92 — *Charitable trust— Bequest to charily—Administration—Suit for.*

C. P. CODE (V OF 1908), S. 92—Co-Trustees.

S. 92 of the C. P. Code deals with completed trusts and is inapplicable where that stage has not yet been reached. Where the will of the deceased testator bequeathes a legacy for the constitution of a trust the proper remedy to enforce the provisions of the will is by an administration suit. A suit for the administration of the trusts of a will which contained disposition for charitable purposes is maintainable though it is not brought under S. 92, C. P. Code (*Wallis C. J. and Kumaraswamy Sastry, J.*) ANNAVARAPU NACHARAMMA *v.* MALLADI VENKATAPPAYYA. **31 M. L. T. 63 (H C.) : 70 I. C. 903 : 16 L. W. 922.**

Compromise of suit.

——S. 92—*Compromise of suit—Validity.*

A suit under S. 92 cannot be compromised if it is proved that the endowment is a public one and where the question whether the endowment is public or not is still in dispute, there cannot be a lawful agreement and it cannot be said to be proved to the satisfaction of the Court that the suit had been adjusted by a lawful agreement so long as such a controversy exists. (*Cox and Ray, JJ.*) ABDUL KARIM *v.* ABDUS SOUBHAN. **26 I. C. 360 : 18 C. W. N 1264.**

——S. 92—*Compromise of suit—Benefit to private parties.*

A court should not sanction a compromise of a suit under S. 92 of the C. P. C. under which any portion of the trust properties is given to any of the parties. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) MUTHUKRISHNA NAICKEN *v.* RAMCHANDRA NAICKEN. **47 I. C. 611 : 37 M. L. J. 489.**

——S. 92— *Compromise of suit — Fraud—Advocate General's consent.*

Where a compromise decree in a suit for removal of trustees, accounts, etc., was attacked as fraudulent by a regular suit, *held*, that the consent of the Advocate-General was necessary for such suit as it involved an allegation of breach of trust, taking accounts etc. (*Hartnoll, C.J. and Twomey, J.*) MAHOMED SALAY *v.* MULLA GOOLAM MAHOMED. **7 Bur. L. T. 160 : 23 I. C. 111 : 7 L. B. R. 333.**

Costs.

——S. 92—*Costs—Order as to.*

When a Judge decides that there is no misfeasance, he cannot record a decision that the trust is public nor about costs as his power ends with the first decision. (*Sharfuddin and Roe, JJ.*) BRIJ BEHARI LAL *v.* SHEO NATH PRASAD. **35 I. C. 837 : 20 C. W. N. 1354.**

Co-Trustees.

——S. 92—*Co-trustees—Suit or declaration of right to trusteeship—Sanction.*

S. 92 of the C. P. C. has no application to a suit for a declaration that the plaintiff and the defendant are *co-mutwallis* of *wakf* property and are entitled to manage it jointly. (*Banerji and Piggott, JJ.*) ALI HUSSAIN *v.* MAHOMED HUSSAIN. **52 I.C. 628. (All.)**

C. P. CODE (V OF 1908), S. 92—Co-Trustee.

——S. 92—*Co-trustees — Disputes between parties as to who is to be* mutwalli—*Applicability of.*

S. 92 does not cover suits relating to disputes between parties as to who is to be a *Mutwalli* on the ground of family relationship. (*Richards, C.J. and Banerji, J.*) NIAMAT ALI *v* ALI RAZA.
37 All. 86 : 26 I. C. 778 : 13 A. L. J. 26.

——S. 92—*Co-trustees—Suit by one executor against co-executor—Charge of mis-application—S. 92 whether applicable.*

Where an executor of a Hindu will brought a suit against his co-executor for restraining him from meddling with the property and when the plaint contained no suggestion that there was a charitable trust it was held that S. 92 did not apply and that the suit must be treated as a general administration suit. (*Scott, C. J. and Heaton, J.*) BAPUJI JAGANNATH *v.* GOBINDLAL KASANDAS SHAH. 40 Bom. 439 : 34 I. C. 167 : 18 Bom. L. R. 335.

De facto Trustee.

——S. 92—De facto *trustee—Suit for removal—Vesting trust property in new trustee — Court-fee—Death of one of plaintiffs obtaining sanction—Effect.*

A suit brought for the removal of a person who is a *de facto* but not a *de jure* trustee, for the appointment of a trustee and for vesting trust property in him is a suit falling under S. 92 of the Code. It is not necessary to stamp the plaint in such a suit with a court-fee stamp calculated *ad-valorem* on the value of the trust property. The death of one of the plaintiffs in a suit under S. 92 of the Code would not cause the abatement of the suit. (*Scott Smith, J.*) GOPI DAS *v.* LAL DAS.
97 P. R. 1918 : 47 I. C. 983 : 173 P. W. R. 1918.

——S. 92—De facto *trustee—Suit against—Removal of trustee—Minor.*

A *de facto* trustee or a trustee *de son tort* is subject to the same liabilities as a *de jure* trustee and a suit under S. 92 is maintainable against the former. 33 C. 789 ; 22 B. 659; 15 C. 329 ; 26 M. 450, Ref. A person who is not a *sui juris* and requires a guardian to look after his property, cannot be entrusted with the management of a trust. (*Stuart, J. C. and Kanhaiya Lal, A. J. C.*) MUHAMMAD NASIM *v.* MUHAMMAD AHMAD.
1 O. L. J. 726 : 27 I. C. 389 : 18 O. C. 38.

Forum.

——S. 92—*Forum— Additional District Judge—Bengal, N.W.P. and Assam Civil Courts Act* (1887), *S.* 8 (2).—*'Any other court empowered in that behalf by the Local Govt.'—Meaning of.*

An Addl. Dist. Judge is, by S. 8 (2), empowered to exercise the same powers as a Dist. Judge in suits under S. 92, C. P. Code. He need not, in such cases, be empowered by Local Government. The phrase "Any other court impowered in that behalf by the Local Government" in S. 92, probably refers to Courts such as the Subordinate Judge's Courts. (*Chatterjea and Panton, JJ.*) MOHABOR RAHMAN *v.* ABDUR RAHIM.
62 I. C. 115 : 48 Cal. 53.

C. P. CODE (V OF 1908), S. 92—Mandatory Provision.

——Ss. 92 and 24—*Forum—Bengal, N. W. P. and Assam Civil Courts Act* (*XII of* 1887), *S.* 8—*Additional Judge—Powers.*

An additional Judge appointed under S. 8 of Act (XII of 1887) but not empowered by the Local Government to receive suits under S. 92, C. P.C., and not having the functions of a District Judge assigned over in his favour, cannot try a suit under the said section transferred to him under S. 24, C. P. C, from the file of a District Judge. (*Stephen and Mullick, JJ.*) MUHAMMAD MUSA *v.* ABDUL HUSSAIN KHAN. 41 Cal. 866 : 22 I. C. 951 : 18 C. W. N. 612.

——S. 92—*Forum—Sub-judge—Notification by Local Govt.*

A notification by a Local Government empowering a Sub-Judge to try a particular suit pending before the District Judge is not one contemplated by S. 92 of the Code. (*Woodroffe and Teunon, JJ.*) ABDUL KARIM *v.* ABDUSSOBHAN.
39 Cal 146 : 13 I. C. 243 : 16 C. W. N. 44.

——S. 92—*Forum—Sub-court — Effect of notification.*

A Sub-Judge, to whom was transferred by the District Court a suit under S. 92, being empowered by Government notification to try suits under S. 92, is not deprived of his jurisdiction by a subsequent notification confining the jurisdiction to a specified local area. (*Abdur Rahim and Spencer, JJ.*) GANAPATHI ASARI *v.* SUNDARAM CHETTY. 31 I. C. 397.

——S. 92—*Forum—Suit—Transfer by District Juage to Court of Additional Judge—Oudh Civil Court Act* (*XVII of* 1879), *S.* 7.

If the assignment of the duties referred to in S. 7 of the Oudh Civil Courts Act has been sanctioned in the manner required by law, suits instituted under S. 92 of the C.P.C. can be transferred for trial by a District Judge to the Court of an Additional Judge. (*Kanhaiya Lal, J. C.*) GAURI NATH *v.* RAM NARAIN.
52 I. C. 45 : 22 O. C. 93.

Mandatory Provision.

——S. 92—*Mandatory provision—Suit for accounts against trustee—Necessity for sanction —Trustee in possession under a compromise of a litigation.*

The provisions of S. 92 of the C. P. C. are mandatory. It is not merely the right of the plaintiff that has to be looked to but also the nature of the relief which the plaintiff seeks and if the relief asked for is one which is specified in sub-S. (1) the direction laid down in the section must be obeyed. A suit by a plaintiff for accounts from the defendants who were managing certain *wakf* property as trustees under a compromise comes within S. 92 C.P.C. (*Rafique and Lindsay, JJ.*) SANG TO *v.* PARASRAM. 49 I. C. 530.

——S. 92—*Mandatory provision.*

S. 92 of the C. P. C. is mandatory and a suit claiming any of the reliefs therein mentioned must be brought in conformity with its provisions or not at all. (*Piggolt and Walsh, JJ.*) NAIMUL HAQ *v.* MOHAMMAD SUBHAN-UL-LAH.
41 All. 1 : 48 I. C. 94 : 16 A L J. 841.

C. P. CODE (V OF 1908), S. 92—Mandatory Provision.

——S. 92 (2)—*Mandatory provisions—Religious Endowments Act, Ss.* 14 *and* 18—*Scheme suit.*

A suit for removal of a trustee and for settling a scheme is governed by S. 92, C. P. C., and not by the Rel. End. Act. The object of S. 92 is to make it clear that the provisions of section are mandatory and the object of the saving clause is to make it clear that Rel. End. Act is still in force. (*White, C. J. and Sankaran Nair, J.*) AJAPA NATESA PANDARA SANNADHI *v.* RAMA LINGAM PILLAI. **20 I. C. 767 : 24 M. L. J. 658.**

——S. 92—*Mandatory provision—Scheme suit without sanction under the old Code—The new Code, if retrospective.*

S. 92 (2) was enacted to settle the point if the provisions of S. 539 were directory or mandatory and so it operates retrospectively, especially when there is no saving of pending suits under the section. Hence a suit for removal of certain trustees and for administration of a trust instituted in 1904 without the sanction of the Advocate-General would be barred by S. 92 (2). (*Fawcett, A. J. C.*) HEMANDAS *v.* CHELLARAM. **13 I. C. 264 : 5 S. L. R. 184.**

Object of.

——S. 92—*Object of—Abuse of process of Courts.*

The object of S. 92 is not to encourage abuse of the process of the Court by vexatious or improper suits. Its real object being the benefit of persons interested in the trust, the Legal Remembrancer, when applied to for permission to sue should satisfy himself as to the *bona fides* of the applicants and their proposed suits. (*Richards, C. J. and Banerjee, J.*) NARAYAN DAS *v.* KHUNI LAL. **37 I. C. 897.**

Parties.

——Ss. 92, 93 and O. 1, R. 1—*Parties—Alienee of trust properties.*

Where the plaint alleges that the alienee took the property from the trustee with full knowledge of its character as a public trust for religious purposes and that he has for some years paid part of the income to the trust the alienee is a necessary party as the question whether the alienee is a constructive trustee in virtue of the alienation and by reason of his conduct may arise. 23 B. 659 foll. (*Chandavarkar and Hayward, JJ.*) COLLECTOR OF POONA *v.* BAI CHANCHALBAI. **35 Bom. 470 : 12 I. C. 30 : 13 Bom. L. R. 690.**

——S. 92 and O. 1, Rr. 3 and 10 (2)—*Parties—Alienee—Trespasser.*

S. 92 does not cover a claim to recover possession of trust property from a trespasser or a transferee from a trustee neither of whom can be brought before the court in a suit under S. 92 by virtue of either R. 3 or R. 10 (2) of O. 1, C. P. C. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) GULAM MOULA *v.* ALI HAFIZ. **47 I. C. 111 : 28 C. L. J. 4.**

——S. 92 and O. 1, R. 3—*Parties—Alienee of trust property.*

The alienee of the trust property for the breach of which a *mutwalli* is sued under S. 92 may be

C. P. CODE (V OF 1908), S. 92—Parties.

made a party and may be declared to be trustee of the trust property directing the alienee to convey the same if the court decides against him. (*Greaves, J.*) ALI HAFFIZ *v.* ABDUR RAHMAN. **32 I. C. 801 : 42 Cal. 1135.**

——S. 92—*Parties—Persons claiming to be trustees.*

In a suit for framing a scheme for a public charity, the persons who *bona fide* allege to be trustees thereto, should be made parties : otherwise their rights would be lost if a scheme were framed. 36 M. 364, (1917) M. W. N. 550. Ref. (*Krishnan, J.*) MULAKUTLA RAMA MURTHI *v.* CHILLARA BHASKARAYYA, **50 I. C. 58.**

——S. 92 and O. 1, R. 10—*Parties—Hereditary trustee—Son a party.*

In a suit under S. 92 for removal of a hereditary trustee, the son of a defendant is a necessary party. (*Ayling and Seshagiri Aiyar, JJ.*) VAITHILINGAM *v.* RAMALINGAM PILLAI. **6 L. W. 9 : 38 I. C. 133 : (1917) M. W. N. 550.**

——S. 92 and O. 1, R. 1—*Parties—Alienees.*

It is doubtful whether alienees or trespassers on trust property can by joined as parties to a suit under S. 92. (*Tyabjee and Spencer, JJ.*) PRASANNA VENKATACHELLA *v.* COLLECTOR OF TRICHINOPOLY **33 I. C. 45 : 38 Mad. 1064.**

——S. 92—*Parties—Alienee of trust property—Whether necessary party.*

An alienee of a trust property is not a necessary party to suit under the section and a declaration and decree for possession against him cannot be given against him. (*Wallis, C. J. and Hannay, J.*) RANGAYYA NAIDU *v.* CHINNASWAMI IYER. **17 M. L. T. 191 : 28 I. C. 898 : 28 M. L. J. 326.**

——S. 92 and O. 1, R. 10—*Parties—Alienee of trust property.*

In a suit under S. 92 neither a decree for possession nor even for a mere declaration can be given against the alienees of trust properties. The alienees are proper though not necessary parties to such a suit. Os. 1 and 2, C.P.C. providing for the array of parties in suits of evey discription will govern also the particular class of litigation under S. 92. 31 M. 212, dist. 28 A. 112 : 35 B. 470 : 2 C. L. J. 431 Fol. (*Wallis, C. J. and Seshagiri Aiyar, J.*) ASAM RAGHAVULU SETTY *v.* PELLATE SITAMMA. **(1914) M. W. N. 692 : 27 M. L. J. 266 : 25 I. C. 794. 16 M L. T. 178.**

——S. 92—*Parties—Alienees.*

A relief against strangers for recovery of possession of properties in their hands cannot be granted under S. 92 and hence they must be struck off the record. (*Stuart, A. J. C.*) ANGAD DAS *v.* GHASITI, **26 I. C. 108 : 1 O. L. J. 548.**

——S. 92 and O. 1, R. 10 (2)—*Parties—Alienee from trustee—Suit against alienee—Suit for declaration of invalidity of alienation.*

In a suit under S. 92 an alienee from a trustee is not a necessary party. A prayer that an alienation of trust property be declared "null and void" cannot be brought under S. 92 and no certificate

C. P. CODE (V OF 1908), S. 92—Private Trusts.

of Advocate-General is necessary for such a suit. (*Fawcett, A. J. C.*) OSIN *v.* BALMUKUNDA.
12 I. C. 668. 5 S. L. R. 103.

Private Trusts.

——S. 92—*Private trusts.*

S. 92, C. P. Code, is not applicable to private trusts. (*Lord Buckmaster*). GOPAL LAL SETT *v.* PURNA CHANDRA BASAK. 49 I. A. 100 : 16 L. W. 963 : 67 I. C. 561 : 27 C. W. N. 174 : 20 A. L. J. 625 : 43 M. L. J. 116 : 36 C. L. J. 57 : 49 C. 459 : 24 Bom. L. R. 937 : 1922 P. C. 253 (P.C.).

——S. 92—*Private trusts—Not governed by.*

The provisions of S. 92, C. P. C, apply only to trusts for public purposes and not to private trusts. (*Rafique, J.*) BRAUMAL *v.* DAWRAKA DAS. 25 I. C. 667.

——S. 92—*Private trust—Suit in respect of.*

S. 92 applies to a public trust and a suit relating to a private trust is not maintainable in the Dist. Court but in an ordinary Civil Court. (*Richards, C. J. and Bannerji, J.*) ABDUL HASSIN *v.* AZIZ AHMED. 25 I. C. 661.

——Ss. 92 and 93—*Private trusts—Acts of trustee—Right to impeach*—Locus standi.

The acts of a trustee of a private trust cannot be impeached by a person having no interest in the trust property. (*Lindsay, J. C.*) SAIYAD TAWAHER HUSSAIN *v.* LAL LACHMAN DAS. 56 I. C. 707 : 7 O. L. J. 246.

——S. 92—*Private trust.*

The court should pause before interfering under S. 92, with a matter which is more a family matter than of a public nature. Where A set apart a certain portion of his property, to be devoted entirely at the discretion of the trustee for the time being and the will contemplated that one of the testator's descendants should always be trustee, it is questionable whether this is a public trust. A direction for accounts in a suit in which the administrator of an estate is not made a party is useless. (*Fox, C. J. and Harlnoll, J.*) OFFICIAL ASSIGNEE *v.* ABDUL HUSSAIN. 28 I. C. 116.

Public Trust.

——S. 92—*Public trust*—Wakf—*Suit for removal of* mutwalli—*Trust.*

A suit to remove a duly appointed *mutwalli* of a trust created for a public purpose of a religious or charitable nature cannot be instituted save in conformity with S. 92, C. P. C. (*Richards and Banerji, JJ.*) SAIYAD ALI *v.* ALI JAN. 35 All. 98 : 18 I C. 573 : 11 A. L. J, 25.

——S 92—*Public trust—Charitable or religious nature—Essentials.*

Unless a trust is expressly created for a public purpose of a charitable nature, the mere fact that the income of certain property has been for long spent in feeding an idol and in maintaining and taking care of pilgrims will not by itself constitute a trust of such a nature. (*Piggott, J. contra.*) The words "any express or constructive trust" in S. 92 of the C. P. C. (1908) should be construed

C. P. CODE (V OF 1908), S. 92—Public Trust.

liberally and in a sense as favourable as possible to the assumption of jurisdiction by a Court under that section wherever there is a fair ground for affirming the existence of a trust. (*Karamat Hussain and Piggott, JJ.*) GOPAL DAS *v.* SHIVA DAS. 11 I. C. 308 : 8 A. L. J. 1120.

——S. 92—*Public trust—Test of—Grant to Nanaksahi gaddi by Muhammadan ruler for charitable purpose—Evidence necessary.*

(*Per Chamier, J. contra Karamat Hussain, J.*)—A grant by a Muhammadan ruler to a Nanaksahi gaddi of villages for charitable purposes which for over 100 years have been carried out by means of providing for the maintenance of the trustee, of fakirs to go about preaching the faith of the Guru and for the visitors, is a grant for public trust within the meaning of S. 92. A trust to be a trust for a public purpose, it is enough to show that it is for the benefit of a section of the public. *Per Karamat Hussain, J.* (*Obiter dicta*) :—(i) The creation of a public or private trust save by making a *wakf* is unknown to Muhammadan law. (ii) A Muhammadan ruler could not make a *wakf* in respect of property which could not be a subject of *wakf*. (iii) A public trust must be proved by strong evidence ; the mere fact that the income of certain property has for a long time been spent to support fakirs and visitors is not sufficient evidence of such a public trust. (iv) A grant to a mahant (the income of which he is not bound to spend on a public charitable purpose) does not mean that a public charity was created. All the legal requisites essential for the constitution of a public charity must be established by strong and clear evidence to enable the Court to declare that certain property is a public charity. An institution which encourages celebacy and parasitism and offers temptation to crime and vice cannot be an institution for public purposes of a charitable or religious nature. (*Karamat Hussain and Chamier, JJ.*) PURAN ATAL *v.* DARSHAN DAS. 11 I. C. 166.

——S. 92—*Public trust—Acharaya of a temple—Constructive trustee—Suit for scheme—Maintainability of.*

A constructive trustee within the meaning of S. 92 of the C. P Code would include a person who holds a particular fiduciary position whose obligation as such can be enforced in a court of law. *Held*, on the evidence that the Acharya of the Swaminarayan temple at Vadtal was a trustee to whom S. 92 of the C. P. Code would apply. It is true that the mahant or manager of a math is not a trustee in the strict sense of the term when used of an express or declared trust. It would be more accurate to describe him as occupying a fiduciary position. This fiduciary relationship is commonly called an implied trust but the implied trustee is subject to the same obligations as the express or declared trustee. In the case of a math as in the case of a temple the ownership is in an ideal person. In the one case it is the idol; in the other case it is the office of spiritual head. The individual holding the office is trustee for the office, the gadi or math or the institution. The succession to the property follows the succession to the office. This is the general law as to mutts In the case of maths the corpus and the income

C. P. CODE (V OF 1908), S. 92—Public Trust.

belongs to the institution though a shebait or head of a math has a nearer position than a Dharmakarta. 22 Bom L. R. 457 ; 11 M. I A. 405 : 20 Bom L. R. 1088 : 24 Bom L. R. 629 Rel. (*Morten and Pratt, JJ.*) SARIPAT PRASAD *v.* LAKSHMIDAS. **25 Bom. L. R. 747 : 1924 Bom. 193.**

——S. 92 (2)—*Public trust—Suit by trustee against co-trustees for accounts.*

A trustee of a public charity can sue his co-trustee for an account without the sanction of the Advocate-General or the Collector (*Ayling, O.C.J., Oldfield, Kumaraswami Sastry, Ramesam and Odgers, JJ.*) APPANNA *v.* NARASINGA. **41 M. L. J. 608 : 15 L W. 18 : (1921) M. W. N. 833 : 30 M. L. T. 1 : 45 M. 113 : 69 I. C. 304 : 1922 Mad. 17. (F. B.)**

——S. 92—*Public trust—Grant to specific persons as servants of a mosque for expenses of lamp oil, etc.—Scheme.*

A grant to certain specified persons, described as servants of the mosque, recited that the revenue of lands granted was to be enjoyed by the grantees according to their own needs, to defray the lamp oil expenses for the mosque and the maintenance. In the registers maintained by Government the property had been treated with the assent of the heirs of the grantees as an endowment of the mosque. *Held*, that the grant constituted a public religious trust and a suit for scheme was maintainable. 8 W. R. 313 : 6 B. 88 : 15 C. 329, Ref. (*Wallis, C. J. and Ayling, J.*) SAHIB ABDULA *v.* HYDER BEG SAHIB. **51 I. C. 42 : 10 L. W. 135.**

——S. 92—*Public trust—Mutt—Head of.*

The Head of a Mutt is not a trustee of Mutt property and no suit lies for his removal under S. 92, C. P. C. (*Wallis, C. J. and Napier, J.*) KAILASAM PILLAI *v.* NATARAJA TAMBIRAN. **40 I. C. 627 : 32 M. L. J. 271.**

[Affd. O. A. 39 M. L. J. 98 (P. C).]

But *see* **37 M. L. J. 231 : 52 I. C. 914 ; 40 M. 745 : 40 I. C. 531 ; 43 Cal 707 : 33 I.C 583 (P. C.) ; 53 I. C. 288 : 43 Mad. 253.**

——S. 92—*Public trust— Inam—Grant to God and not to archakas—Proprietary right—Usage of—Misappropriation by Archakas for a few years—Effect.*

The inams in question were granted absolutely for the benefit and support of a temple as trust properties and not for the limited purposes of the performance of the Archaka duties alone and no usage was proved or recognizable in law, concerning the application of the income to the said limited purpose, and there was no question of prescriptive right in the Archakas in the matter of the user of the trust properties : *held*, that the Archakas were not entitled to proprietary right in the inams, and misappropriation by the Archakas for a few years prior to suit formed merely a breach of trust and no usage. (*Coutts Trotter and Srinivasa Aiyangar, JJ.*) NARASIMACHARLU *v.* SUBBIAH. **36 I C. 270 : 31 M. L, J. 202.**

——S. 92—*Public trust—Caste institution—Scheme.*

C. P. CODE (V OF 1908), S. 92—Public Trust.

Though a caste or a section thereof can own a temple, a temple which is merely managed by certain caste is the subject of a charitable trust and a scheme can be framed for it under S. 92, C. P. C. 11 Bom. 534 : 8 Bom. 432 : 23 M. 82 : 27 M. 192 Foll. In framing a scheme the court need not remove trustees already holding office when no misconduct is proved against them. (*Wallis, C. J, and Phillips, J.*) MUTHIAH CHETTI *v.* PERIANNAN CHETTI. **34 I. C. 551 : 4 L. W. 228.**

——S. 92—*Public trust—Mutt.*

The section should be applied to mutts and the public, the Advocate-General and the Courts of justice should have the power to stop the wholesale misuse of the income of a charitable religious institution like a *matam*. (*Miller and Sadasiva Aiyar, JJ.*) MALHU SAMIER *v.* SREE SREE MELHANITHI SWAMIER AVERGAL. **38 Mad. 356 : 13 M. L. T. 498 : (1913) M. W. N. 581 : 19 I. C. 694 : 25 M. L. J. 393.**

——S. 92—*Public trust—Dedication—Proof—Persons interested — Worshippers — Scheme when framed.*

When a deed of endowment is silent as to the nature of the trust, *viz.*, public or private, extrinsic and circumstantial evidence can be let in as to the nature of the trust. Where a temple is open to public worship and when the usual religious festivals are conducted, the proper inference to be drawn from the circumstances is that it is a public trust and any person having a right to worship at such a temple is entitled to sue under S. 92, C. P. C., Even apart from the question of mismanagement and misappropriation, a court can settle a scheme if it can conduce to the better management of the trust property. (*Stuart and Kanhaiya Lal, A. J. Cs.*) LAKSHMI KUNWAR *v.* MURARI KUNWAR. **45 I C. 213. : 5. O. L. J. 97.**

——S. 92—*Public trust—Test of.*

Apart from its history the court may consider the nature of the traditions or the usages of an Asthal to determine whether the trust is a public or a private trust. In a suit under the section for the removal of a mahant, the consent of some of the plaintiffs-respondents in appeal, to the management of the property by the original mahant cannot affect the validity of the suit on the date of institution or the jurisdiction of the Court to hear the appeal. If no member of the cult of the founder of the Asthal can be trusted to take charge of the Asthal property without the possibility of recurrence of mismanagement, it is proper that an independent committee should be appointed who will appoint a person to manage. (*Kanhaiya Lal and Kendall, A. J. Cs.*) LACHMAN DAS BABA *v*, RAJJAN LAL. **38 I. C. 800 : 20 O. C. 49.**

——S. 92—*Public trust — Evidence of — Management—Wishes of donor—Powers of Court.*

Where there is an express declaration in the deed, the intention of the grantor can be gathered from the surrounding circumstances. If they indicate that the beneficial interest vested in the public and not in one or more individuals

C. P. CODE (V OF 1908), S. 92—Reliefs.

although the control and management vested in the members of the family, the Court is entitled to hold that the trust was for public purposes. 19 C. W. N. 305, Appl. S 92 only contemplates suits brought in a representative capacity for the benefit of the public and to enforce public rights in respect of an express or constructive trust, claiming one or other of the reliefs mentioned in that section. Suits brought not to establish a public right but to remedy a particular infringement of an individual right are not within the section. 33 Cal. 789, foll. Where in the deed there is no provision for joint management by two or more members of the family the Court cannot grant a relief against the intention of the founder. (*Coutts and Sultan Ahmad, JJ.*) RAJESWAR SINGH *v.* BASUDEO NARANI.

1 Pat. L. T. 428 : 3 U. P. L. R. (Pat.) 4 : 57 I. C. 270 : 1921 Pat. 6.

Reliefs.

——S. 92—*Reliefs—Delivery of property.*

A court has inherent power to pass a decree in a suit relating to trust, under S. 92 (h) appointing new trustees and directing old ones to deliver the properties to them. (*Rafique and Piggott, JJ.*) JAI NARAIN *v.* BANKEY LAL.

58 I. C. 566 : 17 A. L. J. 957.

——S. 92—*Reliefs—"Such further relief," Meaning.*

In S. 92, C. P. C., the words "such further relief as the nature of the case may require" cover every subsidiary order or direction on any matter of detail necessary for carrying out the main purposes of the section. 24 C. 418, Fol. (*Piggott and Walsh, JJ.*) DAHRAM DAS *v.* DHARAM DAS. **40. I. C. 182.**

——S. 92—*Reliefs—Suit for possession and declaration by residents of locality, whether maintainable.*

A suit for declaration but not a suit for possession of certain property alleged to be *waqf* is maintainable by the residents of a locality interested in a *waqf* property. (*Karamat Husain and Chamier, JJ.*) DASONDY *v.* MOHAMMAD ABU NASAR. **33 All. 660 : 11. I. C. 36 : 8 A. L. J. 710.**

——S. 92—*Reliefs—Suit by new trustee against old to recover property—Accounts and damages—Old muktessors in possession—Religious Endowments Act*, S. 14.

A suit by a newly appointed muktessor of a temple, against the defts. who were the trustees and the old muktessors of the temple, to recover possession of land belonging to the temple and the moveable property belonging to the deity and mesne profits and accounts is governed by S. 92 of the C.P.C. because it is a suit for the removal of the defts. from their position as trustees, for the restoration of the trust property to the plaintiff as the Muktessor, for taking accounts, and for damages for the wrongful acts of trustees. The defts. could not be regarded as strangers claiming to hold the lands adversely to the trust though they might not agree as to their obligations under the trust, since they were really trustees and as such they claimed to be entitled to hold the lands

C. P. CODE (V OF 1908), S. 92—Religious Trust.

from generation to generation subject to the due fulfilment of the trust. *Per Marten, J.*—There is much which is common between S. 14 of the Religious Endowments Act and S. 92 of the C.P.C. but the latter is substantially the wider and provides *inter alia* for settling a scheme which is a jurisdiction of a very wide and beneficial nature. A plaintiff may proceed for appropriate relief under either Act ; and the opening words in S. 92 (2) only mean that if he elects to proceed under the Religious Endowments Act, he is not to be prevented from so doing by S, 92. (*Shah and Marten, JJ.*) HANSRAJ *v.* ANANT.

42 Bom. 742 : 48 I.C. 514 : 20 Bom, L.R. 954.

——S. 92—*Relief—Suit to establish trusteeship—Mosque*—Mutwali.

Where none of the reliefs specified in S. 92, C.P.C., are claimed and the plaintiff does not ask the court to appoint him a *Mutawalli*, the suit is incompetent under S. 92, C. P. C. (*D. Chatterjee and Chapman, JJ.*) ABDUL GHAFOOR MIAH *v.* ALTAF HOSAIN. **29 I.C. 423 : 20 C.W.N. 605.**

——S. 92—*Reliefs—Not allowed by the sections—Grant of.*

A suit brought under S 92 of the C.P.C. must be limited to matters included in the section and it is not competent to the court to enlarge the scope of the suit and to grant reliefs other than those included in the section. 89 P.R 1901, Foll. (*Shadi Lal and Martineau, JJ.*) NIZAMULHAQ *v.* MUHAMMAD ISHAK. **50 P.W.R. 1919 : 51 I C. 611 : 144 P.R. 1919.**

——S. 92 (2)—*Reliefs—Public trust—Charitable trust—Alienation by Hindu widow—Claim of reversioner—Sanction.*

A claim of the reversioners for possession of a public trust on alienation made by the Hindu widow, is not cognisable without sanction under S. 92. (*Abdur Rahim, O. C. J. and Seshagiri Aiyar, J.*) VENKATASUBBAMA *v* VENKATARANGAM CHETTY, **31 M.L.J. 280 : 36 I.C. 678 : 4 L.W. 264.**

Religious Trust.

——S. 92—*Religious trust—Pujary of idol is a servant and not a trustee.*

Where a person was put in charge as pujary of an idol in a Dharmsala, he is a servant and not a trustee and a suit uner S. 92, C.P. Code, is not maintainable against him (*Rafique and Lindsay, JJ.*) BALDEO DUTT *v*, GOPALJI.

21 A.L.J. 310 : L.R. 4 A 190 : 1923 A. 247.

——S. 92—*Religious trust— Mahomedan Waqf—Power to appoint mutawalli.*

Although a Dt. Judge has the powers of a Kazi under the Mahomedan Law to deal with an application for appointment of a *Mutawalli* he may relegate the petitioner to a suit under S. 92 of the C. P. C. (*Richardson and Walmsley, JJ.*) JAMILA KHATUN *v.* ABDUL JALIL MEAH. **49 I.C. 799 : 23 C.W.N. 138.**

——S. 92—*Religious trust—Suit by trustee to recover amount due.*

A suit by a temple trustee to recover the amount due by deft. under the terms of the trust cannot be maintained without leave as the suit is

C. P. CODE (V OF 1908), S. 92—Religious Trust.

not exempt from S. 92, C.P. Code or S. 18, Religious Endowments Act. (*Ayling, Coutts-Trotter and Kumaraswami Sastri, JJ.*) SAMINATHA PILLAI *v.* SUNDARESA PILLAI. 29 M.L.T. 267: 62 I.C. 911 : 14 L.W. 238.

——S. 92—*Religious trust—Public or private—Inference as to.*

Where the origin and founder of a temple are unknown, the facts that members of public are freely admitted, festivals are celebrated in a certain manner, and the like lead to the inference that the temple is a public one, and the inference is not rebutted by the fact that a particular mode of worship is followed, that management follows a particular line of descent in the *pujari* family, etc., (*Abdur Rahim and Oldfield, JJ.*) PURAVIYA GOUNDAN *v.* POONACHI GOUNDAN. 62 I C. 655 : 40 M.L.J. 289.

——S. 92—*Religious trust—Mosque—Founded to perpetuate memory of departed men—Whether public religious institution—Inam grant.*

A mosque founded to perpetuate the memory of a departed man is a public religious institution if the public use it as a matter of right and an inam has been gaanted for its upkeep. A suit under S. 92 lies to remove trustees who have been guilty of misconduct. One of the conditions of the inam was that the grant was to enure *till the mosque existed. Held*, the condition referred to the keeping of the mosque as a place of public worship and the mere fact that the building was allowed to stand was not a fulfillment of the condition of the grant. (*Ayling and Srinivasa Aiyangar, JJ.*) SIKKANDER ROWTHER *v.* SECRETARY OF STATE. 38 I.C. 200 : 5 L.W. 402.

——S. 92—*Religious trust—Trust for public purposes of religious nature.*

The mausoleum, mosque and *Khangah* of a religious Mahomedan who was the founder of a new religious order and to whom there could be no succession under any recognised rules, is a constructive trust of a religious nature for public purposes and a Civil Court is competent to interfere with it. (*Stuart and Kanhaiya Lal, A. J. Cs.*) SHURFUDDIN *v.* MAQBULUNNISA. 40 I.C. 101. 4 O.L.J. 174.

——S. 92—*Religious trust—Suit by Chela of mutt for possession of office and emoluments—Forfeiture of office by reigning mahant.*

Where the chela of an asthal claims possession of the office of a mahant and of the properties of the asthal in his own right alleging that the reigning *mahant* has forfeited the office by contracting a marriage and other irregularities, the suit is not one falling within the scope of S. 92, C. P. Code, and the sanction of the Advocate-General is not necessary therefor. (*Das and Bucknill, JJ.*) MAHANT RAGHUNATH DAS *v.* SHEO KUMAR MISSER. 1923 P. 309.

Removal of Trustee.

——S. 92—*Removal of trustee—Grounds of—Hindu temple.*

The Dharmakarta holds the position of a trustee and as such on assertion of private ownership in trust property and falsification of accounts, he is liable to be removed. (*Lord Shaw*). J. P. SHRINIVASA CHARIAR *v.* C. N. EVALPPA MUDALIAR. 31 M.L.T. 1 (P.C) : 49 I.A. 237 : 24 Bom.L.R. 1214 : 21 A.L.J. 250: 27 C.W.N. 317 : 36 C.L.J. 524 : L.R. 3 P.C. 213 : 45 M. 565: 43 M.L.J. 536: 68 I.C. 1 : 16 L.W. 247 : 1922 P.C. 325 (P.C.).

C. P. CODE (V OF 1908), S. 92—Removal of Trustee.

——S. 92—*Removal of trustee—Dt. Judge ordering suspension of mahant on report—No suit—Jurisdiction—Revision.*

The C.P.C. gives no powers to the Dt. Judge to take any action to protect property forming the subject-matter of a public endowment unless and until a regular suit is filed in his court under S. 92. When the Dt. Judge exercises any of the powers vested in him under that section without a suit, he acts without jurisdiction and the High Court in its revisional jurisdiction can set aside the order of the Dt. Judge suspending a Mohunt on a mere report when there was no suit before him under S. 92. (*Tudball and A. Raoof, JJ.*) MOHUNT DARSHAN DAS *v.* THE COLLECTOR OF MEERUT. 47 I. C. 850 : 16 A. L. J. 742:

——S. 92—*Removal of trustee—Suit under compromise—Trustee appointed — Insolvent declared—Application to remove—If in continuation of suit—Manager of a temple—Remedy for his removal.*

In order to remove a certain trustee of a temple a suit was brought under S. 92 of the Civil Procedure Code. But the case was compromised and a decree was obtained that the same man should be the manager of the temple. Afterwards an application was made to the District Judge stating that the manager should be removed from his office as he was declared insolvent. It was held that the application could not be entertained as it was not in continuation of the suit since the case was already decided and a decree was made accordingly. The remedy for the removal of the manager of a temple from his office lies under section 92 of Civil Procedure Code and no application for the same can be made effectively in the Miscellaneous Department. (*Banerji and Rafique, JJ.*) RAM CHAND *v.* GAYA DIN TEWARI. 30 I C. 482 (1).

——S. 92—*Removal of trustee—Mahomedan waqf—Power of Court to remove mutwalli and appoint a stranger as such.*

In a suit under S. 92, C. P. C., the Dt. Judge removed the sister of the founder from the office of *mutwalli* and no one of the founder's family being available appointed a stranger. *Held*, that the appointment of the plff. as mutwalli was entirely within the discretion of the Dt. Judge as Kazi and in the circumstances of the case, it was not without jurisdiction although the plff. was a stranger. (*Richardson and Shamsul Huda, JJ.*) NARAIN DAS *v.* KAZI ABDUR RAHIM. 24 C. W. N. 690 : 58 I. C. 705 : 47 Cal. 866.

——S. 92—*Removal of trustee—Sanction—Suit by gaddinashin to eject trespasser.*

A suit brought by persons claiming to be the worshippers of a shrine and beneficiaries in the property attached thereto, for the removal of the trustee thereof falls under S. 92 of the Code and,

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if instituted without the consent in writing required by the section, the relief for the removal of the trustee cannot be adjudicated upon. (*Shadi Lal and Chevis, J.*) MD. ABDUL KADIR *v.* HUSSAIN BIBI. **44 I. C. 879 : 11 P. W. R. 1918.**

——S. 92—*Removal of trustee—Stranger as a Receiver.*

In a suit under S. 92 the Court has power to appoint a receiver and take the management of the temple out of the hands of the trustees apointed by the Temple Committee pending the disposal of the suit even though there is no prayer for his removal and though he cannot be removed except on a proper enquiry. (*Oldfield and Ramesam, JJ*). C. KUPPUSWAMI MUDALIAR *v* Y. SUBRAMANIAM CHETTIAR. **16 L. W. 927 : (1923) M. W. N. 75 : 68 I. C. 565 : 41 M L J. 545: 1923 Mad. 284.**

——S. 92—*Removal of trustee—Failure to keep accounts—Doubt as to existence of trust.*

Where there is considerable doubt as to whether there is a trust in respect of certain properties, the omission of the alleged hereditary trustees to maintain proper accounts without any wilful default on their part is no ground for their removal. (1918) M. W. N. 786 foll. 16 L. W. 247 dist. (*Spencer and Devadoss, JJ.*) JAKKAM REDDI SESHADRI REDDI *v.* SIR S. SUBRAMANIA IYER, K. C. D. E. **16 L. W. 839 : 74 I. C. 35 : 32 M. L. T. 89 : 1923 M. 163.**

——S. 92—*Removal of trustee—Grounds—for—Archaka and trustee same individual--Committee of supervision.*

The mere fact that the hereditary trustees of a temple are also its *archakas* is no ground for their removal though it is not desirable that the two offices should be combined in the same individuals. It is possible to appoint a committee or some other authority to supervise their management. Where the hereditary archaka trustees of a Hindu Temple have long been acting *bona fide* in the belief that they were the owners of certain lands subject to the performance of services to the deity and have been appropriating the surplus income of the lands, they are not liable to removal. (*Abdur Rahim and Moore, JJ*) MUTTEYI SRINIVASACHARYULU *v.* DINAVATI PRATYANGA RAO **64 I. C. 816 : 30 M. L. T. 101 (H. C).**

——S. 92—*Removal of trustee—Temple Committee—Appointment of fresh trustee—Suit by other trustee against appointee for injunction—Suit without sanction under S. 92 or S. 14 of the Rel. End. Act.*

A temple committee appointed a trustee to fill up a vacancy. Two out of three existing trustees sued the members of the Devastanam Committee and the person appointed by them as a third trustee for a declaration that the appointment by the committee was invalid, as having been made under corrupt motives and for an injunction restraining the appointee from interfering with affairs and property of the temple. *Held*, that the suit is not maintainable without sanction under S. 92 C. P. C. Such a suit falls under S. 92 (1) (h) C. P. C. and not within S. 14 of the Rel. End.

C.P. CODE (V OF 1908), S. 92—Removal of Trustee.

Act. 15 C. 329 ; 26 M. 450 Foll. (*Abdur Rahim and Spencer, JJ.*) SUBRAMANIA PILLAI *v.* KRISHNASWAMI SOMOYAJIAR. **42 Mad. 668 : 26 M. L. T. 143 : 53 I. C. 605 : (1919) M. W. N. 522.**

——S. 92—*Removal of trustee—Hereditary trustee—Trustee spending money not required by terms of endowment—Right to reimbursement.*

A hereditary trustee can be removed, if his continuation in office is likely to endanger the interests of the institution. 2 Mad. 197 ref. In cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust. But every mistake or neglect of duty or inaccuracy of conduct of trustees which will not induce Courts of Equity to adopt such a necessary course The acts or omissions must show danger to the trust property or a want of honesty or a want of a proper capacity to execute the duties or a want of reasonable fidelity. The courts must look entirely to the interests of the trust, and where the circumstances show that for the benefit of the institution it is disirable not to allow it to remain under the management of a hereditary trustee, he ought to be removed. Want of capacity to manage the trust properties is a sufficient ground for removal of a trustee. One of the most important duties of a trustee is to keep separate accounts for the trust property and to keep the trust property separate from his own property : and if that is not done and difficulties in taking accounts thereby arise, there is a presumption against the deft. and in favour of the trust. A trustee of a public charity choosing year after year to spend monies not required by the terms of the endowment out of his own pocket cannot be allowed credit for such expenditure. The trustee is bound to carry out the directions of the founder and not to encumber the trust property by systamatically incurring expenditure beyond the limits of the income of the trust property. (*Abdur Rahim and Burn JJ,*) RAJAH OF KALAHASTI *v.* GANAPATHI IYER., **48 I. C. 897 : (1918) M. W. N. 555.**

——S. 92—*Removal of trustee—Appointment of fresh trustee—Sanction necessary.*

A person without instituting a suit under S. 92, C. P. C. (1908) cannot seek to oust from possession persons who claim to hold as trustees. A Court can appoint a *Mutavalli* to fill up a vacancy in the office. (*Oldfield and Tyabji, JJ.*) MAHOMED GHOUSE *v.* MOIDEEN SIDDIKH. **29 I C. 849 : 18 M, L. T. 48.**

——S 92—*Removal of trustee—Hindu widow.*

A Hindu widow holding a hereditary office of trustee of a public charity alienated the office. The next reversioner sued for immediate possession on the ground that the alienation did not determine the estate of the trustee but the illegality was a good ground for removal of the trustee. *Held* S. 92 was no bar to a suit and the next reversioner could have the widow removed from office. (*Wallis, J.*) MULLANGI VENKATRANGAM CHETTY *v.* VENKATASUBBAMMAL, **13 M L. T. 515: 19 I. C. 740 : 25 M. L. J. 373.**

C.P. CODE (V OF 1908), S. 92—Removal of Trustee.

———S. 92—*Removal of trustee, grounds for —De facto trustee—Long management—No misconduct— Scheme— Additional trustee when appointed.*

Where the defendant and his ancestors though not the lawful trustees, had been in office for many years, Courts would not easily disturb the defendant's possession and depose him at the instance of strangers unconnected with the family of former trustees, except on proof of misconduct or for the clear benefit of the trust. Where the association of strangers along with the existing trustee in the management is likely to lead to friction, the existing trustee will be allowed to manage the trust as the sole trustee, subject to exhibiting the accounts for examination of the worshippers. (*Wallis, C.J. and Spencer, J.*) SUBBARAYA CHETTY *v.* SUBRAMANIA AIYAR.

48 I.C. 833 : (1918) M.W.N. 786.

———S. 92—*Removal of trustee—Hereditary trusteeship—Selection from family members, propriety of—Co-trustee when can be appointed.*

In a suit under S. 539, C.P.C. 1882, the Court cannot remove any of the existing trustees. When the office of trustee descends hereditarily, a trustee cannot be appointed from the members of the family by selection. When some members of the family who held the office of trustee were guilty of breach of trust or carelessness. *Held* that it is desirable to associate a respectable resident of the place in the management of the trust. (*Benson and Sundara Aiyar, JJ.*) THANDAPAMENI KRISHNAYYA *v.* REDILIBOTTA SUBBAYA. **11 I.C. 728 : 21 M.L.J. 784.**

———S. 92—*Removal of trustee—Nature of relief.*

When the plaintiffs in a suit for the removal of the trustee are not trustees, they can sue for removal of the trustees without asking for possession themselves. (*Krishnaswami Aiyar and Ayling, JJ.*) GHULAM AHMED *v.* SHAHA MOHOMED ESUF. **(1911) 1 M.W.N. 142 : 9 M.L.T. 301 : 9 I.C. 168 : 21 M.L.J. 450.**

Right to sue.

———S. 92 (1) (e)—*Right to sue—Share in the offerings—Scheme already framed.*

A suit by hereditary *pujari* for a share in the offerings made to a deity, falls under S. 92 1 (*e*); but where a scheme has already been framed in respect of the property, the suit is not maintainable and the right procedure is to apply to the Court forming the scheme to give directions to the application of the fund. (*Shah and Crump, JJ.*) SAKHARAM DAJI *v.* GANU RAGHU.

45 Bom 683 : 60 I C. 924 : 23 Bom. L. R. 125.

———S. 92—*Right to sue not barred by a decree under Religious Endowments Act.*

A decree obtained in a suit under S. 5 of the Religious Endowments Act does not bar a suit under S. 92 of the Code. (*Mookerjea and Buckland, JJ.*) SAHAYRAM *v.* KHAGENDRA.

63 I. C. 418.

———S. 92—*Right to sue— Heirs of founder —Right to sue for removal of trustee and proper management—Removal of trustee.*

C P. CODE (V OF 1908), S. 92—Right to sue.

In certain events, for instance, where the line originally indicated by the founder of trust fails, the founder or his heir has the right to nominate the shebait and this principle is applicable equally to private and public trusts. 11 C.L.J. 2, ref. The founder or his heirs may sue for the enforcement of the trust, for removal of the old trustee, for the appointment of a new one and may thereby secure the proper administration of the trust and its properties. Whatever restrictions may have been prescribed by the legislature as to the mode of institution of such suits in respect of public trusts, the right of the founder of a private trust or of his heirs remains unimpaired, 10 W. R. 458 Ref. The question whether there are sufficient grounds for the removal of a shebait is within the judicial discretion of the court and the court will be guided by consideration of the welfare of the trust. (*Mookerjee and Panton, JJ.*) MANOHAR MUKHERJEE *v.* PEARY MOHAN MOOKERJEE. **54 I.C. 6 : 30 C.L.J. 177 : 24 C. W. N. 478.**

———S. 92—*Right to sue—Public trust.*

A suit relating to a public trust is not maintainable without the Advocate-General's permission unless the plaintiff has special claim or interest. (*Fletcher and Teunon, JJ.*) GIR PROSONNA ROY *v.* BECHARAM PATRA. **35 I.C. 846.**

———S. 92—*Right to sue—Members of caste—"Interest"—Meaning of.*

It is impossible to define with any degree of accuracy what exactly constitutes an interest as contemplated in S. 92 of the Civil Procedure Code. It need not be a direct interest in the sense that only a beneficiary can institute a suit but it must be a real substantial and existing interest. Where a trust provided for the maintenance of the widow and orphans of a certain caste and dedicated a building for the use of pilgrims as a *Dharam Sala*. *Held* a suit by some members of the caste living in the *Mohalla* in which the institution was situate could maintain a suit. (*Broadway and Harrison, JJ.*) MURLIDHAR *v.* SULTAN SINGH. **73 I.C. 302 : 1923 Lah. 518.**

———S. 92—*Right to sue— 'Interest'—Meaning of.*

The fact that the plaintiffs belong to the family of the founder and are entitled to succeed to the properties thereof under certain contingencies would naturally give them an 'interest' so as to enable them to bring a suit under S. 92 of the Code. 42 M. 360, Dist. (*Abdur Rahim and Burn, JJ.*) VAITHYANATHA AIYAR *v.* TYAGARAJA AIYAR. **68 I.C. 631 : 41 M.L.J. 20.**

———S. 92—*Right to sue—Person interested.*

The interest required under S. 92 to enable plaintiffs to sue is something substantial. In respect of a chatram charity, a person living in the neighbourhood of the institution and being a member of the Brahmin community and as such entitled to make use of the charity was held to possess a substantial interest. (*Sadasiva Aiyar and Spencer, JJ.*) GOPALA KRISHNIER *v.* GANAPATHYA AIYAR **(1920) M. W. N. 478 : 58 I.C. 124 : 12 L.W. 772.**

C. P. CODE (V OF 1908), S.92—Right to sue.

——S. 92—*Right to sue— Bad for want of requisite interest on the part of one of the pl/fs. —Subsequent addition of other persons having requisite interest.*

In a suit under S. 92, C.P.C. one of the plaintiffs was found to have no interest as is required by the section and thereupon two other men who had the requisite interest applied to the Collector and obtained sanction to institute the same suit and were than added as third and fourth plaintiffs. *Held* the suit was not liable to be dismissed on the ground that it was bad as laid. (*Abdur Rahim and Phillips, JJ.*) JANKKAM REDDI SESHADRI REDDI *v.* SUBRAMANIA IYER. **43 Mad. 720 : (1920) M.W.N. 337 : 38 M.L.J. 504 : 56 I.C. 450 : 11 L.W. 536.**

——S. 92— *Right to sue— Interest—Hindu temple—Rel. End. Act*, S. 14.

Per Oldfield and Coutts Trotter, JJ, (*Abdur Rahim, J. Contra.*) The mere right to worship in a temple is not such an interest as is sufficient to enable the plaintiffs to sue for a scheme under S. 92, C.P.C. The interest of the relator must be a clear or a present and substantial interest and not a remote, fictitious or purely illusory interest; it must be an existing interest and not a mere contingency. The question is one of fact. (*Abdur Rahim, Oldfield and Coutts Trotter, JJ.*) RAMACHANDRA IYER *v.* PARMESWARA MENBU.
42 Mad. 360 : 36 M L.J. 396 : 25 M.L.T. 304 : 9 L.W. 492 : 50 I.C. 693 : (1919) M.W.N. 370.

——S. 92—*Right to sue—Persons having interest—Trustee—Liability to account—Limit to.*

Residents of the locality in which a choultry is situated and members of the community for whose benefit the choultry was founded have a sufficient "interest" therein within S. 92 of the C. P. C. to institute a suit. The Court held the defendants liable only for the collections made during 12 years prior to suit though mismanagement related to a much longer period. (*Wallis, C.J. and Seshagiri Aiyar, J.*) GARUDA SANYASAYYA *v.* NERELLA MUTHEMMA.
35 M.L.J. 661 : 9 L.W. 1 : 48 I C. 740 : 25 M.L.T. 86,

——S. 92—*Right to sue—Church.*

A member of a church need not sue by virtue of an office. (1874, 6 P.C. 157 foll.) (*Sadasiva Iyer and Napier, JJ.*) KATTALAI MICHEL PILLAI *v.* J. M. BARTHE.
39 Mad. 1056 : 19 M. L. T. 249: 34 I.C. 557 : 30 M.L.J. 423 : 3 L.W. 348 : (1916) 1 M.W.N. 307.

——S. 92—*Right to sue—Suit by disciples of mutt for setting aside compromise—No sanction.*

A suit by the disciples of a mutt under O. 1, R. 10, C. P. C. to set aside a compromise decree entered into by the Head of the mutt or an alienation by him for purposes not binding on the mutt, can be maintained. Sanction under S. 92, C. P. C. is not necessary for the purpose. (*Wallis, C. J. and Hannay, J.*) ARUNACHELAM CHETTIAR *v.* VILLAPS. **28 M. L. J. 410: 28 I. C. 337 : 18 M. L. T. 135.**

C. P. CODE (V OF 1908), S. 92—Sanction.

——S. 92—*Right to sue—Private right.*

The section protects the right of the public and does not take away private rights; it should not be used to deprive individuals, whose rights have been infringed, of their remedy. (*Wallis, C. J.*) MULLANGI VENKATARANGAM CHETTY *v.* VENKATASUBBAMMAL. **13 M. L. T. 515 : 19 I. C. 740 : 25 M. L. J. 373.**

——S. 92—*Right to sue—Trustee next in succession—Applicability of.*

For a suit by a person having a special right such as one next entitled to be trustee, no sanction under the section is necessary. (*Benson and Sundara Ayyar, JJ.*) SAVALA CUNNIAH CHETTY *v.* THERUVENGADA RAMANUJA CHARIAR.
24 M. L. J. 48: 18 I.C. 622 (1913) M. W. N. 368 :
[This is not the Law under S. 92, C. P. C., Ed.]

——S. 92 and O. 33, R. 1—*Right to sue*—Forma pauperis—*'Persons interested'—Meaning of*—Poojari *of temple.*

A suit under S. 92, C. P. C. cannot be instituted in *Forma Pauperis.* The sanction granted by the Legal Remembrancer to institute such a suit cannot be a good permission until, at the time of granting it, the fact that the plffs. were paupers had been brought to his notice. A person has an interest in the trust within S. 92 if he has an interest in its due and proper administration. A person who is merely benefited or claims a benefit by some act on the part of the trustee which is not shown to be in accordance with the purposes of the trust is not a person having an interest. A *poojari* of a temple can fairly be presumed to have an interest in the trust within the meaning of S. 92 of the Code. (*Figgott, J. C. and Rafique, A. J. C.*) SARABJIT BHARTHI *v.* LAGAN DEI. **14 I. C. 731 : 15 O. C. 202.**

——S. 92—*Right to sue—Worshipper in Hindu temple.*

A Hindu entitled to worship in a temple has an "interest" in it; the section does not require a "direct" interest. (*Hayward, A. J. C.*) OSERI *v.* BAVA BALMUKANDASS. **24 I.C. 712 : 7 S. L. R. 129.**

Sanction.

——S. 92—*Sanction—Sanction granted for one kind of suit.*

A sanction granted for a suit under S. 92 means any suit which may be raised under that section and it is not confined to one of the species of suits that could be raised on the application. (*Lord Dunedin.*) RAJA ANAND RAO *v.* RAMDASS DADURAM. **48 Cal. 493 : 13 L. W. 318: (1921) M. W. N 24: 17 N. L. R. 37: 25 C. W. N. 794: 62 I. C. 737 : 30 M. L. T. 194 : 48 I. A. 12 (P. C.).**

——S. 92—*Sanction obtained for some reliefs —Other Reliefs joined.*

Where plaintiff's suit asks for some reliefs sanctioned by Collector and others not so sanctioned, the whole suit should not be dismissed. It must be tried so far as the relief sanctioned by the Collector is concerned. (*Macleod, C. J. and Crump, J.*) SAKHARAM BALWANT *v.* LAXMAN TRIMBAK. **1923 Bom. 428.**

——Ss. 92 and 93—*Sanction—Conditional consent.*

C. P. CODE (V OF 1908), S. 92—Sanction.

A conditional consent given by the Collector, on an application under S. 92 (read with S. 93, C. P. C. is no consent at all, the consent having been given subject to the condition that the Court thought that S. 92 applied to the case. The provisions of S. 92, C. P. C. are imperative. (*Scott, C. J. and Batchelor, J.*) SULEMAN *v.* SHAIK ISMAIL. **39 Bom. 580: 30 I. C. 17: 17 Bom. L. R. 625.**

———**Ss. 92 and 93**—*Sanction—Collector—Delegation of functions.*

The duties imposed upon a Collector by Govt. Resolution under S. 93 of the C. P C are of a very special nature, and cannot be discharged by his subordinates. (*Scott and Batchelor, JJ.*) SOMCHAND BHIKABAI *v.* CHAGGAN LAL. **35 Bom. 243: 10 I. C. 803: 13 Bom. L. R. 207.**

———**S. 92**—*"Sanction"—Form of.*

The plaintiffs who are seeking to obtain the Court's assistance to enforce the management of the trust property are not to be defeated because the collector elected to name only one of the petitioners and to refer to the others merely as the other applicants. (*Batchelor and Rao, JJ.*) JAFARKHAN *v.* DAUDSHAH. **9 I.C. 358: 13 Bom. L. R. 49.**

———**S. 92, O. 1, R. 8**—*Sanction—Public pathway—Suit for declaration and injunction.*

The suit for declaration and injunction of path way is one to which O. 1, R. 8 is appropriate if the court's permission is taken, the recourse to the Advocate-General being unnecessary. (*Pantan. J.*) HARISHCHANDRA SAHA *v.* PARAN NATH CHAKRAVARTY. **69 I. C. 910: 26 C. W. N. 587.**

———**S. 92**—*Sanction—Validity of—Failure to consider whether the party suing has any interest in the trust.*

The failure of the Collector before granting sanction, to consider whether the trust is a public trust, whether there are grounds for holding that there was a breach and whether the persons suing have any interest in the trust, does not invalidate a sanction granted by him. (*Shadi Lal, C.J. and Wilberforce, J.*) MUHAMMAD SHAFI *v.* ABDUL RAHIM. **60 I. C. 570.**

———**S. 92**—*Sanction—Necessity for.*

Where the object of suit is to secure certain advantages to a trust, any two persons can sue in that behalf with the sanction of the Advocate-General or the Collector of the Dt. concerned, (*Seshagiri Aiyar, J.*) KADIRVELU CHETTY *v.* NANJUNDAIYAR. **35 I. C. 88 : 3 L. W. 512.**

———**S. 92**—*Sanction—Suit against co-trustee for joint possession, scheme and accounts—Sanction not necessary.*

No sanction is required for a plaintiff suing as a trustee for obtaining a decree for an account against his co-trustees. (*Ayling, Oldfield, Kumaraswami Sastri, Ramesam and Odgers, JJ.*) APPANNA PORICHA *v.* NARASINGHA PORICHA. **15 L. W. 18: 30 M. L. T. 1 : 45 M. 113 : 41 M. L J. 608 : 69 I. C. 304 : (1921) M. W. N. 833 : (1922) Mad. 17 (F.B.).**

———**S. 92**—*Sanction—Suit by trustee against co-trustee for accounts.*

C. P. CODE (V OF 1908), S. 92—Sanction.

A suit by a trustee against his co-trustee for accounts of management is a suit coming within S. 92, C. P C. and sanction of the Advocate-General is necessary for the suit. (*Sadasiva Aiyar and Coutts Trotter, JJ.*) GOVINDASAMI KADAVAKAN *v.* KALIAPERUMAL. **(1922) M. W. N. 83: 66 I. C. 837 : 16 L. W. 155.**

———**S. 92**—*Sanction—Granted to more than two—All must join.*

Where a sanction under S. 92 is granted to more than two persons interested in the trust, all must join in the suit, and not any two of them. (*Wallis, C.J. and Seshagiri Aiyar, J.*) MADDALA BAGAWAN NARAYANA *v.* VADAPALLI PERUMALLACHARYALU. **31 I. C. 236 : 29 M. L. J. 231.**

———**S. 92**—*Sanction—Appointment of new trustee.*

A suit for appointment of new trustee requires sanction under S. 92, C.P.C. (S. 539 of old Code). (*Krsihnaswamy Iyer and Ayling, JJ.*) GHULAM AHMED *v.* SHAHA MOHAMMED USUFF. **(1911) 1 M.W.N. 142: 9 M. L. T. 301 : 9 I. C. 168 : 21 M.L.J. 450.**

———**S. 92**—*Sanction—Suit by one trustee against another for accounts.*

A suit by a trustee or trustees of a public charitable or religious trust against a co-trustee for accounts and for delivery of account books and other papers does not fall within section 92 of the Code of Civil Procedure and may be brought without the sanction of the Advocate-General. 40 B. 539 Foll. 45 M, 113 and 22 B. 496 Ref, (*Kotwal and Prideaux, A.J.C.*) AYUB, KAREEM *v.* JAFFAR, AYUB. **6 N.L.J. 209: 74 I.C. 45: 1923 Nag. 298.**

———**S. 92**—*Sanction to file suit against some defendants not obtained.*

A suit under S, 92 for declaration and injunction and settlement of a scheme in relation to certain immoveable property, which was alleged to be *wakf* and dedicated to the Imams of islam, was filed with the previous sanction of the Collector of Karachi, in the names of two persons as plaintiffs against J and A sons of M who are referred to as his heirs and legal representatives. By their written statement defendants alleged that the property in question originally belonged to M and that on his death it became the absolute property not only of his sons, the two defendants, but of his other heirs, who were not specifically named in the written statement but their names were supplied later to the plaintiff's pleader who consented to their being brought on the record as co-defendants and applied for amendment of his plaint which was granted. Beyond this, the plaint underwent no alteration in any shape or form. The sanction of the Collector was however not obtained prior to the application for this amendment. Summonses were issued to the newly added defendants who appeared and adopted the same written statement as filed by the original defendants. When the suit came on for hearing the defendants contended as a preliminary point, that as the sanction of the Collector had not been obtained prior to the amendment of the plaint by the addition of the eight defendants referred to above the suit should stand dismissed, as not being a suit sanctioned by the Collector.

C. P. CODE (V OF 1908), S. 92—Sanction.

Held, that the original sanction given by the Collector to the institution of the suit substantially authorised the plaintiffs to sue for a declaration that certain immoveable property was *Wakf* and for an injunction against all that claimed an interest therein, and the mere absence of names of some of those interested in the property does not invalidate the sanction already granted or necessitate a fresh sanction before the interested parties could be brought on the record. 36 Bom. 168 Dist. (*Raymond, A. J. C.*) SAYED BACHAL SHAH *v.* JUMA SHAH.

16 S. L. R. 221 : 1923 S. 35.

———S. 92—*Sanction—Consent of Collector in Sind—Whether sufficient.*

The consent of the Collector in Sind is enough, and that of the Advocate-General of Bombay is unnecessary, in order to institute a suit under the section. (*Hayward, A. J. C.*) OSERI *v.* BAVA BALMUKANDASS.

24 I. C. 712 : 7 S. L. R. 129.

Scheme.

———S. 92—*Scheme—Object of—Mahomedan mosque—Management—Scheme—Guiding principles—Intention of founder — Usage — Power of Court—C. P. C.* (1882), *S.* 539.

The object of the enquiry in a suit under S. 539 of the C. P. C. (1882) (S. 92, C. P. C.) is not to determine the conflicting rights of private individuals but to devise the best method for fully and effectually carrying out the purposes for which the trust was created.

In settling a scheme of management for a Mahomedan mosque, the court has a wide discretion ; the wishes of the founder regarding the management if conformable to the changed conditions and circumstances of the present day as well as the past history of the institution, might be taken into consideration ; but the primary duty of the Court is to consider the general interests of the body of the public for whose benefit the trust is created and the Court might vary any rule of management which it finds to be impracticable or unsuited to the best interests of the institution.

In view of the mischief of leaving the power of appointing or electing new trustees in the hands of an indeterminate and necessarily fluctuating body of people, such as the inhabitants of a locality, the Judicial Committee directed the appointment of future trustees to be made by a Committee formed out of the worshippers on a representative basis. (*Mr. Ameer Ali.*) MAHOMED ISMAIL ARIFF *v.* AHMED MOOLA DAWOOD.

43 Cal. 1085 . 14 A. L. J. 741 :
(1916) 1. M. W. N. 460 : 20 C. W. N. 1118 :
20 M. L. T. 110 : 18 Bom. L. R. 611 :
31 M. L. J. 290 : 24 C L. J. 198 :
43 I. A. 127 : 4 L. W. 269 :
8 L. B. R. 517 :
35 I. C. 30 : 9 Bur. L. T. 141 : (P. C.)
[On appeal from 5 Bur. L T. 221 :
18 I. C. 105.]

———S. 92—*Scheme—Discretion—Exercise of—Costs.*

The High Court has a large discretion in the matter of sanctioning a scheme for the management of a temple and of its funds. Unless it can be shown that that discretion has been improperly exercised or that the High Court had failed to give due consideration to matters which they should have taken into consideration, its decision ought not to be interfered with. Costs of all the parties were ordered to come out of the temple funds, the trustee paying them in the first instance and then recouping himself from the funds. (*Lord Macnaughten.*) SEVAK KIRPA SHANKAR DAJI *v.* GOPAL RAO MANOHAR TAMBEKAR

12 M. L. T. 448 : (1912) M. W. N. 1106 :
16 C. L. J. 640 : 15 Bom. L. R. 13 :
17 I. C. 441 : 24 M. L. J. 199 (P. C.).

C. P. CODE (V OF 1908), S. 92—Scheme.

———S. 92—*Scheme—New trustees—Power to appoint.*

Even when a will directs that members of the testator's family are to be appointed members of the committee if suitable persons are not available, the court has power to appoint strangers. (*Rafique and Piggott, JJ.*) JAI NARAYAN *v.* BANKEY LAL.

58 I C. 566 :
17 A. L. J. 957.

———S. 92—*Scheme—Right of management—Suit for partition whether maintainable.*

A suit for the partition of the right of management and superintendence in respect of property of a temple is not maintainable. 19 A. 428 ; 27 M. 192 : 29 M. 283 (P. C.) foll. (*Piggott and Walsh, JJ.*) PURAN MAL *v.* BRIJ LAL.

39 All. 651 : 41 I. C. 835 :
15 A. L. J. 666.

———S. 92—*Scheme—Management of the trust—Discretion of Court.*

In a suit under S. 92, C. P. C. the Court has complete discretion in arranging for the management of the trust although it must take into consideration such matters as the wishes of the founder, the past history of and the custom of the institution and the way in which the management was carried on before. (*Piggott and Walsh, JJ.*) DHARAM DASS *v.* SADHO PRAKASH.

40 I. C. 177.

——— Ss. 92 and 93—*Scheme—Administration of trust.*

Where the trustees named by a testator for making and completing the trust at the point of time fixed by him, have died and the object of the trust as named by him is specific and definite, the Court will administer the trust. (1903) 1 Ch. 831· 16 B. 626, foll. S. 539 does not apply to a suit to eject a trespasser from property under a public religious trust. 8 B. 365 : 15 B. 148: 24 B. 170, rel. (*Chandavarkar and Hayward, JJ.*) CHELLABAI *v.* UDERAM.

36 Bom. 29 :
12 I. C. 577 : 13 Bom. L. R. 989.

———S. 92—*Scheme—Alteration of—Power of Court.*

Where a court has sanctioned a scheme for the administration of a religious or charitable trust the Court can vary the scheme from time to time according to the exigencies of the case. A clause in a decree settling a scheme giving liberty to the persons interested to apply from time to time for modification of the scheme if necessary does not entitle the Court to vary the rules of succession to the office of high priest which had been

C. P. CODE (V OF 1908), S. 92—Scheme.

determined in the suit according to ancient usage and custom. A variation in this respect cannot be said to be a modification within the meaning of that clause. (*Mookerjee and Rankin, JJ.*) MANADANANDA JHA *v.* TARAKANANDA JHA.

37 C. L. J. 281 : 76 I. C. 220 : 1924 Cal. 330.

——S. 92—*Scheme—Alteration in—Application—Fresh suit—Procedure.*

A Court which has sanctioned a scheme for the administration of a charitable trust is competent from time to time to vary the scheme if the exigencies of the case require on an application, without the necessity of a fresh suit, 28 M. 319 and 30 M. 138, ref. (*Mookerjee and Beachcroft, JJ.*) SADUPHADYA OMESHANAND OJA *v.* RAVANESHWAR PRASAD SINGH.

43 I. C. 772.

——S. 92—*Scheme—Private right—Infringement of—Preferential claim of descendants of founder overlooked—Claimant not made a party to scheme suit—Right of claimant—Fresh scheme suit.*

A suit under S. 92 was instituted by persons claiming to be interested in the due administration of the trust and the defendants in that suit admitted that the trust was a public one. The plaintiff the sole surviving descendant of the founder of the trust on the death of *mutwalli* of *wakf* without appointing a successor applied to be made a party to the scheme suit alleging that *wakf* was a private trust, but her application was disallowed and the District Court appointed the defendant as *mutwalli* of the *wakf*. *Held*, that in the suit as framed plaintiff could not be appointed *mutwalli* and the proper remedy of the plaintiff was to bring a scheme suit under S. 92 and to get her preferential claims to mutwalli-ship recognized. (*Mookerjee and Richardson, JJ.*) ATIMANNESSA BIBI *v.* ABDUL SOBAN.

43 Cal. 467 : 20 C. W. N. 113 : 32 I. C. 21 : 22 C. L. J. 577.

——S. 92—*Scheme—Modification of—Powers of Court.*

In a scheme for the administration of a public charity framed by the Dt. Court and confirmed by the High Court an application for modification of the scheme can be entertained only by the High Court but the Dt. Court can give necessary directions to carry out the modified scheme. Where the income of a public endowment is of an uncertain and variable character, audits should be fairly frequent and searching. No one, having any pecuniary interest in the endowment or who is a creditor of the endowment should be on the Committee of management of the endowment. (*Mookerjee and Holmwood, JJ.*) UMESHANANDA DUT JHA *v.* RAVANESHWAR PRASAD SINGH.

17 C. W. N. 841 : 17. I. C. 969 : 16 C. L. J. 431.

——S. 92—*Scheme—Kattalais—Management—Right to frame a scheme.*

A scheme should be framed where there has been gross mismanagement of the affairs of the temple and some scheme for the co-ordination of the various Kattalais and for some control over the various Kattalais in so far as it may ensure

C. P. CODE (V OF 1908), S. 92—Scheme.

the harmonious working of the Kattalais, wherever they have to co-operate, is necessary. It cannot be said that the income of the various Kattalais belonging to a temple could be mixed up and utilised for all the purposes of the temple indiscriminately. These trusts are somewhat analogous to temple service inams, just as the latter are different from inam properties belonging to a temple, being granted to office holders on condition of rendering services in a temple and do not belong to the idol, though the idol may be interested in the rendering of the services. Similarly the incomes of the Kattalais do not belong to the idol though the idol is interested in the proper performance of the distinct duties attached to each Kattalai. A Kattalai is a distinct endowment "under a separate trustee to which specific items of expenditure are assigned as legitimate charges to be paid therefrom." Where there are numerous Kattalais a scheme has to be framed which will ensure the harmonious working of the Kattalais, when they have to co-operate in the Pagoda Service, and prevent the embezzlement of the funds of the Kattalai or their diversion by the trustees contracting debts. It is very necessary that the scheme should contain stringent prohibitions against the borrowing or lending of money by the trustees from or to the trust funds, or from one Kattalai to another Kattalai. The preparation of a budget, the proper keeping of accounts in which the income and expenditure of the Kattalais may be separately shown and the periodical audit of those accounts are matters most essentially to be provided for in the regulations in order to fix the trustees with responsibility for the due performance of their trusts and to avoid waste and indebtedness. The need for supervision and co-ordination by a controlling and inspecting body is also apparent. (*Spencer and Ramesam, JJ.*) MANIKKAVACHKA DESIKA GNANA SAMBANDA PANDARA SANNADI *v.* VAITHI LINGA MUDALIAR.

18 L. W. 247 : 74 I. C. 115 : 1924 M. 168.

——S. 92—*Scheme—Successive suits—Maintainability of—Application for amendment of scheme.*

When a scheme drawn up by a Court contains a provision permitting parties or persons interested in the religious institution to apply to the Court for directions and for modifications to be made in the scheme already existing ; the proper remedy for defects discovered in the original scheme is to apply by petition to the court that framed the scheme and not to file a regular suit. *Quaere* Whether Courts have inherent powers to alter schemes without a fresh suit being brought for the purpose when there is no provision for alteration in the scheme? 24 B. 45; 43 I.C. 772 Ref.

The mere fact that in a prior suit a prayer for the settlement of a scheme was not granted will not prevent a renewed attempt being made by a suit to have a scheme framed when the occasion arises at a later date. 36 M. 364 : 37 C. 870 Ref. (*Spencer and Krishnan, JJ.*) GOVINDASAMI NAIDU *v.* UCHAPPA GOUNDAN. (1922) M. W. N. 477 : 70 I. C. 579 : 1922 Mad. 413.

C. P. CODE (V OF 1908), S. 92—Scheme.

———S. 92—*Scheme—No limitation.*

Where a suit is brought by plffs. not in assertion of their individual rights but on behalf of the general public who are interested in the institution for the settlement of a proper scheme of management of the charities and for other relief there is no bar of limitation. (*Spencer and Devadoss, JJ.*) GOPU NATARAJA CHETTY *v.* RAJAMMAL. 43 M. L. J. 448 : (1922) M. W. N. 464 : 31 M. L. T. 125 (H. C.) : 16 L. W. 122 : 69 I. C. 15 : 1922 Mad. 394.

———S. 92—*Scheme — Selection of trustees —Appointment from plff.'s community on the ground that the trust had largely benefited by its endowment.*

In a suit for the framing of a scheme of management for a temple the plff.'s community had at great cost made large additions to the temple. The lower Court by the scheme provided for two members of the community being additional trustees. The scheme also provided for additional trustees being appointed from the residents of the village. *Held*, that there was nothing improper in the appointment of the additional trustees. (*Abdur Rahim, O. C. J. and Moore, J.*) ANNASWAMI AYYANGAR *v.* NARAYANAN CHETTIAR. 54 I. C. 263 : 10 L. W. 494.

———S. 92—*Scheme* — Cypres *application* — *Power of Court to direct.*

It is competent to the Court in framing a scheme for a Hindu religious or charitable endowment to sanction a *cypres* application of the funds of the endowment if the objects of the trust are not suited to modern conditions and if there is a general charitable intention in the terms of the endowment. The trustee himself cannot apply the income *cypres* without the sanction of the Court. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) MUTHUKRISHNA NAICKEN *v.* RAMACHANDRA NAICKEN. 47 I. C. 611 : 37 M. L J. 489.

———S. 92—*Scheme — Alteration of — Procedure.*

Alterations in a scheme of management provided by the consent of all the persons interested in the endowment can be made only by a suit filed under S. 92 of the C. P. C. Where the scheme is the result of an award it cannot be altered by the consent of the parties. (*Wallis, C. J. Sadasiva Aiyar and Spencer, JJ.*) YEGNARAMA DIKSHIDAR *v.* GOPALA PATTAR. 8 L. W. 357 : 47 I.C. 548 : (1918) M. W. N. 595.

———S. 92—*Scheme—Points to be ascertained.*

A scheme which does not ascertain the income of the properties of the trust the expenses and the remuneration of the person in charge thereof is an unsatisfactory scheme. (*Abdur Rahim and Srinivasa Iyengar, JJ.*) DOST MUHOMMAD KHAN *v.* NAZIR ALI SAHIB. 42 I. C. 474 : 6 L. W. 134.

———Ss. 92 and 47—*Scheme—Construction of.*

A clause in a scheme provided for an appeal from an order removing or appointing a trustee. *Held*, the clause will not apply to an order declining to remove a trustee. (*Oldfield and Krishnan, JJ.*) LOKASHIKHAMANI MUDALIAR *v.* THIAGAROYA CHETTIAR. 5 L. W. 596 : 38 I. C. 415 : (1917) M. W. N. 420.

———S. 92—*Scheme—Court's powers.*

Per *Seshagiri Iyer, J* : Court's jurisdiction to frame a scheme under S. 92, C. P. C. is not excluded by the fact that the temple for which the scheme is to be framed is one subject to a Temple Committee but in framing the scheme the Court should not unduly interfere with the power entrusted by the statute to the Committee, *e. g.*, by appointing a Board of Control between the trustees and the Temple Committee. (*Wallis, C. J. and Sehagiri Aiyar, J.*) SITHARAMA CHETTY *v.* SIR S. SUBRAMANI AIYAR. 39 Mad. 700 : 30 M. L. J. 29 : 19 M. L. T. 25 : 32 I. C. 211 : 3 L. W. 43.

———S. 92 — *Scheme — Directions for the performance of a festival.*

When a decree directs a trustee of a Hindu temple to perform festival, a court has no jurisdiction to give certain directions for the same. (*Oldfield and Sadasiva Iyer, JJ.*) KRISHNA IYENGAR *v.* VIRARAGHAVA THATHACHARIAR. 30 I. C. 771 : 2 L. W. 607.

———S. 92—*Scheme — Hereditary trustee — Appointment of treasurer—Necessity for.*

To deprive a hereditary trustee of the possession of the funds is a strong step for the Courts to take. If, however, a Court is satisfied that it is necessary in the interest of the institution to deprive him even of this power and to appoint a treasurer who should, in supersession of the *Dharmakartha* handle the monies allocated for the expenses, the scheme may be modified in that respect. Where an application to modify scheme settled for the administration of a public trust, is based not on the ground that the scheme is really defective but is made for the purpose of giving the worshippers a larger share in the management of the trust, and where the scheme itself is proper, though badly worked, the Court will refuse to modify the scheme. Allegations of malversation on the part of the trustees afford no ground for a modification of the scheme though they may sustain a suit for their removal from office. (*Sadasiva Iyer and Napier, JJ.*) NAMBHURI VENKATARAMA CHETTI *v.* VEMUR THIRUVENGADATHAN CHETTY. 28 I.C. 479.

———S. 92—*Scheme—Grounds for—When can be claimed.*

The relief by way of settlement of a scheme need not depend upon charges against the trustees in office. It is sufficient if mis-management is averred and that a large surplus is left after meeting the expenditure to seek the aid of the Court to frame a proper scheme to render the recurrence of the state of affairs impracticable. (*Spencer and Seshagiri, Aiyar, JJ.*) SIVAGNANA *v.* ADVOCATE GENERAL OF MADRAS. 28 M. L. J. 174 : 2 L. W. 148 : 27 I. C. 874 : (1915) M. W. N. 185.

———S. 92—*Scheme—Existing rights—Hereditary rights—Additional trustees.*

C. P. CODE (V OF 1908), S. 92—Scheme.

A Court in framing a scheme regarding a temple is bound to have regard to the existing rights of individuals to the trusteeship of the temple. 28 M. 319. 21 M. L. J. 784 : 19 M. L. J. 772 : 21 B. 556, rel. on. Courts are averse to the creation of a hereditary right to the office of a public trustee.

Obiter :—Indian Courts have the same powers as the Courts of Chancery in England to appoint additional trustees even where there are hereditary trustees. It is desirable to provide some authority to supervise the administration by the trustees ; where there are several trustees all of them should not participate in every detail of the administration but while all should take part in important acts, one should be made responsible for all routine business. (*Abdur Rahim and Sundara Iyer, JJ.*) VEERARAGHAVA THATHA CHARIAR *v.* SRINIVASA THATHACHARIAR.

23 M. L. J. 134 : 16 I. C. 225 : 12 M. L. T. 269.

——— **S. 92**—*Scheme—Effect of--Private rights lost--Alteration of scheme.*

Only on substantial grounds can a Court alter a scheme once settled by Court in respect of a public trust ; therefore, a scheme framed by a court under S. 92 bars a subsequent suit by a trustee not a party to the scheme suit, to establish his private rights to trust, which if established, would interfere with a charitable scheme made by Court. The erroneous order of court refusing to add him a party to the previous scheme suit cannot give the private individual a right to sue which he otherwise would not have had. He must institute a fresh scheme suit under S. 92, C. P. C. (*White, C. J. and Phillips, J.*) RAMDAS *v.* HANUMANTHA ROW.

36 Mad. 364 : 21 M. L. J, 952 : 10 M. L. T. 356 : 12 I. C. 449 : (1911) 2 M. W. N. 387.

——— **S. 92**—*Scheme—When framed.*

Even apart from any question of mismanagment and mis-appropriation, a Court can settle a scheme if it can conduce to the better management of the trust property. (*Stuart and Kanhiaya Lal, A. J. Cs.*) LAKSHMI KUNWAR *v.* MURAIR KUNWAR. **45 I. C. 213 : 5 O. L. J. 97.**

——— **S. 92**—*Scheme—Framing of—Powers of Court—Necessity for scheme—Arrangements made by the founder—Decree—Form of.*

There is no warrant for the proposition that the Court in framing a scheme under S. 92, C. P. C., had no power to depart from the arrangement contemplated by the author of the trust. The institution of a suit under S. 92, C. P. C attracts the jurisdiction of the Court and the Court has complete power to make such appointment as it considers proper in the circumstances, even though such appointment may involve a departure from the arrangement contemplated by the author or the original constitution of the trust. There is no legal restriction in the power of the Court ; but, although there is no restriction the Court ought not to depart from the arrangement contemplated by the settlor except for a very strong reason. The mere fact that the trust deed does not contemplate a scheme does not mean that a scheme should not be framed in the case

C. P. CODE (V OF 1908), S. 92—Scope of.

if the Court thinks that one is necessary. In a suit for the administration of a public trust it is necessary that the decree should give liberty to the parties to apply. The effect of making such a provision is that the suit is kept alive and it is possible for the parties to take the direction of the Court from time to time and so often as may be necessary. (*Das and Bucknill, JJ.*) MAHOMED WAHEB HUSSAIN *v.* ABBAS HUSSAIN.

4 Pat. L.T. 326 : 71 I.C. 280 : 1923 P. 420.

——— **S. 92**—*Scheme suit—Majority of worshippers of certain denomination—Number of trustees.*

Where it was found in a scheme suit that the majority of worshippers were of a certain denomination, it is fair that a majority of the trustees also are from that denomination. (*Robertson, C. J. and Lentaigne, J.*) FAZAL RAHMAN *v.* GULAM HOSSAIN ACHA. **2 Bur. L. J. 208 : 76 I. C. 788 : 1924 R. 134.**

——— **Ss. 92 and 93**—*Scheme—Construction—Doubtful provisions—Modification in execution proceedings.*

Doubtful provisions of a scheme framed by the Court must be construed reasonably but debatable points must not be worked out. Neither can the scheme be modified in execution proceedings. A separate suit will lie to modify the scheme or to clear doubtful points. Election proceedings in pursuance of a scheme of the Court should be short, summary and inexpensive. (*Hartnoll and Twomey, JJ.*) MAHOMED ESOOF *v.* MAHOMED ESOOF.

24 I. C. 915 : 7 Bur. L. T. 298.

Scope of.

——— **S. 92**—*Scope of—Suit for possession of properties from trustees removed from office.*

S. 92 C. P. C. does not apply to a suit in which plaintiff claims to be appointed as lawful trustees and as such seeks to recover possession of the properties of the trust from the former trustees who are alleged to have been properly dismissed from office and who are therefore trespassers. (*Walsh and Ryves, JJ.*) INAYAT HUSAIN *v.* FAIZ MAHOMED, **45 A. 335 : L. R 4 A. 142 : 21 A. L. J. 191 : 71 I. C. 767: 1923 A. 319 (1).**

——— **S. 92**—*Scope of—Idol—Suit against trespasser on property—Sanction—Necessity for.*

A suit by an idol in his juristic capacity against persons who are interfering unlawfully with his property or with his income is not governed by S. 92, C. P. Code. It is not a correct proposition to say that an idol, who is being defrauded by his lawful guardian or trustee, might be treated by a court of law on the footing of an infant and that any person claiming a benevolent interest in the fortunes of the said idol, would be permitted to maintain a suit in the name and as the next friend of the injured idol. (*Piggott and Walsh, JJ.*) DARSHAN LAL *v.* SHIBJI MAHARAJ BIRAJMAN. **20 A.L.J. 977 : 45 A. 215 : L. R. 4 A. 50 : 71 I. C. 420 : 1923 A. 120.**

——— **S. 92**—*Scope of—Suit for removal of trustee—Private right to office.*

C. P. CODE (V OF 1908), S. 92—Scope of.

S. 92, C.P. Code provides for the institution of a representative suit by the beneficiaries to secure the proper administration of a public trust either by the removal of the existing trustees or by the settlement of a scheme by which the object of the trust can be properly carried out. A dispute between rival claimants to the office of trustee does not fall within the section. In order to bring a case within S. 92, C. P. C. the suit must be a representative one, brought for the benefit of the public and to enforce a public right in respect of an express or constructive trust upon a cause of action, alleging a breach of trust or necessity for directions as to its administration against a trustee of such express or constructive trust. Such a trustee may be a *de jure* trustee or a trustee *de son tort*. (*Lindsay and Kanhaiya Lal, JJ.*) PUTTU LAL *v.* DAYA NAND. **20 A. L. J. 712: L. R. 3 A. 455: 44 A. 721: 68 I. C. 786: 1922 All. 499.**

——S. 92—*Scope of—Suit for declaration.*

The section does not bar a suit for declaration that the plaintiff is a duly constituted mohant. (*Richards, C. J. and Sundar Lal, J.*) GANGARAM *v.* RAMSARAN. **34 I. C. 502.**

——S. 92—*Scope of—Suit for declaration that defendants are not trustees of a temple.*

A suit for a declaration that defendants are not properly appointed trustees of a temple and for an injunction appropriate to that declaration does not fall within the purview of S. 92. (*Macleod, C. J. and Shah, J.*) NILKANTH *v.* RAMAKRISHNA **23 Bom. L. R. 876: 64 I. C. 353: 46 Bom. 101: 1923 Bom. 67.**

——S. 92—*Scope of.*

A suit is not taken out of the scope of S. 92 because the defendant denies the trust and claims to be the owner of the property. (*Batchelor and Rao, JJ.*) JAFAR KHAN *v.* DUDSHA. **9 I. C. 358 : 13 Bom. L. R. 49.**

——S. 92—*Scope of—Suit for a declaration of public right of way—Permission of Court obtained under O. 1, R. 8—Effect.*

S. 92, C. P. C. need not be resorted to where a suit for a declaration of public right of way is filed with the permission of Court obtained under O. 1, R. 8. (*Panton, J.*) HARISH CHANDRA SAHA *v.* PRAN NATH CHAKRABARTHY. **69 I. C. 910: 26 C. W. N. 587.**

——S. 92—*Scope of*—Waqf—*Mutwalli—Powers of management.*

A sanction given by the Dt. Judge on an application by the *mutwalli* may be sufficient authority for the *mutwalli* for letting out the *waqf* property for more than three years. It is not necessary to bring a suit under S. 92, C. P. C. for obtaining such sanction. (*Chatterjee and Panton, JJ.*) FAKIRNUNESSA BEGUM *v.* THE DISTRICT JUDGE OF 24 PERGANNAHS. **47 Cal. 592: 56 I. C. 475: 24 C. W. N. 339.**

——S. 92—*Scope of.*

A suit under this section is primarily a suit against a trustee and can only be instituted either on the ground that there has been a breach o trust or that direction of the Court is necessar

C. P. CODE (V OF 1908), S. 92—Scope of.

for the administration of the Court. (*Chatterjee and Huda, JJ.*) ASHRAF ALI *v.* MAHOMMAD NURAJJAMA. **49 I. C. 355 : 23 C.W.N. 115.**

——S. 92—*Scope of—Suit for declaration that property should be declared to be* waqf.

S. 92 does not apply to a suit for a declaration that a certain property should be declared to be *waqf*. 66 P. R. 1892, foll. (*Abdul Raoof, J.*) NIHAL SINSH *v.* MALAN. **2 Lah. L. J. 457.**

——S. 92—*Scope of—Suit for possession and declaration—Sanction when necessary.*

Where the worshippers of a temple sue for possession of temple property, the suit is not maintainable as *prima facie* it is only the trustees who could claim that relief. They can however sue for a declaration that it is trust property and to such a suit S. 92 will not apply. (*Broadway and Abdul Raoof, JJ.*) SALIG RAM *v.* BASSAO MAL. **67 I. C. 320 : 1 L. L. J. 150.**

——S. 92—*Scope of—Suit by trustee against dismissed trustee for possession.*

S. 92 only governs suits for the vendication of the rights of the public in public charitable trusts and not suits for vendicating the plaintiff's right of management and getting possession for the purpose. Further a suit by a trustee against a person whom he alleges to have been lawfully dismissed is nonetheless outside the scope of the section because it asks for an account of the trust money and payment of the amount due. 33 Cal. 789, foll. (*Napier and Odgers, JJ.*) VENKU *v.* DORAISAMI. **14 L. W. 38: 62 I. C. 761 : (1921) M. W. N. 439.**

——S. 92—*Scope of—Religious Endowment Act* (1863) *S.* 14—*Removal of trustee.*

S. 92 is mandatory and no suit could be brought for any of the reliefs specified in the section except under the conditions laid down therein for the removal of trustees. It is not necessary to obtain sanction under the Rel. End. Act, and without such sanction a removal could be ordered. It is enough, if sanction under S. 92 is obtained. 24 M. L. J. 658 : 37 M. 184 : Fol. S. 92 (2) C.P.C. saves the special jurisdiction of the District Court under Rel. End. Act, so that a person desiring to sue for removal of a trustee or for such other specific relief as can be given under that Act, can do so without complying with the provisions of S. 92. A Court is not bound to decide in a scheme suit whether the alienations of the trust property were binding on the institution. 27 M. L. J. 266 : 28 M. L. J. 326 fol. (*Ayling and Srinviasa Aiyangar, JJ.*) SUBRAMANIYA AIYAR *v.* VENKATACHALA VATHYAR. **(1916) 2 M. W. N. 351 : 37 I. C. 688 : 4 L. W. 444.**

——S. 92—*Scope of—Suit to enforce rights of worshippers.*

Where individual persons claim as citizens, rights of worship or performing certain festivals in a temple, no sanction of the Advocate-General or Di. Judge is necessary as the case is one for direction that the officer in charge of the trust should perform the duties according to usual practice. (*Seshagiri Iyer, J.*) KADIRVELU CHETTY *v.* NANJUNDAIR. **35 I. C. 88: 3 L. W. 512.**

C. P. CODE (V OF 1908), S. 92—Scope of.

——S. 92—*Scope of—Suit under.*

A suit under S. 92 of the C. P. C. is a representative suit. (*Sadasiva Aiyar and Moore*, JJ.) PRAMESHWARAM MENPU *v.* NARAYANAN NAMBOODRI.
40 Mad. 110: 3 L. W. 305: (1916) 1 M. W. N. 402: 34 I. C. 384: 31 M. L. J. 279.

——S. 92—*Scope of—Form of relief—Suit for removal—Consent of Collector — Religious Endowments Act*, S. 14—*Difference between the two sections.*

S. 92, C. P. C. and S. 14 of Act XX of 1863, in so far as the forms of relief to which they relate are the same, appear to offer a choice to persons interested in the trust of proceeding under either of the sections, but they are not bound to proceed under both. Where a suit praying for reliefs contemplated by S. 92, C.P.C. was instituted after the new Code came into force, but the consent of the Collector in respect of those reliefs had been obtained before the new Code came into force *held* that the consent was nevertheless valid. (*Miller and Abdur Rahim, JJ.*) NELATOORU VENKATARANGACHARYULU *v.* NEDATHUR KRISHNAMACHARYULU. **37 Mad. 184 : 14 M. L. T. 44 : 20 I. C. 515 : 24 M. L. J. 697.**

——S, 92 — *Scope — Arbitration — Private rights— Dispute as to jurisdiction to try suit under—District Court—C, P. Courts Act*, S. 17.

A suit under S. 92, C.P.C. does not concern the private rights of the parties thereto and consequently the suit cannot be referred to arbitration. Under S. 17 of the C. P. Courts Act the District Court is the principal Civil Court of original jurisdiction and alone has jurisdiction to try suits under s. 92, C. P. C. Where the law has given jurisdiction to determine a civil dispute to specific tribunals the jurisdiction of other tribunals is excluded. (*Prideaux and Kotwal, A. J. C.*) GANOBA *v.* NARAYAN. **6 N. L. J. 7. 72 I. C. 1016. 1923 Nag. 112.**

——S, 92—*Scope of—Right to exclusive worship—Suit to restrain interference.*

S. 92 debars persons from unrestricted access to courts and hence must be strictly construed. A suit to restrain interference with plaintiff's right to exclusive worship is not within S.92 and consent of the Advocate-General is not necessary. Such a suit can be brought by any person claiming such right without joining the trustees as parties. The result of the suit would bind all interested in the right. (*Young, J.*) COWASJI *v.* BELLA. **50 I. C. 509 : 11 Bur. L. T. 249.**

Trespasser.

——S. 92—*Trespasser—No proof that heirs of trustee were appointed at trustees.*

Where there is no allegation that the heirs of trustees were themselves appointed trustees or they took possession of the property as trustees, a suit against them for breach of trust is not maintainable af they are mere trespassers and should be proceeded against in ejectment. (*Ryves and Gokul Prasad, JJ.*) MAHAMED BUX *v.* MT. PIARI. **62 I. C. 744: 19 A. L. J. 236.**

——S. 92—*Trespasser—Suit to eject—Right to trust property.*

C. P. CODE (V OF 1908), S. 92—Trespasser.

A suit for a declaration that the plaintiff is entitled to the office of *mutwalli* of the mosque property in suit and for possession thereof, by the ejectment of the defendant who is in wrongful possession of it, does not fall within S. 92, C. P. C. 33 A. 503 ; 35 A 98, dist. 33 C. 789 : 22 B. 216: 36 B. 29 appr. (*Banerjee and Ryves, JJ.*) MUHAMMAD ABDUL MAJID KHAN *v.* AHMAD SAEED KHAN. **35 All. 459 : 20 I. C. 37 : 11 A. L. J. 673.**

——S. 92—*Trespasser—Ejectment of.*

Any member of the Hindu community can sue on behalf of his community with the permission of the Court and without the permission of the Legal Remembrancer to eject a trespasser from *Thakurdevara* property in a village. (*Knox, J.*) TIKA RAM *v.* RATAN LAL. **19 I. C. 973.**

——S. 92— *Trespasser — Suit by trustee against.*

The section does not refer to a suit by trustees of a public religious trust, against persons to whom the property has wrongfully passed and who are strangers to the trust and it makes no difference that the persons hold it as heirs of the late manager of the trust. (*Batchelor and Rao, JJ.*) MALHAR BHAGVANT KULKARNI *v.* NARASINGH KRISHNA MAJLI. **37 Bom. 95 : 17 I. C. 665 : 14 Bom. L. R. 941.**

——S. 92—*Trespasser—Suit to eject.*

A suit for the removal of a trespasser in possession of trust property does not come under S. 92. (*Carnduff and Richardson, JJ.*) AYATANNESSA BIBI *v.* KULAR KHALIFA. **41 Cal. 749 : 22 I. C. 677 : 19 C.W.N. 234.**

——S. 92— *Trespasser— Suit against—Section is not applicable.*

A suit by a trustee for recovery of possession of trust properties against trespassers does not fall under S. 92, C. P. Code. (*Le Rossignal and Mortineau, JJ.*) GANGA PURI *v.* MOHAN LAL. **73 I. C. 645: 4 Lah. 295.**

——S. 92 (O. C. S. 539) — *Trespasser —Suit against.*

S. 92 applies only in cases of an express or constructive trust created for a public charitable purpose. It applies only to a suit against a trustee and not a suit *against* a trespasser. (*Kindersley and Forbes, JJ.*) ARUNACHELLA CHETTY *v.* MUTHU CHETTIAR. **17 I. C. 586 : 23 M.L.J. 347.**

——S. 92—*Trespasser—Suit against.*

Under S, 92 a suit for possession cannot be maintained against a trespasser in possession of trust property. (*Chamier, J. C.*) MAMI *v.* MAHOMED YUSAF. **10 I. C. 712: 14 O. C. 65.**

——S. 92—*Trespasser—Right to sue.*

The relators of an author of a charitable trust have no claim against third parties, in possession of trust properties from the last trustee but who are not trustees themselves. They can sue only the trustees for accounts under S. 92 (1) (d). An order for accounts and inquiries can be passed against third parties in possession only in a suit properly framed. (*Hayward, A. J. C.*) TIKAMDAS MULCHAND *v.* GOKALDAS VISHINDAS. **35 I. C. 593: 10 S. L. R. 12.**

C. P. CODE (V OF 1908), S. 92—Trustee de son tort.

Trustee de son tort.

——S. 92—*Trustee* de son tort—*Suit against—Maintainability of.*

A suit under S. 92, C. P. Code, is maintainable against a trustee *de son tort* who has without title chosen to take upon himself the character of trustee. (*Rafique and Lindsay, JJ.*) RAM BILAS *v.* NITEA NAND. **44 A. 652 : L. R. 3 A. 365 : 69 I.C. 990 : 21 A. L. J. 105 : 1922 A 642.**

——S. 92—*Trustee* de son tort.

S. 92 of the C. P. C. applies to the case of persons who are trustees '*de soa tert*'. 23 B. 659 ; 33 C. 789 foll. (*Banerjee and Ryves, JJ.*) SIDDHAN LAL *v.* GAURI SHANKER. **40 I. C. 165.**

——S. 94 (c) and (e)—*Proceedings under S. 40, B. T. Act—Power to restrain—Civil Courts.*

A Civil Court has no jurisdiction to issue an injunction to a party to a proceeding under S. 40 of the B. T. Act restraining him from proceeding further with an application made by him under that section to a Revenue Court. (*Atkinson and Adami, JJ.*) BHAJAN AHIR *v.* MUSAMMAT GANGESHWAR KUAR. **5 Pat L. J. 76: 53 I. C. 37: 1919 Pat 461.**

——S. 94 (e)—*Order for security and accounts.*

An order directing the furnishing of security and submission of accounts passed on an application for the issue of temporary injunction is one under S. 94 (e). (*Mookerjee and Beachcroft, JJ.*) SITO MAHTO *v.* F. F. CHRISTIEN. **17 I. C. 361 : 17 C. W. N. 318.**

——S. 95—*Perpetual injunction.*

No suit for damages can be maintained against a defendant for obtaining maliciously and without reasonable cause a perpetual injuntion which was dissolved on appeal. 13 W. R. 305 doubted. (*Fletcher and Richardson, JJ.*) MOHINI MOHAN MISSER *v.* SURENDRA NARAIN SINGH. **42 Cal. 500: 18 C. W. N, 1189 : 26 I. C. 296: 21 C. L. J. 68.**

——S. 95—*Limitation Act—Application — Suit.*

An application under S. 497 for damages for wrongful obtaining of injunction against the applicant, which application was subsequently treated as a plaint, is not barred if made within three years from the date of dismissal of the suit on appeal in which the injunction was obtained. (*Mookerjee and Carnduff, JJ.*) BHUT NATH PAL *v.* CHANDRA BENODE PAL. **16 I. C. 443 : 16 C. L. J. 34.**

——S. 95—*Claim for compensation—When to be awarded—Interim injunction.*

It is doubtful if an award of compensation can be made in a case where the order of injunction was passed after hearing both the parties and it was found there was sufficient grounds for making it.

The proper stage for making such an application would be only when the suit is heard and until then, it would be premature. (*Ramesam, J.*) CHINTAMANENI VENKATAPAYYA *v.* VENKATAPAYYA. **17 L.W. 150: 71 I. C. 450 : 1923 Mad. 352.**

C. P. CODE (V OF 1908), S. 95.

——S. 95—*Measure of damages—Compensation for wrongful arrest.*

Expense or injury in S. 95 for wrongful arrest includes also general damages such as damages for injury to reputation or humiliation No special procedure is necessary for wrongful arrest. (*Coutts Trotter, J.*) SUBRAYA DAVAY *v.* VENKATARAMA AIYAR. **3 L. W. 30: 32 I. C. 592. (1916) 1 M. W. N. 76.**

——S. 95—*Appeal—Provincial Small Cause Court—If can order compensation—Appeal.*

An order under S. 95 of C. P. C. passed by a Small Cause Court dismissing an *interim* attachment issued by itself is valid and such an order cannot be questioned on appeal. (*Kumaraswamy Sastri, J.*) KARUMURU VENKATASWAMI *v.* LANKA STRIPURIAH. **26 I. C. 359.**

——Ss. 95 and 104—*Appeal— Compensation—Order—Second appeal.*

An order for compensation under S. 95, C. P. C. is one independent of the decree, although it sets off the compensation as against the decreed amount. The right of appeal must be determined by S. 104 C. P. C. and it cannot form a subject of second appeal. (*Sankaran Nair and Bakewell, JJ.*) KANNAPPA CHETTIAR *v.* SAMBASIVA THEVAN. **21 I. C. 756**

——S. 95—*Attachment—Grounds for—Want of reasonable and probable cause—Malice—Special damage.*

Plaintiff must prove want of reasonable and probable cause in a suit for damages for attachment before judgment and malice. Malice is any improper or indirect motive (*i. e.*) no hatred or enmity is necessary. If the motive for the attachment is to enforce speedy payment and not to defeat any intended fraud of the debtor, it will amount to malice. The plaintiff in such a suit must prove special damage It will be sufficient if it is shown that the allegations against him must damage his reputation and credit. The fact that the defendant is a man of slender means ought not to be taken into consideration as a ground for reducing the amount available as damages to the plaintiff. (*Sundara Iyer and Phillips, JJ.*) NANJAPPA CHETTIAR GANAPATHI GOUNDAN. **35 Mad. 598 : 21 M. L. J. 1052: 10 M. L. T. 365: 12 I. C. 507: (1911) 2 M. W. N. 414.**

——S. 95—*Malice—Proof of—Abuse of legal process—Improper injunction, arrest or attachment before judgment.*

Liability for improper injunction, arrest or attachment before judgment in a suit for compensation therefor, is subject to the same conditions as an order under C. P. C. S. 95. So proof of malice is unnecessary. Where the goods of a shop have been seized it is the duty of the officer of the Court to see that the rent is paid and proper watch kept. (*Chamier J. C. and Lindsay, O A. J. C.*) MANOHAR LAL *v.* GOBARDHAN PERSHAD. **9 I. C. 60: 13 O. C. 357.**

——S. 95—*Measure of damages.*

For wrongful attachment the decree-holder moving the court is responsible for any loss suffered by the person whose goods are wrongfully

C. P. CODE (V OF 1908), S. 95.

attached. He is a trespasser and is responsible for all damages though he may have acted innocently and mistakenly. 3 B. 74. 17 C. 436, ref. (*Twomey, J.*) MURUGAPPA CHETTY *v.* KARANATH. 12 I. C. 26 : 4 Bur. L. T. 220.

——Ss. 95 and 104 (2)— *Appeal —Order of Divisional Court in appeal against order refusing compensation—Second appeal.*

An order of a Divisional Court under S. 95, reversing an order of the Court of first instance is an appellate order under S. 104 (9 and under the authority of S. 104 clause (9) is not appealable. (*Hartnoll C.J. and Twomey, J.*) C.V.C.T. FIRM *v.* SAYA BYA. 11 I. C. 917 : 4 Bur. L.T. 204.

——Ss. 95 (1) (a)— *Attachment —Grounds for.*

To justify an attachment before judgment it is not enough that the defendant is in straightened circumstances but it must be proved that he was actually about to dispose of his property.

Compensation may be given for improperly obtaining a temporary attachment though the same is set aside on notice. An order refusing compensation is appealable. (*Oldfield and Sadasiva Aiyar, JJ.*) NARAHARI AYYAR *v.* VAITHINATHA AIYAR. 25 M.L.T. 46 : 49 I.C. 86 : 9 L.W. 69.

——S. 95 (3)—*Bar of suit— Attachment before judgment—Suit for damages—Bar.*

A claim for compensation for wrongful attachment of property before judgment made in a counter affidavit disputing the propriety of the *interim* order, is no bar to a suit for damages. S. 95 C.P.C. operates as a bar only if the claim is made at a stage at which either of the conditions postulated by the section have been fulfilled, but not otherwise. (*Oldfield and Seshagiri Iyer, JJ.*) SOKKALINGA CHETTY *v.* KRISHNASWAMI AIYAR. 38 M.L.J. 324 : (1920) M.W.N. 192 : 55 I.C. 786 : 11 L. W. 479 : 27 M. L. T. 259.

——S. 96 and O. 9, R. 6 and O. 17, R. 2—*Decree—Deft. absent—Plff. examined —Decree* ex parte—*Application for rehearing rejected—No appeal preferred—Appeal against decree—No interference in second appeal.*

On an adjourned hearing of a suit, the deft., his pleader and his witnesses were absent ; the Court passed a decree after hearing the plff. An application for rehearing the case by the deft. was rejected as the Munsif had no jurisdiction and the deft. was left to appeal in the regular way. The appeal by the deft. against the original decree was dismissed, *Held*, on second appeal that the decree passed by the Munsif in the absence of the deft. was a decree *ex parte*, and upon the dismissal of his application for rehearing he could have appealed against the order to the Dt. Judge, but cannot appeal against the decree under S. 96. As he had preferred an appeal against the decree and as the appeal was dismissed on the merits, the High Court could not interfere. (*Richards, C.J. and Banerji, J.*) HUMI *v.* AZIZUDDIN. 39 All. 143 : 36 I C. 277 : 14 A. L. J. 1226.

——S. 96—*Adverse finding—Appeal, if competent.*

C. P. CODE (V OF 1908), S. 96.

A party cannot appeal against a decision in his favour on the ground that one of the findings is against him. (*Rafique and Piggott, JJ.*) AHMADUNNISSA *v.* GULZARI LAL. 24 I.C. 36.

——Ss. 96 and 100—*Order for retrial in appeal against dismissal of suit.*

Where an appellate court set aside the decree of the lower court and directed a retrial of the suit with reference to the entry in the record of rights, published subsequently to the decree, and such other evidence as may be adduced by the litigants ; *held* such an order is made in the exercise of the inherent power of the court and not under O. 41, R. 3 and as such an appeal is competent under S. 96 read with S. 100. (*Mookerjee and Chotzner, JJ.*) BHAIRAB CHANDRA DUTT *v.* KALI KUMAR DUTT, 37 C.L.J. 491 : 71 I.C. 453 : 74 I.C. 1038 : 1923 C. 606.

——S. 96—*Findings of fact of trial Court—Interference of Appellate Court.*

It is a salutary rule that where the issue is simple and straightforward and the only question is which set of witnesses is to be believed the findings of fact of the Trial Judge should not be lightly disregarded : but it is otherwise where the question depends upon admitted surrounding circumstances and the Trial Court has not sifted the evidence with reference thereto. (*Mookerjee and Buckland, JJ.*) PRASANNA MAYI *v.* BAIKUNTHA NATH. 34 C L.J. 384 : 25 C. W. N. 779 : 66 I.C. 782 : 49 Cal. 132 : 1922 Cal. 260.

——S. 96—*Suit for rent—Plff.'s title proved but tenancy disproved—Suit dismissed—Right of appeal exists.*

Where, in a suit for rent the lower Court holds that though plff.'s title was proved the relationship of landlord and tenant had not been established, and dismisses the suit, *held* that the plff. has a right of appeal against the decision and that it was immaterial whether the appeal related to the question of title or whether such decision was in favour of the plff. (*Shamsul Huda, J.*) DINABHANDHU *v.* JAGABANDHU. 63 I. C. 520 : 33 C.L.J. 384.

——S. 96—*Appeal from preliminary decree after final decree is passed— Not maintainable—Amendment.*

Where a final decree is passed no appeal will lie against a preliminary decree. But the Court may allow the appeal to be amended so as to convert it into one against the final decree. (*Mookerjee and Buckland, JJ.*) KULADA PRASAD *v.* RAMANAND PATNAIK. 33 C.L.J. 414 : 25 C.W.N. 776 : 48 Cal. 1036.

——S. 96—*Small cause suit tried on the original side—Appeal from decree.*

The nature of a suit of a small cause nature instituted in a Court the presiding officer of which is not invested with small cause jurisdiction and decided as an ordinary suit by the successor of the first officer who was invested with such jurisdiction, is not altered and an appeal from the decree lies to the District Judge. (*N. R. Chatterjee and Fanton, JJ.*) KHAMASA BEWA *v.* PROMOTHO NATH ROY. 51 I. C. 967.

C. P. CODE (V OF 1908), S. 96.

——S. 96—*Small Cause— Suit transferred under* S. 23 *of the Provl. Sm. C.C. Act—Appeal—Remand.*

An appeal lies from a decree in a suit transferred from the Small Cause Court to the original side under S. 23 of the Prov. Sm. C. C. Act and the Appellate Court can remand the suit. (*Teunon and Newbould, JJ.*) ANHAYESWARI DEBI *v.* HATU SHIEKH. **45 I.C. 645.**

——S. 96—*Adverse finding—Not appealable if decree favourable.*

When a suit is dismissed for want of cause of action there cannot be an appeal by deft. on finding of certain facts. (*Sharfuddin and Roe, JJ.*) BRIJ BEHARI LAL *v.* SHEONATH PRASAD. **35 I. C. 837 : 20 C.W.N. 1354.**

——S. 96—*Right to appeal—Statutory grounds.*

If the competency of an appeal is in question the appellant must establish that he has a right of appeal, for a right of appeal is not a natural right but must be given by express rules of statute. 40 Cal. 21 (P C.); (1877) 3 Q.B.D. 1 Foll. (*Sanderson, C.J. Woodroffe and Mookerjee, JJ.*) MATHURA SUNDARI DASSI *v.* HARA CHANDRA SHAH. **43 Cal. 857 : 20 C.W.N. 594 : 34 I.C. 634 : 23 C.L J. 443.**

——S. 96 — *Sustainability of—Appeal—Fruitless even if successful.*

In execution, the court directed the properties of the judgment-debtor to be sold in a particular order. The judgment-debtor appealed but before the appeal was heard, the properties were sold and objections to the sale were rejected. *Held*, that the appeal was incompetent and should be dismissed, because even if it were successful, it would be fruitless, as the sale could now be set aside, (*Stephen and Richardson, JJ.*) MOHESH CHANDRA SHAHA *v.* BRINDARANI CHOWDHURANI. **15 I.C. 529.**

——S. 96—*Party not aggrieved — Cannot file appeal.*

Where appellant is not aggrieved by the judgment dismissing the appeal against him, he is not entitled to prefer an appeal against it. (*Shadi Lal, C.J. and Abdul Qudir, J.*) GOPALDAS *v.* MT. ZAINALA BIBI. **1923 Lah. 504.**

——S. 96—*Order— Setting aside execution sale without notice to auction purchaser — Appeal.*

An appeal lies from an order setting aside execution sale without notice to the auction purchaser at the instance of the auction-purchaser. (*Scott-Smith, J.*) GUL BANO *v.* MUHAMMED ZAKAR KHAN. **3 Lah. L.J. 463.**

——S. 96—*Sustainability of — Decree set aside on review during pendency of the appeal.*

Where a decree appealed from has since been set aside on review the appeal cannot be heard and must be dismissed. 26 All. 240 : 34 All. 282 Foll. (*Scott Smith and Broadway, JJ.*) BASHESHAR NATH *v.* RAM KISHEN DAS. **54 I. C. 966 : 140 P.R. 1919.**

——S. 96 — *Adverse finding — Decree in favour of party.*

C. P. CODE (V OF 1908), S. 96.

An appeal is not maintainable against opinions in a judgment when the decree is in favour of a party. (*Broadway, J.*) ASMATULLAH *v.* MAJID KHAN. **51 I. C. 622 : 53 P. W. R. 1919.**

——S. 96—*Right of appeal—Party adversely affected by decree—Water supply in ryotwari tracts—Right of Government to regulate—Right of private party to appeal against decree.*

In the Ryotwari tracts the Govt. has a right to regulate the water supply, and so the party adversely affected by a decree against the Govt. can appeal; and the decree against the Govt. since it prevents the Govt. from using the channel as supply channel, and the order allowing the suit to be withdrawn as against them was illegal. 1914 M. W N. 788 Ref. (*Ayling and Odgers, JJ.*) E T, DHARMARAJA *v.* K. M PETTUR RAJA. **46 Mad. 811 : (1923) M. W. N. 677 : 18 L. W. 243 : 45 M. L. J. 212 : 74 I. C. 4 : 1924 Mad. 79.**

——S. 96 and O. 22, Rr. 34—*Decree—Abatement.*

An order declaring a suit to have abated is a decree which is appealable. 18 M. 496 ; 26 M. 224 Rel. Although Rr. 3 and 4 of O. 22, C. P. C. do not expressly state that the abatement of a suit has the same effect as a dismissal of a suit, that appears to be the intention of the legislature for purposes of appeal and second appeal. (*Sadasiva Aiyar and Moore, JJ.*) SUPPU NAYAKAN *v.* PERUMAL CHETTY. **19 M L T 364 : 30 M. L. J. 486 : 34 I. C. 372 : (1916) 1 M. W. N. 301.**

——S. 96—*Effect of appeal.*

Appeal being a continuation of the original proceeding, the Appellate Court's decree is the decree in the suit. (*Ayling and Kumaraswami Sastri, JJ.*) CHENGALAVALA GURRAJU *v.* MADAPATHY VENKATESWARA ROW. **(1916) 1 M. W. N. 223 : 30 M. L. J. 379 : 33 I. C. 9 : 19 M. L. T. 268.**

——S. 96—*Costs—Order as to, on withdrawal.*

Where on withdrawal of a claim against some defendants, a decree is passed which makes the defendants liable for their own costs, an appeal does lie. (*Napier, J.*) INDOOR SUBBARAMI REDDI *v.* NELATUR SUNDARAJA IYENGAR. **18 M. L. T. 460 : 31 I. C. 312 : (1915) M. W. N. 1021.**

——S. 96—*Adverse finding—Right of Appeal—Suit dismissed.*

A defendant in a suit has no right of appeal against a finding as such when the suit has been dismissed by the court below. The apprehension that the finding may operate as *res judicata* unless set aside is not enough. (*Wallis, C. J. and Sashagiri Aiyar, J.*) ACHANTA VENKATA SURYANARAYANA *v.* YELLAPREGADU SHIVASANKARA NARAYANA. **2 L. W. 101 : 27 I. C. 861 : 17 M. L T. 85.**

——S. 96—*Forum of appeal—Transfer of venue.*

Where the jurisdiction of Court which passed a decree in a suit based on a contract is removed

C. P. CODE (V OF 1908), S. 96.

as regards the place of contract and transferred to another Civil Court, the proper Court to which an appeal lies is the Court authorised to hear appeals from the latter Court and not the Court authorised to hear appeals from the former. (*Seshagiri Iyer, J.*) SUBBAYYA *v.* RACHAYYA, **26 I. C. 519 : 37 Mad. 477.**

——S. 96—*Adverse finding—Appeal.*

Notwithstanding a suit is dismissed, a deft. has a right of appeal and for that purpose it is open to the parties to go behind the decree and see really what the adjudication is. (*White, C.J. and Oldfield, J.*) RANGANATHAM CHETTY *v.* LAKSHMI AMMAL, **14 M. L. T. 189 : (1913) M. W. N. 690 : 21 I. C. 15 : 25 M. L. J. 379. [also 52 I. C. 34 : 36 M. L. J. 641.]**

——S. 96—*Right to appeal—Statute—Effect on right.*

The new code does not deprive the litigant of the right of appeal which he had under the old code even though such right could not be exercised immediately on the introduction of the new code. (*Abdur Rahim and Ayling, JJ.*) KALINGA *v.* NARASIMHA. **(1911) 1 M. W. N. 143 : 9 M. L T. 259 : 9 I C. 937 : 21 M. L. J. 631.**

——S. 96 — *Adverse finding — Not* res-judicata.

No appeal lies from a decree merely on the ground that certain observations made in the judgment of the Court below are unfavourable to the person in whose favour the decree is passed. An opinion of the Appellate Court in the course of a judgment in such an appeal cannot operate as *res judicata* when, in point of law, no appeal lay and the Court had no power to adjudicate on the rights of parties on an appeal from such a decree. (*Mitra A. J. C.*) NARAYAN *v.* SYED BAHADUR. **44 I. C. 723.**

——Ss. 96 and 152—*Amendment of decree—Appeal—Material alteration.*

When a decree is amended and the charge has increased the right of the decree holder a great deal it is a new decree in the suit and as such would be appealable. (*Drake Brockman, J. C.*) DINAJI *v.* LAXMAN, **29 I. C. 589 : 11 N. L. R. 92.**

——S. 96— *Does not apply to execution proceedings.*

S. 96 (3) C. P. Code applies only to suits and not to proceedings in execution. (*Jwala Prasad and Foster, JJ.*) LACHMAN LAL *v.* PADARATH SINGH, **4 Pat. L T. 735 : 1924 P. 346.**

——S. 96—"*An appeal*"—*If excludes a fresh appeal.*

The words "an appeal" in S. 96 C.P.C. do not exclude the entertainment of a fresh appeal if the dismissal of the first appeal does not bar the hearing of the fresh appeal. (*Das and Kulwant Sahay, JJ.*) SURAJDEO NARAIN SINGH *v.* PRATAP RAI. **4 Pat. L. T. 405 : 2 Pat. 739 : 75 I. C. 284 : 1923 Pat. 213 . 1923 P. 514.**

——S. 96—*Right to appeal — Improperly joined party.*

C. P. CODE (V OF 1908), S. 96.

If a person who ought not to have been made a defendant is impleaded as such, he cannot appeal. No person has a right of appeal from a decision unless his interest is prejudicially affected by it. (*Mullick and Jwala Prasad, JJ.*) NAND LAL PAL *v.* NARESH CHANDRA DEB. **41 I. C. 468 : 2 Pat. L. W. 108.**

——S. 96—*Adverse finding—Suit decided in favour of a party.*

A finding upon a point necessarily arising in the case operates as *res judicata* between the parties and the aggrieved party can prefer an appeal against the finding, although the decree is in his favour. 7 A. 606 ; 11 C. 301 ; (P. C.) Dist. (*Mullick, J.*) REGHUNATH KURMI *v.* NARAIN RAI. **40 I. C. 771.**

——S. 96—*Decree—Decision on issue—Suit for damages—Set off—Suit decided on limitation—Appeal.*

The plff. sued for damages for breach of contract. The deft. claimed a set off. The court decided that plff.'s claim was barred by limitation. On appeal it was held that the decision of the Plff.'s claim was not a decision of the suit, which was one embracing both the claim and the set off and therefore no decree could be passed and that no appeal lay under S. 96. (*Pratt and Crouch, A J. C.*) UDHARAM *v.* SECRETARY OF STATE. **19 I. C. 922 : 6 S. L. R. 287.**

——S. 96 (2) and 41, R. 27—Ex parte *decree—Appeal—Additional evidence.*

An appellate court can under O. 41, R. 27 direct the production of additional evidence which has been wrongly excluded by the original court, even in appeals against *exparte* decrees. 30 Mad. 54 foll. (*Pratt, J, C. and Boyd, A. J. C.*) KODUMAL *v.* AGA KHAN MAHOMED SHAH. **34 I.C. 493 : 9 S. L. R. 191.**

——S. 96 (3) *Consent order—Consent given under mistake of fact—Setting aside, grounds for.*

Serious and substantial injustice to the party must be shown to result from letting the order stand which was made by the consent of the pleader under a mistake of fact. (*Lord Sumner*) JAMNABAI *v.* FAZALCHOY. **18 L. W. 437 : 33 M. L. T. 376 (P. C.) : 46 M. L. J, 160 : 26 Bom. L. R 189 : 77 I. C. 355 : L, R, 5 P. C. 30 : 1923 P, C. 184.**

——S. 96 (3) — *Consent decree—Waiver of limitation—Appeal.*

Where the plea of limitation is waived though the suit is time-barred, the decree following is a consent decree and thus not appealable. (*Lord Buckmaster*) RAMCHANDRA DEO GARU *v.* CHAITANA SAHU. **18 A. L. J. 625 : (1920) M. W N. 366 : 39 M. L. J. 68 : 28 M. L. T. 97 : 12 L. W. 260 : 24 C.W.N. 1055 : 56 I. C. 539 : 22 Bom. L. R. 1313 : 47 I. A. 200 : 2 U. P. L. R. 122 (P.C.).**

——S. 96 (3)—*Consent order—Not appealable.*

No appeal lies from an order made by consent of parties especially if the appellant has derived

C. P. CODE (V OF 1908), S. 96.

some benefit under it. (*Mookerjee and Beachcroft, JJ.*) SAYED ASAD RARA *v.* WAHIDUNNESSA BEGUM. 57 I. C. 70 : 30 C. L. J. 231.

——S. 96 (3)—*Compromise — Dismissal of suit under O 23, R. 3.*

No appeal lies against an order of dismissal of a suit under O 23, R. 3 of the C. P. C. (*Chatterjee and Beachcroft, JJ.*) BROJENDRA KUMAR DAS *v.* GOBIND MOHAN DAS. 34 I. C. 186 ; 20 C. W. N. 752.

——S. 96 (3)—*Compromise decree—C. P. C. O. 23, R. 3.*

A decree under O. 23, R. 3 can be passed only after there has been on order that the compromise be recorded ; this being not a mere matter of form, a consent decree passed without such order is liable to be set aside on appeal notwithstanding the bar under S. 96 (3). (*Jenkins C.J. and Chatterjee, J.*) PABAN SARDAR *v.* BHUPENDRA NATH NAG. 33 I. C. 769 : 43 Cal. 85.

——S. 96 (3)—*Compromise—Person not party can appeal.*

A person who is not a party to the compromise though a party to suit, can appeal against the compromise decree which binds only those who are parties to the compromise. (*Mookerjee and Chatterjee, JJ.*) LOKI NATH SINGH *v.* GAJU SINGH. 22 C. L. J. 333 : 31 I. C. 426 : 20 C. W. N. 178.

——S. 96 (3)—*Consent decree--Partition suit.*

An appeal may be preferred by persons not parties to a consent decree. A consent decree in a partition suit as between some of the parties is not binding on any of the parties. (*Mookerjee and Beachcroft, JJ.*) GOBIND CHANDRA SARDAR *v.* BHAGABAT SARDAR. 27 I. C. 242.

——Ss. 96 (3) and 104 (2)—*Consent decree—Appeal—Decree passed—Further appeal.*

The trial court refused to record an oral compromise alleged by the defendants on the ground that all the parties to the suit had not joined the compromise. On appeal, the District court found as a fact that all the parties had agreed to the compromise and passed a decree in terms of the compromise. On a further appeal to the High Court, *held*, that the order of the District court was final under S. 104 (2) C. P. Code and that the decree passed by him fell under S. 96 (3) C. P. Code and was not appealable. 27 M. L. J. 173 : 46 I. C. 775, diss. (Le *Rossignol and Campbell, JJ.*) GURCHARAN SINGH *v.* SHIBDEV SINGH. 3 Lah. 175 : 66 I. C. 258 : 1922 Lah. 309.

——S. 96 (3) and O. 43, R. 1 (m)—*Compromise—Order directing compromise to be recorded — Appeal.*

An order directing a compromise to be recorded does not cease to be such simply because it directs at the same time a decree to be passed in accordance with it ; such an order is appealable under O. 43, R. 1 (m). S. 96 (3) is not applicable. (*Rattigan and Shadi Lal, JJ.*) MUHAMMAD RASHID *v.* RAHMTULLAH, 134 P. W. R 1914 : 96 P. R. 1914 : 24 I. C. 630 : 212 P. L. R. 1914.

C. P. CODE (V OF 1908), S. 96.

——S. 96 (3)—*Confession of judgment—Decree—Appeal.*

A decree on a confession of judgment cannot be appealed from by the party so confessing where upon the offer of the plff. to be bound by oath of the deft. the latter agreeing to the proposal filed a document purporting to be his statement on oath and was accepted by the court and the parties. The plff. cannot urge in appeal that the statement was really not on oath. (*Rattigan and Chevis, JJ.*) FATEH MUHAMMAD *v.* FATEH MUHAMMAD KHAN. 80 P. L. R. 1913 : 18 I. C. 758 : 109 P. W. R. 1913.

——S. 96 (3)—*Compromise decree— Amended decree- Appeal.*

The plea that a decree does not accord with the compromise is an attack on the decree and can be taken only in an appeal and not in revision. (*Chevis, J.*) BAWA SINGH *v.* LACHMAN SINGH. 24 P. R. 1911 : 186 P. L. R. 1911 : 10 I. C. 850 : 56 P. W. R. 1911.

——S. 96 (3)—*Consent decree—No appeal.*

Held by Coutts Trotter, J :—A decree to which the pleaders of both parties had consented is a consent decree, though subsequently at the time of passing the decree, one of the parties resiled from it. From such a decree there is no appeal. 41 M. 233 not foll. (*Sadasiva Aiyar and Coutts Trotter, JJ.*) GOVINDASAMI KADAVARAN *v.* KALIAPERUMAL. (1922) M. W. N. 83 : 66 I. C. 837 : 16 L. W. 155.

——S. 96 (3)— *Compromise — Excess of pleader's authority—Appeal.*

An appeal lies against a decree passed on compromise entered into by a vakil without reference to his client. 23 M. L. J. 381, Dist. 21 M. 274 Fol. (*Seshagiri Iyer and Kumaraswami Sastri, JJ.*) THENAL AMMAL *v.* SOKKAMMAL. 41 Mad. 233 : 41 I. C. 429 : 22 M. L. T. 149.

——S. 96 (3)—*Consent order— Appointment of Commissioner—Scope.*

An order directing the appointment of a Commissioner with the consent of parties does not come under cl. (3) of the section. (*Seshagiri Iyer and Kumaraswami Sastri, JJ.*) LODD GOVINDA DOSS *v.* RAJAH OF KARVETNAGAR. 30 I. C. 357 : 29 M. L. J. 219.

——Ss. 96 (3) and 104, Cl. (2) O. 43 R. 1 (m)—*Compromise—Petition—Objection—Appeal.*

A second appeal lies against the decree of the Dt. Judge confirming on appeal the decree of the first Court passed in accordance with the terms of a compromise. All terms forming the consideration for the adjustment of matters in dispute became related to the suit and can be embodied in the decree. (20 M. L. J. 20 : 35 C. 837, Fol.) (*Sadasiva Iyer and Tyabji, JJ.*) AYYAGARI VEERASALINGAM *v.* KOVVURI BASVI REDDI. 27 M. L. J. 173 : 1 L. W. 541 : 25 I. C. 56 : 16 M. L. T. 125.

——S. 96 (3)—*Consent decree—Decree without objection by deft.*

The fact that deft. does not raise any objection to a particular relief cannot make the decree a consent decree when the relief is eventually

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decreed. (*Mittra, A. J. C.*) KOMAL SINGH *v.* JAGANNATH MURAT SINGH. 49 I. C. 840 : 15 N. L. R. 39.

——S. 96 (3)— *Consent decree — What is— Appeal.*

Every decree incorporating an agreement, compromise or satisfaction ordered to be recorded under O. 23, R. 3, is not *ipso facto* a decree passed with the consent of the parties within S. 96 (3) which is limited to cases where the parties invite the Court to pass a particular decree and the Court acts accordingly. A decree based on a finding against the consent of a party that the matter has been compromised is not within S. 96 (3) and is appealable. A decree dismissing the suit on the ground that a plea in bar of the suit on the basis of an alleged compromise cannot properly be said to be one made under O. 23, R. 3. (*Stanyon, A. J. C.*) RENUKA *v.* ONKER. 46 I. C. 775.

——S. 97. *See* also C. P. CODE s. 11— HEARD AND FINALLY DECIDED

——S. 97—*Preliminary decree— What is— Omission to appeal—Partnership —Dissolution— Decree drawn up.*

The C. P. Code, makes no provision for something which is neither a decree nor an order, nor anything which is both; nor does it provide that one adjudication by the Court can be resolved into diverse elements, some of which are decrees and some orders. The question is one of substance, whether an adjudication is a decree or an order. In a suit for taking accounts of a partnership, the Trial Judge made an order declaring the partnership as dissolved from a particular date and ordered that an enquiry be made by the referee as to who were the partners and as to the dealings of the partners with the assets of the partnership. No appeal was preferred against this adjudication. The inquiry was made, accounts were taken and a final decree was passed. In an appeal against the final decree, the appellant contended *inter alia*, that the trial judge had no jurisdiction to refer the question as to who were the partners. *Held*, that the former adjudication of the trial Judge was a 'decree" in so far as it declared the rights of the parties. The appellan s were precluded from disputing its correctness by reason of their omission to appeal against it. The adjudication did not cease to be a decree, because a subordinate part of it if correctly made might have been separately made as an order. (*Lord Sumner.*) AHMED MUSAJI *v.* HASHIM EBRAHIM. 42 Cal. 914 : 42 I. A. 91 : 19 C. W. N. 449 : 17 M. L. T. 312 : 2 L. W 377 : 21 C. L. J 419 : 13 A. L. J. 540 : 17 Bom. L. R. 432 : 29 M.L J. 70 : 28 I.C. 710 : (1915) M.W.N. 485 (P. C).

——S. 97—*Passing of final decree—Appeal from preliminary decree—No appeal against final decree.*

Though no appeal against the final decree is preferred it is no reason for not hearing the appeal against the preliminary decree in a suit for partition. When the preliminary decree is

C. P. CODE (V OF 1908), S. 97.

set aside on appeal the final decree based upon it falls to the ground. (*Richards, C. J. and Tudball, J.*) KANHAIYA LAL *v.* TIRBEENISAHAI. 36 All. 532 : 24 I. C. 827 : 12 A. L. J. 876.

——S. 97—*Passing of final decree—Appeal from preliminary decree—Final.*

Plaintiff in a partition suit appealed from a preliminary decree and defendant subsequently appealed from final decree. *Held* plaintiff's appeal is not barred : if an appeal from preliminary decree succeeds, the final decree passed later on falls to the ground. (*Richards, C. J.—and Banerji, J.*) M. A. HUSAIN KHAN *v.* JASADDUK HUSAIN. 34 All. 493 : 16 I. C. 157 : 10 A. L. J. 19.

——S. 97—*Omission to appeal—Effect of.*

Where no appeal is preferred against a preliminary decree for sale in mortgage suit the points which could have been raised in that appeal had it been filed, could not be urged in an appeal against the final decree in the same suit. (*Shah and Hayward, JJ.*) MURLIDHAR NARAYAN *v.* VISHNUDAS BALMUKANDAS. 40 Bom. 321 : 33 I. C. 749 : 18 Bom. L. R. 38

——S. 97—*Court-fees—Appeal.*

Where a party who has the facility of time of appealing against the final decree, appeals against the preliminary decree only he cannot be allowed to do so as by so doing he has the chance of getting a reversal of the final decree without paying court fee for the same. The section does not prevent a party from filing a combined appeal against a preliminary and final decree if the dates permit him to do so. (*Scott C.J. and Heaton, J.*) DATTARAYA RAMCHANDRA *v.* AJMUDDIN FAKRUDDIN. 33 I. C. 146 : 18 Bom. L. R. 76.

——S. 97—*Combined appeal—Preliminary and final decree.*

S. 97 does not preclude a party from filing a combined appeal against a preliminary and final decree if their dates permit him to do so. (*Scott, C. J. and Shah, J.*) BALWANT SINGH RAMCHANDRA *v.* SAKARAM MANCHARAM. 33 I. C. 137 : 18 Bom, L. R. 80 (Note).

——S. 97—*Preliminary decree—Decision on preliminary issues.*

A decision as to misjoinder, limitation or jurisdiction does not amount to a preliminary decree within the meaning of S. 97 ; so a decision in plaintiff's favour upon a preliminary defence that the matters in dispute were caste questions outside the Court's jurisdiction is not preliminary decree and is not appealable. (*Scott C. J. Heaton, Macleod, Shah and Hayward, JJ.*) CHANMALSWAMI RUDRASWAMI *v.* GANGADHARAPPA BALSINGAPPA. 39 Bom. 339 : 26 I. C. 885 : 16 Bom. L. R. 954. (F. B.)

——S. 97—*Preliminary decree—Findings.*

The right to appeal under S. 97 lies only from a preliminary decree and not from a preliminary finding in a suit directing accounts to be taken. (*Heaton and Shah, JJ.*) KALURAM PIRCHAND *v.* GANGARAM SAKHARAM SHET. 38 Bom. 331 : 23 I. C. 605 : 16 Bom. L. R. 67.

C. P. CODE (V OF 1908), S. 97.

———**S. 97**— *Preliminary issue— Finding recorded but no decree drawn up—Whether preliminary decree.*

Where there is only a preliminary finding and no decree is drawn up, there is no preliminary decree and no appeal under S. 97. The finding can be appealed against in the appeal against the decree and can be determined by the appellate court. (*Heaton and Rao, JJ.*) SAKHA RAM, *v.* SADASHIVA BALSHET LODHA. **37 Bom. 480 : 19 I. C. 894 : 15 Bom. L. R. 382.**

———**S. 97**—*Preliminary decree—What is.*

Though a party can appeal from a preliminary decree, he can do so only if the decree exists in formal shape. The Court must, if applied to, after passing of the preliminary decree, have the decree drawn up to enable the aggrieved party to appeal from it. (*Scott, C. J. and Beaman, J.*) SIDHANATH DHOND GARUD *v.* GANESH GOVIND GARU.

37 Bom. 60 : 17 I. C. 637 : 14 Bom. L. R. 916.

———**S. 97**—*Scope of.*

The legislature in enacting S. 97 of the present C. P. C. intended to prevent preliminary questions being raised in the form of an appeal after a case has been decided upon the merits. (*Chandavakar and Batchelor, JJ.*) GOVIND RAMCHANDRA SHEMBEKAR *v.* VITHAL GOPAL SAHASRABUDHE.

36 Bom. 536 : 16 I. C. 159 : 14 Bom. L. R. 560.

———**S. 97**—*Appeal against final decree—Powers of appellate Court—Correctness of preliminary decree.*

It is not open to the appellants, in an appeal against the final decree, to attack the preliminary decree, which might have been directly challenged by an appeal. But the appellate court can consider whether the preliminary decree was capable of enforcement and whether it afforded a basis for the final decree as made. (*Mookerjee and Panton, JJ.*) TARAPRASANNA SARKAR *v.* KALIKA MOHAN SARKAR. **38 C. L. J. 111 :75 I. C. 319 . 1924 Cal. 80.**

———**S. 97**—*Appeal against preliminary decree —Passing of final decree after, does not affect hearing of appeal.*

There is a difference between cases where the final decree is passed before the appeal is preferred from the final decree and cases where it is passed after the appeal is preferred. In the latter case the appellate court is competent to hear and dispose of the appeal. 25 C. W. N. 776 : 18 C. L. J. 214 ; 18 C.L.J. 321 Ref. (*Newbould and Panton, JJ.*) MEA HUSSAIN KHAN *v.* SHEIKH SAMIR.

68 I. C. 475 : 1923 Cal. 282 (1)

———**S. 97**—*Final decree passed—No appeal against preliminary decree.*

An appeal against a preliminary decree is not maintainable unless there is also an appeal against the final decree passed subsequent to the preliminary decree by the Court below. 40 C 1036 20 C. W. N. 231 : 18 C. L. J. 321 ; 10 C. L. J. 113, referred to. (*Chatterjee and Pearson, JJ.*) MONOHAR PESHAKAR *v.* HARAN CHANDRA KARMAKAR.

71 I. C. 290.

———**S. 97**—*Preliminary decree—Objection to —Plea of limitation.*

C. P. CODE (V OF 1908), S. 97.

A Party not pleading limitation as a bar to the suit before passing the preliminary decree cannot plead it in appeal from the final decree. (*Chatterjee and Panton, JJ.*) GOVIND CHANDRA *v.* NIROD KUMAR.

50 I. C. 747.

———**S. 97**—*Passing of final decree—Preliminary decree—Appeal after final decree passed but before it is signed.*

An appeal against the preliminary decree after the final decree is passed but before it is signed is not incompetent as no copy can be got for the final decree until it is signed and drawn up and the only appealable decree is the preliminary decree. 30 I. C 321, Fol. (*Fletcher and Huda, JJ.*) BHAGABAN CHANDRA *v.* ISHAN CHANDRA.

46 I. C. 802 : 22 C. W. N. 831.

———**S. 97**—*Passing of final decree—Effect.*

An appeal filed against a preliminary decree can be heard though final decree made after the appeal was passed and lodged, is not appealed against. (*Jenkins, C. J. and Chatterjee, J.*) PEARY MOHAN MUKERJEE *v.* CHANDRA SEKHAR SARKAR.

33 I. C. 59 : 19 C. W. N. 1132.

———**S. 97**—*Preliminary decree—What is—Order of remand.*

The order remanding after settling certain issues is a preliminary decree and must be appealed. (*Richardson and Mullick, JJ.*) HIRA LAL PAL *v.* ETBAR MANDAL.

32 I. C. 866 : 20 C. W. N. 43.

———**S. 97**—*Passing of final decree--Preliminary decree appealed against.*

Under the section an appellant, who has not appealed against the preliminary decree, is prevented from questioning it in subsequent proceedings. He may not appeal against the final decree, but may appeal against the preliminary decree, and the final decree will be amended according to the decision of the appeal from the preliminary decree. (*Fletcher and Teunon, JJ.*) ATUL CHANDRA SINGHA *v.* KUNJA BEHARI SINGH,

30 I. C. 321 : 22 C. L. J. 90.

———**S. 97**—*Passing of final decree—Before filing appeal against preliminary decree.*

Where before the filing of an appeal against a preliminary decree, a final decree was passed and no appeal was preferred against the final decree. *Held*, no appeal lay against the preliminary decree as it had been affirmed by the final decree. 18 C. L. J. 321. Foll. (*Woodroffe and Coxe, JJ.*) SADHU CHARAN DATTA *v.* HARA NATH DATTA. **27 I. C. 135 : 20 C. W. N. 231.**

———**S. 97**—*Preliminary decree—Objection to —If could be taken in appeal from final decree.*

Under the old Code, objections to a preliminary decree could be taken in an appeal against the final decree, without appealing from the preliminary decree. (*Fletcher and Richardson, JJ.*) TROILUKHYANATH MANDAL *v.* ABANISH CHANDRA ROY. **24 I. C. 18: 21 C. L. J. 459.**

———**S. 97**—*Passing of final decree—Appeal from preliminary decree filed when final decree not appealed from.*

C. P. CODE (V OF 1908), S. 97.

The appeal against the preliminary decree preferred after the passing of the final decree must fail if the final decree is not appealed from because S. 97 C. P. C. does not relieve the person appealing from the preliminary decree from appealing against the final decree too. (*Brett and Sharfuddin, JJ.*) KHIRODAMOYI DASI *v.* ADHAR CHANDRA GHOSE. 21 I. C. 516: 18 C. L. J. 321.

———S. 97—*Passing of final decree—Preliminary decree—Appeal against final decree during pendency of appeal—Effect.*

Where the preliminary decree in a suit for partition had been appealed against and was modified by the High Court in second appeal a final decree passed by the original court during the pendency of the appeal is inoperative on account of the modification of the preliminary decree. (*Jenkins C. J. and Mookerjee J.*) ABDUL JALIL *v.* AMEER CHAND PAUL. 21 I. C. 510: 18 C. L. J. 223.

———S. 97—*Passing of final decree—Pending appeal from—Preliminary decree final.*

A final decree passed during pendency of an appeal against the preliminary decree must be deemed to be subject to the result of the appeal, and is not operative where the preliminary decree is materially varied in appeal. 36 C. 762 ; 32 A. 225. Dist. 33 A, 528, not Foll. (*Jenkins, C. J. and Mookerjee, J.*) NISTARINEE DABEE *v.* RAI MOHUN BISWAS. 20 I. C. 576: 18 C. L. J. 214.

———S. 97—*Passing of final decree—Preliminary and final decrees.*

A final decree, passed before the appeal from the preliminary decree must be brought to the appellate court's notice, otherwise the appellate court's decree supersedes the final decree also. 36 C. 762; 6 C. L. J 547, 32 C. 1023, 32 A. 225, Dist. 12 C, 45, Exp. 3 W. R. (P. C.) 11, 3 C. 30, Foll. (*Chatterjee and Walmsley. JJ.*) UGRA NARAYAN SINGA *v.* BASAN NARAYAN SINGH. 17 C. W. N 868: 19 I. C. 630: 18 C. L. J. 209.

———S. 97—*Preliminary and final decree—Duty of party to appeal against both.*

Where a final decree has been made, whether or not an appeal had been preferred against the preliminary decree it is the duty of the party aggrieved by the final decree to appeal against the final decree: An appeal therefore, against the preliminary decree after the passing but before the signing of the final decree and without chal lenging by appeal the final decree is useless and could not be entertained. 18 C. L. J. 321. 32 All. 225, 36 Cal. 762, foll. (*Broadway, J.*) GANDA RAM *v.* SUNDER LAL. 67 I. C. 278: 2 L. L. J, 673.

———S. 97—*Passing of final decree—Pending appeal.*

An appeal against a preliminary decree can be maintained in spite of the fact that a decree has been passed in pursuance of the preliminary decree especially when the prelimary decree is in accordance with the final decree and does not in any way modify or supersede it. 37 Mad, 29 foll, 36 Cal, 762, Dist. (1913) M. W. N. 140, not foll. (*Abdur Rahim and Oldfield, JJ.*) SIVA SUBRAMANIA MUDALIAR *v.* LAKSHMANA IYER. 52 I. C. 697.

C. P. CODE (V OF 1908), S. 97.

———S. 97—*Preliminary decree reversed in appeal—Effect on final decree.*

If a preliminary decree under this section is reversed on appeal, the final decree passed on the footing of that preliminary decree ceases to be operative. (*Ayling and Seshagiri Aiyar, JJ.*) A. CANNIAH MUDALY *v.* A RANGASWAMI MUDALI. 48 I. C. 7: 35 M. L. J. 361.

———S. 97 and O. 35, Rr. 4 and 5—*Passing of final decree—Appeal from—Preliminary decree.*

If a preliminary decree is reversed in appeal the final decree, so far as it is dependent thereon, falls with it and becomes inoperative. The passing of the final decree pending appeal against the preliminary decree is no bar to the hearing of the appeal even though no appeal has been preferred against the final decree. 36 C. 72, 32 A. 225, 33 A. 528, 34 A. 493, Dist. (*Sankaran Nair and Sadasiva Aiyar. JJ.*) KUPPUSWAMY AIYAR *v.* BEGMAH BOI AMMANI. (1913) M, W. N. 173: 24 M. L. J. 190: 18 I. C. 730: 13 M. L. T. 209.

———S. 97—*Passing of final decree—Appeal from—Preliminary decree.*

Deft. appealed against the preliminary decree but after the final decree was passed, *Held* that as there was nothing of substance left after the passingof the preliminary decree the deft. should have been allowed to amend his memorandum of appeal so as to convert the appeal into one against the final decree, especially because he had paid the court-fee for the latter. (*Sundara Iyer and Sadasiva Iyer, JJ.*) SUBBARAMANIA CHETTIAR *v.* PALACHAKRAPANI CHETTIAR. 16 I. C. 380: (1913) M. W. N. 140.

———S. 97—*Passing of final decree—Preliminary Decree—Appeal from.*

The passing of a final decree does not preclude a party from preferring an appeal against the preliminary decree 12 I. C. 664 foll. 10 I.C. 514 Dis. (*Sundara Aiyar and Spencer, JJ.*) RAMIEN *v.* VEERAPPUDIYAN. 37 Mad. 455: 11 M. L. T. 69: 22 M. L. J, 217 : 14 I. C. 394: (1912) M. W. N. 117 and 530.

———S. 97—*No right of appeal against preliminary decree Exists after passing final decree.*

Where there are preliminary and final decrees in the same suit an appeal against the preliminary decree alone cannot be maintained unless it is instituted before the passing of the final decree. 36 Cal. 762, 30 All. 479:37 Mad. 455 Ref. (*Hallifax, A. J. C.*) BIHARIDAS *v.* BAJRANGDAS. 67 I. C. 261: (1922) Nag. 179.

———S. 97—*Preliminary decree.*

Appeal from preleminary decree cannot be treated as one against the final decree also. (*Dalal and Daniels. A.J.C.*) RAJA SETA SWAMI DAYAL *v.* MUSAMMAD SHER KHAN. 74 I.C. 485 : 9 O. & A. L. R. 205.

———S. 97—*Omission to appeal—Preliminary decree—Mortgage—High rate of interest—No appeal.*

A Court passing a preliminary decree in a suit on a mortgage is at liberty to fix interest at any rate that may seem suitable. If no appeal is made against the order fixing the rate of interest, then that order becomes final and cannot be questioned

C. P. CODE (V OF 1908), S. 97.

in any future proceeding for final decree. It makes no difference that the preliminary decree was made on a compromise between the parties. (*Roe and Chapman, JJ.*) BENUDHAR PANDA *v.* KANGOI KRISHNA CHANDRA DAS. **51 I. C. 738: 4 P. L. J. 306.**

——— **S 97**—*Passing of final decree—Appeal from preliminary decree—Effect on.*

An appeal against the preliminary decree in a partition suit can be heard even after the final decree therein is passed and even though no appeal has been preferred against it provided the appeal against the preliminary decree was preferred before the final decree was passed. (*Chamier, C. J., Shafuddin, Atkinson and Kingsford, JJ.*) WAHIDUNNISA *v.* DEEP NARAIN. **20 C. W. N. 1174 : 1 Pat, L. J. 406 : 35 I. C. 873 : 1 Pat. L W. 13 (F.B.).**

——— **Ss. 97 and 2**—*Preliminary decree—Decision on—Preliminary issue.*

A decree is an order granting or refusing any of the reliefs and hence the decision that notice was necessary under S. 80, C. P. C. does not amount to a preliminary decree, when the plff. alleges that he has given notice and the decision is not therefore appealable. (*Rigg. J. C.*) NGA MEIK *v.* NGA GYI. **(1917) 3 U. B. R. 1 : 40 I. C. 677 : 11 Bur. L. T. 95.**

——— **S. 98**—*Reference to third Judge—Scope of the trial.*

Where two judges of a division bench differ on a point of law and refer the matter to a third Judge, the latter must confine his opinion to the specific point and not dispose of the case *de novo* on the merits. (*Sir John Edge*). PARTAB SINGH *v.* BHALUTI SINGH.
35 All. 487 : 40 I. A. 182 : 16 C.C. 247 : 17 C.W.N. 1165: 14 M. L. T, 299: 25 M. L. J. 492: 11 A.L. J. 901: 18 C. L. J. 384: (1913) M. W. N, 785 21 I. C. 288 : 15 Bom. L. R. 1001. (P. C.)

——— **S. 98**—*Letters Patent, Cl. 36—Applicability—Judges differing in opinion.*

The natural place to find the rules governing the exercise of the appellate civil jurisdiction over the other Judges of the High Court would be the Letters Patent, while the natural place to find the rules governing the exercise of the appellate civil jurisdiction over the civil Courts of the mofussal subject to the High Court would be the Civil Procedure Code. The Code makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court. This right of appeal depends on clause 15 of the Charter. Appeals under the Letters Patent are governed by the Letters Patent, and appeals under the Code are governed by the Code. Further the Code only deals with appeals from certain Courts and does not deal with appeals within the High Court from the decision of one judge of the Court to another. Therefore when a Bench of two Judges is hearing an appeal from the decision of a single Judge of the same High Court whether on the original side or the appellate, and they differ in opinion. The opinion of the senior judge would prevail. 26 All. (1921) 23 Bom. L. R. 623 Ref. (*Marten and Pratt, JJ.*) BANDY WALAD DAGADU MAHAR *v.* JAMNADAS. **1923 Bom. 218.**

C. P. CODE (V OF 1908), S. 98.

——— **S. 98**—*Second appeal— Difference of opinion—Procedure—Letters Patent, cl. 36.*

The procedure when Judges differ on second appeals from mofussil is governed by S.98. C.P.C. and not by cl. 36, Letters Patent. 3 B. 204 ; 10 C. 814; 25 M 555; 22 M 68; 11 A 176 F.B Rel. (*Scott C. J., Heaton, Macleod, Shah and Hayward, JJ.*) BHUT JAYAT SINGH *v.* LAKADU DHARSING. **43 Bom. 433; 492 : 50 I.C. 715 : 21 Bom. L. R. 157 (F. B.).**

——— **S .98**—*Reference to a third judge—Third Judge deciding case on another point—Procedure.*

Under S, 98, C.P. Code, a third judge to whom a point of law is referred on a difference of opinion between the members of a Division Bench of the High Court cannot dispose of the appeal generally but can only dispose of the point of law referred and then decide the appeal in the manner indicated by the referring judges, having regard to the possible answers that might be given. Where the qnestion of law actually referred to a third judge was not decided by him and the reference consequently proves infructuous, the appeal must be disposed of under S. 98 (2) C. P. Code. (*Woodroffe, Walmsley and Suhrawardy, JJ.*) JNANENDRA MOHAN DUTT *v.* UMESH CHANDRA GUHA. **26 C. W. N. 985 : 1922 C. 544.**

——— **S. 98**—*Reversal of part of decree.*

If the appellate court judges agree that a part of the lower court's judgment is erroneous, that part must be reversed,and if as to rest the judges are equally divided, it is deemed as confirmed 11 A 176, 6 B L. R. 131 dist. (*Jenkins, C.J., Mookerjee and Richardson, JJ.*) KRISHEN DOYAL GIR *v.* IRSHAD ALI KHAN. **31 I. C. 965 : 22 C. L. J 525.**

——— **S. 98**—*Judges differing on a question of law—Decision to be arrived at with reservation of point of law.*

Under S. 98. where the Judges differ on a point of law, they should come to a complete decision except the question of law on which they differ, so that, by their judgment, they should make it clear that a final result would be arrived at on the decision of the question of law one way or the other. (*Jenkins, C. J., Coxe and Ray, JJ.*) MOHAMMAD GOWHAR ALI *v.* SAMIRUDDIN SHEIKH. **22 I. C. 383 : 18 C. W. N, 33,**

——— **S. 98**—*Reference—Chief Court—Punjab.*

A Division Bench of the Punjab Chief Court cannot make a reference under S. 10 (2) (b) of the Punjab Courts Act when the members of the Bench have differed on a point of law. The proper course is to refer the point under the proviso to S. 98, C. P. C. (*Rattigan, Shah Din and Le Rossignol, JJ.*) GOKAL CHAND *v.* HUKAM CHAND NATHUMAL. **109 P. W. R. 1916 : 154 P. L. R. 1916: 34 I. C. 714 : 70, 71 P. R. 1917.**

——— **S 98**—*Land acquisition appeal—Difference of opinion.*

Where in an appeal under the Land Acquisition Act the judges composing a Division Bench differ as to the amount of additional compensation, theaward of the Lower Court should be confirmed

under S. 98, C. P. C. (*Abdur Rahim, Oldfield and Seshagiri Aiyar, JJ.*) T. MANAVIKRAMAN TIRUMALAPAD *v* THE COLLECTOR OF NILGIRIS.
41 Mad 943 : 8 L W. 261 : 24 M. L. T. 155 : 35 M.L J. 110 : 49 I. C. 27 : (1918) M. W. N. 540.

——— **S 98**— *Revision cases— Differenoe of opinion.*

Letters Patent, Cl. 36 and not S. 98, C. P. C, governs the procedure in cases of difference of opinion in revision cases. (*Abdur Rahim and Ayling, JJ.*) *In re* CARI VENKANNA PATRUDU.
18 M. L. T. 591 : 32 I. C. 330 : 17 Cr. L. J. 42.

———**S. 98** (2)—*Difference of opinion—C.P. C. XIV of* 1882, *S.* 575—*Distinction between*

Under the old Code when two Judges differed. the whole appeal was referred to a third Judge, but under the new Code, it is only the point of law that has to be referred. (*Brett, Mookerjee and Vincent, JJ.*) MAHAMMAD MEHDI HASSAN KHAN *v* SHEO SHANKAR PRASAD SINGH.
14 C. L J. 552 : 39 C. 353 : 13 I. C. 353 : 16 C. W. N. 817.

———**S, 99**—*Misjoinder of parties and causes of action—Suit in ejectment by landlord against several tenants in possession of separate holdings —Procedure irregular—Waiver of objections.*

Where a landlord sued to eject several tenants in possession of different parcels of land, making them all defendants is one and the same suit, and the litigation was conducted as though the defendants were a community with common interests, the procedure though highly irregular, nevertheless prevents the landlord from objecting to the use of evidence given in the case of some tenants as evidence in favour of all the parties, (*Sir Lawrence Jenkins*) SETHRATNAM AIYAR *v.* VENKATACHALA GOUNDAN.
43 Mad. 567 : 47 I. A. 76 : (1920) M. W. N. 61 : 27 M. L. T. 102 : 11 L. W 399 : 38 M. L. J. 476 : 18 A. L. J. 707 : 22 Bom L. R. 578 : 56 I. C. 117 : 25 C. W. N. 485 (P. C.) : [On appeal from 24 M. L. J. 571 : (1913) M. W. N. 434 : 20 I. C. 374 : 13 M. L. T. 450]

———**S. 99** —*Plaintiff a major —Suit instituted by next friend not valid.*

Where a plaintiff has attained majority before the institution of the suit a plaint signed and verified on his behalf by a next friend is not valid and the defect is not a mere irregularity in proceeding and cannot be cured by section 98 of the Civil Procedure Code. (*Mears, C. J. and Piggott, J.*) RUHUL AMIN *v.* LALA SHANKAR LAL.
45 A. 701 : L. R. 4 A 342 : 21 A. L. J. 626 : 77 I. C. 30 : 1924 A. 54.

———**S. 99**—*Irregularity—Defendant joined as a minor though in fact a major.*

If the plaint in a suit describing the defendant as a minor is not amended even after the court's finding that he was a major and the proceedings went on, the defendant appearing in Court, instructing his pleader and defending his suit, the

irregularity is cured by the conduct of the parties (*Lindsay and Sulaiman. JJ.*) THAKUR HARGOBIND SINGH *v.* HUKUM CHAND. **L.R. 4 A. 291.**

———**S. 99** —*Order under wrong section.*

Where order passed under O. 39, Rr. 5 and 6 should have been passed under O. 21, R. 42, the High Court refused to set aside as in substance the order was right. (*Piggott and Walsh, JJ.*) JAI NARAIN *v.* BANKEY LAL. **41 I C. 89.**

———**S. 99**—*Power of attorney—Institution of suit under—Defect in power—Not a general power.*

If the power of attorney, on the strength of which a suit is instituted is defective as when it is a special and not a general power, there is merely an irregularity in proceedings not affecting the merits of the case and hence is no ground for setting aside the decree appealed from on that ground. (*Shah and Crump. JJ.*) GANPATI NANA POWAR *v*, JIVANABAI KOM SUBBANNA.
24 Bom L. R 1302 : 47 B. 227 : 76 I. C. 34 : 1923 B. 44.

———**Ss. 99 and 96**—*Misjoinder of causes of action— Objection to be taken in trial Court.*

An objection that there cannot be a decision in a partition suit of rights subordinate to that of the co-sharers cannot be gone into for the first time in appeal. (*Woodroffe and Walmsley, JJ.*) MIDNAPORE CO. *v.* NARES NARAIN. **63 I. C. 161 : 33 C. L. J. 317.**

———**S. 99** —*Defect—Minor sued without guardian.*

Where the mother of a minor refuses to act as guardian, the Court ought to appoint one of its officers as guardian *ad litem*. An omission to appoint one is a serious defect not curable by S.99. (*Mookerjee, A.C.J. and Fletcher, J.*) SURENDRA NATH *v.* AGHOR NATH. **62 I. C. 464 : 25 C. W. N. 525.**

———**S. 99 and O. 1, R. 3**—*Misjoinder—Joinder of different tenants—Suit for enhancement of rent.*

Plaintiff landlord brought one suit for the enhancement of rent in respect of two *etmans* in a temporarily settled area twenty years after the last proceedings for increasing the rent. In the record of rights the defts. were recorded as settled raiyats. *Held*, that the plaintiffs and the defendants being the landlords and tenants of the *etmans* and having the same interest in each, the misjoinder in bringing one suit was merely technical and did not affect the merits of the case. (*Chatterjee and Duval, JJ.*) JOGESH CHANDRA *v.* MOKBUL ALI. **23 C. W. N. 845 : 54 I. C. 850 : 30 C. L. J. 140.**

———**S. 99**—*Misjoinder—Power of Appellate Court.*

S. 99 C. P. C. provides that, when a Court of first instance decides a question of misjoinder in favour of plaintiff, the defendant cannot open the question in appeal (*Mookerjee and Beachcroft, JJ.*) HIMAT KHAN *v.* SHER KHAN.
21 I. C. 537 : 18 C. L. J. 260.

———**S. 99**—*Remand under O.41, R.23, C.P.C. —Case decided on the merits—Irregularity.*

C. P. CODE (V OF 1908), S. 99.

A remand under O. 41, R, 23, C. P. C, when the first Court decided the suit on the merits, is an irregularity within S. 99 not affecting the merits of the case and the High Court would not set it aside. 28 Cal. 324 Foll. (*Stephen and Mullick, JJ.*) NAHINCHANDRA TRIPATHI *v.* PRAN KRISHNA DEY.
41 Cal 108 : 20 I. C. 39 : 18 C. L. J, 613.

——— **S. 99**—*Set off—Court-fee not paid—Objection in appeal—Interference.*

The error committed by admitting a claim of set off without Court-fees does not affect the merits of the case or the jurisdiction of the Court and so afforded no ground for reversal or remand under S. 99 (*Jenkins, C. J., Harington, Stephen, Mookerjee and Holmwood, JJ.*) ABDUL AZIZ *v.* RAZAK ALI.
19 I. C. 918 : 17 C, L. J. 365 (F. B.),

———**S. 99**—*Issue—Form of issue erroneous—No prejudice.*

That the form of an issue threw the onus on the wrong party, is not a ground in appeal for setting aside the decree provided the parties were not misled and the evidence fully gone into. (*Mookerjee and Beachcroft, JJ.*) HAZARIMAL *v.* ABANI NATH.
17 C. L. J. 38 : 18 I, C. 625 : 17 C. W. N. 280.

———**S. 99**—*Plaint—Improper verification.*

The plaintiff contended in second appeal from a suit which had been filed that so far as the minor plaintiffs were concerned, the plaint ought to have been taken off the file as it was not properly verified, *held*, that the proper procedure here was not to frame any issue but to decide the preliminary question, whether the plaint was properly verified first, for then the plaintiff would have had an opportunity of curing the defect and therefore there was no substance in the plaintiff's contention. The defect, if any, was completely cured by S. 578 of the Code of 1882. 22 All. 55, 24 W. R. 71 Rel. (*Mookerjee and Carnduff, JJ.*) SHASHEE BHUSHAN DAS *v.* RASIK LAL ROY.
15 I. C. 583 : 17 C. W. N. 989,

———**S. 99**—*Valuation—Objection to—Waiver—Case triable by superior Court tried by inferior Court—Prejudice.*

Where an inferior Court disposes of a case which should have been heard by a superior Court there is ground for thinking that the parties were prejudiced. A party is not estopped from questioning the jurisdiction of a Court to hear an appeal though he himself presented the appeal in that Court. 16 P. R. 1907 Foll. 36 P. R. 1902 Dist. (*Broadway, J.*) CHELCO *v.* KALI DAS.
44 I. C. 816 : 21 P. R. 1918.

———**S. 99**—*Misjoinder of parties—No ground for second appeal.*

Misjoinder of parties, when it does not affect the merits of the case or the Court's jurisdiction, affords no ground for second appeal. (*Scott-Smith, J.*) SHAH NAWAZ *v.* SHAH NAWAZ.
37 I. C. 197 : 118 P. L. R. 1916.

———**S. 99**—*Receiver not formally appointed—Conduct of parties—Estoppel as to Receiver's powers.*

When a Commissioner is not formally appointed but the parties conducted themselves in such a manner as to show that they accepted the appointment neither party, in view of S. 99 can go back upon this. (*Johnstone and Chevis, JJ.*) MUKLI MAL DAYAL *v.* LACHMAN,
72 P. L. R. 1914 : 22 I. C. 526 : 45 P. W, R. 1914.

———**S. 99**—*Misjoinder.*

The fact that relief prayed for did not affect each defendant equally does not constitute misjoinder nor is it a ground for upsetting a decree unless the defendant is prejudiced. (*Rattigan and Shah Din, JJ.*) RAM NARAIN *v.* RAM KRISHEN.
108 P. W. R. 1911 : 10 I. C. 515: 179 P. L, R. 1911 : 46 P.R. 1911.

———**S. 99**—*Misjoinder — If includes non-joinder.*

Per Schwabe, C. J.— *Quære*, whether misjoinder in S. 99. C. P. Code, includes non-joinder. (*Schwabe, C, J. and Wallace, J.*) MOHANAVELU MUDALIAR *v.* ANNAMALAI MUDALIAR.
17 L. W. 241 : 44 M. L. J. 249 : 72 I.C. 63 : (1923) M. W. N. 89 : 1923 Mad. 337.

———**S. 99 and O. 1, R. 9**—*Objections as to non-joinder—Procedure.*

Per Ramesam, J :—Objections as to non-joinder should be taken at the earliest opportunity and if so taken fall under two heads :—

(1) If it is absolutely necessary to have the absent party, he ought to be added unless the plff. refused to add him, when the suit should be dismissed. If the trial Court erroneously proceeds with the suit, without following either of these courses, the objection can be repeated on appeal and the appellate Court may dispose of it in one of the two ways aforesaid.

(2) If it is not a case of imperative necessity but only a matter of convenience or expediency either the absent party may be added or the suit may be tried without him. In such a case the objection if repeated in appeal may be dealt with similarly. (*Spencer and Ramesam, JJ.*) THINA SHANMUGA MOOPANAR *v.* MONA CHUNA NANA SUBBAYYA MOOPANAR.
42 M. L, J. 133 : (1922) M. W. N.106 : 15 L. W. 283 : 70 I. C. 645 : 31 M. L. T. 266 (H. C.) : 1923 Mad. 317.

——— —**S. 99 and O.21, Rr. 54 (g), 89,90, 91, 92**—*Execution sale—Want of attachment in execution does not interfere with power of Court to sell property.*

Attachment is only a step in execution, the omission of which does not vitiate a sale of property unless material loss results therefrom. After the confirmation of sale, there can be no objection as to attachment, the want of which, being a mere irregularity, does not interfere with the executing Court's power to sell the property. 21 All. 311 Foll. (*Oldfield and Krishnan, JJ.*) SIVA KOLUNDU PILLAI *v.* GANAPATHI IYER.
37 I. C. 964 : (1917) M. W. N. 89.

——— —**S 99**—*Misjoinder.*

An Appellate Court has no power to reverse the decision of the first Court on the ground of misjoinder. 36 Cal. 780 (P. C.) Foll. (*Sadasiva Iyer and Napier, JJ.*) VASUDAVA RAVI VARMA *v.* ATHI KOTTIL EAZHUVAN KUNNANUR.
26 I. C. 51.

C.. P. CODE (V OF 1908), S. 99.

——S. 99—*Additional evidence on appeal.*

The second Appellate Court cannot set aside the decree of the first Appellate Court on the ground of improper admission of additional evidence unless it is satisfied that the decision on the merits is wrong and that the additional evidence might have resulted in the wrong decision. 36 Mad. 477, Foll. (*Sadasiva Iyer and Napier, JJ.*) PEDDIBHOTLA KAMESWARAMMA *v.* BEZWADA CHELAPATHI. **26 I C. 50 : (1914) M. W. N. 864.**

—— ——S. 99—*Misjoinder—Objection on appeal*

An objection as to misjoinder cannot be taken for the first time on appeal especially when the suit is decided on the amendments in the first Court. (*Sundara Iyer and Sadasiva Iyer, JJ.*) RAGAVA IYER *v.* MURUGESA MUDALI **17 I. C. 97.**

——S. 99—*Misjoinder of causes of action—Interference by High Court.*

The High Court will not interfere merely on the ground of misjoinder of causes of action especially when the lower Appellate Court has overruled the plea and decided the case on the merits. S. 99 gives the procedure to be followed in appeals heard after the new Act came into force though the old Code was in force at the time of the institution of the appeal. 34 Mad. 55 : 20 M. L J, 344 Foll. 5 I.C. 774 Dist. (*Spencer and Sundara Iyer, JJ.*) TEJ MAL SOWCAR *v.* JAGAPILLA PAPAYAMMA.

11 M. L. T. 25 : (1912) M. W. N. 50 : 13 I. C. 788 : 22 M. L. J. 225.

——S, 99—*Misjoinder of parties—Objection in appellate Court.*

Where an objection on the score of nonjoinder of parties is taken for the first time in appeal the proper course for the appellate Court is to add the necessary parties and dispose of it, or remit the suit to the first Court for retrial. It should not dismiss the suit. (*Sankaran Nair and Ayling, JJ.*) GOTHALI VENKANNA *v.* GOTALICHINNA.

(1911) 1 M. W. N. 321 : 10 I. C. 392 : 9 M. L. T. 503.

——S. 99—*Mere irregularity—Omission of judge to sign deposition of witness.*

The deposition of a hand-writing expert signed by him and admitted in evidence does not vitiate the trial though it is not signed by the Judge. (*Batten, J. C.*) ALAM SINGH *v.* SETH GOPALDAS.

68 I. C. 664 : 1923 Nag. 7 (1).

——S. 99—*Defect—Minor appellant—Different guardian—No objection—Decree is valid.*

Where a minor, is represented in an appeal against an order in execution by a different guardian from the one who represented him in execution and no objection is taken to it, the Second Appellate Court cannot, under S. 99 of the Code, merely on that ground reverse the decree. (*Macnair, A. J. C.*) ABDUL GANI *v.* BARKIA. **61 I. C. 605.**

——S. 99—*Mere irregularity—Omission to prove loss of document.*

The omission to explain the non-production of a document before tendering secondary evidence is only a mere irregularity within the meaning of

C. P. CODE (V OF 1908), S. 99.

S. 99 of the Code. (*Drake-Brockman, J. C.*) SURAT SINGH *v.* RANI.

59 I. C. 461.

—— S. 99—*Misjoinder of parties and causes of action—Objection—No prejudice.*

No objection as to misjoinder of causes of action and parties can be entertained for the first time in appeal, especially where there is no prejudice to the parties. (*Mittra, A. J. C.*) DHONDIRAM MANGNIRAM *v.* RAMGOPAL CANIRAM.

43 I. C. 960.

——S. 99 and O. 7—*Pleadings—Particulars in.*

The defendant could not object to the frame of the plaint in appeal, where it stated all the facts fully and did not in fact mislead the defendant. (*Drake Brockman, J. C.*) VISWANATH *v.* SHAKAR LAL. **34 I. C. 704 : 12 N. L. R. 90.**

——S. 99—*Decree—Order enlarging time amounting to a redemption decree—Applicability of* S. 99.

Where the order amounts impliedly to a redemption decree, it may be treated as such under S. 99 of the Code notwithstanding an irregularity in form. (*Stanyon, A. J. C.*) BALKISHEN *v.* ATMARAM.

26 I. C. 701 : 10 N. L. R. 150.

——S. 99—*Jurisdiction—What is.*

The word 'jurisdiction' in S. 99 of the C.P.C. judged from the point of view of locality, pecuniary value or the subject-matter of a suit means competency to try. (*Drake Brockman, J. C.*) DURGAGIR *v.* KOLLU.

10 I. C. 731 : 7 N. L. R. 33.

——S. 99—*Irregularity in signing—Vakalatnama is only formal.*

S. 99 C. P Code, covers a case when a person authorised to instruct a pleader actually signs the vakalat for the litigant, where no fraud is committed and the litigant himself knows of it and acquiesces in it. It is a formal irregularity cured by the section. (*Miller, C. J. and Kulwant Sahay, JJ.*) BANWARI RAI *v.* CHETHRU LAL RAI.

74 I. C. 1033.

—— S. 99—*Defect of signature—Section applies,*

Defect of signature does not justify reversal of the decree. The mere fact that pleadings are not duly signed does not invalidate them. (*Jwala Prasad and Adami, JJ.*) RAJA BRAJA SUNDAY DEB *v.* SIVARANJAN.

59 I. C. 282 : 1 Pr 647.

——99 and O. 34, R. 1—*Joinder unnecessary party.*

The joinder of an unnecessary party in a mortgage suit does not involve its dismissal but is a mere irregularity. (*Atkinson, J.*) ASAM PANDY *v.* RAJMEN MISSER.

52 I C. 105.

——S. 99—*Appointment of guardian—Ad-litem—Notice—Irregularity.*

It the Court has allowed a party to appear as the guardian of a minor and to conduct the proceedings in his behalf the mere circumstance

C. P. CODE (V OF 1908), S. 99.

that a notice was not issued to the guardian is immaterial and the irregularity is curable under S. 99, 30 Cal. 1021 referred to. (*Mullick and Kingsford, JJ.*) JAHANAVI PRASAD SINGH *v.* GHARBARAM DEBOY. **35 I. C. 404.**

——S. 99 and O. 6, R. 14—*Failure of plaintiff to sign pleadings—Not power of attorney given to agent—Objection no raised—Section* 99 *applies.*

Where the plaintiff filed the plaint through an agent and did not even sign the plaint, and there was no power of attorney given by the plaintiff to her agent on the record and no explanation was apparently obtained for her failure to sign the plaint and no objection however appeared to have been taken. *Held* S. 99 of the C P. C. applies to the case. (*Maccoll, J.*) MA NGWE KIN *v.* MA HME.

1 Rang. 42 : 74 I. C. 100 : 1923 Rang. 206.

——S. 100—*See also* PRACTICE.

Abandonment.
Acquiescence.
Additional evidence.
Admissibility of evidence.
Adoption.
Adverse Possession.
Ancestral Property.
Appreciation of evidence.
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Burden of Proof.
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Grounds.
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Legal necessity.
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Misjoinder.
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Nature of tenancy.
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Question of fact.
Question of law.
Second Appeal.
Sufficiency of evidence.
Sustainability.
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Abandonment.

——S. 100—*Abandonment— Point expressly abandoned in Court below.*

C. P. CODE (V OF 1908), S. 100—Acquiescence.

Where the appellant expressly abandons a point in the court below he ought not to be allowed to take it in second appeal. (*Mookerjee and Chotzner, JJ.*) JADU GOPAU KUNDU CHOWDHURY *v.* GOPAL CHANDRA NANDI. **69 I. C. 44 (1).**

——S. 100—*Abandonment—Finding of fact.*

Finding as to abandonment is a finding of fact. (*Chatterjea and Beachcroft, JJ.*) KAILAS CHANDRA *v.* KOMESH CHANARA SEN. **32 I. C. 355.**

——S. 100—*Abandonment—Finding of fact.*

The High Court will not interfere in second appeal with a finding of fact by the lower appellate Court that there was a complete abandonment of a holding by the tenant thereof. (*Jenkins, C. J. and Ray, J.*) MONOHAR PAL *v.* ANANTA MOYEE DASYA. **20 I. C. 198. : 17 C W. N. 802.**

——S. 100—*Abandonment.*

A finding of non abandonment cannot be attacked in second appeal. (*Martineau, J.*) AHMAD YAR *v.* MAHOMEDALI. **3 Lah. L. J. 445.**

——S. 100—*Abandonment.*

Finding as to the effectiveness of abandonment in law on the facts found could be challenged in second appeal even where there is not any ground in the memorandum of appeal. (*A. Raoof, J.*) RAJA *v.* SALABAT. **66 I. C. 935 : 3. Lah. L. J. 26.**

——S. 100—*Abandonment—Finding of fact.*

A finding on abandonment of a holding is a finding of a fact and consequently a second appeal only on matters of legal principle arising out of these facts can be taken up, 13 P. W. R. 1910 Ref. (*Shadi Lal and Wilberforce, JJ.*) NAND SINGH *v.* CHAJJU. **41 P. R. 1919 : 51 I. C. 396 : 82 P. L. R. 1919.**

——S. 100—*Abandonment.*

Where a party or his pleader abandons a point in the lower appellate Court he cannot raise it in second appeal. (*Lindsay, J. C.*) MAHADEO TEWARI *v.* SITLA BAKHSH SINGH. **1922 Oudh 102 : 65 I. C. 408 : 8 O. L. J. 660.**

Acquiescence.

——S. 100—*Acquiescence—Question of law.*

The question of acquiscence is a matter of legal inference to be drawn from the facts proved in the case and can be taken up in second appeal. (*Chevis and Leslie Jones, JJ.*) CHUBAR *v.* JAS KAUR. **69 P. R. 1917 : 41 I. C. 927 : 103 P. W. R. 1917.**

——S. 100—*Acquiescence— Necessity—Question of fact.*

Acquiescence is sometimes a pure question of fact, but becomes a question of law when the point is whether conduct of a party not amounting to direct consent should be taken as waiver. Necessity may be a question of fact, but becomes a question of law when the Court decides on wrong principles as to the *quantum* of proof of necessity. (*Johnstone C. J. and Shadi Lal, J.*) NIDHAN *v.* BHUTA. **36 I. C. 700 : 107 P. R. 1916.**

——S. 100—*Acquiescence—Question of, is one of law.*

C. P. CODE (V OF 1908), S. 100—Acquiescence.

The question of acquiescence from the facts found by the lower Court is one of law and not a question of fact. 21 A. 496 followed. (*Hallifax, A. J. C.*) SHANKER *v.* RANGUBAI.
71 I. C. 942 : 1924 N. 56.

——S 100—*Acquiescence—Question of fact.*
Acquiescence is not a question of fact, but of legal inference from the facts found. (*Hallifax, A. J. C.*) RAMRATAN *v.* SHIODATTARAI.
73 I. C. 137.

Additional Evidence.

——S. 100—*Additional evidence—Findings thereon—Conclusive.*
Findings of fact, even if such findings are based on additional evidence taken for the first time by the Court of Appeal below, on remand from the High Court, are binding on second appeal. (*Mukerjee and Beachcroft, JJ.*) RASH MOHINEE DASSEE *v.* NAFAR CHANDRA PAL CHOWDHURY. **27 I. C. 265 (2).**

——S. 100 and O. 41, R. 27—*Additional evidence—Appellate Court refusing to admit—Interference in second appeal.*
Per *Chief Justice and Ayling, J.* (*Sadasiva Iyer, Diss.*) The High Court is not empowered to interfere in second appeal with an order of the Lower Appellate Court rejecting an application made to it for the admission of additional evidence under O. 41, R. 27 (1) of the C. P. Code. *Per Sadasiva Iyer, J.*—The question whether the Appellate Court exercised the discretion properly is a question of law and the High Court is entitled to consider it in second appeal. (*Wallis, C. J., Ayling and Sadasiva Iyer, JJ.*) VAITHINATHA PILLAI *v.* KUPPA THEWAR. **42 Mad. 737 : 37 M. L. J. 125 : 26 M. L T. 246 : (1919) M. W N. 525 : 53 I. C. 274 : 10 L. W. 122 (F. B.)**

——S. 100—*Additional evidence—Admission of.*
Per Sadasiva Aiyer, J.—The High Court cannot admit fresh evidence as to facts in second appeal. Where a party thinks that any fresh evidence, which is discovered after the decision of the Appellate Court would have been of assistance to him if it had been considered at the original trial or appeal he should withdraw the appeal and apply for review of judgment in the Lower Appellate Court. *Per Spencer, J.*—A Bench of the High Court hearing second appeals may when calling for a finding on any issue from the Lower Appellate Court permit the parties to adduce fresh evidence on that issue if a good case is made out for it. (*Sadasiva Aiyar and Spencer, JJ.*) RAMAN MENDI *v.* MAMMALI.
39 I C. 954 : (1917) M. W, N. 560.

Admissibility of Evidence.

——S. 100—*Admissibility of evidence—Objection.*
The appellant cannot raise objections to the admissibility of documents received in evidence in the lower Court if under the circumstances the application is quite too late. (*Richards, C. J. Tudball and Walsh, JJ.*) KIRPIA *v.* HARDEO.
34 I. C. 57 (F. B.).

C. P. CODE (V OF 1908), S. 100—Admissibility of evidence.

——S. 100—*Admissibility of evidence in lower Court.*
Although an erroneous omission in the trial court to object to an admission which was irrelevant did not make it relevant and admissible in evidence, an objection that a document that *per se* is not admissible in evidence, has been improperly admitted in evidence cannot be entertained in second appeal. (*Mookerjee and Rankin, JJ.*) SAYERUDDIN AKONDA *v.* SAMIRUDDIN AKONDA.
72 I. C. 985 : 1923 Cal. 378.

——S. 100—*Admissibility of evidence—Inadmissible evidence—Finding based on.*
Finding of a lower appellate Court based no inadmissible evidence can be impeached in second appeal. 2 W R. 74 : 21 C. L. J. 45 Ref. (*Mookerjee and Chotzner, JJ.*) TARAKUMAR GHOSE *v.* KUMARA ARUN CHANDRA SINGH.
74 I. C. 383 : 1923 Cal 261.

——S. 100—*Admissibility of evidence.*
If a document is wrongly admitted in courts below the High Court in second appeal cannot decide there is other evidence to justify decree. (*Mookerjee and Fletcher, JJ.*) UJIR ALI SARDAR *v.* SHADHAI BEHARI **35 C.L.J. 182 : 68 I. C. 1003 : 1922 C. 185.**

——S. 100—*Admissibility of evidence—Objection.*
Where no objection is taken in the first Court to the admission in evidence of a document objection cannot be taken in second appeal that it has not been proved that the conditions exit which make S 22 applicable. (*Newbould, J.*) REAJADDI SARKRR *v.* GANGA CHARAN BATTACHARJYA. **53 I. C 863.**

——S. 100—*Admissibility of evidence—Objection to—Non-joinder—Objection on the ground of.*
An objection as to the mode of proof of certain documents taken for the first time in second appeal could not be entertained, nor can an objection as to non-joinder of parties be allowed for the first time in second appeal. (*Newbould, J.*) HARIDOY NATH PARUI *v.* AKSHOY LAL CHOWDHURY. **52 I. C. 463.**

——S. 100—*Admissibility] of evidence—Objection to.*
Private chittas were admitted in evidence in the trial Court without objection and acted upon by the Courts. The point of inadmissibility of the documents cannot be permitted to be taken in second appeal. (*Fletcher and Newbould, JJ.*) NAFAR JOARDAR *v.* PRATIMA SUNDARI DASSYA.
41 I. C. 726.

——S. 100—*Admissibility of evidence—Omission to object in Court below.*
Evidence admitted without objection in the Trial Court cannot be objected to being on record in the Appellate Court. An erroneous omission to object in the primary Court to the admissibility of a certain piece of irrelevant evidence does not make it relevant in the Appellate Court. 23 I. A. 106 Foll. (*Chatterjee and Newbould, JJ.*) KANGALI MOLLA *v.* BENI MADHAB BISWAS. **34 I C. 534.**

——S. 100—*Admissibility of evidence- Finding of fact—Evidence not existing in record;*

C. P. CODE (V OF 1908), S. 100—Admissibility of evidence.

Where a finding of a Lower Appellate Court is based mainly upon evidence which is explicitly referred to and avowedly reproduced in the judgment, but it is not to be found anywhere in the record, the mistake vitiates the decision and renders it contrary to law within S. 100 of the C. P. C. of 1908. 24 W. R. 343 Rel. (*Carnduff and Chapman, JJ.*) BHUPENDRA KUMAR CHAKRAVARTHI *v.* PYARI MOHAN ROY,
15 I. C. 515 : 17 C. W. N. 37.

——S. 100—*Inadmissible evidence—Finding based on.*

The Court hearing the second appeal can challenge a finding of fact arrived at by illegally relying upon irrelevant and inadmissible evidence. (*Woodroffe and Coxe, JJ.*) TARINI CHARAN SARKAR *v.* FAKARANUNNJSSA CHOWDHRANI
15 I. C. 459.

——S. 100—*Admissibility of evidence—Evidence Act*, S. 45—*Comparison of handwriting.*

Comparison of signatures is one of the modes of proving handwriting and although where there is no other evidence such proof would be regarded as hazardous and inconclusive, it cannot be regarded as an error in law to base the conclusion on such proof alone, and a Court of second appeal would have no power to set aside a finding based on such comparison. 14 I. C. 741, *Foll.* (*Broadway and Moti Sagar, JJ.*) BALAK RAM *v.* MAHOMED SAID. **5 L. L. J. 530 : 1923 Lah. 695.**

——S. 100—*Inadmissible evidence—Finding of fact based on no legal evidence—Whether can be set aside.*

A finding of fact which is not based on legal evidence can be set aside even in second appeal. (*Shadi Lal, J.*) NAGINA SINGH *v.* SUNDER.
33 I. C. 937 : 24 P. W. R. 1916.

——S. 100—*Admissibility of evidence—Objection.*

An objection to the admissibility of a document in evidence cannot be allowed to be raised in second appeal when, in lower Appellate Court, the party objecting only endeavoured to explain away its effect. A finding of fact arrived at by the Lower Appellate Court is conclusive in second appeal unless it is vitiated by an error in law or by there being no evidence to support the conclusion or unless the conclusion drawn is not warranted by the findings. (*Spencer and Coutts-Trotter, JJ.*) AYYA PERUMAL UDAYAN *v.* RAMASWAMY CHETTIAR. **29 M. L. J. 362 : (1915) M. W. N. 614 : 30 I. C. 983 : 2 L. W. 650**

——S. 100—*Admissibility of evidence—Second appeal.*

A High Court cannot in second appeal question a finding of fact merely because the evidence in the lower Court was not conclusive upon the issue of fact, if the evidence was otherwise legally admissible. 11 O. C. 264. Diss. (*Lindsay, J. C.*) JAGANNATH *v.* KEDAR. **24 I. C. 633.**

——S. 100—*Inadmissible evidence—Findings on—Power of High Court to interfere with finding.*

C. P. CODE (V OF 1908), S. 100—Adverse possession.

The High Court has power in second appeal to interfere with a finding of the Lower Court on a question of fact, where the finding is based upon inadmissible evidence or evidence legally insufficient to prove it. (*Evans, A. J. C.*) SHAH BAZ KHAN *v.* RAHIMAN. **11 I. C. 536 (Oudh).**

——S. 100—*Admissibility of evidence—Relevancy of document.*

Relevancy and proof of document is a question of law and can be raised at any stage but the question as to the proof of a document is one of procedure and can be waived. (*Das and Bucknill, JJ.*) KALIKA NAND *v.* SHIVA NANDAN.
3 Pat. L. T. 149 : 63 I. C. 625 : 1922 P. 122.

——S. 100—*Admissibility of evidence.*

Entries in *balwara* papers are admissible in evidence. (*Das and Adami, JJ.*) JUGDEO NARAIN *v.* BULAKI GOPE. **2 P. L. T. 343 : 63 I. C. 226 : 1921 Pat. 343.**

——S. 100—*Admissibility of evidence—Judgment based on.*

Where the Lower Court has based its decision partly on irrelevant evidence, the High Court will not in Second Appeal decide whether the other evidence in the case is sufficient to support the findings arrived at. S. 167 of the Evidence Act is not a bar to such a case being remanded. (*Dawson Miller, C. J. and Mullick, JJ.*) MUSSAMAT SUMITRA KUER *v.* RAM KAIR CHOWBEY,
1 Pat. L. T. 702 : 5 Pat. L. J. 410 . 57 I. C. 561 : 1921 Pat. 17.

Adoption

——S. 100—*Adoption—Evidence considered—Finding of fact.*

Where the lower Court after considering the whole evidence adduced by the parties finds an adoption proved the finding cannot be interfered in second appeal. (*Rattigan, J.*) THAKKERDOSS *v.* CHUNNI LAL. **12 P. W. R. 1915 : 27 I. C. 606 : 62 P. L. R. 1915.**

Adverse Possession.

——S. 100—*Adverse possession—Inference from documents.*

Where the question of adverse possession is one of inference from documents the concurrent findings of the Indian Courts may be upset by Privy Council as the question was not one of fact. (*Viscount Haldane*) CHOUDHRI SATGAR PRASAD *v.* KISHORE LAL. **42 All. 152 : 46 I. A. 197 : 18 A. L. J. 235 : 11 L. W. 384 : 38 M. L. J. 259 : (1920) M. W. N. 3 : 22 Bom. L. R. 451 : 2 U. P. L. R. 55 : 55 I. C. 486 : 24 C. W. N. 394 (P. C.)**

——S. 100—*Adverse possession—Inference from facts.*

The question whether possession is adverse or permissive may be one of legal inference from documents. The mere fact that the evidence in the case is merely documentary does not constitute the finding of the lower court findings of law. The question of the weight to be attached to the instances proved by the documentary evidence is one of fact. 29 A. 203 ; 42 A. 152 Ref to.

C. P. CODE (V OF 1908), S. 100—Adverse possession.

(*Daniels, J.*) MOHAMMED AHMED *v.* BABU.
71 I. C. 762 : 1923 A. 442.

——— **S. 100**—*Adverse possession—Question of fact.*

Where a house was found to be occupied by the defendant's father adversely to the plaintiff landlord for more than 12 years before suit, this finding of fact is fatal to the appeal. 41 All, 669 Dist. (*Ryves and Daniels, JJ*) BISHESHAR NATH *v.* ABDULWRHID. 75 I. C. 672 : 1923 A. 382. (1).

———S. 100—*Adverse possession—Question of law.*

Where the facts are not in dispute and where the conclusion depends upon the inferences to be drawn from admitted facts, a question of adverse possession may be a question of law. (*Walsh and Stuart, JJ.*) CHAMPA LAL *v.* MANGAL CHAND.
40 I. C. 420.

———S. 100—*Adverse possession—Inference from facts.*

The question of adverse possession is a mixed question of fact and law. The facts found by the Judge must be accepted by the High Court in second appeal, but the conclusion drawn from them, namely, whether the possession was adverse or not, is a question of law and can be considered by the High Court. 19 Cal, 253, 262.: 20 C. 93: 29 C. L. J. 241 ; 24 C. W. N. 1057 Ref. (*Chatterjee and Pearson, JJ.*) JOGENDRA NATH MOOKERJEE *v.* RAJENDRA NATH BHATTACHARJEE.
26 C. W. N. 890: 68 I. C. 200 : 1922 Cal. 54.

———S 100—*Adverse possession—Question of law.*

The question of adverse possession is a mixed question of fact and law. Whether a deft, did act in a particular manner is a question of fact but when the Court is called upon to decide the true legal affect of that act upon the title of the plffs. the question is a question of law. (*Mookerjee and Beachcroft, JJ.*) CHINTAMANI PRAMANIK *v.* HRIDAY NATH KAMILA. 51 I.C. 123 : 29 C. L. J. 241.

———S. 100—*Adverse possession—Question of law—Continuity of 'possession' necessity.*

The question whether or no possession is adverse is one of mixed law and fact and the High Court can in second appeal interfere and determine whether on facts found a certain possession may legally amount to adverse possession. Continuity of possession is necessary to render it adverse. (*Jenkins, C. J. and Coxe, J.*) SHOOKOOR MULLICK *v.* BEHARI LAL. 11 I. C. 185.

———S. 100—*Adverse possession—Prescription.*

A finding of the lower appellate court that the possession of a party to the suit has not been adverse for a continuous period of 12 years is a finding of fact which cannot be disturbed in second appeal. (*Martineau, J.*) MAHOMED AZIM-KHAN *v.* SULTAN AHMED KHAN.
4 Lah L. J. 309.

———S. 100—*Adverse possession—Interference.*

Abandonment by an occupancy tenant or adverse possession by a landlord is not necessarily question of fact. When the decision is based on no evidence or is against express *prima facie* reliable

C. P. CODE (V OF 1908), S. 100—Appreciation of evidence.

evidence which by law is to be presumed to be correct in the absence of all evidence to the contrary or is based on a misconstruction of the Punjab Tenancy Act, the High Court can interfere in second appeal. 81 P. R. 1916: 19 Cal. 253 (P. C.) 41 Cal. 972 (P. C.) Rel. 141 P. R. 1883 Dist. (*Bewan Petman, J.*) MAHOMED UMAR KHAN *v.* RAZIKHAN. 170 P. R. 1919 : 54 I. C. 873 : 2 Lah. L. J. 136.

———S. 100—*Adverse possession—Hindu widow—Title—Finding of fact.*

The question of widow's acquisition of a prescriptive title and the extent of the title acquired is one of fact. (*Sankaran Nair and Ayling, JJ.*) KUPPUSWAMY *v.* SRINIVASA IYENGAR.
(1911) 1 M. W. N, 314: 10 I. C. 63 : 9 M. L T. 445.

———S. 100—*Adverse possession—Inference from facts found.*

The question of adverse possession is one of inference from facts found and is a question of law justifying a second appeal. (*Hallifax, A. J.C*) MT. MUNGA *v.* LACHMI PRASAD.
6 N. L. J. 70 : 74 I. C. 51 : 1923 Nag. 65.

———S. 100—*Adverse possession—Trespass.*

The term "trespasser" is a term of law and the High Court in second appeal may examine whether the finding of the Lower Court on the point is correct on the evidence tendered. (*Mullick, J.*) CENTRAL KARKEND CO., LTD, *v.* KARTIC REWANI. 34 I. C. 616 : 1 Pat. L. J. 47.

Ancestral property.

——— S. 100—*Ancestral property—Plff's. relationship.*

Findings as to the relationship of the plff. and the ancestral character of the property in dispute are findings of fact binding on the court of second appeal. (*Broadway and Moti Sagar, JJ.*) KARTAR SINGH *v.* KIRPA SINGH.
30 P. L. R. 1922.

———S. 100—*Ancestral property—Finding of fact.*

A finding by the Appellate Court that the right to the "birt" is not proved to be ancestral is one of fact and is not a matter to be decided in second appeal. (*Martineau, J.*) BISHIN DATT *v.* KRISHEN DATTA. 67 I. C. 439 : 3 Lah L. J. 414.

———S. 100—*Ancestral property—Finding of fact.*

Although on the facts established it might have been possible to hold that there was a sufficiently strong presumption that the land in suit was ancestral *qua* the plff., the finding that the land was not ancestral being one of fact and the view taken by the lower appellate Court being not opposed to law a second appeal was not competent. (*Shadi Lal and Le Rossignol, JJ.*) SHER SING *v.* RAM SINGH.
42 P. L. R. 1919.

Appreciation of evidence.

———S. 100—*Appreciation of evidence.*

Where the High Court differed from the lower Courts not only in the estimate of the evidence, but also with regard to the inferences derivable

C. P. CODE (V OF 1908), S. 100—Appreciation of evidence.

from documents produced in the case and other circumstances, the r Lordships dealt with the case on its merits. (*Amir Ali*). JAGDEO NARAIN SINGH *v.* BALDEO SINGH **1923 M W· N. 361 : 27 C. W. N. 925 : 71 I. C. 984 : 3 Pat. L. T. 605 : 36 C. L. J. 499 : 49 I. A 399 : 32 M. L. T, 1 : 2 P. 38 : 45 M. L. J. 460 : (1922) P. C. 272 P. C.**

——S. 100—*Appreciation of evidence.*

The High Court has nothing to do in second appeal, as to the importance of evidence but it has to accept the finding of the Lower Court as a question of fact, except where a special question *e. g.*, credibility of witnesses apart from demeanour arises. (*Richards, C. J. and Banerji, J.*) MALUDEO KHAN *v.* ABDUL SATAR. **39 All. 426 : 39 I. C. 666 : 15 A. L. J. 349.**

——S. 100—*Appreciation of evidence—Inferences as to the legal standard of care taken by boiler can be considered by High Court.*

Where the facts are not in dispute the inference which the Cour· below draws from these facts and the legal standard of reasonable care set up by it are ques'ions of law and the High Court can see whether the Court below was right in holding *e.g.* that the defendant in despatching baled jute in a boat with 20 or 32 leaks. I or 1½ inches in length, through which water entered into the boat, the jute being left in the hold of the boat for thirty hours complied with the requirements of S, 151 of the Contract Act merely because there was continuous pumping out of the water which had only the effect of saving the boat. (*Chatterjea and Cuming, JJ.*) LAKSHMI NARAIN *v.* THE SECRETARY OF STATE FOR INDIA. **27 C. W. N. 1017 : 1924 Cal. 92.**

——S. 100—*Appreciation of evidence—Not a question of law.*

The weight to be attached to a statement in a rent receipt or any other document is a matter within the cognisance of the Court of first appeal with which the High Court in second appeal is not entitled to interfere. (*Fletcher and Panton, JJ.*) SATISH CHANDRA MUSTAFI *v.* ABDUL MAJID MUHAMMAD. **47 I. C. 780.**

——S. 100—*Appreciation of evidence--Weight due to.*

The value of the evidence is not a matter for consideration in second appeal. (*Teunon and Richardson, JJ.*) TAMIZ-UD-DIN *v.* TAJU. **46 Cal, 152 : 46 I. C. 237 : 22 C. W, N. 822.**

——S. 100—*Appreciation of evidence—Misapprehension.*

The error of the Judge in criticising the evidence of one of the witnesses on the wrong idea that the other two had not examined vitiates his finding. (*Fletcher and Newbould, JJ.*) BARODA PRASAD ROY CHOWDHURY *v.* MANMATHA NATH MITRA. **41 I. C. 456.**

——S. 100—*Appreciation of evidence--Weight given to a document which is not one of title. whether a question of law.*—Halabadi Chittas, —Question of undue preference to *thak* map involves a pure question of fact and as such cannot be raised in second appeal. *Halabadi Chittas* cannot be called documents of title and, therefore what effect is to be given to then in evidence is not a question of law. (*D. Chatterjee and Beachcroft, JJ.*) BARATH CHANDAR *v.* RAMNANDA DEB. **32 I. C 862.**

——S. 100—*Appreciation of evidence—Error of law affecting weight to be attached to evidence —Remand,*

The Lower Appellate Court can attach such value as it thinks proper to each piece of documentary evidence and the High Court in second appeal could not go into the weight to be attached to each. (*N. R. Chatterjee and Mullick, JJ.*) NABENDA KISHORE ROY *v.* RAHIMA BANU. **31 I. C 695 : 19 C. W, N. 1015.**

——S. 100—*Appreciation of evidence.*

If a finding of fact is recorded on a mis-interpretation of the evidence it can interfered with in second appeal. (*Moti Sagar, J.*) THE FIRM. JOWALA DAS, PARAMANUND *v.* UTTAM CHAND. **1923 Lah. 585.**

——S. 100—*Appreciation of evidence—Finding based on misreading of judgment.*

A finding cannot be contested in second appeal if it is based on a misreading of the first court's judgment. (*Scott Smith and Fforde, JJ.*) MT. BASANTI *v.* CHANDRA SINGH. **1923 Lah. 502 (2).**

——S. 100—*Appreciation of evidence—Conclusion can be attacked.*

Although in second appeal findings of fact cannot be impugned, it is nevertheless open to a party to challenge the correctness of the conclusions drawn from such findings. (*Broadway and Moti Sagar, JJ.*) BAJ SINGH *v.* PARTAB SINGH. **1923 Lah. 497. (2)**

——S. 100—*Appreciation of evidence—Finding of fact—Discussion of evidence—Partition.*

Where the judgment of the lower appellate Court leaves no room for doubt that the material evidence in the case has been considered, the mere fact that reference in detail is not made to every piece of evidence, does not vitiate his judgment. The findings of fact would therefore be binding in second appeal. (*Broadway and Abdul Raoof, JJ.*) NATHU SHAH *v.* HAVELI SHAH. **65 I. C. 475 : 1 L. L. J. 72 : 1922 L. 140.**

——S. 100—*Appreciation of evidence.*

The High Court cannot in second appeal upset a finding of fact on the ground that the evidence on record has not been properly appreciated by the court below. (*Chevis, A.C.J. and Abdul Raoof, J.*) JADU NATH *v.* RAMAN MAL. **4 Lah. L. J. 426.**

——S. 100—*Appreciation of evidence—Error in weighing evidence.*

Findings of fact are conclusive in second appeal even though there has been an error on the part of the Court below in weighing the evidence. (*Petman, J.*) BHAN SINGH *v.* GOKALCHAND. **53 I. C, 137.**

——S. 100—*Appreciation of evidence—Ignoring evidence.*

C. P. CODE (V OF 1908), S. 100—Appreciation of evidence.

The ignoring of an important plea of evidence by the Lower Appellate Court is a good ground for second appeal. (*Broadway, J.*) RAM KISHEN *v.* ATMA RAM. **42 I. C. 76 : 148 P. W. R. 1917.**

——S. 100—*Appreciation of evidence—Finding of fact when can be set aside in second appeal.*

When the Court of first instance has not come to a definite finding of fact by not applying the judge's mind to a proper consideration of the evidence in the case, the Court of second appeal can set aside his finding of fact. (*Le Rossignol, J.*) BHANI *v.* BANSI.
33 I. C. 1002 : 28 P. W. R. 1916.

——S. 100—*Appreciation of evidence—Finding of first Appellate Court.*

A finding of a first Appellate Court is not illegal simply because it does not give as much weight to a certain circumstance as the High Court might have done, if it had been the Court of first appeal, especially when it is based also on other facts. (*Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) CHOKKALINGA PILLAI *v.* MAHALINGAM PILLAI.
24 I. C. 383 : 1 L. W, 350.

——S. 100—*Appreciation of Evidence.*

In second appeal the High Court will not entertain any question as regards the weight to be attached to the oral evidence in a case. (*Daniels, J. C.*) BHUDHAR SINGH *v.* BHIKAM SINGH.
65 I. C. 370 : 8 O. L. J. 629.

——S. 100—*Appreciation of evidence--Weight to be given to.*

The weight or value to be given is not a subject for discussion in second appeal. (*Lindsay, J. C.*) MANKARAN SINGH *v.* BAIJ NATH SINGH.
18 O. C. 160 : 30 I. C. 279 : 2 O. L. J. 283.

——S. 100--*Appreciation of evidence—Credibility of witnesses.*

The credibility of witnesses accepted by the Courts below cannot be considered in second appeal but the sufficiency of the evidence can be considered in second appeal. (*Kendall, A. J. C.*) RAM DAT *v.* SUKHIA. **25 I. C. 869 : 1 O. L. J. 470.**

——S. 100 — *Appreciation of evidence — Witnesses—Creditability—Second appeal.*

Where evidence is disbelieved simply because the witness is a *patwari* or a relative of the party producing him and such other general reasons, it is an error in law and a second appeal will lie. (*Baillie, S. M. and Tweedy, J. M.*) GAYA PRASAD PANDE *v.* ABBAS BANDI BIBI.
25 I. C. 660 1. O. L. J. 383.

——S. 100—*Appreciation of evidence—Findings of fact, when to be questioned.*

The findings of fact cannot be questioned on second appeal unless the appellant shows that the lower court has committed some error of law in deciding it. The value to be attached to evidence is not a question open in second appeal. (*Lindsay, J. C.*) DULARE SINGH *v* SUMER SINGH. **21 I. C. 95.**

——S. 100—*Appreciation of evidence.*

A second Appellate Court cannot consider the credibility of any particular evidence. But

C. P. CODE (V OF 1908), S. 100—Burden of proof.

where the lower Court has rejected admissible evidence or has acted upon inadmissible or inadequate evidence the second AppellateCourt can interfere in second appeal. (*Lindsay, A. J. C.*) LALMAN *v.* NAND LAL. **20 I. C. 894 : 17 O. C. 1.**

——S. 100—*Appreciation of evidence—Weighing of evidence.*

The precise degree of weight to be attached to the different parts of evidence is not a matter for second appeal. If a finding of fact had been arrived at after a careful consideration of the whole evidence no valid objection in law could be made in second appeal with respect to the finding. (*Piggott, A. J. C.*) PARBATI *v.* MAHARAJ SINGH.
10 I. C. 188.

——S. 100—*Appreciation of evidence—Question of weight to evidence.*

The question of weight to be attached to evidence cannot be dealt in second appeal. (*Dass, J.*) NAROOP RAI *v.* SRIKANT PRASAD. **55 I. C. 922 : 2 U.P.L.R. (Pat.) 49: 1 Pat. L.T, 224.**

——S. 100—*Appreciation of evidence.*

Failure of the Lower Appellate Court to appreciate document put in evidence is not a ground for second appeal. (*Roe and Jwala Prasad, JJ.*) AMAR DAYAL SINGH *v.* BISHUN CHAND SAHU.
38 I. C. 158.

Benami.

——S. 100—*Benami—Fraud.*

A question of benami or fraud is not a question of pure facts : it is a mixed question of fact and law, and if the Court proceeds on a mere suspicion and draws inference from facts proved such as no reasonable man would draw, then the Court committed an error of law, and the High Court may interfere in second appeal. 21 Mad. 56 : 7 All. 649, Ref. (*Mullick and Atkinson, JJ.*) MUSSAMMAT JANKI BAI *v.* NAJAF KHAN.
43 I. C. 49 : 3 Pat. L. W. 339.

Burden of Proof.

——S. 100—*Burden of proof—Question of law or fact.*

The question of onus is not necessarily and in all cases one of law. How much or what evidence is sufficient to discharge the *onus* is a question which will depend upon the weight to be attached to the evidence adduced. (*Russel and Chandavarkar, JJ.*) PANNALAL *v.* GANU BHAVAJI NHAVI. **12 I. C. 691 : 13 Bom, L. R. 1021.**

——S. 100—*Burden of proof—Error as to—Finding of fact.*

A solitary statement seeming to throw onus on the wrong party while the whole evidence was considered does not vitiate the finding of fact. (*Caspersz, J.*) ALTAP ALI *v.* SHEIKH MOHATEP.
9 I. C. 4.

——S. 100—*Burden of proof—Negotiable instrument—Want of consideration—Question of onus of proof—One of law.*

Question of burden of proof where defendant admits execution but denies partial or total absence of consideration is one of law. (*Broadway and Abdul Qadir, JJ.*) GURDIH SINGH *v.* KARAM DAD. **4 Lah, L. J.199.**

C. P. CODE (V OF 1908), S. 100—Burden of proof.

——S. 100—*Burden of proof.*

A wrong allocation of onus becomes immaterial when it does not affect the decision on the merits. (*Martineau, J.*) AHMAD YAR *v.* MAHOMED ALI.
3 Lah. L. J. 445.

——S. 100—*Burden of proof — Custom — Necessity for certificate.*

Where a question of burden of proof clearly involves a question of custom, an appellant is not entitled to argue it on second appeal without a certificate. (*Abdul Raoof and Harrison, JJ.*) MILKHI *v.* MUSSAMMAT PUNNI.
2 Lah. 348 : 66 I.C. 492.

——S. 100—*Burden of proof--Question of law.*

The question upon which party the onus of proving any particular point lies, is undoubtedly a question of law on which a second appeal lies. (*Scott Smith, J.*) MUSSAMMAT NAIMAT BIBI *v.* MAHOMED FAIZ. **65 I. C. 745.**

——S. 100—*Burden of proof—Finding of fact —Error as to—Interference.*

Defts. executed a mortgage in favour of the plaintiffs for Rs. 4,580 made up of sums due to previous mortgagees, previous debt due on account-price of buffaloes and payment of debts due to other persons. Before the Sub-Registrar the executants admitted receipt of full consideration, but at mutation they stated that the whole of the consideration had not been received. In a suit by plaintiff, for possession as mortgagee, *Held*, that the question of *onus probandi* arising in this case was a question of law rendering a second appeal competent. (*Broadway and Wilberforce, JJ.*) GANGA RAM *v.* RULIA. **64 I. C. 301 : 2 Lah. 249.**

——S. 100—*Burden of proof—Allocation of.*

On a question as to whether there was consideration for a Hundi the question of allocation of onus is the most vital question between the parties and it is the duty of a Court of second appeal to rectify a mistake made by the Lower Appellate Court in this respect. (*Shadi Lal and Wilberforce, JJ.*) MADHO RAM *v.* NANDU MAL.
58 I. C. 982 : 1 Lah. 429.

——S. 100—*Burden of proof--Finding of fact.*

A correct appreciation by an Appellate Court of a direction of the Lower Court as to the burden of proof, and a consequent arrivingat a finding of fact must be accepted in Second Appeal. (*Sadasiva Aiyar and Spencer, JJ.*) SHANMUGA UDAYAR *v.* KANDASAMI ASARI. **59 I. C 973. 12 L. W. 170 :**

——S. 100—*Burden of proof—Question of Law.*

The adjustment of the burden of proof in a case is a question of law. (*Lindsay, J.C.*) DULAREY SINGH *v.* SURAJ BALI SINGH.
43 I.C. 478 : 4 O. L. J. 556.

——S. 100—*Burden of proof—Acceptance—Estoppel.*

When the burden of proof put by the Court below was accepted and witnesses produced by the plaintiff, he cannot turn round and say in second appeal that his evidence should be disregarded as he was not bound to call any evidence. (*Lindsay, A J.C.*) SITA RAM *v.* HAIDAR KHAN. **1 O.L.J. 352: 25 I. C. 138 : 17 O. C. 134.**

C. P. CODE (V OF 1908). S. 100—Concurrent findings.

——S. 100—*Burden of proof—Cast on wrong party—Disregarding evidence.*

A fact resulting into a finding of wrong burden of proof and disregard of evidence on record is not binding in second appeal. (*Mullick and Bucknill, JJ.*) SHEOPUJAN RAI *v.* KESHO PRASAD SINGH. **2 Pat. 919 : 76 I. C. 347 : 5 Pat. L. T. 315 : 1924 P. 310.**

——S. 100—*Burden of proof—Objection to.*

After evidence was given by both sides and the Lower Court has preferred that of one side, the objection as to wrong shifting of burden of proof is groundless in second appeal. (*Chapman, J.*) JANG BAHDAUR SINGH *v.* RAM SUNDAR SINGH.
38 I.C. 817 : 1 Pat. L. W, 194.

Circumstantial Evidence.

——S. 100 — *Circumstantial evidence — A finding of fact to be questioned.*

When there is no illegality or irregularity in a finding of fact, it cannot be questioned in a second appeal, although it has only circumstantial evidence for its basis. (*Lindsay, J.C.*) BALKISKAN *v.* RAJ BAHADUR. **37 I. C. 439 : 3 O. L. J. 644.**

Concurrent Findings.

——S. 100—*Concurrent findings—Consideration—Passing of—Finding of fact.*

Where there is a concurrent finding of both the lower Courts regarding receipt of consideration, there is no ground for interference in second appeal. (*Scott Smith and Shadi Lal, JJ.*) AMAR DAS *v.* SUKH DIAL. **186 P. L. R. 1914 : 25 I. C. 511 : 86 P. W. R. 1914.**

——S. 100—*Concurrent findings—Finding of fact—No evidence—Interference.*

The High Court will interfere to upset even concurrent findings of fact if they are not based on evidence but on a wrong presumption. (*Johnstone and Scott Smith, JJ.*) IMAM DIN *v.* DULO. **239 P. L. R. 1914 : 25 I. C. 278: 144 P. W. R. 1914.**

——S. 100—*Concurrent findings.*

Concurrent finding of fact can only be disturbed in second appeal for cogent reasons. (*Shah Din and Chevis, JJ.*) NIAMAT *v.* NURA.
95 P. W. R. 1911 : 10 I. C. 338 : 169 P. L. R. 1911.

——S. 100—*Concurrent findings.*

Ordinarily it is not possible on second appeal to go behind concurrent findings of fact but where not only the findings are perverse in the sense that they were opposed to the weight of the oral evidence but that was due to the fact that the trial court wholly ignored the entry in certain document whilst the first appellate court entirely failed to realise its probative value the High Court set aside the concurrent findings of fact. (*Pratt, J.*) MAUNG HLAING *v.* MAUNG CHIT SUO.
1. R 135 . 1923 R, 196.

——S. 100—*Concurrent findings—Finding of fact—Reasons for, to be shown.*

C. P. CODE (V OF 1908), S. 100—Conflicting findings.

When questions of fact are involved in a case, the Appellate Court ought to give its reasons for dismissing the appeal and its judgment should at least show that the Court understood the case and did consider the ground of appeal in view of the provisions of S. 100, C. P. C. with regard to the binding nature of concurrent findings of fact on the High Court. (*Mc Coll, J. C.*) NGA SEN BAW *v.* NGE LUE. 33 I. C. 666 : (1915) II. U. B. R. 92.

Conflicting findings.

——S. 100—*Conflicting findings—Interference*

Where the trial Court found in a partition suit there was a partition as a family arrangement and the Appellate Court accepted the finding on partition but set aside the family arrangement, *held* the finding as to partition having been accepted, the decision against the family arrangement was unsupportable. (*Coutts and Sultan Ahmad, JJ.*) DAL BHAJAN SINGH *v.* KARIMAN SINGH 1 Pat. L. T. 465 : 57 I. C. 413.

Consideration of Evidence.

——S. 100—*Consideration of evidence—Finding based on inadmissible evidence can be set aside by High Court.*

Where a finding of fact is vitiated by the consideration of inadmissible evidence, it is open to the High Court in second appeal to come to an opposite conclusion on a consideration of the evidence. (*Stuart, J.*) SAKTOO MAI *v.* GOPAL CHAND. 4 U. P. L. R. (A), 5 : 66 I. C. 313 : 1922 All. 439.

——S. 100—*Consideration of evidence—Finding on inadmissible evidence—High Court, interference of.*

Where the finding of an Appellate Court is based on evidence which is inadmissible, the High Court will interfere. (*Tudball and Stuart, JJ.*) SRI THAKURJI *v.* HIRDE NARAIN. 63 I. C. 811.

——S. 100—*Consideration of evidence.*

The mere fact that the Court has not made any observation on a particular piece of evidence is not enough to show that the Court wholly ignored it and cannot form a ground of second appeal. (*Knox, J.*) SHYAM LAL *v.* RAM CHARAN. 43 I. C. 525.

——S. 100—*Consideration of evidence—Not adequate—Remand.*

Where the judgment of the court below is not satisfactory and the court has not come to a finding on a consideration of the whole evidence on the point, the case should be remanded for a rehearing. (*Suhrawardy and Cuming, JJ.*) ISAP ALI *v.* SATIS CHANDRA ROY. 65 I. C. 504.

——S. 100—*Consideration of evidence—Finding of fact—Based on admissible and on inadmissible evidence.*

Where a finding of fact is based on evidence some of which is inadmissible the High Court cannot uphold the finding on the admissible evidence excluding the evidence which is inadmissible. (*Chatterjea and Suhrawardy, JJ.*) SARAJ KUMAR ACHERJI *v.* UMED ALI. 25 C. W. N. 1022 : 63 I. C. 954 : 35 C. L. J. 19.

C. P. CODE (V OF 1908), S. 100—Consideration of evidence.

——S. 100 — *Consideration of evidence—Finding based on statement not admissible in evidence—Can be questioned in second appeal.*

As the District Judge has based his finding not on the certified copy which shows what the entries in the records are, but on a statement which is not admissible to prove the entries, the finding can be contested in second appeal. (*Martineau, J.*) RAM LAL *v* GHANESHAM DAS. 71 I. C. 825 : 1923 Lah. 150 (1).

——S. 100—*Consideration of evidence—Findings of fact—When open to attack in second Appeal.*

Ordinarily grounds which impugn findings of fact cannot be entertained in second appeal but where an Appellate Court bases a finding of fact upon one piece of evidence alone without considering the whole of the evidence bearing upon the point the finding is not binding on a court of Second Appeal. A finding of fact to be binding on a Court of Second appeal must be a judicial decision reached on a consideration of the whole of the evidence, and where it appears that all the available evidence has not been considered, the High Court will interfere and should interfere in Second Appeal. 58 I. C. 482 : 56 I. C. 529 : 54 I. C. 768 : 65 I. C. 475, Ref. (*Broadway and Moti Sagar, JJ.*) FIRM OF MAUSA RAM GORDHAN DAS *v*, FIRM OF MANGAL SAIN DUNI CHAND. 65 I. C. 497 : 1922 Lah. 149,

——S. 100—*Consideration of evidence.*

The finding of the Lower Appellate Court however erroneous, but based on the evidence of the record cannot be disturbed by High Court. (*Abdul Raoof and Harrison, JJ.*) NIRANJAN SINGH *v.* BHAGWAN SINGH. 3 Lah. L. J. 409.

——S. 100—*Consideration of evidence.*

A finding of fact arrived at that the plaintiff was a minor on consideration of inadmissible evidence, can be attacked in second appeal. (*Broadway and Abdul Qadir, JJ.*) BALWANT SINGH *v* BALDEO SINGH. 64 I. C. 929 : 2 Lah. 271.

——S. 100—*Consideration of evidence.*

The finding of Lower Appellate Court with respect to the market-value and the amount paid in the pre-emption suit, however erroneous, cannot be contested in second appeal. (*Chevis and Scott-Smith, JJ.*) GAN PAT RAI *v.* HARI RAM. 64 I. C. 297 : 3 Lah. L. J. 108.

——S. 100—*Consideration of evidence.*

Where the lower Appellate Court has after full consideration of all the evidence including the terms of the sale deed, found that defendant did not acquire a right to a proportionate share in the *shamilat*, such finding is one of fact, 3 P.R. 1917, *Ref.* (*Chevis and Shadi Lal, JJ.*) SULTAN ALI *v.* MALIK AMIR. 35 P. R. 1919 . 51 I. C. 378 : 78 P. L. R. 1919.

——S. 100—*Consideration of evidence.*

Where the lower Appellate Court made no effort whatever to refer to or deal with the evidence in the case and a finding was come to *held* it cannot be accepted as conclusive in secon

C. P. CODE (V OF 1908), S. 100—Consideration of evidence.

appeal, and that the judgment was not a proper one. (*Shah Din, C. J.*) SHER SINGH *v.* DALIP SINGH. 100 P. L. R. 1917 : 42 I. C. 282 : 89 P. W. R. 1917.

——S. 100—*Consideration of evidence—Omission of important evidence.*

If the lower Appellate Court in arriving at a finding of fact bas ignored important evidence on the record bearing on the question, the High Court can set aside the findings. (*Johnstone, C.J. and Shah Din, J.*) JIWNA *v.* NATHU. 38 I.C. 586 : 17 P.W.R. 1917.

——S. 100—*Consideration of evidence—Finding of fact—Interference by High Court.*

In second appeal the Chief Court will not interfere with finding of facts, where they are based on a consideration of all the material facts and evidence. (*Johnstone, C.J.*) GURANDITTA MAL *v.* RAM DAS. 38 I.C. 62 : 112 P.R. 1916.

——S. 100—*Consideration of evidence—Finding of fact—No interference.*

Where tue Lower Appellate Court has arrived at a finding of fact on a consideration of the whole evidence, the Chief Court will not disturb such finding in Second Appeal. (*Shadi Lal, J.*) SHARAF NOOR *v.* AHMAD. 240 P.L.R. 1915 : 30 I.C. 505 : 97 P.W.R. 1915.

——S. 100—*Consideration of evidence—Finding of fact—No evidence.*

A finding of fact based on no evidence or against express *prima facie* reliable evidence can be set aside in second appeal. (*Johnstone, J.*) KHUBI *v.* CHOTTU. 103 P L.R. 1915: 28 I.C. 555 : 41 P.W.R. 1915.

——S. 100—*Consideration of evidence—Remand.*

Where an Appellate Court fails to come into close quarters with the evidence, the findings must be held to be vitiated and there must be a re-hearing of the appeal. (*Oldfield and Phillips, JJ*). AMBALAVANA PANDARA SANNADHI *v*, PICHA KUTTI ODAYAN. (1920) M.W.N. 163 : 53 I.C. 308 : 10 L.W. 525.

——S. 100—*Consideration of evidence—Duty of Appellate Court.*

When the Appellate Court reverses a finding of fact it ought to apply its mind to the consideration of the whole evidence in the case. (*Seshagiri Iyer and Phillips, JJ.*) LAXMIPATHAYA *v* RAMACHANDRA. 31 M.L.J. 311 : (1916) 2 M.W.N. 133: 35 I.C. 421 : 20 M.L.T. 228.

——S. 100—*Consideration of evidence—Finding of fact—Unsatisfatcory consideration.*

An unsatisfactory discussion of evidence, is not, like absence of evidence or disregard of it a ground for interference in second appeal. (*Oldfield and Seshagiri Iyer, JJ.*) SABELLA APPANNA *v.* MALIDI APPANNA. (1914) M.W.N. 833: 1 L.W. 772 : 25 I.C. 700 : 16 M.L.T. 300.

——S. 100—*Consideration of evidence—Duty of Lower Court.*

The High Court will in second appeal consider whether the Lower Appellate Court applied its

C. P. CODE (V OF 1908), S. 100—Consideration of evidence.

mind to the evidence on record and pronounce its finding upon a consideration of the evidence. (*Sundara Iyer, J.*) RANGACHARIAR. *In re* 15 I.C. 190 : (1912) M.W.N. 175.

——S. 100—*Consideration of evidence—Finding of fact—When open to question.*

A finding of fact by the lower appellate court reached without considering material evidence in the case will not be accepted, (*Prideaux, A.J C.*) LAL SINGH *v.* PARASHRAM. 68 I.C. 332 : 1922 Nag. 226.

——S. 100—*Consideration of evidence.*

The High Court has authority to interfere in second appeal if the findings are not reasonabiy deducible from the evidence. (*Batten, A.J.C.*) RAMACHANDAR *v.* DATTATRYA. 48 I.C. 742.

——S. 100—*Consideration of evidence.*

The Court must apply its mind to every piece of relevant evidence produced but need not refer to every portion of such evidence. (*Stuart, J.C.*) GOPI NATH *v.* BENI MADHO. 52 I.C. 173: 1 U.P.L R. (J.C.) 12

——S. 100—*Consideration of evidence--Finding of fact—Omission to consider Evidence.*

When the lower Appellate Court failed to consider the entire evidence on record a finding of fact can be questioned in second appeal. (*Lindsay, J.C.*) SHEODARSHAN LAL *v.* ASSESAR SINGH. 46 I.C. 52: 5 O.L.J. 179.

——S. 100—*Consideration of evidence—Judgment of reversal.*

In a judgment of reversal it is absolutely necessary tnat good grounds should be shown for coming to any finding of fact. There must be sufficient material in the judgment of Appellate Court to show the High Court that Lower Appellate Court has considered the evidence and duly considered the reasons given by the trial Courts in its judgment for coming to a contrary decision. (*Adami*, J.) BHIKHU MANDAL *v.* BHIKEHAKAR DUTTA. 2 Pat. L.R. (Cir.) 32: 1923 P. 275.

——S. 100—*Consideration of evidence—Finding of fact—Kabuliyat.*

It is not proper in the second appeal generally to consider whether or not the lower courts have taken a right view of evidence in coming to findings of fact, but the construction of Kabuliyats upon which the courts below mainly based their view, that a custom was shown, can certainly be considered by the High Court in order to see whether their meaning has been rightly interpreted. (*Bucknill and Ross, JJ.*) NATHUNI RAI *v.* MAHARAJADHIRAJ RAMESHWAR SINGH BAHADUR. 73 I.C. 629 : 1 Pat. L.R.289.

——S. 100—*Consideration of Evidence—Commissioner's report— Failure of lower appellate court to consider.*

The report of the commissioner in a case of a boundary dispute is an important piece of evidence and should be considered by the lower appellate court. An omission to do so justifies the second appellate court in remanding the case to the lower appellate court. (*Coutts and Das, JJ.*) MUSSAMMAT SONEKUAR *v.* BAIDYANATH SAHAY. 3 Pat. L. T. 483 : 1922 P. 562 (2).

C. P. CODE (V OF 1908), S. 100—Consideration of evidence.

——S. 100—*Consideration of evidence—Whole evidence not considered—Effect.*

A finding of fact which has been arrived at without the consideration of the entire evidence on record is not binding on the court in second appeal. (*Coutts and Das, JJ.*) LALA GIRJA PRASAD *v.* JAGAL KISHORE. **1922 P. 503.**

——S. 100—*Consideration of evidence—Finding of fact—Omission to consider evidence.*

The mere fact that the Court of first appeal has not made special mention of a documeut which is a piece of relevant evidence is not sufficient to show that he has not considered it at all. (*Mullick, J.*) BASRUL HAQ *v.* MUHAMMED AJIMUDDIN **43 I.C. 857 : 3 Pat. L.W. 213.**

——S. 100—*Consideration of evidence.*

A finding of fact not based on a reasonable consideration of evidence can be attacked in second appeal, (*Atkinson and Jwala Prasad, JJ.*) DILAN SINGH *v.* CHO SINGH, **42 I.C. 397 : 2 Pat. L. W. 183.**

——S. 100—*Consideration of evidence.*

When a Judge has only pretended to consider the evidence, the High Court on second appeal will not accept the decision as binding on a question of fact. It is not necessary that the Judge should discuss all the evidence. The evidence discussed should be reasonably adequate for a decision. (*Chapman and Roe, JJ.*) KALISAHU *v.* KEDARMAL. **38 I.C. 561.**

Construction of document.

——S. 100—*Construction of Document—Misconstruction.*

The date, at which a particular holding first began to be held as a definite holding, is essentially a question of fact, and must depend on evidence. That evidence may be, and naturally is, documentary, but the documents admitted in evidence upon that question are really historical materials, and although they have to be construed, and if possible understood, they are not to be treated as involving issues of law merely because they have to be construed. It is not as though they were being construed, as instruments of title or mere contracts or statutes, or otherwise the direct foundation of rights. (*Lord Sumner.*) THE MIDNAPUR ZAMINDARY CO LTD., *v.* UMA CHARAN MANDAL, **4 Pat. L. T. 627 : 33 M. L. T. 291 (P. C.) : 45 M. L. J 663 : (1923) M. W. N. 832 : 25 Bom. L. R. 1287 : L. R. 4 P. C 184 : 31 A. L. J. 723 : 74 I. C. 482 : 1923 P.C. 187. (P. C.).**

——S. 100—*Construction of document—Kabuliyat—C. P. Cdoe, (1882), S. 584.*

The question of the construction of a kabuliyat is a question of law, on which the High Court can entertain a second appeal. (*Lord Parkar.*) RAMACHANDRA BHAN DEO *v.* SECRETARY OF STATE. **43 Cal. 1104 : 43 I. A. 172 ; 20 M. L. T. 235 : 20 C. W. N, 1245 : (1916) 2 M. W. N. 175 : 4 L. W. 251 : 14 A. L. J. 1009 : 18 Bom. L. R. 838 : 24C. L. J, 296 : 31 M. L. J. 745 : 37 I. C. 223 (P.C.).**

C. P. CODE (V OF 1908), S. 100—Construction of document.

——S.100—*Construction of document—Power to reverse finding of lower Appellate Court—C. P. Code, (1882), Ss. 584 and 585.*

The right construction of documents is a question of law which Judges in second appeal are not precluded from considering by any finding of the Lower Appellate Court based on such documents. Where the lower appellate Court found in favour of the plff.'s proprietary title relying on in ferences drawn from an incorrect construction of the *wajib ul-arz* : *Held*, that the High Court in second appeal was not bound by the finding. (*Sir John Edge.*) FATEH CHAND *v.* KISHEN KUNWAR. **34 All. 579 : 39 I. A, 247 : 16 C. W. N. 1033 : 23 M. L. J. 330 : 12 M. L. T. 413 : (1912) M. W. N. 1065 : 10 A. L. J. 335 : 14 Bom. L. R. 1090 : 17 C. L. J. 1 : 16 I. C. 67 (P. C.).**

[Affirming 29 All. 203 : 4 A. L. J. 38.]

——S 100 — *Construction of document—Misconstruction—When a question for second appeal.*

Where a Court of appeal has read entries in revenue papers and has simply decided to what extent the entries indicated the plaintiff's possession of certain plot of land and it has in no way interpreted these entries to indicate any legal point, his decision in interpreting these documents is a decision of fact and not of law. Where there is sufficient evidence to support a finding of fact in second appeal it cannot be impeached on the ground that the reasoning is not accurate. (*Stuart, J.*) SHEIKH MUHAMED SHUKER *v.* ABDUL GHANI. **71 I. C. 369 : 1923 A. 362.**

——S. 100—*Construction of document.*

A wrong construction of a document coupled with a wrong inference from certain facts constitute an error of law where there is no other evidence accepted by the Court and this furnishes a ground for second appeal. (*Mears, C. J. and Tudball, J.*) SHORARAT SINGH *v*, GHULAM EZID. **55 I. C. 366 : 18 A. L. J. 195.**

——S. 100—*Construction of document—Consideration—Finding as to—Recitals in deed.*

A finding based on a recital of consideration in a mortgage deed is conclusive in second appeal. (*Ryves and Piggott, J.*) NARAIN SINGH *v.* BHIKHA RAM. **21 I. C. 841.**

——S. 100—*Construction of document—Right of re-purchase—Assignability—Question of law—Second appeal.*

The assignability or otherwise of a right of repurchase given in a sale deed depends upon the construction of the sale deed which is a question of law and therefore open to second appeal. (*Beaman and Heaton, JJ.*) VITHOBA MADHAV *v.* MADHAV DAMODAR. **42 Bom. 344 : 20 Bom. L. R. 654 : 46 I. C. 734.**

——S. 100 -*Construction of document--Question of law--Misconstruction of document containing admission—If one.*

C. P. CODE (V OF 1908), S. 100 —Construction of document.

Per Mookerjee, J. The misconstruction of a document which is the foundation of a suit is no doubt a question of law, but the misconstruction of a document which is alleged to contain an admission, that is to say, a misappreciation of the meaning and effect of an admission is not a question of law which can be raised in second appeal. (*Mookerjee, A. J. C. and Fletcher, J.*) UJIR ALI SIRDAR *v.* SHADHAI BEHARA.

35 C. L. J. 182 : 68 I. C. 1003 : 1922 Cal. 185.

———S. 100—*Construction of document*—solenamah.

The construction of a *solenamah* between the same parties in a prior litigation is binding on the parties in a subsequent suit on the basis of the same document. (*Greaves and Newbould, JJ.*) DWARKA NATH CHAKRAVARTI CHOWDHURY *v.* ATUL CHANDRA CHAKRAVARTI.

46 Cal. 870 : 51 I. C. 922 : 29 C. L. J. 465.

———S. 100—*Construction of document.*

The construction of a deed means first ascertaining the meaning of the words, which is a question of fact and secondly their legal effect which is a question of law. Unless there is a question of legal effect of a deed, a second appeal does not lie. 22 Cal. 609 (P. C.): 27 Mad. 291: (P. C.). 19 Mad. 485 : 34 All. 579 (P.C.) : 29 All. 203 : 26 Cal. 81 (P. C.) : 31 All. 457 (P. C.) : 32 All. 363 (P. C.): 28 All. 488 (P. C.) 19 Cal. 253 : 20 Cal 93 (P. C.) :16 C. W. N. 567 : 3 C, W. N, 255 : 8 C.W.N. 774 (F. B.) 4 Bom L. R. 801 : 21 Bom. 91 Foll; 17 Cal. 291 (P. C): 18 Cal. 23 (P. C.) . 19 Cal. 249 (P. C.) : 22 Cal 609 (P. C.) 29 Bom. 1 (P.C.): 34 Cal. 718 (P. C.) Ref. to. (*Mookerjee and Beachcroft, JJ.*) RAJA MAKUND DEB *v.* GOPI NATH SAHU.

25 I. C. 286 : 21 C. L. J. 45.

———S. 100—*Construction of a document—Finding of fact—Omission to consider evidence.*

There is a conflict of opinion as to whether a second appeal will lie where the lower Court omits to consider evidence or misreads or misconstrues evidence. But the omission of the Court to make mention of particular document is not a substantial error or defect within the meaning of S. 100. (*Coxe and Chatterjee, JJ.*) DIBAKAR NAG *v.* MRITTANJOY BHATTACHARYA.

13 I. C. 495.

———S. 100—*Construction of document—Question of law.*

The High Court will not interfere in second appeal simply because a document which is merely a piece of evidence and not a document of title is misconstrued by a Lower Court. (*Coxe and Chatterjee, JJ.*) MADAN MOHAN *v.* MANMATHA NATH BOSE.

13 I. C. 425.

———S. 100—*Construction of document.*

Misconstruction of a piece of documentary evidence is not a mistake of law to give room for second appeal. (*Carnduff, JJ.*) GANPAT *v.* BALMUKUND.

13 I.C. 206.

———S.100—*Construction of document—When a question of law.*

Though the misconstruction of a document which is the foundation of a suit or which is in the nature of a contract or a document of title, is a ground for second appeal, a second appeal does not lie only because some portion of the evidence is in writing and the Court makes mistake as to the meaning of it (*Mookerjee and Teunon, JJ.*) BUZLUL KARIM *v.* CHANDA SATISH.

15 C. W. N. 752 : 10 I. C. 325 : 13 C. L. J. 418.

———S. 100—*Construction of document—Question of fact or law.*

The expression ' construction ' as applied to a document includes two things : first, the meaning of the words; and secondly, their legal effect. The meaning of the words is in all cases a question of fact. The effect of the words is a question of law. (1891) 1 Q. B. 79, *Foll.* A second appeal is not admissible merely because some portion of the evidence is in writing of which the meaning has been mistaken by the lower appellate Court. (*Campbell and Moti Sagar, JJ.*) DAL SINGH *v.* PLUIMAN.

1923 Lah. 626.

———S. 100—*Construction of document—Deed open to one of two constructions.*

Where it is possible to read the words of a document in dispute either way, it is open to the lower appellate court to adopt whichever reading appears to be more reasonable to it after considering all the connected circumstances and where it has done so, its finding as to what the words in dispute really are, is a finding of fact which cannot be questioned in second appeal. (*Scott Smith and Abdul Quadir, JJ.*) NIGAHIA RAM *v.* BHAGU MAL.

65 I. C. 580 : 1922 Lah. 240.

———S. 100—*Construction of deed—Question of fact—Intention of parties.*

The question whether the parties to a deed of transfer intended that certain property should pass under the deed is one of fact and cannot be agitated in Second Appeal. (*Abdul Raoof and Moti Sagar, JJ.*) SHANKAR DAS. *v.* MALI.

63 I. C. 746.

———S. 100—*Construction of document deposition—Question of law.*

The construction of a deposition is what the Court thinks is proved by it and it is wrong to speak of it as a construction so as to make it a question of law. (*Abdul Raoof and Harrison, JJ.*) RAGGU MAL *v.* SITA RAM.

63 I. C. 575.

———S. 100—*Construction of document—Sale.*

Where a sale deed is silent on the point the question whether a *pro rata* share in the *shamilat* was intended to be conveyed to the vendee is one of fact which cannot be gone into in second appeal. (*Rattigan, C. J.*) MAHOMED ALI *v.* AMIR KHAN.

36 P. R. 1919 : 51 I. C. 380: 79 P. L. R. 1919.

———S. 100—*Construction of document—Sale or exchange.*

Whether a transaction is a sale or exchange is a question of fact to be decided according to the terms of the document and surrounding circumstances and hence no second appeal lies. 30 Cal. 738 (P. C.) and 37 Mad. 423, Dist. (*Broadway, J.*) PRABHU DIAL *v.* SHADI RAM.

50 I. C. 288.

———S. 100—*Construction of documents.*

A question ' regarding the construction of the document is a question of law justifying a second appeal. (*Broadway, J.*) MANGAIYA RAM *v.* GANESH DAS.

47 I. C. 351 : 161 P. W. R. 1918:

C. P. CODE (V OF 1908), S. 100—Construction of document.

——S. 100 — *Construction of document—Wajib-ul-arz—Finding of fact.*

A finding of fact based on a totally unwarranted reading of a passage in the *wajib-ul-arz* of a village is liable to be set aside in second appeal. (*Chevis and Jones, JJ.*) SANT SINGH *v.* FRANGU. **41 I. C. 755 : 54 P. W. R. 1917.**

——S. 100 — *Construction of document—Question of law or fact—Second appeal.*

A question to be decided by lower Appellate Court on the construction of a deed by itself is a question of law in second appeal but one to be decided on the deed together with other circumstances is a question of fact. 34 All. 579, (P. C.), Ref. to. (*Johnstone, C. J.*) AHMAD KHAN *v.* ALAM KHAN. **120 P. L. R. 1916 : 37 I.C. 297: 115 P. W. R. 1916.**

——S. 100—*Construction of document.*

The inference to be drawn from the wording of a document may be a question of fact or law, each case depending upon the circumstances. (*Johnstone, C. J.*) DEWAN CHAND *v.* SUNDAR. **68 P. R. 1916 : 182 P. W. R. 1916 : 36 I. C. 199 : 77 P. L. R. 1917.**

——S. 100 — *Construction of document — Exchange or sale.*

Whether exchange is in reality a sale is a question of law when the contention is that vendee's payment for prior mortgagees amounts to payment to vendor. (*Rattigan, J.*) QAZI *v.* SHARFA. **100 P. W. R. 1913 : 19 I.C. 301 : 199 P. L. R. 1913.**

——S. 100—*Construction of document.*

The question of construction of documents is a question of law. 34 All. 579, (P. C.) ; Rel on. (*Sadasiva Iyer and Tyabii, JJ.*) RAMASUBBA AIYAR *v.* AVUDAI AMMAL. **25 I. C. 123 : (1914) M. W. N. 595.**

——S. 100—*Construction of document—Whether a ground.*

The misconstruction of a document is a ground for second appeal. (*Tyabji and Spencer, JJ.*) PALANIANDI CHETTY *v.* KAMBARAYA CHETTY. **24 I C. 87 : 1 L. W. 416.**

——S. 100—*Construction of document.*

Interpretation of documents and inferences to be drawn from that interpretation are not mere questions of fact and even concurrent findings based on such interpretation and inferences can be set aside in second appeal. 24 C.W.N. 594, ref, (*Dhobley, A. J. C.*) KRISHNA RAO *v.* NILKANTH. **5 N. L. J. 25 : 69 I. C. 800 : 18 N. L. R. 163 : 1922 Nag. 52.**

——S 100—*Construction of document.*

Where the lower Court arrives at a finding of fact by a wrong construction of the pleading and without any evidence, the finding is liable to be questioned in a second appeal. (*Jwala Prasad, J.*) RAGHUNATH CHATTERJI *v.* JUTHU CHATTAR. **56 I.C. 466 : 2 U. P. L. R. (Pat.) 97.**

——S. 100—*Construction of document.*

A second appeal cannot be entertained on the ground that the courts below have misconstrued written documents which are neither documents of title nor embody a contract, nor are the foundation of the suit. (*Das and Adami, JJ.*) KULDIP NARAYAN RAI *v.* BANWARI RAI. **5 Pat. L. J, 251 : 1 Pat. L. T. 126 : 55 I. C. 179 :2 U. P. L. R. (Pat.) 31.**

C. P. CODE (V OF 1908), S. 100—Custom.

——S. 100—*Construction of document.*

A question of how a document should be construed if it is a document of title and not merely a piece of evidence in the case is a question of law, and High Court will interfere in second appeal in cases in which the lower Appellate Court has misconstrued the document or has made no attempt to construe it. (*Das, J.*) THAKUR RUDRESHWARI PRASAD SINGH *v.* DHANA MAHTO. **52 I. C. 119.**

Conversion of Revision.

——Ss. 100 and 115—*Conversion of revision into second appeal—Appeal barred at time of alteration.*

When a revision petition is by order of Court altered into a second appeal, the second appeal will be in time if at the date of the finding of the revision, the time for second appeal, had not expired. (Up. Burma C. R. No. 28 of 1914 Foll.) (*Saunders, A. J. C.*) NGA YEIN *v.* NGA SO. **(1916) II U B. R. 106 : 34 I.C. 264 : 10 Bur. L. T. 10.**

Cost.

——S. 100—*Costs—Lower Court interfering with discretion of first Court—Ground for interference in Second Appeal.*

Interference with the discretion of the Trial Court by the Lower Appellate Court in the matter of costs, is a ground for interference in Second Appeal under S. 100. (*Walsh, J.*) HAKIM ZAHUR AHMAD *v.* FATEH ULLAH. **64 I. C. 962, 3 U. P. L. R. (All.) 55.**

——S. 100—*Costs—Second appeal.*

A second appeal on a question of costs can be maintained. (*Martineau, J.*) KARAM KAUR *v.* KIRPA SINGH. **2 Lah. L. J. 310.**

Court fee.

——S. 100—*Court fee—Erroneous decision.*

A second appeal lies from an order of Appellate Court rejecting a memo. of appeal for non-payment of deficit Court fees if there is an error in calculating the amount of Court-fees. (*Roe and Jwala Prasad, JJ.*) MOHAMMED ABDUL KARIM *v.* MOHAMMED YUSUF. **51 I. C. 114.**

Custom.

——S. 100—*Custom—Mixed questions of law and fact.*

Questions as to the existence of an ancient custom are questions of mixed law and fact. The judgemust find what were the things actually done and alleged in pursuance of the custom and then determine whether these facts so found satisfy the requirements of the law. The latter is a question of law—not fact. (*Lord Atkinson.*) PALANIAPPA CHETTY *v.* SREEMATH DAIVASIKAMONY PANDRA SANNADHI. **40 Mad. 709 : 21 C. W. N. 729 : 15 A. L. J. 485 : 1 Pat. L. W. 697 : 33 M. L. J. 1 : 19 Bom. L. R. 567 : 22 M. L. T. 1 : (1917) M. W. N. 507 : 26 C. L. J. 153 : 6 L. W. 222 : 39 I.C. 722 : 44 I. A. 147 (P.C.).**

C. P. CODE (V OF 1908), S. 100—Custom.

———S. 100—*Custom—High Court should consider the admissibility and quantum of evidence to establish custom.*

In second appeal the Court should consider whether the evidence that is brought forward to prove custom is not only legally admissible evidence but whether the sum total of that evidence regarded from the point of quantum is of sufficient weight to justify the Court's coming to a conclusion that the custom has been proved. (*Mears, C.J., and Piggott, J.*) MT. DHOLA KUAR *v.* MATHURA SINGH. **75 I. C. 657 : 1923 A. 341.**

———S. 100—*Custom—Finding of fact—Power of High Court to interfere.*

Where a question arises as to the existence or non-existence of a particular custom and the lower appellate court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom, the question is one of law and the High Court is entitled in second appeal to consider whether the finding is based on sufficient evidence. The High Court in second appeal has jurisdiction to consider the evidence given in support of an alleged custom and to determine whether or not that evidence is sufficient in point of law to establish the custom set up. Where the lower appellate court after examining the evidence legally and properly and not having rejected admissible evidence finds that the evidence is not sufficient to establish a custom, no question of law can arise. 30 A. 311 ; 37 A. 125 ; 31 A. 557 ; 45 C. 285 Ref. (*Stuart, J.*) SHAKIRA BIBI *v.* NANDAN RAI. **4 U. P. L. R, 95 : 66 I. C. 613 : 1922 All. 241.**

———S. 100—*Custom—Pre-emption — Mixed question of fact and law—Interference in second appeal.*

The question of the custom of pre-emption does not stand on a wholly different basis from the question of a custom alleged to govern the parties in any other matter. A finding on the question of custom must be looked upon as a mixed question of fact and law, and where the finding of the lower appellate court proceeds upon some clear error of law, or misinterpretation of a document, the High Court will interfere in second appeal. (*Mears, C. J., and Piggott, J.*) YAQUB ALI *v.* TAJJAMAL HUSAIN. **L. R. 3. A. 504.**

———S. 100—*Custom—Finding on—Nature of.*

A finding on a question of custom is a mixed finding of fact and law. (*Rafique, and Piggott, JJ.*) SHAMSHER SINGH *v.* PYARE LAL. **20 A. L. J. 57 : 64 I. C. 956 : L. R. 3 A. 87 : 1922 All. 88.**

———S. 100—*Custom—Custom established by evidence on record—A question of fact.*

Whether the facts found in any given instance prove the existence of the essential attributes of a custom, is a question of law which may be discussed in second appeal.

A decision that an alleged custom is not established by the evidence on the record is a decision on a question of fact. (*Mookerjee and Beachcroft, JJ.*) KAILAS CHANDRA DUTT *v.* PADMA KISHORE RAY. **25 C. L. J. 613 : 21 C. W. N. 972 : 41 I. C. 959 : 45 Cal. 285.**

C. P. CODE (V OF 1908), S. 100—Custom.

———S. 100—*Custom—Finding.*

A finding of custom cannot be challenged in second appeal on the ground that the evidence is insufficient. (*Chatterjee and Newbould, JJ.*) LOCHAN *v.* ADHAR CHANDRA. **35 I. C. 630.**

———S. 100—*Custom—Reasonableness of.*

The question whether a custom is reasonable or not is a question of law and not of fact. It is wrong to hold that a custom is unreasonable in so far as it permits the appropriation of timber trees on a holding by the tenant. Where there is nothing unfair dishonest or contrary to the public good in a custom, the custom is not unreasonable. (*Chapman and Walmsley*, JJ.) GURAI KAR *v.* KAURMONI SINGHA. **29 I C. 312 : 19 C. W. N. 1188.**

———S. 100—*Custom—Question of fact—Question of law.*

Whether certain events did or did not happen is a question of fact but whether the facts proved establish a custom is a question of law. A judgment based upon evidence not admissible in law be deemed unsustainable. (*Mookerjee and Beachcroft, JJ.*) DURGA CHARAN *v.* RAGHUNATH MAHTO. **18 C. W. N. 55 : 18 C. L. J. 559 : 20 I C. 810.**

Also 29 Mad. 24 diss. Case law reviewed. **45 Cal. 285 : 25 C. L. J. 613 : 41 I. C. 959 : 21 C. W. N. 972.**

———S. 100—*Custom—Evidence—Sufficiency.*

When there is legally insufficient evidence to prove a custom, a finding of the existence of custom may be questioned in second appeal but when the insufficiency depends on the weighing of the evidence it cannot be contested in second appeal. 29 Mad. 24 ; 28 All, 98 Ref. (*Coxe, J.*) MAKUND MURARI DASS *v.* KRISHNA DHONE GHOSE. **9 I. C. 839.**

———S. 100—*Custom — Gift—Jains — Hindu Law—Certificate.*

Jains are subject to Hindu Law in matters of alienation except where a special custom is proved as a widow would not be competent to make a gift under Hindu Law ; the question whether she has this right by custom is one that cannot be raised in the absence of a certificate in second appeal, (*Broadway and Brasher, JJ.*) CHHAJU MAL *v.* KUNDAN LAL. **70 I. C. 838 : 1923 Lah. 53.**

———S. 100 — *Custom—Certificate as to—Second appeal.*

On second appeal the question of custom must be confined to that set out in the certificate granted by the lower appellate Court. (*Scott Smith and Abdul Raoof, JJ.*) NATHU *v.* BANNA. **3 Lah. 344 : 69 I. C. 507 : 1922 L, 426.**

———S. 100—*Custom—Certificate—Punjab—Question of custom.*

A question of custom is not allowable in a second appeal without the required certificate. 23 I. C. 352, Foll. (*Johnstone, J.*) ILAHIA *v.* NIZAMUD-DIN. **94 P. W. R. 1914 : 24 I. C. 623 : 193 P. L. R. 1914.**

C. P. CODE (V OF 1908), S. 100—Custom.

———S. 100—*Custom—Question of law.*

The question whether the facts proved and found satisfy the requirements of law to establish a custom is a question of law which the High Court must consider in second appeal. (*Spencer and Krishnan, JJ.*) OLLAPPAMANANNA NANAKAL *v.* SECY. OF STATE. **55 I. C. 770 : 12 L. W. 371.**

———S. 100—*Custom—Usage—Second appeal.*

The existence or non existence of an alleged custom is a mixed question of law and fact and a finding thereon is open to revision in second appeal. (*Ayling and Krishnan JJ.*) ZAMORIN RAJA AVERGAL OF CALICUT *v.* UNICUT KARANAVAN SAM NAIR. **38 M. L. J. 275 : 55 I. C. 380 : 27 M. L. T. 111.**

———S. 100—*Custom—"Usage having the force of law"—When a ground of second appeal.*

The words "usage having the force of law" in S. 100 (a) of the Code do not give the Court any large powers of interference with findings as to custom in so far as they are findings of fact. When the reliability of evidence let in is for the Lower Appellate Court, the value attached to the evidence if it is accepted as true and the relevancy of the evidence are questions to be considered by the High Court also. If in spite of uncontradicted instances ranging over a long period and recognized judicially in several cases, the Lower Appellate Court finds against the existence of a custom on the ground that in its opinion the instances are not sufficient in number, the High Court can hold on the facts found that the custom is legally established. (*Wallis, C. J., Sadasiva Aiyar and Kumaraswamy Sastri, JJ.*) KUMARAPPAREDDI *v.* MANAVALA GOUNDAN.

41 Mad. 374 : 34 M. L. J. 104 : 23 M. L. T. 44: (1918) M. W. N. 350 : 44 I C. 699 : 7 L. W 243. (F. B.).

———S. 100—*Custom—Usage having the force of law.*

The expression "usage having the force of law" in S. 100 (a) should ordinarily be confined to the usages of the country or of the community, the law merchant and usages referred to in S. 11 of Act, (VIII of 1865). It is doubtful whether question as to private rights fall within section 100, clause (a). (*Ayling and Seshagiri Iyer, JJ*) PANKAJAMMAL *v.* SECRETARY OF STATE.

40 Mad. 1108 : 5 L. W. 346 : 32 M. L. J. 237 : 40 I. C. 516 : 21 M. L. T. 411.

———S. 100—*Custom—Usage—Second appeal.*

Under the section the usage must be in derogation of the law, and the question at issue should be not only whether such a usage exists but also whether it is a usage having the force of law. A decision about parties belonging to one system of law and net to another is not decision with regard to a "usage having the force of law" so as to be questioned in second appeal under S 100 of the Code, as a matter of law. (*Spencer and Phillips, JJ.*) MAHAMAD MIRAN BIBI *v.* MAHAMAD ROWTHER. **37 I. C. 879 : (1917) M. W. N. 98.**

———S. 100 (1) (a)—*Custom—Power of Court in second appeal to consider evidence.*

C. P. CODE (V OF 1908), S. 100—Custom.

Under S. 100 of the C. P. Code, in a case where a custom differing from the general law is set up, the High Court in second appeal should consider whether the evidence adduced suffices to establish all the elements of antiquity and certainty necessary to constitute a valid custom. (*Drake Brockman, J. C.*) BALIBHADRA DAS *v.* MIRCHILAL.

48 I. C. 236.

———S. 100—*Custom—Finding as to—Mixed question of law and fact.*

Where a point of custom raises a mixed question of law and fact the court can in second appeal go into the evidence to see whether it establishes the alleged custom. (*Simpson and Wozir Hasan, A. J. C.*) BALBHADDAR PRASAD *v.* NARAYAN DAS. **9 O. L. J. 518: 73 I. C. 727: 1923 O. 102.**

———S. 100— *Custom*— Wazibularz *rejected under erroneous view of law.*

A Court of Second appeal can interfere with the finding of the Court of the First Appeal on a point of custom where the latter Court has rejected the *wajib-ul arx* under an erroneous view of the law. (*Daniels, J. C.*) SWAMI DAYAL *v.* RAM DAS. **64 I. C. 86: 24 O. C. 237.**

———S. 100—*Custom—Finding of fact—Relevency of evidence, dispute as to.*

Where the First Appellate Court finds the evidence let in support of an alleged custom, as unreliable, but expresses an erroneous opinion as to its relevancy the High Court will not, in Second Appeal, merely on that ground re-asses its value as proof of the custom. (*Lindsay, J. C.*) SANT BAKHSH *v.* GAJADHAR. **61 I. C. 781 : 8 O. L. J. 202.**

———S. 100—*Custom—Proof.*

A Second Appellate Court is bound by the finding of the lower Courts that certain documents are sufficient proof of the custom. (*Lindsay, J. C.*) BASDEO SINGH *v.* RAMPHAL SINGH.

32 I. C. 748: 2 O. L. J. 607.

———S. 100—*Custom*—Wazib-ul-arz — *Proof of custom.*

The question whether a *wajib-ul-arz* is sufficient proof of a custom recorded is a question not of law but of fact, relating to the weight due to the evidence. It cannot be said as a matter of law that a *wajib-ul-arz*, if unrebutted, is conclusive proof of custom. (*Lindsay, J. C.*) TILAK RAM *v.* SITA RAM. **30 I. C. 503: 2 O. L. J. 388.**

———S. 100—*Custom—Proof of.*

An appellant even in second appeal can impeach the validity of proof of custom, on the evidence which he can show as unreliable and not amounting to proof in law though it is considered sufficient. (*Rafique, A. J. C.*) SUBHADRA *v.* TRIBHUAN DAT. **15 I. C. 247.**

———S. 100—*Custom—Finding of fact — When can be disputed.*

A decision as to the existence of a custom is a question of fact, but an appellant in second appeal is entitled to show that the evidence even if true, does not establish the custom. (*Evans, J. C.*) GANESH DAT SINGH *v.* SUKHRAJ SINGH.

14 I. C. 12.

C. P. CODE (V OF 1908), S. 100—Custom.

———S. 100—*Custom—Existence of custom of privacy — Finding cannot be attacked in second appeal.*

A question as to the existence of a customary right of privacy in a town is a question of fact and when the evidence on both sides has been considered by the lower appellate Court the High Court will not interfere in second appeal. 45 C. 285: 46 C. 189: 37 M L. J. 199 foll. (*Fawcett, J. C. and Kemp, A. J. C.*) SHAH MAHOMED *v.* RAMZAN. **66 I. C. 833.**

Damages.

———S. 100—*Damages—Finding of fact.*

Ordinarily the question as to the amouut of damages is a question of fact and the finding as to amount of damages arrived at by the lower appellate Court is binding on the High Court: but when the amount is fixed arbitrarily, it cannot be taken as an amount arrived at on a finding which is binding on the High Court. (*Sulaiman, J.*) JUGAL KISHORE *v.* RAM NARAIN, **1923 A. 199.**

———S. 100—*Damages—Question of fact.*

The amount of damages is a question of fact. 31 All. 333: 10 W. R. 164: 3 C. L. J. 140, Ref. (*Stanley, C. J. and Banerji, J.*) MAMTAZ HUSSAIN *v.* LEWIS. **9 I. C. 984.**

———S. 100—*Damages—Measure of.*

In second appeal the Court may go into the question or *quantum* of damages on merits, (*Johnstone, J.*) GODHARAM *v.* DEVA DOSS. **1 P. R. 1915: 28 I. C. 273: 14 P. L. R. 1916.**

———S. 100—*Damages— Contract of sale—Condition of goods.*

Where under the terms of a contract of sale, goods were to be undamaged, and the Courts below found it to be damaged, it is a finding of fact binding in second appeal. (*Jwala Prasad and Ross, JJ.*) FIRM OF RAMDAYAL RAM NARAIN *v.* FIRM OF BHAIRO BUX GOWRIDUTTA. **1 Pat. L. R. 398 : 1924 P. 240.**

Dedication.

———S. 100—*Dedication—Proof of.*

Whether a certain land is really *debutter* or only nominally so, and whether the *shebaits* put an end to its *debutter* character by consent are questions of fact and therefore the High Court will not deal in second appeal with them. (*Coxe, J.*) TULSI DAS *v* SIDDHI NATH. **9 I. C. 650 : 20 C. L. J. 315 (Note).**

———S. 100—*Dedication—Finding of fact.*

Where the lower Appellate Court finds that a house in dispute has been dedicated to religious or chartiable uses, the finding is one of fact which won't be disturbed in second appeal. (*Shah Din, J.*) DAULAT RAM *v.* GADI RAM, **49 I. C. 138: 1 P. R. 1919.**

———S. 100—*Dedication—Question of law.*

The question whether certain property is *waqf* property is a question of law or at any rate a mixed question of law and fact. (*Lindsay J. C. and Stuart, A. J. C.*) ABDUL GAFUR *v.* SHIAM SUNDAR DAS. **17 I. C. 303 : 16 O. C. 76.**

C. P. CODE (V OF 1908), S. 100—Defective Judgment.

Defamation.

———S. 100—*Defamation—Suit for damages—Question if writing is defamatory of plaintiff—Quantum of damages*—Bona fides *and fair comment—Questions of fact—Appeal, second—Interference by High Court.*

The question whether a writing is defamatory of the plaintiff, the questions of fair comment, justification, *bona fides* and the *quantum* of damages awardable to the plaintiff in an action for libel, are all questions of fact on which the High Court in second appeal, is bound by the findings of the Lower Appellate Court. (*Sadasiva Iyer and Spencer, JJ.*) NAGANATHA SASTRI *v.* SUBRAMANIA IYER. **32 M. L. J. 392: 5 L. W. 598: 40 I. C. 126: 21 M. L. T. 324.**

Defective Judgment.

———S. 100—*Defective judgment—Appellate judge, duty of to arrive at clear findings.*

It is the duty of the judge in his judgment when sitting as the final court of fact to state clearly what his findings are, and the High Court siting in second appeal cannot deduce from casual statements in the Judgment findings of fact which are not clearly expressed. (*Newbould and Panton, JJ.*) JOGENDRA KISHORE ROY *v.* SHEIKH AKTAR. **67 I. C. 998: 1923 Cal. 278.**

———S. 100—*Defective judgment—Finding of fact—Not clear.*

It is the duty of lower Courts on appeal to come to clear findings on facts as they are final and the High Court cannot go behind them. (*Chauduri and Cuming, JJ.*) HARIPADA MUKERJE *v.* RADHA BULLAE PAL, **53 I. C. 1007: 23 C. W. N. 1048.**

———S. 100—*Defective judgment—Meaning uncertain—Setting aside.*

A judgment can be set aside on the ground of the uncertainty of the meaning thereof. (*Jenkins, C. J. and Mookerji, J.*) DEVENDRA NATH *v.* ANANDA HADI, **25 I. C. 576: 19 C. L. J. 545.**

———S. 100—*Defective judgment—Finding of fact based only on local investigation is not sustainable.*

The Judgment of a lower appellate court based entirely on a local investigation conducted by the Judge of the Court of first instance cannot he sustained in second appeal. 52 I. C. 241 and 39 Mad. 501 Foll. (*Martineau, J.*) RALLA *v.* HARNAN SINGH. **(1923) Lah. 208 (1).**

———S. 100 and O. 41, R. 31—*Defective judgment—Finding of fact—Omission to record reasons for findings—Power of High Court.*

Even if the judgment of the Appellate Court was meagre and not in conformity with the rule, unless a substantial error affecting the merits of the case is shown, High Court will not interfere. (*Spencer and Krishnan, JJ.*) MYGUPALA GANGANNA *v.* VENKATA VIJAYA GOPALARAJU. **20 M. L. T. 520 : 31 M. L. J. 870 : 38 I. C. 26 : (1917) M. W. N. 143.**

———S. 100—*Defective judgment.*

Where a judgment is of a most unsatisfactory and perfunctory character, the finding of fact

C. P. CODE (V OF 1908), S. 100—Defective Judgment.

contained in it can be challenged in second appeal. (*Coutts and Das, JJ.*) GIRIZA PRASAD *v.* JUGAL KISHORE. 70 I. C. 853 : 1922 P. 503.

——S. 100—*Defective judgment—Finding of fact—Unsatisfactory.*

It should be clearly established that a suit is barred by time and a finding that " on a consideration of all the circumstances of the case " that the suit is barred by limitation is defective and unsatisfactory. (*Chapman and Atkinson, JJ.*) RAM PERTAP LAL *v.* KESHO PRASAD SINGH. 41 I. C. 385 : 2 Pat. L. W. 12.

Discretion.

——S. 100—*Discretion—Misapprehension of fact by Lower Court.*

An appellant can urge in second appeal that the Lower Appellate Court has improperly held that no sufficient cause existed for delay in filing the appeal when it is found that it had misapprehended the facts. (*Karamat Hussain and Chamier, JJ.*) BALMUNKUND *v.* KUNDAN LAL. 13 I. C. 943 : 9 A. L. J. 15.

——S. 100—*Discretion — Interference by High Court.*

Where two Courts fully acquainted with the case and before whom the evidence could be, but was not given, exercise a discretion the High Court will not interfere with the exercise of such discretion. (*Fletcher and Cuming, JJ.*) SOROOP MANDAL *v.* AIYAN RAI KOWRA. 54 I. C. 731.

——S. 100—*Discretion—Order for instalments.*

Whether in directing the payment of the decretal amount by instalments the Court below has exercised a judicial discretion or not is a question which cannot be raised in second appeal. (*Caspersz and Sharfuddin, JJ.*) BIDHA SEKHAR BANERJEE *v.* MAHTABUDDIN. 11 I. C. 736 : 15 C. W. N. 1083.

——S. 100—*Discretion—Future Interest.*

A question of the award of future interest is discretionary with the Court and is not a pure question of law. (*Motisagar, J.*) AGHA MAHOMED ASLAM *v.* JODH SINGH, 1923 Lah. 513 (2).

——S. 100—*Discretion—Second Appeal—No interference in.*

Unless a very strong case is made out a court of second appeal will not interfere with the discretion of the court below in passing a decree for money payable in instalments, especially where a large portion of the amount decreed consists of interest. 15 C. W. N. 1088 Ref. (*Abdul Raoof and Martineau, JJ.*) BHUP CHAND *v*, UDE RAM. 66 I. C. 147 : 1922 Lah. 355.

——S. 100—*Discretion--Adjournment—Value of affidavit.*

Where the lower Courts take up a big suit at 5-30 P. M. and finding that defendant's vakil was not prepared to cross-examine the plaintiff's witness, gives a decree for the plaintiff. the High Court would not interfere in second appeal if no affidavit explaining the facts and showing how he was prejudiced, is filed by the defendant before the Lower Appellate Court. (*Coutts Trotter and Seshagiri Iyer, JJ.*) MURUGA PILLAI *v.* KRISHNAMOORTHY CHETTY. 34 I. C. 547 : 3 L. W. 368.

C P. CODE (V OF 1908), S. 100—Grounds.

——S. 100—*Discretion—Interference,*

Where the Lower Court exercised their discretion in granting the plaintiff a declaration somewhat different from that asked for in the plaint without formal amendment to that effect of the plaint, the Court of second appeal should no interfere with the discretion of the Lower Courts in the absence of good reasons. (*Piggott J. C.*) MUHMMAD SARFARAZ BEGAM *v.* MUNNA. 17 I C. 315.

——S. 100—*Discretion.*

Where it is found that the conclusions of fact at which a Court arrived, and which formed the basis of its decision, were not such as could possibly support that decision, then the Court's discretion to extend the limitation for an appeal uuder S. 5, Lim. Act has not been exercised in a legal manner and the High Court is entitled to reverse the decision arrived at. (*Miller. C. J. and Roe, J.*) JAHAR MAL *v.* PRITICHAND. 52 I. C. 225 : 4 Pat. L. J. 381.

Dispossession.

——S. 100—*Dispossession—Finding of fact.*

Where the lower Appellate Court finds on the facts that there has been no dispossession, the High Court in second appeal would not interfere with that finding. (*Jenkins, C. J. and Mookerjee, J.*) RUDRA NARAIN MAITY *v.* NATABAR JANA. 41 Cal. 52 : 18 C. L. J. 89 : 21 I. C. 431 : 18 C. W. N. 353.

Exclusion of Evidence.

——S. 100—*Exclusion of evidence—Objection to second appeal.*

Where evidence is excluded by an original Court and such exclusion is not objected to in the first Appellate Court such objection cannot be allowed in second appeal. (*Sharfuddin and Coxe, JJ.*) MOHIM CHANDRA BASTEK *v.* RUP MANJARI DASI. 16 I. C. 213.

——S. 100—*Exclusion of evidence—Finding of fact—Suspicion—Not a valid ground.*

Where a District Judge considers the evidence in support of a will with strong pre-possession against authenticity based on what he considers to be suspicious circumstances connected with its appearance and the tenor of its contents and rejects that evidence mainly on pre-conceived ideas regarding the general credibility of witnesses of a certain class, the method of the District Judge in the case is clearly wrong (*Sankaran Nair and Abdur Rahim, JJ.*) RAMASWAMI CHETTY *v.* KARUTHALACHI. 11 M. L. T. 38 : 12 I. C. 751 : (1911) 2 M. W. N. 495.

Grounds.

——S. 100—*Grounds—Reference to the Original Court's decision.*

On a second appeal the decision of the Lower Appellate Court is the only one to be referred in the grounds of appeal and not the decision of the

C. P. CODE (V OF 1908), S. 100—Implied obligation.

Original Court. (*Fox, C. J. and Hartnoll, J.*) SUBRAMANIAM PILLAI *v.* GOVINDASAMY PILLAI.
6 Bur. L. T, 180 : 21 I. C 232 .
7 L. B. R. 39.

Implied Obligation.

——S. 100—*Implied obligation—Question of fact.*

The question of an implied obligation under S. 70 of the Contract Act is a question of fact, (*Batchelor and Shah, JJ.*) TANGYA FALLA *v.* TRIMBAK DAGA. 40 Bom. 646 : 35 I. C. 794 : 18 Bom L. R. 700.

Jurisdiction.

——S. 100—*Jurisdiction—Maintainability of second appeal—Order not appealable.*

A second appeal lies in a case in which an appellate Court wrongly admits an appeal against a non-appealable order and passes a decree therein, and in such second appeal an objection to maintainability of the appeal in the lower Court can be raised for the first time. (*Kanhaiya, Lal, J.*) BHAGWAN DAS *v.* MAHOMED BANO.
75 I. C. 1053 :
4 L. R. A. (Civ.) 447 : 1924 All. 183 (2).

——S. 100—*Jurisdiction—Decree of lower Appellate Court without jurisdiction.*

When the Judge of the lower Court passes a decree without jurisdiction a second appeal lies to the High Court against such decree. (*Huda and Panton, JJ.*) ADURAM HALDAR *v.* NAKULESWAR RAI. 49 I. C, 137 : 29 C. L. J. 48.

——S. 100—*Jurisdiction—Second appeal.*

Where a decree has been made by the Appellate Court without jurisdiction an appeal lies against it precisely in the same way as if it had been made with jurisdiction. (*Mookerjee and Beachcroft, JJ.*) BANDIRAM MUKERJEE *v.* POORNA CHANDRA ROY. 45 Cal. 926 : 43 I. C 758 : 27 C. L. J. 115.

——S. 100—*Jurisdiction.*

The question of jurisdiction can be for the first time agitated in Second Appeal. (*Broadway and Jafar Ali, JJ.*) RAM KISHAN *v.* RANSHAN.
1923 Lah. 551.

Legal Necessity.

——S. 100—*Legal necessity—Alienation by Hindu widow—Necessity.*

Ordinarily the court of second appeal should not go into a finding regarding necessity for an alienation by a Hindu widow, and determine whether or not there is sufficient evidence supporting the finding, (*Stuart and Sulaiman, JJ.*) UDAI BHAN SINGH *v.* GAJENDRA SINGH.
L. R. 3 A. 376. 70 I. C. 815: 1923 All. 28.

——S. 100—*Legal necessity—Finding as to, is one of facts.*

The finding as to the existence of necessity is clearly a finding of fact and cannot be impugned in second appeal. (*Moti Sagar, J.*) DALJIT SINGH *v.* HARI CHAND. 1923 Lah. 669.

——S. 100—*Legal Necessity—Finding as to.*

Where the lower appellate Court has decided the question as to the existence of necessity on entirely wrong principles his finding is vitiated

C. P. CODE (V OF 1908), S. 100—Misreading of evidence.

and can be examined in second appeal. (*Broadway, J.*) ANOKH SINGH *v.* SAPURAN SINGH.
1923 Lah. 660.

——S. 100—*Legal necessity.*

Finding as to legal necessity cannot be questioned in second appeal. (*Motisagar, J.*) BALBIR SINGH *v.* GOBIND. 1923 Lah. 532.

——S. 100—*Legal necessity—Question of law or fact—Custom—Alienation.*

Question of necessity for an alienation may be one of fact or of law, and when the point raised is whether the Court below has infringed rules and maxims laid down by the High Court and has decided on wrong principles as to the quantum of proof of necessity required, then the question is one of law. (*Campbell, J.*) PREM DAS *v.* SARBALAND. 1923 Lah. 41.

——S. 100—*Legal necessity.*

The finding of the Lower Appellate Court with respect to the alienation not for the benefit of the family cannot be contested in second appeal. (*Le Rossignol and Wilberforce, JJ.*) MUNSHI LAL *v.* SOHAN LAL. 66 I. C. 881: 3 Lah. L. J, 137.

——S. 100—*Legal necessity—Alienation — Evidence—Finding of fact.*

A finding of fact not based on evidence or proceeding on a wrong principle is open to question in second appeal. In deciding the question of legal necessity the Court should take into consideration all the circumstances of the alienor. (*Chevis, J.*) GANGARAM *v.* DEVA SINGH.
38 P. L. R. 1918; 47 I. C. 39: 92 P. W. R. 1918.

——S. 100—*Legal necessity.*

An appellate Court will not interfere with a concurrent finding of the two lower Courts as to the legal necessity for a sale. (*Shah Din, J.*) SHIB RAM *v.* HAMIR SINGH. 1 P. L. R. 1915: 27 I. C. 645: 234 P. W. R. 1915.

Legitimacy.

——S. 100—*Legitimacy—Finding of fact.*

Question of legitimacy cannot be gone into in second appeal, it being a question of fact. (*Broadway and Dundas, JJ.*) GURDIT SINGH *v.* SUNDAR.
2 Lah. L. J. 505.

Misjoinder.

——S. 100—*Misjoinder.*

A finding of fact on a question of misjoinder arrived at on evidence cannot be disturbed in second appeal. (*Tyabji and Phillips, JJ.*) UPPARA HANUMANTHU *v.* PEDDAPALLE SAMACHARLU.
33 I. C. 188: (1916) 1 M. W. N. 9.

Misreading of Evidence.

——S. 100—*Misreading of evidence.*

The misapprehension by the lower appellate Court of evidence on a point is no ground for a second appeal. (*Coxe and Chatterjee, JJ.*) BEHAR BUKHTIARPORE LIGHT RAILWAY COMPANY, LTD. *v.* JAHNDOG MAHTON. 21 I. C. 393.

——S. 100—*Misreading of evidence—Question of law.*

Where the lower Appellate Court errs in regard to the most important part of the evidence

C. P. CODE (V OF 1908), S. 100—Misreading of evidence.

bearing upon a question and approaches the consideration of that evidence from a wrong standpoint, it commits an error of law, and the High Court could interfere in second appeal. (*Chatterjee and Richardson, JJ.*) AKHOY KUMARI DEBI *v.* KANAI LAL KUNDU, **16 I C. 618 : 17 C, W. N. 224.**

———**S. 100**—*Misreading of evidence.*

Where the lower appellate Court comes to an erroneous decision owing to a misreading of the revenue records, the High Court has power to interfere in second appeal. (*Wilberforce, J.*) MALIK KHAN *v*, NAWAB. **4 Lah. L. J. 307.**

———**S. 100**—*Misreading of evidence.*

Where the judgment of the Lower Court is based on misconception of the evidence and contains several mistakes, the High Court in second appeal will go into the evidence and come to a finding on the question in dispute. (*Johnstone, C. J.*) NIHALA *v.* RULIA, **42 I. C. 272 : 92 P. L. R. 1917.**

———**S. 100**—*Misreading of evidence.*

Where a finding of fact is arrived at as a result of a complete misreading of a document a second appeal is competent. 36 I. C. 199, appr. (*Broadway, J.*) CHANNA RAM *v* KALU. **42 I. C. 218 : 73 P. R. 1917.**

———**S. 100**—*Misreading of evidence.*

When the lower appellate Court goes astray though misreading of the records on vital matters a second appeal is allowed. (*Johnstone, J*). MUHAMMAD NAWAZ *v.* GHULAM HAIDER. **250 P. W. R. 1915 : 29 I. C. 167: 75 P. L. R. 1915.**

———**S. 100**—*Misreading of evidence — Finding of fact—Document not supporting finding —Remand.*

Where the finding of a Subordinate Court is based on documentary and oral evidence and the High Court on second appeal finds that the documentary evidence does not support the conclusion, it will remand the case for a fresh finding. (*Sundara Aiyar and Ayling, JJ.*) ETTAKKAMANA MANHOLI GOVINDAN *v.* AMAYA MANGALATH PUTHIA. **15 I. C. 103: (1912) M. W. N. 821.**

———**S. 100**—*Misreading of evidence—Interference by High Court.*

The High Court will interfere in second appeal with the finding of a lower Appellate Court, if it finds that it has misread and misinterpreted certain documentary evidence and based its finding on no evidence at all (*Evans, J. C.*) INDAR DAWAN SINGH *v.* DEPUTY COMMISSIONER FAIZABAD. **13 I.C. 629.**

———**S. 100**—*Misreading of evidence.*

Misreading of the documentary evidence is not a question of law which justifies a second appeal. (*Das, J.*) MAHABIR MISSER *v.* MT. ASOKUER. **67 I. C. 435: 1923 P. 154.**

Mixed question of law and fact.

———**S. 100**—*Mixed question of law and fact —Second appeal.*

A finding as to a mixed question of law and fact can be interfered with in second appeal.

C. P. CODE (V OF 1908), S. 100—Mixed question of fact and law.

(*Ryves and Piggot, JJ.*) ABDUL RAHIM KHAN *v.* AHMED KHAN. **36 All. 231 : 25 .I. C. 162 : 12 A. L. J. 303.**

———**S. 100**—*Mixed question of law and fact —Question not to be allowed, if involves remand.*

A question which necessitates a remand and the taking of evidence, if not raised in the Courts below, cannot be raised for the first time in second appeal. The High court will not entertain an objection raised for the first time in second appeal to the jurisdiction of the Sub-Registrar in whose jurisdiction a certain lease deed had been regisiered on the ground that a ficitious plot of land had been entered in the lease to give him jurisdiction. (*N. R. Chatterjee and Panton, JJ.*) KALU *v.* HAMIJUDDI HOWLADAR. **51 I. C. 862.**

———**S. 100**—*Mixed question of law and fact —Tenancy, nature of.*

A decision on a question of the nature of the tenancy, *viz.*, whether it is a permanent one or a tenancy at will is a mixed question of law and fact and can be decided in second appeal, 44 Cal. 119 and 8. C W N 755 followed. (*Broadway and Abdul Quadir, JJ.*) LALA MOTI SAGAR *v.* DHANNA MAL. **72 I. C. 177 : 29 P. W. R. 1922 : 1922 Lah. 329.**

———**S. 100**—*Mixed question of law and fact —Execution sale—What passes under.*

In an execution sale what the Court intended to sell and what the purchaser understood, he bought, is a mixed question of law aud fact. How the parties themselves viewed it at the time is of much greater value than evidence procurable some 20 years after the transaction. In determining what the Court indended to sell the state of the law at the time of the sale is not conclusive. (*White. C. J. and Phillips, J.*) ALAGARAYA GOUNDAR *v.* MINAKSHI NAIDU, **37 Mad, 22: 24 M.L.J. 652 : 10 M.L.T. 298: 12 I. C. 389 : (1911) 2 M. W. N. 328.**

———**S. 100**—*Mixed question of law and fact —Implied contract,—*

Implied contract may be a question of fact or law according to the circumstances. It may be a question of fact when it is used in the sense of an agreement based on offer and accceptance. It may be a question of law when the question depends on inference to be drawn from admitted facts. It may be also a contract implied by law or rather is imposed upon the parties by law. (19 C. 253, 19 M. 485, Foll. 17 M. 43, 18 M. 216, 2 M. L. J. 292, Con.) (*Boddam and Sankaran Nair, JJ.*) NAGU CHETTI *v.* BHASKARA SETUPATI. **(1911) 1 M. W. N. 6: 9 I. C. 41 : 9 M.L.T, 191.**

———**S. 100**—*Mixed question of fact and law— Duty of Court—Conclusion on facts found.*

In second appeal, the court can legally decide mixed questions of fact and law, but it is undesirable to dispose of the question in the absence of findings of fact by the lower appellate Court. Whether a right conclusion has been drawn on the facts found can be gone into in second appeal. (*Batten, J. C.*) POMDUSA *v.* BAHENABAI. **69 I. C. 193: 1923 Nag. 124.**

C. P. CODE (V OF 1908), S. 100—Mixed question of fact and law.

——S. 100—*Mixed question of fact and law—Priority—Oral and registered sale.*

A mixed question of law and fact cannot be allowed to be raised for the first time in second appeal; a question relating to a contest between a verbal sale and a registered sale-deed is a mixed question of fact and law. (*Robinson, J.*) ABDUL SATTAR *v.* MAUNG LE MAUNG. 22 I. C 802.

Nature of Tenancy.

——S. 100—*Nature of tenancy—Mistake as to area.*

A finding as to the status of a tenant is a finding of fact and should not be interfered with in second appeal except on the ground of some clear error of law. A mistake as to area is not a mistake of law. (*Richardson and Walmsley, JJ.*) DARPA NARAIN SARKAR *v.* GIRISH CHANDRA. 46 I. C. 351.

——S. 100—*Nature of tenancy.*

The decision of the question whether a certain 'joti' (tenancy) is a tenure or a raiyati holding is a question of fact while the question whether a tenure is a permanent tenure is not merely one of fact, If it depends to a large extent on the construction of the kabuliats executed from time to time by the tenant or his predecessor. (*Richardson and Walmsley, JJ.*) PRODYOT KUMAR TAGORE *v.* KRISHNA MONIA DASYA. 40 I. C. 513: 21 C. W. N. 809.

——S. 100—*Nature of tenancy—Determination of, on certain facts—Mixed question.*

The question whether a tenancy is one at will or of permanent nature on certain given facts is mixed question of law and fact. (*Sanderson, C. J. and Mookerjee, J.*) SURENDRANATH *v.* DWARKA NATH. 44 Cal. 119: 24 C. L. J. 350: 35 I. C. 605: 21 C. W. N 530.

——S. 100—*Nature of tenancy—Question of law.*

The nature of a tenancy is a question of law when it turns on the construction of some written instrument. The question whether a tenancy is a tenancy at-will or a yearly tenancy may be a question of law but it does not mean, that the whole question is open in second appeal on the merits. It means that it is open to a party to show that one or other of the terms have been wrongly applied to the facts found. A question of law arises where the finding of a Court is not based on any evidence capable of supporting it or where the evidence is all the other way pointing irresistably to another or opposite conclusion. (*Richardson and Newbould. JJ.*) DURGA NATH *v*, RAJENDRA NATH. 20 I. C. 363: 17 C W. N. 1073.

——S. 100—*Nature of tenancy—Presumption as to tenancy—Mixed question of law and fact.*

Where certain facts concerning a tenancy go to prove that the tenancy was in nature of permanent one. *Held*, that the question was one of mixed law and fact, one of law so far as the inference from the facts concerned and of fact (with which the High Court will not interfere) so far as the length of the tenancy, fixity of rent and other matters. (*Mookerjee and Carnduff, JJ.*) MOHORAM SHEIKH CHAPRASY *v.* TELA MUDDIN KHAN. 15 C. L. J. 220: 13 I. C, 606: 16 C. W. N. 567.

C. P. CODE (V OF 1908), S. 100—New plea.

——S. 100—*Nature of tenancy—Question of law—Determination of lease.*

The question whether a legal right, such as the right of tenant in the land, has determined is a question of law and not of fact and is open to revision in second appeal. (*Stuart, A. J. C.*) HABIBULLAH SHAH *v.* SURJI. 15 I. C. 857: 15 O. C. 295.

——S. 100—*Nature of tenancy—Question of law.*

Question of status of tenant is a question of law. (*Mullick, J.*) BIDYA NATH *v.* KHIKHINDA KOER. 35 I. C, 544: 1 Pat. L J. 157.

Negligence.

——S. 100—*Negligence—Mixed question of law and fact—Whether can be reviewed in second appeal.*

The lower appellate court has found that there was gross negligence on the part of a Lambardar which involves a question of mixed fact and law and is open to review in second appeal. (*Lindsay and Kanhaiya Lal, JJ.*) ASAD ALI *v.* FAIYAZ ALI. 70 I. C, 591: 1922 All. 421.

——S, 100—*Negligence*—Lambardar— *Agra Tenancy Act*, (1901), *S.* 164.

The question whether the acts or omissions of of the *Lambardar* amount to negligence or misconduct, is one of law and the High Court is not bound by a finding on that question in Second Appeal. (*Ryves and Gokul Prasad, JJ.*) CHABRAJSI KUAR *v.* GANGA SINGH. 43 All. 29: 18 A. L. J. 863: 60 I. C 643: 2 U. P. L. R. All. 272.

——S. 100—*Negligence—Finding of fact.*

The question of negligence is very largely a question of fact. (*Richardson and Suhrawardy, JJ.*) SYED SADAG REZA *v.* KHOSHMOHINI DASI. 71 I. C. 346: 1922 Cal. 317.

——S. 100—*Negligence—Question of law.*

If the contention is that there is no evidence of negligence, the question is one of law; on the other hand the question, whether the evidence is sufficient to justify the inference of negligence is one of fact (1877) 3 A. C. 193, Foll. (*Mookerjee and Richardson, JJ.*) AKHIL CHANDRA SHAH *v.* INDIA GENERAL NAVIGATION AND RAILWAY COMPANY, LTD. 29 I. C. 260: 21 C. L. J. 565.

——S. 100—*Negligence—Question of law.*

The question whether there is any evidence at all to go to the jury on a case of negligence is a question of law. The question whether the evidence let in is sufficient to constitute wilful negligence is a question of fact with which the High Court will not interfere in second appeal (*Roe and Imam, JJ.*) EAST INDIAN RAILWAY CO. LTD. *v.* JAGO RAM. 4 Pat. L. W. 369: 45 I. C. 197: 1918 Pat. 178.

New Plea.

——S. 100—*New plea—Point going to the root of the whole case cannot be taking.*

The High Court may be justified in an exceptional case, in permitting a point of law to be taken in second appeal which goes to the root of the merits of the whole case. (*Stuart, J.*) RAM GAJADEER *v.* MT. SARTANI. 71 I. C. 381: 1923 A. 343.

C. P. CODE (V OF 1908), S. 100—New plea.

———S. 100—*New plea—Point of law—Limitation—When allowed to be raised.*

A point of law which does not require any questions of fact to be determined but can be decided on the record as it stands may be allowed to be raised in second appeal for the first time. 21 A. 446 foll: 42 C. 72 dist. (*Gokul Prasad, J.*) BHIKHARI SINGH *v.* JOKKAN.

4 U. P. L. R. A. 104 : 66 I. C. 856 : 1922 All. 124.

———S. 100—*New Plea—Objection in Trial Court—Not urged in First Appeal.*

An objection which is taken in the Trial Court but is not urged in the Lower Appellate Court cannot be raised in Second Appeal. (*Rafique and Stuart, JJ.*) SHIAM SARUP *v.* NAND RAM.

43 All. 555 : 63 I. C. 366 : 19 A. L. J. 511.

———S. 100—*New plea—Reopening of the whole case.*

Where the plff. has relied on a custom he cannot be allowed to change his position in Second Appeal, and take his stand on a point which would reopen the whole case. (*Tudball and Rafique, JJ.*) MUKHLAL RAI *v.* HIRANAND SINGH.

19 A. L. J. 442 : 62 I. C. 884 : 3 U. P. L. R. (All.) 81.

———S. 100—*New plea—Jurisdiction.*

A question of jurisdiction is one of pure law though not raised in the lower Court and can be entertained and adjudicated upon in second appeal. (*Tudball and Sulaiman, JJ.*) DAULATIA *v.* HARGOIND. **18 A. L. J 923 : 57 I. C. 206 : 48 All. 18 : 2 U. P. L. R. (A). 289.**

———S. 100—*New plea — New point of law when entertained.*

Though questions of limitation being questions of law are not excluded from being heard in Second Appeal when they have not been raised in the lower Court, it has always been maintained that where a question of law depends on a finding of fact on evidence and that evidence has not been led in the Trial Court, then the High Court in second appeal will not deal with the question of law. (*Macleod, C. J. and Crump, J.*) DIGAMBAR *v.* LAHYADEO. **25 Bom. L. R. 245 : 72 I. C. 226 : 1923 Bom. 254.**

———S. 100—*New plea—Fresh evidence required—Practice.*

A point of law which cannot be decided without further evidence should not be allowed to be raised in second appeal. 24 Bom. 260 foll. (*Pratt and Fawcett, JJ.*) DODDAVA *v.* YELLAWA.

70 I. C. 417 : 1922 Bom. 233.

———S. 100—*New Plea—Limitation.*

Per *Macleod, J.*—There may be cases where admission on the pleadings clearly shows that the plff'.s claim is excluded but it is very rarely that such admissions appear and in such cases the plea of limitation on the ground of adverse possession can be raised in second appeal. (*Beaman and Macleod, JJ.*) PIRSAB KASAMSAH ITAGI *v.* GENAPPA BASAPPA KADIGI.

38 Bom. 227 : 24 I. C. 716 : 16 Bom. L. R. 111.

C. P. CODE (V OF 1908), S. 100—New plea.

———S. 100—*New plea—Question involving consideration of evidence.*

Where a point of fact was not raised in the courts below nor had any issue been framed with reference to it, it cannot be raised for the first time on second appeal. (*Greaves, J.*) SYED NAYAJAN ALI *v.* MIDNAPORE ZAMINDARI COMPANY. **67 I. C. 770 : 1923 Cal. 285.**

———S. 100—*New plea—When allowed to be raised for the first time in appeal or second appeal.*

The court will allow a party to raise a new point of law on appeal or second appeal when no further investigation of facts is necessary and when there is no surprise to the other side. If however the new plea raises a question of fact or mixed question of fact and law, the court will not allow it to be raised. 35 A, 273 : 10 M. 1 Ref. (*Mookerjee and Cuming, JJ.*) SECRETARY OF STATE FOR INDIA *v.* UPENDRA NARAIN ROY.

36 C. L. J. 336 : 71 I. C. 849 : 1923 C. 247.

———S. 100—*New plea—When can be raised.*

It is not open to the appellant to raise, for the first time in second appeal, an issue which would depend on facts. (*Suhrawardy and Cuming, JJ.*) HRIDAY NATH MONDAL *v.* TALA BEWA.

65. I. C. 706.

———S. 100—*New plea—Question turning on new facts.*

An appellant cannot in Second Appeal raise a new question turning on facts not investigated by the lower Courts. (*Sanderson, C. J. and Richardson, J.*) PARIKSHIT MANDOL *v.* CHANDRA MOHAN DUTTA. **62 I. C. 761.**

———S. 100—*New plea—Finding of fact—Second Appeal.*

A question of fact, not raised in the Courts below cannot be raised for the first time in Second Appeal, (*Sanderson, C. J. and Woodroffe, J.*) DINESH CHANDRA BANERJEE *v.* ROMESH CHANDRA DAS. **59 I. C. 316.**

———S. 100—*New plea—When allowed.*

A new point which is not a pure question of law cannot for the first time be taken up in second appeal. (*Teunon and Newbould, JJ.*) NILRATAN MIR *v.* ABDUL GAFUR GAZI.

59 I. C. 3 : 32 C. L. J. 75.

———S. 100—*New plea—Questions to be taken in second appeal.*

The High Court will not entertain an objection which was not raised in the lower Courts and which involves a determination of question of fact and thus compels the Court to remand the case to the Lower Court. (*Chatterjee and Panton, JJ.*) NEWAJUDDIN MANDAL *v.* SHASHI KANTA ACHARJEE BAHADUR. **57 I. C. 883.**

———S. 100—*New plea—Not allowed.*

In a suit for an injunction against certain tenants improperly using the land, the tenants after having failed to establish their plea of permanent tenancy could not in second appeal ask for the scope of the suit to be enlarged and a fresh enquiry started for the purpose of determining whether pecuniary compensation to the plffs. would be

C. P. CODE (V OF 1908), S. 100—New plea.

sufficient instead of an injunction. (*Chaudhuri and Walmsley, JJ.*) ISWARCHANDRA SAHA *v.* SASHINATH DAR CHAUDHURY. **55 I. C. 951.**

———S. 100—*New plea —Issue not framed.*

A controversy cannot be raised in second appeal for the first time in a matter regarding which no issue was framed. (*Walmsley and Huda, JJ.*) JARIP SARDAR *v.* JOGENDRA NATH CHATTERJEE. **24 C. W. N. 53: 54. I.C. 719 : 31 C. L. J. 78.**

———S. 100—*New plea—Interest.*

The question about the liability to interest under the Interest Act cannot be raised in the second appeal for the first time. (*Fletcher and Panton, JJ.*) CHANDRA MOYI CHAUDHARANI *v.* GRAGSON. **48 I. C. 465.**

———S. 100—*New plea —Involving questions of fact.*

A Court of second appeal will not allow a point of law to be taken which was not taken in either of the Lower Courts and which involved questions of fact. (*Woodroffe and Mookerjee, JJ.*) JADUB CHANDRA MULLIK *v.* MANIK SARKAR. **44 I. C. 91 : 22 C. W. N. 156.**

———S. 100—*New plea—Retrial.*

It is not open to the plffs. to ask in second appeal for a retrial on an issue of fact which had not been raised or considered in the Courts below. (*Fletcher and Newbould, JJ.*) HALODHAR MALO *v.* KALI PROSONNA BASU ROY. **43 I. C. 18**

———S. 100—*New plea--Abatement—No issue*

Persons substituted as defendents in place of a deceased defendant cannot raise in second appeal a plea of abatement of a suit which had been raised in their written statement but as to which no express issue was framed. (*Fletcher and Richardson, JJ.*) AKKIYANNESSA *v.* ABDUL GANI SADAGAR. **41 I. C. 1**

———S. 100 — *New plea— Question of law raised for first time.*

If a question of law is raised for the first time in a Court of second appeal upon the construction of a document or upon facts either admitted or found beyond controversy the Court should entertain the plea. 1892 A. C. 473 Ref. (*Sanderson, C. J. and Mookerjee, J.*) NURI MIAH *v.* AMBIKA SINGH. **44 Cal. 47 : 34 I. C. 869 : 20 C. W. N. 1099 : 24 C. L. J. 140.**

———S. 100—*New plea—Points raised in.*

The point whether, in the absence of a written and registered document creating a right of way a suit for declaration of such a right by grant must fail for want of legally sufficient evidence to prove the grant can be opened in appeal though not taken in Courts below. (*Chatterjee and Richardson, JJ.*) SITAL CHANDRA *v.* ALLEN J. DELANNEY. **34 I. C. 450 : 20 C. W. N. 1158.**

———S. 100—*New plea -Not to be set up.*

In second appeal a party cannot be permitted to make a new case involving the investigation of facts. (*Mookerjee and Beachcroft, JJ.*) LABAM SARDAR *v.* CHOYEN MALLICK. **29 I. C. 811 : 19 C. W. N. 768.**

C. P. CODE (V OF 1908), S. 100—New plea.

——— S. 100—*New plea—Question of notice.*

A question of notice cannot be allowed to be raised for the first time in second appeal. (*Richardson and Newbould, JJ.*) TARA PRASANNA BOSE *v.* NILMONI KHAN. **25 I. C. 118 : 41 Cal. 418**

———S. 100—*New plea*—Res judicata—*Plea raised for the first time*

It is open to the High Court, in second appeal to allow a plea of *res judicata* to be raised even though it had not been raised in any of the courts below or even in the memorandum of second appeal. 4 A. 69 ; 22 I. C. 12 foll. (*Campbell, J.*) MIR KHAN *v.* SARFU. **5 Lah. L.J. 163: 74 I.C. 577 : 1923 Lah. 560.**

———S. 100—*New plea—When can be entertained.*

A law point which is patent upon the record even if it has not been taken at all in either of the courts below could be raised for the first time in the second appeal and must be considered. (*Campbell, J.*) SOHAN SINGH *v.* SANTA SINGH. **1923 Lah. 491.**

———S. 100—*New plea.*

Where there is no reference to a plea in the judgments of the Courts below or in the pleadings of the parties, the point cannot be allowed to be raised in second appeal. A decree for a sum cannot be granted in second appeal, when no such relief was asked for in the Courts below. (*Shadi Lal, C. J. and Abdul Qadir, J.*) FIRM RAM DYAL SHEO PERSHAD *v* FIRM GHAMANDI LAL NARAIN DAS. **1923 Lah. 56.**

———S. 100—*New plea—Raising for first time.*

A point which was not raised in either of the Courts below cannot be entertained in the High Court. (*Broadway and Brasher, JJ.*) CHHAJU MAL *v.* KUNDAN LAL. **70 I. C. 838 : 1923 Lah. 53.**

———S. 100— *New plea.*

Objections as to maintainability of suit if raised for the first time in appeal, cannot be allowed. (*Scott-Smith and Campbell, JJ.*) NARINJAN SINGH *v* DIWAN CHARAN, **3 Lah. 239 : 68 I. C. 557 : 1922 Lah. 363.**

———S. 100— *New plea— Question of fact—Not allowed.*

A pure question of fact unless it is at least in the memorandum of second appeal cannot be allowed to be argued for the first time in second appeal. (*Martineau, J.*) MAULA BASKSH *v.* JAFAR ALI KHAN. **4 Lah. L.J. 437.**

———S. 100—*New plea—Mixed question of law and fact—Not to be raised for the first time on second appeal.*

A mixed question of fact and law cannot be raised on second appeal for the first time. (*Scott-Smith and Dundas, JJ.*) JAGGA *v.* BHAG MAL. **4 Lah. L.J. 432.**

———S. 100— *New plea —When allowed in second appeal.*

A point which had been the subject of an issue in the trial court and definitely given up cannot be considered again on second appeal. Similarly

C. P. CODE (V OF 1908), S. 100—New plea.

a new point which was not raised in the Court below cannot be raised on second appeal. (*Scott-Smith and Harrison, JJ.*) SADHU RAM *v.* UTTAM DAS. 3 Lah. L.J. 516.

——— S. 100—*New plea.*

The question that the defendants were entitled to the shamilat land as natural accretion to the proprietary land not having been raised in either of the lower Courts cannot be raised in second appeal. (*Shadi Lal, C.J. and Wilberforce, J.*) KARAM CHAND *v.* VIR SINGH. 3 Lah. L.J. 470.

——— S. 100—*New plea.*

The contention that the parties did not constitute joint Hindu family cannot be raised for the first time in second appeal. (*Le Rossignol and Wilberforce, JJ.*) MUNSHI LAL *v.* SOHAN LAL. 66 I.C. 881 : 3 Lah. L.J. 137.

——— S. 100—*New plea — Question of law—When can be raised—Change of case.*

A pure question of law arising out of the findings of the Courts below and patent on the record can be raised for the first time in second appeal. 51 I.C. 588, foll. The suit for arrears of maintenance cannot be changed into one for contribution in second appeal. (*Broadway, J.*) DIWAN CHAND *v.* BISHEN DAS. 67 I C. 919 : 2 Lah. L.J. 255

——— S. 100—*New plea*—Lis pendens.

If a new plea of *lis pendens* be allowed to be raised in the High Court in the second appeal for the first time especially, a remand is necessary for further enquiry. (*Scott-Smith, J.*) SHER SINGH *v.* KHEM SINGH. 2 Lah. L.J. 230.

——— S. 100—*New plea—Question of law.*

A point of law, which is patent upon the record but which is not raised in the lower Court or in the Chief Court, can be given effect to by the Chief Court *suo motu* in second appeal (*Shadi Lal, J.*) ALLAH DIN *v.* FATEH DIN. 31 P.R. 1918 : 54 P.W.R. 1918 : 45 I.C. 101 : 27 P.L.R. 1918.

——— S. 100—*New plea — Custom—Personal law.*

A plff. basing his right on custom, could not in second appeal ask the Court to decide the case upon the basis of Mahomedan law. (*Rattigan and Chevis, JJ.*) TUFEL MUHAMMAD *v.* SHAHAB DIN. 67 P.R. 1915 : 31 I.C. 85 : 148 P.W.R. 1915

——— S. 100—*New plea—Not to be set up.*

A point not taken in the lower Courts cannot be raised for the first time in second appeal. The parties are bound by the case which arises on their pleadings and which has been enquired into by the trial Court. (*Shadi Lal, J.*) DYAL *v* HIRDE RAM. 80 P.W.R. 1915 : 29 I C. 895 : 153 P.L.R. 1915

——— S. 100—*New plea—Not to be raised.*

A plea not raised in either of the Courts below cannot be entertained for the first time in further appeal to the Chief Court. (*Johnstone and Le Rossignol, JJ.*) CHANDRA SINGH *v.* MOKAND SINGH. 61 P.W.R. 1915 : 29 I.C. 761 : 144 P.L.R. 1915.

C. P. CODE (V OF 1908), S. 100—New plea.

——— S. 100—*New plea—Registration.*

The plea of want of registration of surety bond cannot be entertained on second appeal when the point has been raised in the two Courts below. (*Johnstone, J.*) SHANKER *v.* RAMKISHEN. 53 P.W.R. 1915 : 29 I.C. 271 : 147 P.L.R. 1915.

——— S 100—*New plea—Not to be raised.*

A new plea cannot be raised for the first time in second appeal. (*Scott-Smith, J.*) NARAIN DAS *v.* MUSAMMAT DAROPTI. 2 P.L.R. 1915. 27 I.C. 673 : 233 P.W.R, 1915.

——— S. 100—*New plea—Raising for the first time.*

A new contention not raised either in the first Appellate Court or in the memorandum of second appeal cannot be entertained in Second appeal. A point not taken in the Court of first instance cannot be taken for the first time in appeal. (*Shah Din, J.*) AHMAD KHAN *v.* BAKHATAWAR. 3 P.L.R. 1915 : 27 I.C. 646 : 14 P.W.R. 1915.

——— S. 100—*New plea—Not to be entertained.*

Arguments opposed to the pleadings will not be accepted in second appeal. (*Kensington, C.J. and Ratligan, J.*) KRISHEN DEVI *v.* SHIB SARAN. 77 P. R. 1914 : 25 I. C. 697 : 217 P.L.R 1915.

——— S. 100—*New plea—Second appeal.*

The Court will not allow a new point to be raised in the course of the second appeal. (*Johnstone and Shadi Lal, JJ.*) AMIR CHAND *v.* NARSINGH DAS. 222 P.L R. 1914 : 24 I.C. 941 : 123 P.W.R. 1914.

——— S. 100—*New plea—Custom or Mahomedan law.*

Where the deft. failed to raise a plea in lower Court that Mahomedan Law governed them and did not also raise the same in the ground of appeal. *Held*, it was too late to urge that plea at that stage (*Rattigan and Shadi Lal, JJ.*) MOHAMMAD UMIR *v.* NAWAB DJN. 217 P.L.R. 1914 : 24 I.C. 678 : 127 P.W.R. 1914.

——— S. 100—*New plea—If can be raised in second appeal.*

A point not taken in the pleadings or in the grounds of first appeal and not covered by any issue found in the case, will not be allowed to be raised for the first time in second appeal. (*Rattigan and Scott-Smith, JJ.*) KHAN BAHADUR *v.* ALI AKBAR. 255 P. L. R. 1913 : 20 I. C. 22 : 163 P. W. R. 1913.

——— S. 100—*New plea—Point of limitation not raised in courts below not to be allowed to be raised.*

Points under the Limitation Act not taken in the court below should not ordinarily be allowed to be raised in the High Court. (*Schwabe, C. J. and Wallace, J.*) PARA DEKKAN *v.* AMEERUDDIN SAHIB. 17 L. W. 169 : 72 I. C. 131 : 1923 Mad. 306.

——— S. 100—*New plea—Notice to quit.*

The High Court in second appeal is not bound to consider a ground of defence not raised in the Court below. (*Sadasiva Aiyar and Napier, JJ.*) VENKATAPPIER *v* RAMASWAMI. 10 L. W. 137 : 52 I. C. 517 : (1919) M. W. N. 548.

C. P. CODE (V OF 1908), S. 100—New plea.

——S. 100—*New plea—Notice to quit—Want of.*

The defendant was not entitled to rely on the plea of want of notice in bar of plaintiff's claim in second appeal. 20 M. L. J. 415 ; 9 I. C. 924, Ref. (*Sundara Aiyar, J.*) ARMUGAM PILLAY, *In re.* **15 I. C. 684.**

——S. 100—*New plea—Plea abandoned in Courts below not to be raised.*

A plea was taken in the first court but it appears that it was given up in the first appellate court ; now it cannot be entertained in second appeal, if it depends upon the decision of a question of fact. (*Kotval, A. J. C.*) AMOLAK SAO *v.* EKNATH. **55 I. C. 481 : 16 N. L. R. 89.**

——S. 100—*New plea—Question of law raised for the first time.*

A plea in law going to the root of the plaintiff's claim and arising on the facts found and not affected by any facts outside those findings can be taken for the first time in second appeal. 1 N. L. R. 1, Foll. (*Stanyon, A. J. C.*) SURAJ MAL *v.* PANDHARI. **41 I. C. 45 : 13 N. L. R. 98.**

——S. 100—*New plea.*

In a partition suit, a plea on the ground of inconvenience, cannot be urged in second Appeal, if not urged in the lower Courts. (*Lindsay, J. C.*) TAJA MUL HUSSAIN *v.* BANDE RAJA. **7 O. L. J. 538 : 60 I. C. 433 : 23 O. C. 281.**

——S. 100—*New plea—Point not pressed in Courts below.*

A point raised in the memorandum of appeal to the Lower Appellate Court but not pressed before that Court, cannot be raised in second appeal. (*Lindsay, J. C.*) SAJJAD HUSSAIN KHAN *v.* AMIR JAHAN. **7 O. L. J. 17 : 55 I. C. 441 : 2 U. P. L. R. (J. C.) 31.**

——S. 100—*New plea—Questions of fact.*

A new plea involving the determination of question of fact cannot be allowed in second appeal. (*Daniels, A. J. C.*) JAGANNATH SINGH *v.* MATA PRASAD. **6 O. L. J. 76 : 22 O. C 3 : 50 I C. 190 : 1 U. P. L. R. (J. C.) 30.**

——S. 100—*New plea—Not allowed.*

A finding of fact based on admissible evidence cannot be attacked in second appeal. Where in a redemption suit, the defendant's plea that the mortgagor had transferred the enquity of redemption to the mortgagee had been found against, it is not open to him in second appeal to change his ground and plead that there had been a foreclosure. (*Stuart, J. C.*) JAGAT PAL SINGH *v.* HARNAM SINGH. **3 O. L. J. 244 : 34 I. C. 745 : 19 O. C. 166.**

——S. 100—*New plea—Consideration—Payment of.*

The findings of facts of the lower Appellate Court as to execution of a deed and payment of consideration is conclusive and could not be questioned in second appeal unless vitiated by some error of law. A point not taken in the first Appellate Court nor in the memorandum of second appeal cannot be raised. (*Piggott, A. J. C.*) SAYED ZAHID ALI *v.* BUDH SEN. **21 I. C. 554.**

C. P. CODE (V OF 1908), S. 100—New plea.

——S. 100—*New plea—Plea raised but not tried.*

Where a point raised in the written statement is not made the subject of an issue and was not also brought to the notice of the Appellate Court in an appeal by the plaintiff, the defendant is entitled to raise it in second appeal. (*Piggott, J. C.*) NANDI *v.* BAQUAR HUSSAIN. **18 I. C. 367.**

——S. 100—*New plea—Not to be raised.*

New points involving fresh investigation of facts cannot be raised in second appeal. (*Chamier, J. C.*) JUGAL *v.* BADRI. **12 I. C. 321 : 14 O. C. 332.**

——S. 100—*New plea—Question of limitation—Facts, necessary for, not pleaded—Entertainability of.*

Issues not raised in the written statements of the defendant cannot be entertained in second appeal. (*Das and Adami, JJ.*) KHUL LAL UPADHYA *v.* JUGDESH PRASAD SINGH. **1 P. 23 : 69 I. C. 185 : 3 P. L. T. 795 : 1922 P. 398.**

——S. 100—*New plea—Sufficiency of tender—When can be raised.*

The question of sufficiency or insufficiency of the sum tendered cannot be allowed to be raised for the first time in second appeal. (*Coutts and Ross, JJ.*) JAG SAHU *v* RAM SAKHI KUER. **1 Pat. 350 : (1922) Pat. 58 : 3 Pat. L T. 332 : 65 I. C. 666 : 1922 P. 167.**

——S. 100—*New plea—When allowed.*

An altogether new point should not be allowed to be raised for the first time in second appeal in High Court, when there is no evidence on the record and no finding to support it, (*Dawson-Miller, C. J. and Coutts, J.*) CHANDRA MOHAN DUTTA *v.* SASIBALA DASI. **3 Pat. L. T. 623 : 4 U. P. L. R. (Pat.) 7 : 65 I. C. 277 : (1922) Pat. 39 : 1922 P. 68.**

——S. 100—*New plea—Question of law—Depending on facts not raised.*

In second appeal a question of law cannot be dealt with by the High Court if its determination is based upon a question of fact not raised in the Courts below. (*Miller, C. J. and Roe, J.*) MADANMOHAN PANIGRAHY *v.* BANDU BARIK. **51 I. C. 256.**

——S. 100—*New plea—Question of limitation—Mixed question of law and fact.*

If there is any question of fact to be investigated requiring a fresh decision upon an issue not pressed before the Courts below, the High Court will not allow a question of limitation to be raised in second appeal. But where on the face of the record the question arises it may be raised in second appeal. (*Roe and Jwala Prasad, JJ.*) LACHMAN SINGH *v.* DILJAN ALI. **43 I C. 955 : 4 Pat. L. W. 136.**

——S. 100—*New plea—Question of law—Investigation of facts.*

Where a point of law requires investigation into facts that point of law cannot be allowed to

C. P. CODE (V OF 1908), S. 100—New plea.

be taken for the first time in second appeal. (*Mullick, J.*) BASIRUL HUQ *v.* MOHAMMAD AJIMUDDIN. 43 I. C. 857 : 3 Pat. L. W. 213.

———S. 100—*New plea—Notice to quit.*

Where the defendant did not raise in the Court of first appeal the point as to whether the notice to quit was legal and sufficient, the point could not be raised in second appeal. (*Chapman and Atkinson, JJ.*) SHAH WALI AHMED *v.* MUSST. HUSSAINI BEGUM.

2 Pat. L. J. 595 : 42 I. C, 655 : 2 Pat. L. W. 52.

———S. 100—*New plea—Question of law.*

A new point may be raised for the first time in second appeal. But it should be purely a question of law arising on the findings of the Courts below and not affected by facts outside those findings. 17 Bom. 303 foll. (*Twomey, C. J.*) MA LAY *v.* TUN SHWE. 12 Bur. L. T. 75 : 51 I. C. 588 : 10 L. B. R. 10.

———S. 100—*New plea—Mixed question of law and fact.*

The plea of limitation or estoppel involving questions of fact which are not admitted or undisputed cannot be taken for the first time in appeal. (*Crouch and Fawcett, A. J. Cs.*) BHERUMAL TECKCHAND *v.* DUHLANOMAL.

27 I. C. 933 : 8 S. L. R. 272.

Non-Joinder.

———S. 100—Non-joinder—*Objection when to be taken.*

If an objection as to non-joinder of parties is not taken in the first Appellate Court, it cannot be taken for the first time in Second Appeal. (*Sadasiva Aiyar and Napier, JJ.*) KANDIYAL PARKUM *v.* THOTTOLI KOTTARATHIL.

44 Mad. 344 : 40 M. L. J. 282 : (1921) M. W. N. 229 : 62 I. C. 386 : 14 L. W. 69.

Ouster.

———S. 100—*Ouster—Exclusion from joint Hindu family.*

It is not always an easy matter to separate a finding of fact from a question of law. It may often be open to argument that the materials which have been accepted by one Court as establishing a certain conclusion were not in themselves sufficient for its support, if their legal weight had been properly measured and ascertained. A question of what constitutes exclusion from a joint estate may well in many cases be a question of law. (*Lord Buckmaster*) SHYAMANANDA DAS *v.* RAMKANTA DAS.

21 C. W. N. 1142 ; 42 I. C. 258 : (1917) M. W. N. 642 (P. C.)

Powers of Court.

———S. 100—*Powers of Court—Finding accepted by appellant—Appellate Court—If can go behind.*

The Appellate Court has no power to go behind a finding of the Trial Court, when the appellant has accepted it in his ground of appeal. The carelessness of the appellant's counsel in drafting the grounds makes no difference. (*Scott-Smith, J.*) WADHAWA SINGH *v.* SUNDAR SINGH.

59 I. C. 689 : 21 P. W. R. 1921.

C. P. CODE (V OF 1908), S. 100—Presumption.

———S. 100—*Powers of Court to decide issues of fact.*

Per Miller, C. J.:—It is not for High Court, sitting in second appeal, even if it thought that certain evidence had been improperly rejected by the lower court to weigh that evidence as against the evidence on the other side and arrive at a conclusion of fact upon the matter, except in cases where on the evidence only one conclusion is possible for any court.

Per Jwala Prasad, J.—Where once a second appeal has been properly laid, the ordinary rules under O. 41 and O. 42, C. P. Code will apply. When a finding of fact is set aside and the evidence on the record is sufficient, there is nothing to prevent the court from going into the evidence and determining the case finally under O. 41, R. 24. (*Miller, C. J. and Jwala Prasad, J.*) LOCHAN RAI *v.* LALA SANT PRASAD.

3 Pat. L. T. 303 : 65 I. C. 536 : 1922 P. 417.

Presumption.

———S. 100—*Presumptions—Finding of fact—Surmises—No evidence.*

A Court cannot draw an inference from matters not on record. Where a Court held that interest had been paid merely because the obligor brought a suit on the last day of limitation, *held* the finding was not sustainable. (*Beaman and Heaton, JJ.*) LAKHICHAND CHATRABHY MARWADI *v.* LALCHAND GANPAT PATIL.

42 Bom. 352 : 45 I. C. 555 : 20 Bom. L. R. 354.

———S. 100—*Presumption — Rebuttal—Question of fact.*

The question whether the presumption of the the correctness of the Record of Rights has been rubutted in a particular case is more a question of fact than of law. (*Suhrawardy and Cuming, JJ.*) YAKUB ALI CHOWDHURI *v.* RAJ KUMAR DUTTA.

65 I. C. 527

———S. 100—*Presumption—Finding of fact—No evidence.*

A question decided not on the evidence but on surmise and conjecture is open to question in second appeal. (*Richardson and Walmsley, JJ.*) DHRUPAD CHANDRA KOLEY *v.* HARINATH SINGHA ROY.

27 C. L. J. 563 ; 45 I. C. 660 : 22 C. W. N. 826.

———S. 100—*Presumption — Rebuttal—B. T. Act, S. 103.*

The question whether the presumption of correctness attaching to an entry in a Record of Rights has been rebutted or not is a matter which is not open to review in second appeal. (*Fletcher and Richardson, JJ.*) RAK KUMAR CHACKERBUTTY *v.* BIRENDRA KISHORE MANIKYA BAHADUR.

45 I. C. 65 : 22 C. W. N. 449.

———S. 100—*Presumption—Omission to raise in lower Court.*

Where a presumption which a Court ought to raise is fixed by no rule of law, the privilege of raising it entirely rests with the Court of fact and the High Court cannot in second appeal interfere

C. P. CODE (V OF 1908), S. 100—Presumption.

with it. 13 Mad. 394, Foll. (*Oldfield and Tyabji, JJ.*) NAGARAJA PILLAI *v.* SECRETARY OF STATE. **26 I. C. 723 : 39 Mad. 304.**

——S. 100—*Presumptions—Finding of fact—No evidence but probabilities—Interference by High Court.*

The High Court cannot interfere on a finding of fact based upon no positive evidence but only on probabilities and circumstances. (*Sadasiva Iyer and Spencer, JJ.*) T. M. RAMASAWMY IYER *v.* GANAPATHIA PILLAI. **24 I. C. 709 : 1 L. W. 100.**

——S. 100—*Presumption—Finding of fact.*

Questions of fact cannot be raised in second appeal on the assumption that every piece of evidence legally admissible either raises a presumption or shifts the burden of proof. (*Sadasiva Aiyar and Tyabji, JJ.*) PINGALE VISVANATHA RAO *v.* CHINNA KOLANDAI NAINAR. **22 I. C. 369 : 1 L. W. 197.**

——S. 100—*Presumptions — Not based on evidence but on conjecture.*

A merely conjectural finding of the lower Appellate Court that the common ancestor of the parties occupied the land in suit is liable to be set aside in second appeal. (*Martineau, J.*) KISHEN LAL *v.* KANHAYA. **5 Lah. L. J. 106.**

——S. 100—*Presumption—Finding of fact—Assumptions unwarranted.*

A finding of fact based upon unwarranted assumptions and wrong principles is open to second appeal. (*Scott-Smith and Shadi Lal, JJ.*) RAGHUBIR DAS *v.* MUNSHI. **46 I. C. 511 : 27 P. W. R. 1918.**

——S. 100—*Presumptions—Surmises.*

Findings of facts based on mere conjecture are not judicial findings and cannot be accepted as final even in second appeal. (*Shah Din, J.*) SULTAN AHMAD *v.* PALA. **45 I. C. 800 : 102 P. W. R. 1918.**

——S. 100—*Presumptions—Suspicions.*

A judgment based on mere conjecture and presumptions is liable to be set aside in second appeal. (*Shadi Lal, J.*) BHAGWAN DAS *v.* SHAMSHER SINGH. **55 P. W. R. 1918 : 44 I. C. 433 : 33 P. L. R 1918.**

——S. 100—*Presumption—Rebuttal.*

It is for the final Court of fact to say whether the evidence as furnished by the *batwara* proceedings is so valuable as to rebut the presumption of the correctness of the record of rights, (*Das and Adami, JJ.*) JUGDEO NARAIN *v.* BULAKI GOPE, **(1921) Pat. 343 : 63 I. C. 226 : 2 P. L. T. 343.**

Procedure.

——S. 100—*Procedure--Substantial error in.*

Refusal by the Appellate Court in the exercise of its discretion to admit additional evidence given under O. 41, R. 27, is not a substantial defect or error in procedure. (*Stanley, C. J. and Banerji, J.*) DURGA PRASAD *v.* JAI NARAIN. **33 All. 379 : 9 I. C. 265 : 8 A. L. J. 175.**

C. P. CODE (V OF 1908), S. 100—Procedure.

——S. 100—*Procedure--Error—Findings of fact—Powers of High Court.*

The High Court will reverse a finding in second appeal if there was substantial error in procedure resulting in a finding not *secundum allegata et probata* and not sustainable in law. (*Beaman and Hayward, JJ.*) PURUSHOTTUM DAJEE MANDLIK *v.* PANDURANG CHINTAMAN. **39 Bom. 149 : 28 I. C. 921 : 17 Bom. L. R. 157.**

——S. 100—*Procedure—Finding of fact—False case on both sides.*

Where the first Appellate Court finds that the case set up by both parties is false the way in which the High Court ought to deal with the matter in second appeal is to decide the case upon the facts found by the lower Appellate Court irrespective of the original cases respectevely made by the parties in their pleadings. (*Sanderson, C.J. and Chatterjee, J.*) HARSHANKAR OJHA *v.* GOURI SHANKAR. **45 I. C. 795 : 22 C. W. N. 149.**

——S. 100—*Procedure—Technical error.*

If the Court misconceiving the action as based on a mortgage decrees redemption instead of specific performance the decree is wrong only technically and should not be interfered with in appeal as the parties are in exactly the same position as if specific performance would have been granted. (*Fletcher and Teunon, JJ.*) DHARINIDHAR MOOKERJEE *v.* RAKHAL DAS BHATTACHARJEE. **35 I. C. 631.**

——S. 100—*Procedure—Error in—Case where investigation necessary.*

The rejection of a Commissioner's report without directing further inquiry in a case which could not be decided without any investigation is a substantial error or defect in the procedure provided by the Code, which may possibly have produced an error or defect in the decision upon the merits. (*Sanderson, C. J. and Mookerjee, J.*) TIRTHA BASI SING ROY *v.* BEPIN KRISHNA ROY. **34 I. C. 30 : 23 C. L. J. 600.**

——S. 100—*Procedure—Defect in—Failure to realise true question in controversy.*

Failure on the part of the Lower Appellate Court to appreciate the true question in controversy is a defect in procedure and the appeal should be reheard. (*Mookerjee and Carndurf, JJ.*) NARAKH LAL *v.* THAGOO LAL. **13 I. C. 455 : 22 C L. J. 380.**

——S. 100 and O. 41, R. 17—*Procedure*—Ex parte *hearing of appeal—Interference on second appeal.*

Where the lower appellate court has decided an appeal *ex parte* the High Court has power to interfere in second appeal on the ground that the lower appellate Court acted irregularily in hearing the appeal *ex parte*. 30 M. 54 Foll; 1 I. C. 329 dissented (*Martineau and Harrison, JJ.*) GULAM HAIDAR *v.* JIWAN. **3 Lah. 357 : 69 I. C. 499 : 1922 L. 439.**

——S. 100—*Procedure—Error of.*

The failure by an appellate Court to determine the critical question between the parties to a suit

C. P. CODE (V OF 1908), S. 100—Procedure.

and to consider the oral evidence adduced on behalf of the defendant is a substantial error of procedure. (*Das, J.*) BHIKHAN QASSAB *v.* MARDANALI. 56 I. C. 40.

——S 100 - *Procedure—Error of—Disposal of case on new point.*

A Judge who disposes of a suit on a point taken by himself on appeal without affording the parties an opportunity of proving what is necessary to meet the point cummits an error of law, 17 Mad. 140 Foll. (*Maung Kin, J.*) BICHAY SUKUL *v.* BEHARI SUKUL. 43 I. C. 488 : 11 Bur. L. T. 1.

——— S. 100— *Procedure — Error— Decision without evidence.*

It is a substantial error or defect in the procedure of a lower Appellate Court if it gives decree not based on evidence and the High Court can interfere in second appeal. (*Fox C. J.*) MA THA *v.* P. L. M. M. CHETTY FIRM.
26 I. C. 240 : 7 Bur. L. T. 310.

Question of Fact.

———S. 100—*Finding of fact of the High Court subject to limits prescribed by S. 100 of the C. P. Code.*

The right of appeal to the High Court under S. 109-A of the B.T. Act is subject to S. 524 of the C. P. Code of 1882 and can only be exercised upon the grounds therein mentioned. The High Court has therefore no jurisdiction under the sub-section to set aside the decree of the Dt. Judge upon the ground that he had applied the wrong standard of measurement to land of which the rent was in question. (*Lord Buckmaster.*) NAFAR CHANDRA PAL *v.* SHUKUR. 46 Cal 189 : 23 C. W. N. 345 : 9 L. W. 552 : 51 I. C. 760 : 45 I. A. 188 (P. C.).

——S. 100—*Finding of fact—No evidence —Reversal of finding on second appeal.*

Where on second appeal the High Court set aside the decree of the lower Appellate Court in favour of the plaintiff on the grouud that the evidence taken showed that the true question of fact which had not been considered and as to which no issue had been framed should be answered in favour of the defendant and that there was no evidence to support a finding of fraud arrived at by the lower Courts. *Held*, that the High Court had jurisdiction under S. 100, C, P C. to set aside the decree and that the decision of the High Court on the evidence was correct (*Viscount Haldane*) DANNISA *v* ABDUL SAMAD,
47 Cal. 107 : 46 I. A. 140 : 87 M. L. J. 36 : 24 C W. N. 81 : 21 Bom L R. 920 : 15 N. L. R. 97: 10 L. W 310: (1919) M. W. N. 505: 51 I. C. 177 : 17 A. L. J. 700 (P. C.).

——S 100—*Finding of fact—Jurisdiction of the High Court to interfere with.*

The High Court is not entitled to go behind the findings of fact of the District Judge which did not result from the misconstruction of a document or the misapplication of law or procedure but upon the oral evidence in the case. A finding of the Lower Appellate Court that there was no fraud or collusion in a revenue sale between the purchaser and the defaulter is one of fact binding

C. P. CODE (V OF 1908), S. 100—Question of fact.

on the Hjgh Court in second appeal. (*Sir John Edge.*) MIDNAPUR ZAMINDARI CO. LTD *v* UMACHARAN MANDAL. 37 M. L. J. 199 : 17 A L. J 1004 : (1919) M. W. N. 817 : 26 M. L. T. 489 : 24 C.W. N: 201 : 22 Bom. L. R. 7 : 52 I. C. 497 : 11 L. W. 371 (P. C.)

[Reversing 19 C. W. N. 270 : 26 I. C. 182 : 20 C. L. J. 11.]

——S. 100 --*Finding of fact—No jurisdiction to High Court to interfere—C. P. Code* (1882), S. 584.

Under S. 584 of the C. P. Code of 1882 (S. 100 of the C. P. Code, 1908) the High Court is bound by the findings of fact of the District Judge (on appeal) when he had considered the evidence and saw no reason for differing from the conclusions at which the Subordinate Judge (first Court) had arrived. The District Judge need not give independent reasons for the finding to be one of fact. (*Lord Parker.*) RAMACHANDRA BHAMIJ DEO *v* SECRETARY OF STATE. 43 Cal. 1104 : 43 I. A 172 : 20 M. L. T. 235 : 20 C. W. N. 1245 : (1916) 2 M.W.N. 175 : 4 L.W. 251 : 14 A.L.J. 1009: 18 Bom. L.R 838 : 24 C L.J, 296 : 37 I. C. 223 : 31 M, L, J. 745 (P. C.).

——S. 100--*Findings of fact--No jurisdiction to High Court to interfere with— Permanent arrangement regarding rent.*

Where the Collector and the District Judge on appeal fiuds that a commutation of produce rent into cash in a particular year represented a permanent arrangement to bold good thereafter as between the landlord and tenant, *Held* that the finding was one of fact and as that finding was based not merely on the construction of the *muchilikas* executed by the tenants, but on other evidence as well, the High Court has no jurisdiction in second appeal to interfere with the finding, (*Mr. Amer Ali.*) RAVI VEERARAGHAVULU *v.* BOMMA DEVARA VENKATA.
37 Mad. 443 : 41 I. A 258 : 16 M, L. T. 262 : (1914) M. W. N. 695 : 1 L. W. 779 : 27 M. L. J. 451 : 20 C. L J. 375 : 25 I. C. 305 : 19 C. W. N 97 : 16 Bom. L. R. 853 (P. C.)

——S 100—*Question of fact.*

Where a lower court upon a review of the entire evidence, arrives at a finding as to the extent of the proprietary rights of the vendors, its decision being upon a question of fact cannot be challenged in second appeal. (*Mears, C. J. and Piggott, J.*) IQBAL HAIDAR KHAN *v.* MASI FATIMA BIBI. 74 I. C. 1004 : 45 A. 53 : 1923 A. 358.

———S. 100—*Question of fact —Mistake of fact.*

Where the finding of the lower appellate court is based on a mistake of fact it does not bind the High Court on second appeal. (*Ryves and Gokul Prasad, JJ.*) HABIBKHAN *v.* FIDA HUSAIN KHAN. 71 I, C. 1017 : L. R. 4 A, 138.

——S. 100—*Question of fact.*

Where the Lower Appellate Court arrived at the finding on relevant evidence and certain admissible registered deeds that there was a partition. *Held*, that, being a finding of fact was conclusive. (*Stuart, J.*) SYED MOHAMMED *v.* SYED MANZUR HSSAN. 69, I C, 807: 1922 All. 283 (2).

C. P. CODE (V OF 1908), S. 100—Question of fact.

——S. 100--*Question of fact—Erroneous view of law—Interference.*

The finding of fact of a lower appellate court which proceeds on an erroneous view of the law, and which is inconsistent with the facts recited can be interfered with by the High Court. (*Piggott and Walsh, JJ.*) SABAL SINGH *v.* SALIK RAM SINGH. **44 A. 602 : 20 A. L. J. 473 : L. R. 3 A. 301 . 67 I. C. 67 : 4 U. P. L. R. (A) 93 : 1922 A. 188.**

——S. 100--*Question of fact--Building--Moveable or immoveable property.*

It is a question of fact in each case whether a particular house and the building materials are moveable or not and the High Court will not interfere with the findings of the Court below in second appeal. 8 C. 590 Ref. (*Mears C. J. and Banerji, J.*) JITAN TANBOLI *v* NANKO. **L. R. 3 A. 128 : 1922 All. 45.**

——S. 100—*Question of fact—Finding as to.*

Where in Second Appeal the High Court accepts the lower Appellate Court's finding of fact that a gift was made by a Hindu widow for the benefit of the soul of her deceased husband, which finding, it holds as binding upon it and then holds that no special benefit was to accrue to his soul, the two findings are inconsistent and the High Court in a Letters Patent Appeal must interfere. (*Mears, C J. and Walsh, J.*) GOVIND UPADHYA *v.* LAKHRANI. **43 All. 515 : 63 I.C. 221 : 19 A. L. J. 499.**

——S. 100--*Question of fact—Interference by High Court.*

Findings of fact cannot be interfered with in second appeal, but the High Court will interfere when such findings are not borne out by the evidence or are based upon evidence misunderstood. (*Rafique and Ryves, JJ.*) MATBAR SINGH *v.* RANBAZ SINGH. **19 A.L.J. 149: 61 I.C. 65 : 3 U.P.L.R. (All.) 27.**

——S. 100—*Finding of fact—Possession—Reversal of decree.*

In a suit for declaration of title and retaining possession of certain lands, the Lower Appellate Court found that the lands in suit belonged to the defts., and were in their possession for more than twelve years, that the plaintiffs did not prove their possession within the period of limitation and therefore dismissed the suit. *Held*, that the findings of fact arrived at by the Lower Appellate Court were binding in second appeal. (*Richards, C.J. and Rafique, J.*) SHEO PUJAIN TEWARI *v.* SOHBAT TEWARI. **36 I.C. 427 : 14 A L.J. 1066.**

——S. 100—*Finding of fact—Grant by Government of grazing land—Question of fact.*

Where the question was whether the grant of a certain grazing land was inconsistent with the wishes of the village community and the first Appellate Court *held* that no second appeal lay as the point decided was one of fact. (*Chamier and Piggott, JJ.*) GITA RAM *v.* KIRPA RAM. **36 All. 256 : 24 I.C. 111 : 12 A.L.J. 378.**

——S. 100—*Finding of fact—State of mind.*

A finding as to the state of mind of a person when he performed a certain act is ordinarily a finding of fact. The High Court on second appeal cannot go behind the finding that a deed of gift was executed in immediate apprehension of death unless it is entirely unsupported by evidence. (*Piggott, J.*) NAZAR HUSSAIN *v.* RAFFEQ HUSSAIN. **12 I.C. 730: 8 A.L.J. 1154.**

——S. 100—*Finding of fact—Conclusive.*

The High Court in second appeal is bound to accept a finding of fact and cannot come to a contrary finding. (*Stanley, C. J. and Banerji, J.*) AMIR ALI *v.* KARAMA ALI. **9 I.C. 456.**

——S. 100—*Question of fact—Landlord and tenant—Existence of relationship—Presumption—Entry in record of rights.*

Where on a consideration of the entire evidence in the case the lower appellate court has come to the conclusion that the relationship of landlord and tenant exists between the parties and that the presumption raised by an entry in the record of rights has been rebutted, the finding is one of fact with which the High Court cannot interfere in second appeal. (*Newbould, J.*) KARIM BUX *v.* DWARAKANATH KAR. **64 I.C. 190.**

——S. 100—*Question of fact—Transaction executed to defeat creditors.*

Whether a transaction, *e.g.*, *heba* is executed is breach of S. 53 of the T.P. Act, with intent to defeat or delay creditors is a question of fact and cannot be interfered with in Second Appeal. (*Sanderson, C.J. and Richardson, J.*) RAM KUMAR BANIKYA *v.* SAFIUNNESSA BIBI. **63 I.C. 169.**

——S. 100 *Question of fact—Lost grant.*

When from a certain set of facts, a Court infers a lost grant the decision is on a question of fact and not of law and cannot be challenged in second appeal. (*Mookerjee and Fletcher, JJ.*) KASI NATH BATTACHARJEE *v.* MURARI CHANDRA PAL. **57 I.C. 350 : 31 C.L.J. 501.**

——S. 100--*Finding of fact—Undue influence.*

Finding of undue influence is a finding on the merits when there is some evidence that pressure was brought to bear on one party and the other party had an unfair advantage. (*Richardson and Walmsley, JJ.*) PROBHAT CHANDRA SHOME *v*, SHASHADHAR KUMAR GHOSE. **40 I.C. 215.**

——S. 100—*Finding of fact—Interference.*

The High Court has no power in second appeal to go behind a finding of fact of the lower Appellate Court. (*Sanderson, C. J. and Mookerjee, J.*) SANT PRASAD SINGH *v.* HARI SINGH. **38 I.C. 161.**

——S. 100—*Finding of fact—Meaning of word in common use.*

A decision of an Appellate Court upon the ordinary meaning of a word in common use is final in second appeal. (*Holmwood and Mullick, JJ.*) KARTICK CHANDRA DAS *v.* SATYA SRI GHOSAL. **32 I.C. 240 : 20 C.W.N. 584.**

——S. 100—*Finding of fact—Manufacture—Meaning of.*

The High Court on second appeal will not go behind a finding of fact arrived at by two Courts. The question whether silk is manufactured or not within the meaning of Sch. II of the Railways

C. P. CODE (V OF 1908), S. 100—Question of fact.

Act is one of fact. (*Holmwood and Mullick, JJ.*) EAST INDIAN RAILWAY CO. *v.* CHANGAKHAN.
42 Cal. 888 : 19 C.W.N. 1034 ; 28 I.C. 245 : 22 C. L. J, 212.

——— **S. 100—*Finding of fact—Rent—Amount of.***

A finding of fact cannot be interfered with in second appeal. A finding as to whether certain charges are parts of rent or not is a finding of fact 17 Cal. 726, Foll. 17 Cal 131 (P.C.) Ref. to; 15 Cal 828, Overruled. (*Coxe and Chatterji, JJ.*) KALANAND SINGH *v.* SAIRA. **25 I. C. 540.**

———**S. 100—*Findings of fact—When High Court can interfere.***

The High Court will not interfere with findings of fact of a lower Appellate Court, unless they have been arrived at on an erroneous view of the law. (*Woodroffe and Walmsley, JJ.*) RAM KANAI SHAHA BHUNIA *v.* CHANDRA BALIDASI. **23 I.C. 796.**

———**S. 100—*Finding of fact—High Court bound by.***

The High Court is bound in second appeal, by a finding of the lower Appellate Court on a substantial question of fact. (*Richardson and Newbould, JJ.*) DURGA NATA *v.* RAJENDRA NATH.
20 I.C. 363 : 17 C.W.N. 1073.

———**S. 100—*Question of fact—Representation—Co-heirs.***

Whether one heir of a tenant represents other heirs is a question of fact (*Mookerjee and Teunon, JJ.*) GANGAN SHEIKH *v.* ABAJAN KHATUN.
10 I.C. 116 : 14 C.L.J. 180

———**S. 100—*Question of fact—Question of status of party.***

The finding of the Court below on the question of plaintiff's status is a finding of fact and it cannot be attacked in second appeal. (129 P.L.R. 1912. Ref.) (*Campbell and Moti Sagar, JJ.*) DAL SINGH *v.* PLUIMAN. **1923 Lah. 626.**

———**S. 100—*Question of fact.***

The conclusion that the plaintiff was a full owner and not merely a *dohlidar* is clearly a finding of fact and cannot be impugned in second appeal. (*Moti Sagar, J.*) CHHITRU v. CHAJJU.
1923 Lah. 611.

———**S. 100—*Question of fact—Character of a property.***

There is abundant authority for holding that a finding as to the character of property arrived at after a full consideration of the evidence is a pure finding of fact and it cannot be impugned in second appeal. (*Moti Sagar, J.*) BALBIR SINGH *v.* GOBIND. **1923 Lah. 532.**

———**S. 100—*Question of fact—Whether a place is a town.***

The question whether a certain place is a town for the purposes of the Punjab Pre-emption Act is a question of fact and cannot be raised in second appeal. It cannot be denied that whenever such a question arises it is to be denied upon the evidence and the particular circumstances of each case. It is therefore, difficult to hold that it is a question of law. It is not necessary that a custom prevailing in the town should apply to the *mohallas* or suburbs. (*Abdul Raoof, J.*) DIWAN CHAND *v.* NIZAMDIN.
75 I. C. 610 : 1923 Lah. 443.

C. P. CODE (V OF 1908), S. 100—Question of fact.

———**S. 100—*Question of fact—Inference from fact.***

Where more than one inference is legally open from the evidence, the High Court cannot in second appeal refuse to be bound by that inference drawn in the Court below. (*Broadway, J.*) ABDUL GHANI *v.* ISHAR SINGH. **1923 Lah. 239 (1)**

———**S. 100—*Question of fact.***

A simple finding of fact arrived at by the lower appellate Court could not be disturbed on second appeal and if disturbed, the judgment of the Judge of the High Court can be reversed on Letters Patent appeal. (*Shadi Lal, C. J. and Fforde, J.*) GIRDHARI *v.* ABDULLAH.
73 I. C 232 : 1923 Lah. 236 (1).

———**S. 100, O. 41, R. 23 and O. 43, R. 1 (a)—*Finding of fact—First appellate Court misunderstanding the whole case.***

In an appeal from an order of remand findings of fact cannot be examined by High Court sitting as a Court of second appeal but where the finding of the lower appellate Court appears to have been based on a misappreciation of the true controversy between the parties, a rehearing of the appeal by the lower appellate Court may be directed. 13 I. C 445 Foll. (*Broadway, J.*) QADIR BAKSH *v.* SHAMASDIN. **73 I. C. 756 : 1923 Lah. 206.**

———**S. 100—*Question of fact.***

Issues of facts cannot be agitated in second appeal. (*Shadi Lal, C. J. and Brasher, J.*) MT. CHHOTO *v.* MT. SONA DEVI.
70 I. C. 299 : 1923 Lah. 11 (2).

———**S. 100—*Question of fact—Marriage.***

A finding as regards the factum of marriage between the parties is a finding of fact which will not be interfered in second appeal by the High Court, (*Broadway and Martineau, JJ.*) RAM DASI *v.* MT. RAMA DEVI. **5 Lah. L. J. 117.**

———**S. 100—*Question of fact—Dedication to waqf.***

That certain property is not waqf and does not belong to it is a finding of fact with which the High Court will not interfere in second appeal. (*Chevis and Dundas, JJ.*) ILAHI BAKHSH *v.* KALA RAM. **5 L. L. J. 11.**

———**S. 100—*Question of fact when not binding on the Court of second appeal.***

When there is (i) no evidence (12 Cal. 972) or (ii) no sufficient legal evidence (16 I C. 887) or (iii) important evidence is ignored (103 P. L. R. 1915) or (iv) only a colourable pretence of considering the evidence is made (38 I. C 561) or (v) there is no honest and complete consideration, a finding of fact can be contested in second appeal. Otherwise it is final (18 Cal. 23 P. C.) (*Scott Smith and Abdul Raoof, JJ.*) RAM SINGH *v.* GANGA RAM.
3 Lah. 389 : 70 I. C. 202 : 1922 Lah. 356 (2).

C. P. CODE (V OF 1908), S. 100—Question of fact.

——S. 100—*Question of fact—Evidence when open to examination.*

It is not necessary in law for Appellate Courts such as the District Judge to refer in detail to every piece of evidence on the record. In the absence of doubt that all the available evidence has been given due weight to his findings on questions of fact cannot be attacked in second appeal. Whether or not there had been a complete separation, is a question of fact. (*Broadway and Abdul Raoof, JJ.*) NATHU SHAH *v.* HAVELI SHAH. **1 Lah. L. J. 72 : 16 P. W. R. 1922 : 65 I. C. 475 : 1922 Lah. 140.**

——S. 100—*Question of fact—Mistake as to —No interferenoe.*

However erroneous and inexcusable a finding of fact may be, the High Court cannot disturb it in second appeal. (*Leslie Jones and Wilberforce, JJ.*) HAYAT *v.* FIRM OF DITU RAM RAJU RAM: **4 Lah. L. J. 464.**

——S. 100—*Question of fact—Gift—Nature of.*

That a gift was an absolute one enuring for the benefit of the donee's descendants is a finding of fact with which the High Court cannot interfere. (*Scott Smith and Abdul Raoof, JJ.*) ALLAH SWAYA *v.* ADIL JA. **4 Lah. L.J. 457.**

——S. 100—*Question of fact— Breach of contract.*

A finding that it was the defendant who committed the breach of contract and not the plff. is one of fact which will not be interfered with by High Court in second appeal. (*Shadi Lal, C, J. and Wilberforce, J.*) WELD AND COMPANY *v.* HARCHARAN DAS. **4 Lah. L. J. 317.**

——S. 100—*Question of fact— Permanent tenancy—Evidence.*

Where on a consideration of the entire evidence in the case the lower appellate court comes to the decision that a permanent tenancy had not been established, it is a finding of fact which the High Court has no power to interfere in second appeal. (*Broadway and Abdul Raoof, JJ.*) RAM SAHAI *v.* MAHOMED SADIQ. **4 Lah. L. J. 311.**

——S 100—*Question of fact—Family arrangement—Binding nature of.*

The question whether a family arrangement is beneficial or detrimental to the interests of the minor members of a family and therefore binding or not binding upon them is a question of fact which cannot be contested in second appeal. (*Broadway and Abdul Qadir, JJ.*) THAKUR *v* JAWALA. **4 Lah. L. J. 40**

——S. 100—*Question of fact—Joint Hindu family—Finding as to status.*

Where the principles of Hindu Law applicable to the case have been correctly appreciated by the lower appellate court a finding as to whether certain persons form members of a joint Hindu family or not is a finding of fact with which the High Court will not interfere in second appeal. (*Wilberforce and Abdul Qadir, JJ.*) MT. MAYAWANTI *v.* ISHAR SINGH. **67 I, C. 789 : 3 Lah. L. J 552.**

C. P. CODE (V OF 1908), S. 100—Question of fact.

——S. 100—*Question of fact—Errors in— Not open to consideration on second appeal.*

Where the Lower Appellate Court in a suit to contest an alienation has found that Rs. 475 out of the sale price due on a prior oral mortgage was fictitious and in arriving at this conclusion the Lower Appellate Court has considered the evidence on record connected with this matter then the finding, however erroneous, cannot be challenged in second appeal. 18 C, 25 P. C. foll. (*Abdul Raoof and Harrison, JJ.*) BHAGWAN SINGH *v.* NIRANJAN SINGH. **67 I. C. 436 : 3 Lah. L. J. 409.**

——S. 100—*Finding of fact—Dharmasala— Binding in Second Appeal.*

The finding that a Dharmasala was always treated as private property is one of fact which cannot be attacked in second appeal. (*Wilberforce and Abdul Qadir, JJ.*) SADHU DAS *v.* MUSHTAQ SHAH SINGH. **3 Lah. L. J. 514.**

——S. 100—*Question of fact--Deed—Conveyance—Inclusion of shamilat land.*

The finding of the lower appellate Court that no *shamilat* rights were sold with the proprietary land is one of fact which cannot be questioned in second appeal. 3 P. R. 1917 and 85 P. R. 1919 foll. (*Shadi Lal, C.J. and Wilberforce, J.*) KHARAM CHAND *v.* VIR SING. **3 Lah. L. J. 470.**

——S. 100—*Question of fact—Notice.*

A finding that the subsequent purchaser bad notice and knew that there was a contract of sale with the plaintiff is one of fact. (*Wilberforce and Abdul Qadir, JJ.*) ARURA *v.* GEHNA. **3 Lah. L. J. 447.**

——S. 100—*Finding of fact.*

The finding that the right to the *birt* is not ancestral is one of fact. (*Martineau, J.*) BISHIN DATT *v.* KISHEN DITTA. **67 I. C. 439 : 3 Lah. L. J. 414.**

——S. 100—*Question of fact—Time if essence of contract.*

The question whether time is or is not of the essence of a contract is one of fact and a finding thereon cannot be assailed on second appeal. (*Scott Smith and Abdul Qadir, JJ.*) FAZAL ILAHI *v.* THE IMPERIAL CHEMICAL COMPANY. **67 I. C. 157.**

——S. 100—*Question of fact--Mortgage—Suit by mortgagee—Actual possession, finding about— Cannot be questioned in second appeal.*

The finding of the lower appellate Court that a mortgagee has never been in actual possession of the land,-being one of fact cannot be contested in second appeal. (*Abdul Raoof and Martineau, JJ.*) NARAIN DAS *v.* GANAT RAIBI. **67 I. C. 152.**

——S. 100—*Question of fact— Inadmissible evidence—Right to question.*

A finding of fact arrived at on a consideration of evidence which is inadmissible and which proceeds partly on such evidence can be assailed in second appeal, 57 I. C. 561 foll. (*Broadway and Abdul Qadir, JJ.*) BALWANT SINGH *v.* BALDEV SINGH. **64 I. C. 929 : 2 Lah. 271.**

C. P. CODE (V OF 1908), S. 100—Question of fact.

——S. 100—*Question of fact—Pre-emption suit—Fictitious item of consideration—Market value of the property.*

A finding in a pre-emption suit that a portion of the price mentioned in the deed of sale is fictitious, though erroneous is binding upon the High Court in second appeal. So is a finding as to the market value of the property in dispute based on evidence. (*Chevis and Scott Smith, JJ.*) GANPAT RAI *v.* HARI RAM. **64 I. C. 297.**

——S. 100—*Question of fact—Nuisance—Mixed question of law and fact.*

Where the principles of law applicable have neither been ignored nor violated, a finding as to the existence of a nuisance is binding on the court in second appeal. 31 I. C. 62 ; 106 P. R. 1888 ; 40 B. 401, Ref. (*Broadway and Abdul Qadir, JJ.*) CHIRAGH DIN *v.* KARIM. **64 I. C. 169.**

——S. 100—*Question of fact—Interference in Second Appeal.*

An erroneous finding of fact is different from an error in procedure. Where there is no error or defect in the procedure the finding of fact by the Court of First Appeal is final if that Court had before it evidence proper for its consideration in support of its finding. (*Abdul Raoof and Harrison, JJ.*) RUGGU MAL *v.* SITA RAM. **63 I. C. 575.**

——S. 100—*Question of fact—Finding that a transfer was intended to defeat creditors.*

A finding that a transfer was intended to defraud, defeat or delay the creditors is one of fact. (*Scott-Smith, J.*) ATTAR SINGH *v.* GULAM MOHAMAD. **60 I. C. 527.**

——S. 100—*Question of fact—Legitimacy—Presumption of marriage.*

Though the finding on the question of legitimacy is one of fact, it would not be upheld in second appeal, where the lower Appellate Court has ignored important pieces of evidence and the strong presumption of law in favour of legitimacy. (*Wilberforce and Le Rossignol, JJ.*) SULAKHAN *v.* SANTA SINGH. **60 I C. 375.**

——S. 100—*Question of fact—High Court if can interfere—Suit whether collusive.*

A High Court cannot in Second Appeal interfere with finding of fact arrived at by the District Judge, not resulting from a misconstruction of a document or the misapplication of law or procedure. It is bound by the finding of the lower Court, that a suit is collusive. (*Broadway, J.*) SARJU *v.* BUDHA. **59 I. C. 885 : 3 Lah. L. J. 86.**

——Ss. 100 and 101—*Finding of fact—Gross error.*

The High Court cannot entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. 18 Cal 23 (P. C.) Foll. (*Scott Smith, and Broadway, JJ.*) PHARAYA MAL *v.* ILAHI BAKSH. **104 P. W. R. 1917 : 40 I. C. 772 : 89 P. R. 1917.**

——S. 100—*Finding of fact—Unsatisfactory and vague findings.*

C. P. CODE (V OF 1908), S. 100—Question of fact.

Unsatisfactory and vague findings were interfered with in a second appeal. (*Chevis and Shadi Lal, JJ.*) RADHA RANI *v.* GUJAR MAL. **40 I. C. 496.**

——S. 100—*Finding of fact—Wrong inference from facts whether binding in second appeal.*

Where a wrong inference is drawn from facts, the Chief Court will not be bound by the finding in second appeal. (*Scott Smith, J.*) GHULAM HUSAIN *v.* SULTAN MAHOMED. **39 I. C. 717 : 8 P. W. R 1917.**

——S. 100—*Question of fact—Whether share in shamilat passes is a question of fact.*

Whether a particular transaction carries with it a share in the shamilat is a question of fact but where the lower Courts have not properly considered the rule of decision laid down by the High Court as applicable in such matters, the High Court will interfere in second appeal. (*Shadi Lal and Broadway, JJ.*) GULLU *v.* KHUAD BUKSH. **38 I. C. 120.**

——S. 100—*Finding of fact—Question whether parties follow Mahomedan Law—One of fact.*

The question whether the parties to a suit follow custom or Mahomedan Law cannot be discussed in second appeal as it is a question of fact. 4 I.C. 457 Foll. (*Johnstone, C J. and Chevis J.*) ILAHI BAKSH *v.* RAHIM BAKSH. **106 P. W. R. 1916 : 34 I. C. 219 : 60 P. L. R. 1917.**

——S. 100—*Finding of fact—Immorality.*

The finding that a woman has taken to a life of immorality is a finding of fact. (*Shah Din, J.*) TARA DEVI *v.* DHANPAT RAI. **31 I.C. 797 : 150 P. W. R. 1915.**

——S. 100—*Finding of fact—Finality of.*

A question of fact cannot be either raised or argued in second appeal. (*Chevis, J.*) JAINAN *v.* RULIA. **50 P. W. R. 1914 : 25 I. C. 43 : 145 P. L. R. 1914.**

——S. 100—*Question of fact—Estate—Lands whether part of.*

Where both the courts below have found that the suit lands did not form part of an estate so as to oust the jurisdiction of Civil Courts, the decision is binding on the High Court. (*Ayling and Odgers, JJ.*) TOTA VARNHALIAH *v.* SRI VENKATA SURYANARAYANA. **18 L. W. 324 : (1923) M. W. N. 732 : 75 I C. 465 : 1924 M. 117.**

——S. 100 – *Question of fact — Partnership not one.*

A finding that there was a partnership as defined in the Contract Act is not a finding of fact by which the High Court is bound, The findings that are final are those on the facts from which the existence of the legal relationship of partners might or might not be inferred provided of course they are not otherwise unsound. (*Hallifax, A. J. C.*) MOULA BUX *v.* MUHAMMAD AFZAL. **69 I.C. 781 : 1922 Nag. 96.**

C. P. CODE (V OF 1908), S. 100—Question of fact.

——S. 100—*Question of fact.*

Question as to whether oral will was executed is one of fact. (*Hallifax, A. J. C.*) BHAVANIRAM *v.* DAMMAR SINGH. 66 I. C. 413 : 5 N. L. J. 183 : 1922 Nag. 46.

——S. 100—*Finding of fact—Inference from facts.*

The High Court will not interfere in second appeal with one or two possible inferences drawn by the lower Court. 21 Bom. 91, Appr. (*Drake Brockman, J. C.*) MADHO RAO *v.* GOVIND BHAT. 46 I. C. 794.

——S. 100—*Question of fact.*

A pure finding of fact based on evidence cannot be disputed in second appeal. (*Lyle, A. J. C.*) NIAMAT ALI *v.* ASHIQ ALI. 9 O. L. J. 127 : 67 I. C. 803 : (1922) Oudh. 96.

——S. 100—*Question of fact—Erroneous decision.*

Held, that the law had deliberately laid down that on questions of fact, there should be only one appeal and that it was to the public interest that there should be an end to the litigation even at the cost of occasional error, that if this rule was strictly enforced the parties would know where they were, and that if a High Court every time it differed from the view of the Court below on a question of fact, was to seek out flimsy pretexts for treating the question as one of law, the whole policy of law would be defeated. (*Daniels, J. C.*) AHMAD HUSSAIN *v.* UMRAO FATIMA. 64 I. C. 223 : 24 O. C. 221.

——S. 100—*Question of fact - Conclusion—Correctness, if can be challenged.*

In Second Appeal, findings of fact cannot be impugned, but it is open to a party to challenge the correctness of the conclusion drawn from those findings. (*Wazir Hasan, A. J. C.*) JASADHA *v.* MURALIDHAR. 61 I. C. 144 : 24 O. C. 1.

——S. 100—*Question of fact—Second Appeal.*

A finding of fact of a trial Court ought not generally to be disturbed in appeal. (*Wazir Hasan, A. J. C.*) JAGMOHUN SINGH *v.* RAM DAYAL SINGH. 61 I. C. 135 : 8 O. L. J. 4.

——S. 100—*Question of fact—Attestation—Effect of.*

The question whether the attestation of a document implies assent to the terms of the document is a question of fact and must be determined with reference to the circumstances of each case, and the High Court cannot entertain that point in second appeal. 37 All 350, Foll. (*Lyle, A. J. C.*) DURGA PRASAD *v.* DEBI PRASAD. 51 I. C. 621.

——S. 100—*Finding of fact—Vague and indefinite—Vague finding questioned in second appeal.*

Vague finding of fact may be subject to question in second appeal. (*Stuart, J. C.*) SARABJIT SINGH *v.* RAMPUR MATHRA ESTATE. 37 I. C. 27 : 3 O. L. J. 468.

——S. 100—*Finding of fact—Point not decided by first Court, but decided on appeal.*

C. P. CODE (V OF 1908), S. 100—Question of fact.

Where the trial Court comes to no finding on an issue of fact but the Appellate Court gives a definite finding on the issues after an examination of all the evidence, the second Appellate Court is concluded by the finding of the first Appellate Court. (*Lindsay, J. C.*) TILAK RAM *v.* SITA RAM. 30 I. C. 503 : 2 O. L. J. 388.

——S. 100—*Finding of fact—When binding.*

A finding of fact is binding on a second Appellate Court, if the lower Appellate Court committed no error of law in arriving at the finding. (*Lindsay, J. C.*) RAJ BAHADUR SINGH *v.* MAHABIR PRASAD, 21 I. C. 251.

——S. 100—*Question of fact—When interfered with.*

Findings arrived at on a point of fact will not be disturbed in second appeal. But they will be interfered with if the interior court either gives a wrong decision on a question of law or if evidence is not forthcoming to support it. (*Dawson Miller, C. J. and Mullick, J.*) AJTI CHAUDHURI *v.* JANAK LAL CHAUDHURI. 1923 Pat. 332 : 1924 P. 336.

——S. 100—*Question of fact—Inference from facts—Interference.*

An inference drawn from facts by the lower appellate court is a finding of fact and cannot be interfered with in second appeal. (*Miller, C. J. and Kulwant Sahay, JJ.*) BION *v.* SHEOGULAM LAL. 74 I. C. 843.

——S. 100—*Finding of fact—Error in.*

A finding of fact by a lower Appellate Court, however erroneous, will not be disturbed in second appeal. (*Das, J.*) PURGAN PANDE *v.* DHANPAT TEWARI, 52 I. C. 739.

——S. 100—*Finding of fact—Intention.*

The question whether a particular person did a certain act with a particular intention or not is a question of fact and not a mixed question of law and fact. (*Roe and Imam, JJ.*) RAGHUBIR PRASAD *v.* MISRI KAHAR, 45 I. C. 303.

——Ss. 100 and 107—*Finding of fact—Wrong application of Law—Duty of Appellate Court—Remand.*

A Court of appeal must assume that a Judge knows the law which he is called upon to administer and that he applies it to the facts of the case before him; and if there is evidence to sustain the conclusion of fact at which he arrives, then his decision is unimpeachable. In cases where a Judge states and wrongly states what the law is and applies wrong legal principles to the facts of the case so stated by him then in such cases the Appellate Court will intervene and correct the erroneous principles of law which the Judge has applied and remand the case for a re-hearing with a correct exposition of the law. (*Atkinson and Iwala Prasad, JJ.*) RAMACHARAN MAHTO *v.* HARIHAR MAHTO. 35 I. C. 392.

——S. 100—*Finding of fact—No evidence—Interference in second appeal.*

The High Court can interfere in second appeal with the finding of fact of the lower Appellate Court where there is no evidence on record to justify it. (*Rigg, J. C.*) MA TOK *v.* MA CHIT. (1917) 3 U.B.R. 23 : 42 I.C. 68 : 11 Bur. L.T. 229

C. P. CODE (V OF 1908), S. 100—Question of fact.

——S. 100—*Question of fact—Inference of fact.*

Inferences of fact which are not unreasonable and are justified by evidence cannot be interfered with in second appeal. (*Kincaid, J C, and Raymond, A. J, C.*) PEWANDBAI *v.* CHETANMAL.
62 I. C. 1002 : 15 S. L. R. 84.

——S 100—*Finding of fact—Inference by lower courts.*

When the High Court is satisfied that the conclusions drawn by the lower courts from the facts are legally deducible, it will not enquire in second appeal as to whether those conclusions are correct or not. (*Pratt, J.C. and Crouch, A. J. C.*) NUR MAHOMED *v.* KESSUMAL.
20 I. C. 523 : 7 S. L. R. 11.

Question of Law.

——S. 100—*Question of law—Test of—Finding of fact—No jurisdiction to interfere.*

Questions of law and of fact are sometimes difficult to separate. The proper legal effect of a proved fact is essentially a question of law; so also is the question of admissibility of evidence and the question whether any evidence has been offered on one side or the other ; but the question whether the fact has been proved when evidence for and against has been properly admitted, is necessarily a pure question of fact. The High Court has no jurisdiction in second appeal to revise the evidence and set aside the decree of the Lower Appellate Court on the ground that it had applied the wrong standard of measurement to land of which the rent was in question. (*Lord Buckmaster.*) NAFAR CHANDRA PAL *v.* SHUKUR.
46 Cal. 189 : 23 C. W. N. 345: 9 L. W. 552 :
51 I. C. 760 : 45 I. A. 183 (P. C.)

——S. 100—*Question of law—Legal right—Infringement—Test whether correctly applied.*

The question whether in determining the infringement of certain legal rights the correct tests have been applied is a pure question of law. (*Lord Dunedin.*) PETER CHARLES EARNEST PAUL *v.* WILLIAM ROBINSON 42 Cal. 46 : 41 I. A. 180 :
18 C. W. N. 933 : 27 M. L. J. 117 : 1 L. W. 561
16 M. L. T, 204 : (1914) M, W. N. 631 :
12 A.L.J. 1166 : 16 Bom. L. R. 803:
24 I. C 300 : 20 C. L. J. 353 (P.C.)
[Affirming 12 I. C. 60 : 39 Cal. 59.]

——S. 100—*Question of law — Words—Meaning of.*

The meaning of words is a question of fact in all cases ; the effect of the words is a question of law. (*Stuart, J.*) BADRI PRASAD *v.* RAI KUNWAR.
75 I. C. 686 : 1923 A. 337.

——S. 100—*Question of law—If can be raised for the first time in second appeal.*

A Court of Second Appeal is not bound to entertain a question of law raised for the first time before it. It can however take the point of itself or if some good cause is shown it may permit that point to be argued. (*Banerji, Piggott and Walsh, JJ.*) SHEODAN KURMI *v.* BALKARAN KURMI. 43 All. 193 : 18 A. L. J. 1033 :
2 U. P. L. R. All. 392 : 59 I. C. 116 (F. B.).

C. P. CODE (V OF 1908), S. 100—Question of law.

——S. 100—*Question of law—Legal result of facts.*

The question as to what is the legal result of certain facts is a question of law and can therefore be raised in second appeal. (*Lyle, J.*) TRIBUI PERSHAD *v.* RAM NARAYAN.
20 I. C. 951 : 11 A. L. J. 713.

——S. 100—*Question of law—Point involving evidence.*

The appellant cannot in second appeal take a point of law which involves the taking of additional evidence. (*Marten and Pratt, JJ.*) SHRIDHAR LAXMAN *v.* JANARDHAN. 72 I. C. 993 :
1923 Bom. 37.

——S. 100—*Question of law-Validity of gift.*

If for the first time, in second appeal various questions of law are raised but in order to decide these questions of law evidence would have to be taken, points of law of that description are not admissible. A deed of gift to be valid must be accepted by the donee ; but where it was never suggested in the Court below that the deed was invalid, because it had not been accepted. *Held*, it is not competent in second appeal for the appellant to urge the invalidity of the gift on the ground of non-acceptance. (*Macleod, C. J. and Shah, J.*) TRIKAM LAL *v.* NAGENDAS JETH LAL.
1922 Bom. 148.

——S. 100—*Question of law—Documentary evidence—Inference from—Not a question for second appeal.*

A second appeal does not lie, because some portion of the evidence may be in writing and the Judge makes a mistake as to the meaning of it. For instance, a writing supposed to contain an admission may be put in as part of the evidence, but a mistake in its meaning is not a misconstruction of a document upon which a special appeal will lie if it is connected with other evidence affecting its construction. The misconstruction of a document which is the foundation of the suit, which is in the nature of a contract or a document of title, is allowed to be a ground for second appeal. (*Mukerjee and Chotzner, JJ.*) PRANKISHORE TARAFDAR *v.* SARADA PRASAD PAKRAS. 37 C. L. J. 580 :
72 I. C. 55 : 1923 Cal. 358.

——S. 100—*Question of law—Deductions from facts found.*

In second appeal, the High Court can make deductions from facts found without disturbing the findings of the Lower Appellate Court. (*Fletcher and Richardson, JJ.*) BHUBAN MOHINI *v.* GAJALAKSHMI.
32 I. C. 119 : 19 C. W. N. 1330.

——S. 100—*Question of law—Findings contrary to facts.*

A wrong decision based upon findings contrary to the facts found raises a point of law. Dealing with the evidence piecemeal is a vicious practice. (*Holmwood and Chapman, JJ.*) GOPAL CHANDRA DEB GOSWAMI *v.* PADMAPANI GOSWAMI. 18 I. C. 148

——S. 100—*Question of law — Fraud—Evidence.*

C. P. CODE (V OF 1908), S. 100—Question of law.

The second appellate Court's duty is to see whether the facts found by the Court of first instance justify the inference of fraud, just as the Courts in England have got to do in cases tried by them with a Jury. (*Mookerjee and Beachcroft, JJ.*) RADHA MADHAB PAIKARA *v.* KALPATRA ROY.
16 I. C. 811 : 17 C. L. J. 209.

———S. 100—*Question of law—Status of tenant.*

Whether the grantee is a tenant under the grantor is a question of law from findings of fact and is open to revision on second appeal. (*Carnduff and Richardson, JJ.*) DWARKA NATH *v.* DAMBURDHAR MOHAPATRA.
38 Cal. 278 : 9 I. C. 394 : 15 C. W. N 266.

———S. 100—*Question of law—Legal inference from proved fact—Finding of fact and inferences from facts—Liability to be disturbed in second appeal.*

While the District Court's decision as to the effect of the evidence must stand final as to the facts the soundness of the conclusions from those facts may involve matters of law and may be questioned by a Court of second appeal. The proper legal effect of a proved fact is essentially a question of law. 20 Cal. 93 and 46 Cal. 189 Foll. (*Broadway, J.*) PURAN *v.* LALA. 73 I. C. 795 : 1923 Lah. 216.

———S. 100—*Question of law—Legal inferences from facts—If open to.*

Legal inferences drawn from facts may be examined in second appeal. 20 Cal. 93 foll. (*Broadway and Abdul Qadir, JJ.*) GIRDIT SINGH *v.* MT. ISHAR KAUR. 3 Lah. 257 : 68 I. C. 551 : 1922 Lah. 392.

———S. 100—*Question of law.*

An objection that the appeal to the lower appellate court was presented out of time is a question of law and it may be taken on second appeal. (*Scott Smith and Abdul Qadir, JJ.*) NIGAHIA RAN *v.* BHAGU MAL. 65 I. C. 580 : 1922 Lah. 240.

———S. 100—*Question of law—Abandonment.*

An appellant is entitled to question in second appeal the effectiveness of the abandonment in law on the facts found, and the Court may allow the plea to be raised even if it has not been taken in the memorandum of appeal as it involves a pure question of law. (*Abdul Raoof, J.*) RAJA *v.* SALABAT. 66 I. C. 935 : 3 Lah. L. J. 27.

———S. 100—*Question of law—Second appeal.*

The question of *onus probandi* is a question of law rendering a second appeal competent. (*Broadway and Wilberforce, JJ.*) GANGA RAM *v.* RULIA. 64 I. C. 901 : 2 Lah 249.

———S. 100—*Question of law—Penalty—Stipulation in deed.*

The question whether a stipulation in a deed as to payment of interest is one by way of penalty is a question of law which is open to consideration in second appeal. (*Scott Smith, J.*) LACHHMAN *v.* SANTA 64 I. C. 350 : 14 P. L. R. 1922.

C. P. CODE (V OF 1908), S. 100—Question of law.

———S. 100—*Question of law—Town or village.*

Whether certain local conditions found to exist in a place, constitute the place, a town or village is a question of law, and can be raised in second appeal. (*Le Rossignol, J.*) MANSA RAM *v.* JOTI. 62 I. C. 808.

———S. 100—*Question of law—Presumption—Ignoring of.*

Where the lower Appellate Court comes to a conclusion without taking into account the presumption arising from the habits of the people, it commits an error in law and a second appeal is competent. (*Broadway, J.*) DIWAN *v.* JAGTA.
2 Lah. 206 : 56 I. C. 728 : 113 P. L. R. 1920.

———S. 100—*Question of law—Admissions—Decision contrary to.*

A decision by the lower Appellate Court opposed to the admissions of the parties amounts to a substantial error or defect in procedure. (*Scott Smith and Broadway, JJ.*) LAL SHAH *v.* HIRA LAL. 106 P.R.1917 : 41 I.C.163 : 119 P.W.R. 1917.

———S. 100—*Question of law—Inference from documents.*

The interpretation of a document is a point of law and the legal inference to be drawn from admitted facts is also a question of mixed law and fact with which the High Court can interfere in second appeal. A question whether a vendor's lien was or was not lost is one which is open to consideration in second appeal. (*Ayling and Phillips, JJ.*) KRISHNASWAMI IYENGAR *v.* SUBRAMANIA GANAPATHIGAL. 23 M L T. 85 : 7 L. W. 210 : (1918) M. W. N. 231 : 44 I.C. 523 : 35 M. L. J. 304.

———S. 100—*Question of law — Consent of reversioner—Implied.*

The question whether reversioner's consent to an alienation can be inferred from the established facts is a point of law. 30 A 1, P. C : 2 A. 469, P. C., Foll. (*Ayling and Phillips, JJ.*) VENKATASUBBIER *v.* MUTHUSAMI AIYAR. 18 M. L. T. 521 : (1916) 1 M. W. N. 123 : 31 I. C. 487.

———S. 100—*Question of law—Word—Meaning of.*

The meaning of a word is a question of fact not of law. (*Drake Brockman, J. C.*) MADHO RAO *v.* GOVIND BHAT. 46 I. C. 794.

———S. 100—*Question of law—Inference from documents.*

Inferences drawn from documentary evidence are not questions of law and cannot be challenged in second appeal. (*Dalal, A. J. C.*) BINDESHRI PANDE *v.* SHEO RATAN PANDE.
74 I. C 811 : 9 O. & A. L. R. 443.

———S. 100—*Question of law—No evidence.*

An allegation of absence of evidence to support a specific finding of fact is a ground of law. (*Holms, S. M. and Lovett, J. M.*) GANGA BAKHSH SINGH *v.* HAR PRASAD.
40 I. C. 139 (1) : 4 O. L. J. 140.

———S. 100—*Question of law—Impartible estate—Affidavit on question of law—Weight of.*

Whether a property is a 'Taluqdari property' is a question of law and the non-filing of a counter-

C. P. CODE (V OF 1908), S. 100—Question of law.

affidavit in reply to an affidavit stating it to be 'Taluqdari property' is of no weight. (*Piggott, J. C. and Lindsay, A. J. C.*) NARINDARA BAHADUR SINGH *v.* ABDUL HAG, 25 I. C. 9.

——S. 100—*Question of law—Inference from facts.*

Although an erroneous finding of fact cannot be challenged in second appeal unless it is shown that there is an error of procedure or that there is no evidence in support of the finding, yet inferences drawn from facts might be questioned in second appeal. 25 Bom. 202, ref. (*Rafique, A. J.C.*) BAKHAT BALI SINGH *v.* LEKHRANI KUNWAR. 15 I. C. 509.

——S. 100—*Question of law*—Res judicata—*Raised on appeal.*

The plea of *res judicata* is a question of law and may be raised at any stage of suit. (*Jwala Prasad, J.*) GOBIND MISSIR *v.* BEHARI GOPE. 47 I. C. 685.

——S. 100—*Question of law—Divesting of office.*

The question if a trustee could divest himself of his office is a question of law. (*Fox, C. J. and Hartnoll, J.*) SUBRAMANIAM PILLAY *v.* V. P. GOVINDSWAMY PILLAY.
6 Bur. L. T. 180 : 21 I. C. 232 : 7 L. B. R. 39.

Second Appeal.

——S. 100—*Second appeal—Decision of District Court on appeal from forest officer—Madras Forest Act V of* 1882, *Ss.* 10 *and* 16—*Second appeal to High Court if competent.*

An objector to certain aforestration proceedings put in a claim before the Forest Settlement Officer who registered the claim. There was an appeal to the District Court from the decision of the Forest Officer as provided by S. 10 of the Madras Forest Act. The claimant preferred a second appeal to the High Court, *Held*, that when the proceedings reached the Dt. Court, that court was appealed to as one of the ordinary courts of the country with regard to whose procedure, orders and decrees, the ordinary rules of the C. P. Code apply and that the appeal to the High Court was competent. The claim in such proceedings being the assertion of a legal right to possession of, and property in, land, it would require a specific statutory limitation to exclude the ordinary incidents of litigation such as the right of appeal. 39 I. A. 197, Dist : 11 Mad. 309, Appr. (*Lord Shaw,*) SECRETARY OF STATE *v.* CHELIKANI RAMA RAO.
39 Mad. 617 : 43 I. A. 192 :
31 M. L J. 324 : 20 C W. N. 1311 :
(1916) 2 M. W. N. 224 : 14 A. L. J. 1114 :
20 M. L. T. 435 : 4 L. W. 486 :
35 I. C. 902 : 18 Bom L. R. 1007 :
25 C. L. J. 69 (P. C.) :
[On appeal from 33 M. 1 : 20 M. L. J. 66 :
5 I. C. 882 : 7 M. L. T. 128.]

——S. 100—*Second appeal—Maintainability of—Decision of revenue court—Madras Rent Recovery Act* (*VIII of* 1865), *Ss.* 9, 69 *and* 76—*C. P. Code* (*VIII of* 1859), *S.* 372.

C. P. CODE (V OF 1908), S. 100—Second appeal.

Though there is no provision in the Rent Recovery Act (now Madras Estates Land Act) for appeals to the High Court from the decree of the District Judge on appeal from the Collector, still having regard to the general right of appeal from the decrees of the zilla and District Court given by S. 372 of the C. P. Code of 1859 and S. 584 of the C. P. Code of 1882, a second appeal lies to the High Court. 26 M 518, Ref. (*Mr. Ameer Ali.*) RAVI VEERARAGHAVALU *v.* BOMMA DEVARA VENKATA.
37 Mad. 443 : 41 I, A. 258 :
16 M. L T 262 : (1914) M. W. N. 695 :
1 L, W. 779 : 27 M. L. J. 451 :
20 C, L. J. 375 : 25 I. C. 305 :
19 C. W. N. 97 : 16 Bom. L. R. 853 (P. C.).

——S. 100—*Second appeal—Appellate order not appealed against in time—Amendment of the decree as regards interest—Subsequent filing of appeal—Question of interest not attacked—Limitation.*

If an amendment of a mere clerical error in decree in calculation of interest is allowed after the limitation for second appeal has already expired and if after such amendment a second appeal is filed without raising any objection regardingi nterest, the second appeal is time barred. (*Stuart, J.*) SHIMBHU PRASAD *v,* RAMJAS.
L. R. 3 A. 27.

——S. 100—*Second appeal—Maintainability of—Decree dismissing suit but granting permission to withdraw with liberty.*

Where the lower Appellate Court confirms the dismissal of a suit by the first court but grants permission to the plff. to bring a fresh suit on the same cause of action and the deft. appeals against so much of the appellate decree as is favourable to the plff., *held*, that the appeal cannot be treated as an appeal from an order under O. 23, R. 1 but must be treated as one against that portion of the decree as is favourable to the plff. and is therefore, maintainable. 17 A. 97, Dist. (*Richards, C. J. and Banerjee, J.*) BHARAT SINGH *v.* JAWALI.
37 I. C. 940.

——S. 100—*Second appeal—Findings of fact—Interference.*

When the summary of conclusion from findings of fact could not be arrived at without a misdirection in law, the High Court can review it. (*Walsh and Stuart, JJ.*) NASIR ALI *v.* KHER CHAND. 36 I. C. 996.

——S. 100—*Second appeal—Amendment—Limitation.*

Where the amendment was allowed after the expiration of the limitation period, the High Court can take notice of it in second appeal though the point was not pressed in the lower Appellate Court. (*Rafique and Piggott, JJ.*) BALKARAN UPADHYAYA *v.* GAYA DIN KALWAR.
36 All. 370 : 24 I. C. 255 : 12 A. L. J. 635.

——S. 100—*Second appeal—Maintainability of—Vinchur Court's decision.*

A special appeal can be filed in the Bombay High Court from the decree of the Civil Judge at Vinchur on grounds specified in S. 100 of the C. P. C. (*Heaton and Shah, JJ.*) RAMCHANDRA ANAND RAO *v* PANDU DAGDU TELI.
38 Bom. 340 : 23 I. C. 617 : 16 Bom. L. R. 75.

C. P. CODE (V OF 1908), S. 100—Second appeal.

——S. 100—*Second appeal—Interest, rate of—Finding that rate hard and unconscionable—High Court whether will interfere.*

The High Court in Second Appeal will not interfere with a finding of the lower Appellate Court, that the rate of interest in a mortgage-bond is hard and unconscionable. (*Newbould and Panton, JJ.*) JYOTISH CHANDRA *v.* ATIT SAHA.
61 I. C. 275.

——S. 100—*Second appeal—Inference from facts.*

Where the sole question in a case is one of fact and the inference is to be drawn from facts, a second appeal does not lie. (*Petman, J.*) FIRM OF RAJAMAL BISHAMBHAR NATH *v.* DIWAN CHAND.
51 I. C. 620 : 54 P. W. R. 1919.

——S. 100—*Second appeal—Maintainability of—Order rejecting cross-objection.*

A second appeal is not maintainable against an order rejecting cross objections that the courts might interfere in revision. (*Broadway, J.*) ALLAHA BAKHSH *v.* NOOR BAKHSH.
44 I. C. 812 : 20 P. R. 1918.

——S. 100—*Second appeal—Small cause suit—Execution proceedings.*

In a suit of a small cause nature, execution proceedings is not appealable. (*Spencer and Devadoss, JJ.*) VEMURI PITCHAYYA *v.* RAJA YARLAGADDA.
18 L. W. 739 : 33 M. L. T. 125 (H. C.)
45 M. L. J. 651 : 76 I. C. 750 : 1924 M. 367.

——S. 100—*Second appeal—Maintainability of—Madras Estates Land Act, S. 213—Decree of a Deputy Collector under.*

A decree of a Dy. Collector in a suit under S. 213 of the Act is open to second appeal in accordance with the provisions of the C. P. C. (*Miller and Tyabji, JJ.*) VENKATARAMIER *v.* VYTHILINGA THAMBIRAN AVERGAL.
38 Mad. 655 : 24 I. C. 754 : 1 L. W 89.

Sufficiency of Evidence.

——S. 100—*Sufficiency of evidence.*

A decision that there is no evidence to support a finding is a decision of law, on which the Privy Council will interfere with the findings of fact of the Courts below. (*Lord Moulton.*) HARENDRA LAL ROY *v.* HARI DASI DEBSI. 41 Cal. 972 : 41 I. A. 910 : 1 L. W. 1050 : 27 M. L. J. 80 : (1914) M. W. N. 462 . 16 M. L. T. 6 : 18 C. W. N. 817 : 19 C. L. J. 484 : 16 Bom L. R. 400 : 23 I. C. 637 : 12 A. L. J. 774 (P. C.).

——S. 100—*Sufficiency of evidence—Judgment based on opinions of experts open to challenge in second appeal.*

Where the findings of the Courts below are based on an examination and balancing of opinions and view of experts as to sufficiency of the facts observed and of the inferences drawn they can always be examined. Where there is a material difference of opinion their value and sufficiency even when accepted by one court or other it can be attacked in second appeal. (*Kanhaiya Lal, J.*) ALTAFAN *v.* IBRAHIM. 21 A. L. J. 811 : L. R. 4 A. 561 : 75 I. C. 502 : 1924 A. 116.

C. P. CODE (V OF 1908), S. 100—Sufficiency of evidence.

——S. 100—*Sufficiency of evidence.*

A finding of fact cannot be attacked in second appeal on the ground of the insufficiency of evidence. (*Newbould and Panton, JJ.*) PROSANNA KUMAR BEDANTA *v.* MADHU BADYA.
68 I. C. 500 : 1923 Cal. 279.

——S. 100—*Sufficiency of evidence—Procedure defective—Commissioner's report rejected.*

The procedure is defective within S. 100 (*c*) if the Court rejects the report of the Commissioner without giving him an opportunity to meet objections raised by a defendant not appearing before nor putting his objections before him or if it allows documentary evidence piecemeal by two different Commissioners or when it relies upon a sketch map although it is possible to prepare a scientific map. (*Mookerjee, C. J. and Fletcher, J.*) KAMINI KISHORE SEN *v.* PARBATI LEKHRAJ.
60 I. C. 434.

——S. 100—*Sufficiency of—Evidence unsatisfactory.*

If an Appellate Court is not satisfied with the local enquiry or the map put in by the parties it is not bound to send it back to the Lower Court for re-enquiry. It can decide on the evidence. The High Court cannot in second appeal consider whether the conclusions arrived at by the Lower Courts on a question of fact are right or wrong. (*Richardson and Walmsley, JJ.*) MANINDRA CHANDRA NANDI *v.* SARABINDU RAI.
27 C. L. J. 599 : 45 I. C. 408 : 23 C. W. N. 593.

——S. 100—*Sufficiency of evidence—Second appeal.*

The mere question of sufficiency of the evidence adduced to establish a custom is not a ground of second appeal. (*Mookerjee and Beachcroft, JJ.*) KAILAS CHANDRA DUTT *v.* PADMA KISHORE ROY.
25 C. L. J. 613 : 21 C. W. N. 972 : 41 I. C. 959 : 45 C. 285.

——S. 100—*Sufficiency of evidence—No evidence—Interference in second appeal.*

Where a finding of fact is based on no evidence whatever or on purely conjectural grounds, it can be examined by a High Court in second appeal. 47 C. 107 : 33 P. L. R. 1918 Ref. (*Broadway and Abdur Qadir, JJ.*) MUNSHA SINGH *v.* UTTAM SINGH. 4 Lah. L. J. 31 : 4 U P. L. R. (Lah.) 18 : 64 I. C. 428 : 1922 Lah. 65.

——S. 100—*Sufficiency of evidence—Easement.*

The mere finding that a *parnala* is old is not sufficient to prove that an easement has been established with respect thereto. (*Wilberforce, J.*) AHMAD BAKSH *v.* MUSAMMAT PALI.
66 I. C. 922 : 3 Lah. L. J. 58.

——S. 100—*Sufficiency of evidence—Proof of custom.*

Though the High Court cannot interfere with the findings of fact of the Court below in second appeal it can consider whether the facts found are sufficient to support a custom alleged. 41 M. L J. 437 ref. (*Dhobley, A. J. C.*) KRISHNA RAO *v.* NILKANTH. 5 N. L. J. 25 : 69 I. C. 800 : 18 N. L. R. 163 : 1922 Nag. 52.

C. P. CODE (V OF 1908), S. 100—Sufficiency of evidence.

——S. 100—*Sufficiency of evidence--Evidence —Absence of.*

The question whether there is any evidence in support of a finding of fact is a question of law with which it is competent to the High Court to interfere in second appeal. 23 C. W. N. 315 ref. (*Wazir Hasan, A. J. C.*) GHULAM SARWAR KHAN *v.* MAHOMED ALI KHAN. **65 I. C. 398 : 8 O. L. J. 609 : 1922 Oudh 98.**

——S 100—*Sufficiency of evidence.*

Finding of fact based on some evidence cannot be questioned in second appeal. (*Holms, J.*) SINGHA CHANDA ESTATE *v.* SANT BAKSH SINGH. **42 I. C, 53 : 4 O. L. J. 456.**

——S. 100—*Sufficiency of evidence—Finding of fact—No evidence.*

Even from a finding of fact a second appeal may be taken if the finding is not supported by any evidence on record. (*Holms, J. M.*) SARFARAZ *v.* BABURAM PANDE. **30 I. C. 375 : 2 O. L. J. 364.**

——S. 100—*Sufficiency of evidence—Finding of fact—No evidence.*

Although a finding of fact in first appeal suffices to bar the second Appellate Court from coming to a contrary finding yet, when there is no finding upon the evidence legally sufficient to support it, the finding cannot have the effect of finding of fact. (*Stuart, A. J. C.*) GAURI SHANKAR *v.* MADHO CHARAN. **16 I. C. 887 (Oudh).**

——S. 100—*Sufficiency of evidence.*

The sufficiency or insufficiency of evidence as proof of title cannot be debated in second appeal. (*Lindsay, O. A. J. C.*) BAGWARI LAL *v.* RAINA. **9 I. C. 427.**

——S. 100—*Sufficiency of evidence.*

In a second appeal High Court will interfere with the decision of the first appellate Court, which fails to give reasons for a finding and the judgment is based on legally insufficient evidence. (*Adami, J.*) DEBI LAL SINGH *v.* HRIDAY MAHTO. **58 I. C. 482 : 2 U. P. L. R. (Pat.) 60.**

——S. 100—*Sufficienoy of evidence.*

Defendants not having pleaded that R was in possession at the time of the settlement and there being no evidence in support thereof the finding arrived at by the lower Court as to R's possession was not a legal finding of fact, it being based on a mere surmise. (*Jwala Prasad and Adami, JJ.*) KUMAN DAS *v.* GULAM ALI NADAF. **57 I. C. 323: 1 Pat. L. T. 184.**

Sustainability.

——S. 100—*Sustainability—Finding of fact —Binding in second appeal.*

The High Court is bound in second appeal by the findings of fact of the lower Appellate Court. (*Richards and Banerjee, JJ.*) JUMNA DAS *v.* UMA SHANKER. **36 All. 308: 25 I. C. 158 12 A. L. J. 411.**

——S. 100—*Sustainability—Decree of lower Appellate Court set aside on review.*

Where an appellant presented a second appeal pending an application for review to the lower Appellate Court and subsequently the lower appellate court set aside its decree. *Held* that as

C. P. CODE (V OF 1908), S. 102—Waiver.

the decree appealed from had ceased to exist, the second appeal could not be heard, 28 All. 240 : 34 All. 282, Ref. (*Scott-Smith, J.*) MALAWA RAM *v.* MADAN GOPAL. **55 I. C. 763: 166 P. R. 1919.**

Waiver.

——S. 100—*Waiver—Law or fact.*

Waiver is primarily and in most cases an inference from facts though in certain classes of cases this inference is looked on as an inference of law. (*Heaton and Rao, JJ.*) SAKHARAM *v.* SADASHIV BALSHET LODHA. **37 Bom. 480 : 19 I. C. 894 : 15 Bom. L. R. 382.**

——S. 100—*Waiver—Question of fact.*

The question of waiver is a mixed question of law and fact ; the question of fact is whether circumstances exist from which waiver may be inferred and the question of law is whether from the facts proved waiver can be inferred. The terms of the bond and the conduct of the creditor may be taken into consideration in deciding whether there has been waiver. (*Kumaraswami Sastri, J.*) NICHOLSON BANK *v.* RAJAGOPALA AIYAR. **38 I. C. 302: 5 L. W. 514.**

——S. 100—*Waiver—Question of fact.*

The question whether there is a waiver in a particular case is a question of fact and the finding on that question cannot be challenged in Second Appeal. (*Kincaid, A. J. C.*) BAHADUR *v.* GELOMAL. **59 I. C. 607: 14 S. L. R. 128.**

——S. 102—*Execution proceedings—Suit of a small cause nature below Rs.* 500 — *Second appeal.*

There is no second appeal against an order in performance of a decree passed in suit of a small cause nature for less than Rs.500. (*Kanhaiya Lal, J.*) SURAJMAN CHANBU *v.* ANJORE SHUKUL. **21 A. L. J. 861: L. R. 4 A. 591 : 46 All. 73 : 9 O. & A. L. R. 989: 1924 A. 263.**

——S. 102—*Suit for refund of money wrongly distributed under S. 73—Second appeal.*

Where the subject-matter of a suit under S. 73 Cl. (2) of the C. P. Code for recovery of money wrongly distributed is less than Rs. 500 no second appeal could be preferred from the decree. (*Lindsay and Daniels, JJ.*) KESHO SARAN *v.* KHAIRATI LAL. **21 A. L. J. 248: 74 I. C. 836 : 45 A. 359: 1923 A. 310.**

——S. 102—*Suit for* haq chaharum—*If open to second appeal.*

A suit for *haq chaharum* or one-fourth share of the sale proceeds of a house, is not cognizable by a Small Cause Court and is appealable under S, 102 of the C.P. Code. (*Lindsay and Kanhaiya Lal, JJ.*) BECHAI *v.* BADRI NARAIN. **63 I. C. 292: 19 A. L. J. 719.**

——S. 102—*Suit for money—Forcible taking.*

A suit to recover money forcibly taken from the plaintiff by the defendant is cognizable by the Court of Small Causes and if the amount claimed less than Rs. 500, there is no second appeal. (*Ryves and Gokul Prasad, JJ.*) CHOKEY BHARTI *v.* GALDEO GIR. **57 I. C. 505: 2 U. P. L. R. (All.) 212.**

C. P. CODE (V OF 1908), S. 102.

———S. 102—*Damages—Contract to pay—Second appeal.*

After a period of five years during which plaintiff enjoyed certain lands under a registered instrument of lease from the proprietors they obtained a decree for ejectment against plaintiff through a Revenue Court. The plaintiff sued defendants for a sum of Rs. 125, with interest on the allegation that they could not be legally ejected without the payment of the sum, *Held*, that if the plaintiff's suit could be treated as one for damages the suit was cognizable by the Small Cause Court and there was no second appeal by S. 102, C. P. C. and that if the contract amounted to a mortgage, as he was not in possession at the date of a suit, he was not entitled to possession or to recover the sum paid by him. (*Piggott and Walsh, JJ.*) BHAIRON PRASAD *v.* KURAMAL.
40 I.C. 578 : 15 A. L. J. 534.

———S. 102, and O. 41, R. 23 and O. 43, R. 1, Cl. (u)—*Remand—Order of—Appeal from—Suit of Small Cause nature—Appeal, whether lies.*

Order of remand passed by the lower Appellate Court in a suit cognizable by a Small Cause Court is not appealable. (*Rafique, J.*) SARUP *v.* KUNDAR. 36 I. C. 396.

——S. 102—*Profits—Wrongful appropriation of—Suit of Small Cause Court nature—Second appeal.*

Where the plaint, as framed, does not show an allegation of wrongful receiving of profits of immoveable property on the part of deft., but only a wrongful appropriation of share due to plff., it is a suit of a nature cognizable by a Small Cause Court and no second Appeal lies. (*Piggott, J.*) NARAIN DAS *v.* HARAKH NARAIN LAL. 31 I. C. 797.

———S. 102—*Moveables—Declaration of title—Nature of suit—Second appeal.*

A suit for declaration of ownership of a share in the crop by virtue of purchase is one to recover moveable property or its value and is of a Small Cause nature. No second appeal lies. (*Tudball and Rafique, JJ.*) BINDRABAN *v.* SAHODRA.
21 I. C. 638: 11 A. L. J. 599.

——Ss. 102 and 96—*Appeal—Small Cause nature—Suit instituted during the absence of a Munsif who had Small Cause Court jurisdiction and tried by his successor who had no such power.*

While a Munsiff invested with Small Cause Court powers obtained privilege leave and left his District and his successor who had no such power joined the District a week after, but in the meantime a suit to recover Rs. 50 was instituted which was subsequently tried by the second Munsif, *held*, that the suit was not tried as a Small Cause Court suit and an appeal lay to the District Judge. (*Tudball, J.*) TIRBHUVAN *v.* SHAM SUNDER. 19 I. C. 362: 11 A. L. J. 360.

———Ss. 102 and 115—*Small Cause nature—Suit for money due.*

Where P. executed a bond in favour of J. for Rs. 400 and on the same day gave him a lease of his occupancy holding which provided that the rent was to be retained by J, on account of interest payable under the bond and where J. having been ejected from the occupancy holding sued to recover Rs. 400 due under the bond but his suit was dismissed but the Dt.Judge on appeal decreed the suit. *Held*, on second appeal that the transaction (simple money-bond and the lease of the occupancy holding) was illegal and the plaintiff could not sue for the recovery of the money due under the bond: that as the Dt. Judge had decreed the plaintiff's suit in appeal and as the suit was one of the nature cognizable by the Small Cause Court, no second appeal lay to the High Court; nor the High Court will interfere in revision as the Dt. Judge had not failed to exercise a jurisdiction vested in him or exercised a jurisdiction not vested in him or acted in the exercise of his jurisdiction illegally or with material irregularity. (*Chamier, J.*) POORAN SINGH *v.* JAI SINGH. 17 I. C. 522.

——S. 102, O. 21, R. 71—*Suit to recover deficiency from defaulting purchaser—Amount less than Rs. 500—No second appeal.*

An order on an application under O. 21, R. 71 of the Code for recovery of the deficiency, being less than Rs. 500, from the defaulting purchaser is not open to second appeal. (*Macleod, C.J. and Fawcett, J.*) RAJACHARYA SHESHACHARYA *v.* CHEMMANNA GURUSHANTAPPA.
45 Bom. 223: 59 I C. 192: 22 Bom. L. R. 1193.

——S. 102—*Small Cause nature—Meaning of.*

The words "suit of a nature cognizable in Courts of Small Causes" in the section refer to the nature of the suit and not to the *forum*. A rent suit for Rs 250 was filed in a second class Sub-Judge's Court having Small Cause jurisdiction only up to Rs. 50. A decree was passed and was affirmed in appeal. No second appeal lay as the suit was of a nature cognizable by the Courts of Small Causes. (*Scott, C. J. and Heaton, J.*) RAMAKRISHNA YESWANT-KAMAT *v.* PRESIDENT, VENGURLA MUNICIPALITY. 41 Bom. 367 : 38 I. C. 881 : 19 Bom. L. R. 83.

———S 102—*Profits of office—Small Cause suit.*

A suit for his share of the profits of an office exclusively received by the Deft. a co-sharer, is one for money had and received and as such of a Small Cause nature. There is no second appeal against the decree (*Scott, C J. and Beaman, J.*) BHIKAGI HARI CHANBAL *v.* RADHABAI SITARAM KULKARNI. 37 Bom. 700 : 21 I. C. 181 : 15 Bom L. R. 803.

———S. 102—*Small Cause nature.*

Suit for compensation for removal of trees is not exempted from the cognizance of a Small Cause Court and it does not come within Art. 35 (ii) II Sch. Pro. Small Cause Courts Act (*Cuming and Panton, JJ.*). MIRZA DILBAR HUSSAIN *v.* SADARUDDIN CHOWDHURY. 27 C.W.N 469: 1923 C. 568.

———Ss. 102 and 115—*Suit for price of fish taken from a tank, is small cause.*

There is no second appeal from the decree in a suit for recovery of the price of fish removed from a tank after declaration of title, when the value of the suit does not exceed Rs. 500. (*Woodroffe and Ghose, JJ.*) ARADHAN MONDAL *v.* ABHOYA CHARAN MONDAL. 68 I. C 626 :1923 Cal. 321.

———S. 102—*Execution—Small Cause decree transferred to Original Side—Second appeal.*

An order in execution of a Small Cause Court decree passed by a Small Cause Court Judge, is final, 3 Pat. L. W. 146 Ref. But, when the decree has been transferred to the ordinary Court to be

C. P. CODE (V OF 1908), S. 102.

executed as if it were a decree made by that Court, the orders made in execution are appealable in the same way as orders made in execution of decrees passed by that Court, although a second appeal would be barred under S. 102 of the Code of Civil Procedure : 31 All. 11 Ref. (*Mookerjee and Panton, JJ.*) JAMINIBALA DEBI *v.* KARALI PRASAD. 67 I. C. 6 : 34 C. L. J. 477.

——S. 102— *Suit for grazing fee — Small Cause nature.*

No second appeal lies in a suit for recovery of less than five hundred rupees claimed as grazing fee. There can be no claim for rent unless there is a tenancy and there can be no tenancy unless a right to the land has been given to the grantee. 20 C. L. J. 227, Rel. (*Mookerjee, A. C. J. and Fletcher, J.*) JATINDRA MOHAN LAHIRY *v.* ABDUL AZIZ MIA. 59 I. C. 595 : 32 C. L. J. 83.

——S. 102—*Suit to recover price of coal——No second appeal.*

A suit for price of coal supplied under an agreement is in the nature of a Small Cause suit and where the amount sued for is below Rs. 500 no second appeal lies. (*N. R. Chatterjea and Panton, JJ.*) DHAR AND COMPANY *v.* SIB NARAYAN SINGH. 59 I. C. 188.

——S. 102—*Execution—Second appeal.*

No second appeal lies against an order passed in execution proceedings arising out of a suit of the nature cognizable by a Court of Small Cause below Rs. 500. (*Newbould and Cuming, JJ.*) KUNJA BEHARI ROY *v.* PANCHANON SIKDAR. 54 I. C. 429.

——S. 102—*Partnership—Suit for recovery of money advanced in partnership business with profits—Prov. Sm. C. C. Act, Art.* 29 (*c*).

Plff. sued for recovery of Rs. 40 advanced for a partnership business which had since ceased to exist and also for Rs. 9 as approximate profits of the money put into the business. *Held*, that no second appeal lay, the suit not being one for the balance of partnership accounts within Art. 29 (*c*) of the Prov. S. C. C. Act. (*Beachcroft, J.*) NARAIN PROSAD MAITY *v.* RAMESHWAR ADYA. 51 I. C. 435.

——S. 102—*Declaration—Prayer for, if alters the nature of suit—Second appeal.*

The mere addition of an unnecessary prayer for declaration does not alter the character of a suit which is of a nature cognizable by a Small Cause Court, so as to give the party a right of second appeal which is prohibited by S. 102. (*Fletcher and Newbould, JJ.*) NAGENDRA NATH ROY *v.* ASHUTOSH ROY. 41 I. C. 627.

——S. 102—*Joinder of claims—B. T. Act, S.* 153—*Bar cannot be evaded by.*

Where no second appeal would lie if two different suits had been filed for the recovery of rent and the recovery of damages for breach of a contract by reason of S. 153, Ben. Tenancy Act and S. 102 of the C. P. C., the bar provided by these sections could not be evaded by joining the two claims is one suit for rent. (*Mookerjee and Beachcroft, JJ.*) JAMADAR SINGH *v* JAGAT KISHORE. 34 I. C. 697 : 23 C. L. J. 557.

C. P. CODE (V OF 1908), S. 102.

——S. 102— *Rent—Damages—B. T. Act, S.* 153.

Decision in a suit for less than Rs. 100, as arrears of rent, in the alternative for damages for use and occupation, is not subject to second appeal, either under S. 153, B.T. Act or S. 102, C. P. C. (*Mookerjee and Newbould, JJ.*) MOHIN CHANDER PAL *v.* AHMED ALI KHAN. 33 I C. 346 : 22 C. L. J. 564.

——S. 102—*Contribution—Prov. S. C. Courts Act, Art.* 41.

Suit to recover from deft. the landlord, the whole amount paid by plff. to save the property denying all liability or in the alternative for proportionate amount which alternative claim was allowed is a suit for contribution exempted under Art. 11 of Prov. S. C. Courts Act. (*Chatterjee and Newbould, JJ.*) CHANDRA DAYA SEN *v.* BHAGBEN SEN. 32 I.C. 200 : 23 C. L. J. 125.

——S. 102—O. 41, R. 23 and O. 43, R. 1 (u)—*Remand—Appeal against order of.*

An appeal does not lie against an order of remand in a suit decided by Small Cause Court for less than Rs. 500 in value as a second appeal is not allowed against the decree of the lower Appellate Court in such a suit. (*Mookerjee and Roe, JJ.*) HARADEB DAS AGARWALA *v.* ANANDA SHAIK. 30 I. C. 894 : 22 C. L. J. 97.

——S. 102—*Execution—Sale in execution in rent suit for less than Rs* 100.

A second appeal lies against an order refusing to set aside a sale held in execution of a decree in a rent suit for less than Rs. 100. (*Mookerjee and Beachcroft, JJ.*) ARJUN DAS *v.* GUNENDRA NATH BASU MALLIK. 18 C. W. N. 1266 : 27 I. C. 294 : 20 C. L. J. 341.

——S. 102—*Damages.*

Where in a suit for damages sustained by plaintiff having a right to flow of water over another's land a decree for Rs 50 was passed, it is doubtful if a second appeal would lie. (*Coxe and Chatterjee, JJ.*) BEHAR BUKHTIARPORE LIGHT RAILWAY COMPANY *v.* JHANDDOO MAHTON. 21 I. C. 393.

——S. 102—*Execution—Appeal.*

The word 'suit' in S. 102 may be comprehensive enough to include not only proceedings till the passing of the decree, but also its execution proceedings. Therefore no second appeal lies from an order made in the execution proceedings of the decree in a suit cognizable by a Court of Small Causes where the value or amount of the subject matter in it is below Rs. 500. The question for determining a person's representative character, representing the original decree-holder is capable of being decided in the execution proceedings. (*Mookerjee and Teunon, JJ.*) WARESH MUNSHI *v.* AFATARUDDI BEPARI. 16 I. C, 975 : 16 C. L. J. 96.

——Ss. 102, 73—*Refund of assets—Pro. Sm. C. Courts Act* (*IX of* 1887), *Sch. II, Art.* (26).

Where a suit is for refund of assets improperly distributed under S. 73 and it is found that he is not entitled to it, the nature of the suit is not altered and the suit is one not cognisable by the

C. P. CODE (V OF 1908), S. 102.

Small Cause Court and so a second appeal lies. (*Mookerjee and Carnduff, JJ.*) GOURI DATT *v.* AMARCHAND. 13 I. C. 907 : 15 C. L. J. 49.

——S. 102—*Execution—Suit cognizable by a S. C. C.—No second appeal.*

No second appeal lies against an order in execution of a decree in a suit valued at less than Rs. 500 of the nature cognizable by S. C. C. (*Mookerjee and Teunon, JJ.*) WARISH MUNSHI *v.* APTABIDDIN BEPARI. 10 I. C. 412.

——S. 102—*Declaration — Hut—Cognizable by Small Cause Court.*

A hut is immoveable property and so a suit for a declaration that the but is liable for dues on account of a certain decree is not of a nature cognizable by Small Cause Court So a second appeal will lie. (*Caspersz, J.*) ARJUN RAM PAL *v.* SADANANDA SARMA. 9 I. C. 1.

——S. 102—*Suit for damages for infringement of monopoly—No second appeal.*

A suit for damages by a holder of monopoly against an infringement by previous holder is barred for second appeal under provisions of S. 102 of C. P. Code. (*Martineau, J.*) RAMJI DAS *v.* GOPAL. 69 I. C. 431 : 1923 L. 244.

——S. 102—*Execution proceedings— Second appeal—Valuation of suit.*

In the case of execution proceedings the test to find out whether a second appeal lies is the value of the suit and not the amount sought to be recovered in execution. 29 P. R. 1902 ; 30 M. 212 Ref. (*Broadway and Martineau, JJ.*) MOHNA MAL *v.* TULSI RAM. 67 I. C. 718 : 3 Lah. 141 : 1922 Lah. 290.

——S. 102—*Suit on agreement to share proceeds of a tenancy is one of Small Cause nature.*

A suit based upon an agreement that defendant would pay plaintiff half of what he got from the tenancy granted by the Government is a suit of Small Cause nature. (*Abdul Raoof, J.*) GANGA RAM *v.* MAYA DAS. 67 I. C. 841 : 3 Lah. L. J. 419.

——S. 102—*Suit for interest on mortgage money—No second appeal.*

A suit only for the interest on the mortgage money due to the mortgagee is one triable by a Court of Small Causes and there is no second appeal from the decision in the case. (*Scott Smith, J.*) PARDUMAN CHAND *v.* GANGA RAM. 66 I. C. 285.

——S. 102—*Decree in Small Cause suit passed on review—No second appeal.*

It is absurd to allow a Second Appeal against a decree in a Small Cause suit, not exceeding Rs. 500 merely because the decree has been passed on review. (*Chevis, J.*) KANSHI RAM *v.* KARAM NARAIN. 3 Lah. L. J. 166 : 60 I. C. 259 : 3 U. P. L. R. (Lah.) 65.

——S. 102—*Second appeal — Small Cause decree—Execution proceedings.*

There is no civil miscellaneous second appeal from proceedings in execution of a Small Cause

C. P. CODE (V OF 1908), S. 102.

decree. (*Oldfield and Venkatasubba Rao, JJ.*) MUTHU KARUPPA CHETTY, *v.* PAIYA KAVUNDAN. (1923) M. W. N. 406 : 45 M. L. J. 210 : 18 L. W. 17 : 73 I. C. 956 : 1924 Mad. 32.

——S. 102—*Suit against President, District Board, for damages—If of a Small Cause nature.*

Suit against President, District Board for damages is one of small cause nature. (*Schwabe, C. J. and Odgers, J.*) PRESIDENT OF THE DT. BOARD, SOUTH KANARA *v.* GOPALA KRISHNA BHATTAR. 46 Mad. 808 : 45 M.L.J. 125 : 18 L. W. 82 : 32 M.L.T. (H.C.) 378 : 74 I. C. 223 : 1923 M. 689.

——S. 102—*Suit to recover arrears of* kattubadi—*Is Small Cause nature.*

A suit to recover arrears of *Kattubadi* is one of a Small Cause nature and where its value is less than Rs. 500 no second appeal lies (*Spencer and Ramesam, JJ.*) SUBBAYYA *v.* RAJAH OF VENKATAGIRI. 14 L. W. 349 : 66 I. C. 207: 42 M. L. J. 118 : 1922 Mad. 352.

——Ss. 102 and 42—*Execution proceedings—Decree of Small Cause Court—Execution against immoveable property Second appeal.*

An order passed by a District Munsif in execution of a decree of a Small Cause Court transferred to him for execution against the immoveable properties of the judgment-debtor is appealable. S 102, C. P. C. prohibits a second appeal from the order. 11 Mad. 130 : 11 C. W. N. 861 : 25 Cal. 872, 12 A. 579, Rel. (*Oldfield and Seshagiri Iyer, JJ.*) DATTADA BHIMARAJU *v.* KASIBOTLA SRI RAMA SASTRULU. 37 M. L. J. 303 : 53 I. C. 408 : 26 M. L. T. 256.

——S. 102—*Scope of—Cognizable by Small Causes—Second appeal—Suit subsequently withdrawn from Small Causes—Right of appeal.*

The word "cognizable" in S. 102, C. P. C. is restricted to the nature of the proceedings prior to the decree and not to its character at the time of filing the second appeal. The principle of law that a right to prefer an appeal being a vested right could not be affected by legislation is equally applicable to parties who have acquired a right to treat a judgment as final and conclusive. An act which deliberately withdraws certain class of cases from the jurisdiction of particular Courts cannot be said to declare the law and does not have a retrospective effect. (*Seshagiri Aiyar and Napier, JJ.*) SUBRAMANYA AIYAR *v.* NAMASIVAYA ASARI. 23 M. L. T. 255 : (1918) M. W. N, 238 : 35 M. L J. 377 : 45 I. C, 11 : 8 L. W. 374.

——S. 102—"*Rent*" — Thunduwaram—*Provincial Small Cause Courts Act, Art.* 13.

Per Sadasiva Aiyar and Napier, JJ.—Mirasi right is an interest in the village lands. The *thunduwaram* payable to the mirasidar is not of the nature of "rent" (like *jodi*) but comes under the general expression "dues" in Art 13 of the Pro. S. C. C. Act. A second appeal lies in a suit for the recovery of *thunduwaram*, though the amount sought to be recovered is less than Rs 500. (*Wallis, C. J, Sadasiva Aiyar and*

C. P. CODE (V OF 1908), S. 102.

Kumaraswami Sastri, JJ.) KUMARRAPPA REDDI *v* MANAVALA GOUNDAN. **41 Mad. 374 : 34 M. L. J. 104 : 23 M. L. T. 44 : 44 I. C. 699 : (1918) M. W. N. 350 : 7 L. W. 243. (F. B.)**

——S. 102—*Damages—Cutting trees.*

A suit for damages for wrongfully cutting and carrying off trees is a Small Cause suit though it involves a question of title and is on that account tried on the regular side. It is not cognizable by Revenue Courts under S. 213, Mad. Est. Lands Act, 26 Mad. 176, ref : 21 Bom. 248 ; 24 Cal 558, Appr. 15 M. 98, Foll. (*Spencer and Krishnan, JJ.*) NARANNAPPA *v.* VENKATARAMAN. **20 M. L. T. 281 : (1916) 2 M. W N. 215 : 36 I. C. 202 : 4 L. W. 245.**

——S. 102—*Execution—Sale—Setting aside.*

No second appeal lies from the order refusing to set aside sale in execution of a Small Cause decree. 12 Mad. 116 : 30 Bom. 113, Foll. (*Abdur Rahim and Spencer, JJ.*) SAMI RAO APPA *v.* VYRAVAN CHETTIAR. **32 I. C. 712.**

——S. 102—*Rent — Incidental prayer for declaration.*

In a suit for the recovery of rent, where a prayer for a declaration of right is added but no separate Court fee is paid therefor such prayer should be treated as incidental to the prayer for rent and no second appeal lies. (*Sundara Iyer and Sadasiva Iyer, JJ.*) VEERAPAGHAVA IYENGAR *v.* VELLAI MOOPAI. **17 I. C. 704 : 23 M. L. J. 517.**

——S. 102—*Damages—Government.*

A suit to recover an amount less than Rs. 500 against Government for repairs executed is of Small Cause nature and no second appeal lies thereon. (*Sundara Aiyar and Sadasiva Aiyar, JJ.*) SECRETARY OF STATE *v.* AYLAVAJJULA RAMABRAHMAM **12 M. L. T. 299 : (1912) M. W. N. 954 : 23 M. L. J. 732 : 16 I. C. 400 : 37 Mad. 533.**

——S. 102—*Small Cause nature—Question depends upon the suit as originally framed.*

The question whether a second appeal lies or not must be determined by the nature of the suit as originally framed, not as it was afterwards amended. (*Benson and Sundara Iyer, JJ.*) CHERIYONNI *v.* NHERA POYILE. **(1911) 2 M. W. N. 587 : 10 M. L. J. 528 : 13 I. C. 174 : 22 M. L. J. 47.**

——S. 102—*Small Cause nature—Trial as regular suit.*

No second appeal lies against an order for presentation to the proper Court under S. 23, Pro. S.C C. Act in a suit of a Small Cause nature though tried as a regular suit involving a question of title. (*Sundara Iyer and Phillips, JJ.*) ENADIN *v.* KUNHIPERI. **12 I. C. 957 : 10 M. L. T. 500.**

——S. 102—*Rent—Suit for.*

Though a suit for rent due by a tenant of *Malik Makbuza* fields is not triable by a Small Cause Court it is still one of a nature cognizable by a Small Causes Court and unless the subject matter involved in the suit exceeds Rs. 500, there is no

C. P. CODE (V OF 1908), S. 102.

second appeal from a decree in it. (*Findlay, A. J. C.*) RAMAKRISHNA *v.* NARAIN. **56 I. C. 845.**

——S. 102—*Small Cause nature—Test of.*

The original character of a suit rather than the character it assumes by operation of the findings therein has to be regarded to find out whether it is cognizable by a Small Cause Court. The mere fact of a question of title arising is immaterial. 32 Bom. 356; 2 Bom 248 foll. (*Drake Brockman, J.C.*) KALU RAM *v.* RAOJI. **50 I. C. 629.**

——S. 102—*Nature of suit.*

Nature of suit should be determined from the plaint apart from the defence. (*Brockman, J. C.*) DHANYAT *v.* TANYA. **32 I.C. 998 : 12 N. L. R. 47.**

——Ss. 102 and 115—*Execution—No second appeal.*

S. 102 applies no less to orders passed in execution than to a decree itself. (*Drake Brockman, J. C.*) MANYA *v.* DIWAKAR. **29 I. C. 740 : 11 N. L. R, 99.**

——S. 102—*Plaint returned for presentation to Original Side by Small Cause Court—Suit does not cease to be of Small Cause nature.*

Where in a suit for damages or for the value of trees cut by the defendant from plaintiff's land, the Small Cause Court returns the plaint for presentation on the Original Side, the suit does not cease to be of a Small Cause nature and there is no second appeal 20 A 480; 12 A L. J 1032 foll. (*Lyle, A. J. C.*) KANWAR SINGH *v.* UJAGA SINGH. **3 U. P. L. R. J. C. 18 : 65 I. C. 7 : 8 O. L. J. 391.**

——S. 102—*Trial on the regular side—Small Cause suit tried as a regular suit—Effect of.*

A suit filed in the Small Cause Court was returned to be presented on the regular side. The suit was tried as a regular suit and there was also an appeal before the Dt. Judge. *Held*, that the suit remained a suit of Small Cause nature and that under S. 102 no second appeal lay. (*Stuart, J.*) BACHCHI *v.* DEBI PRASAD. **57 I. C. 557 : 23 O. C. 117.**

——S. 102—*Execution—No second appeal.*

No second appeal lies from an order in execution of a decree in a suit of a Small Cause nature where the value of the subject matter does not exceed 500 rupees. (*Lindsay, J. C.*) GUDAR SINGH *v.* KANDHAI LAL. **46 I. C. 82 : 5 O. L. J. 187.**

——S. 102—*Execution—Order in—No second appeal.*

An order in execution proceedings of a Small Cause decree is within S. 102, C. P. C. and is not open to second appeal. (*Kanhaiya Lal, A. J. C.*) KASHMIRI BANK LTD. *v.* JAGAMOHANSINGH. **18 I. C. 245.**

——S. 102—*Small Cause nature—Tests of.*

The suit as originally brought must be looked at to see whether a second appeal lies or not, so in an ejectment suit the awarding of damages only by the Court will not bar a second appeal. (*Lindsay, J. C.*) JAGANNATH *v.* DEBI SAHAY. **18 I. C. 493.**

C. P. CODE (V OF 1908), S. 102.

——S. 102—*Applicability of.*

Suit for rent other than house rent does not fall within the scope of S 102. (*Mullick and Atkinson, JJ*) SADANAND TEWARI *v.* DEBI NATH MANJHI.
1922 Pat. 154 : 1922 P. 184.

——S. 102—*Execution—Second appeal.*

There is no second appeal from an order by a Munsif acting as an original Court in execution of a Small Cause decree. 11 C. W. N. 861, Foll. (*Roe and Kingsford, JJ.*) MANGER SINGH *v.* KHOBHARI RAI.
3 Pat. L. W. 132 : 43 I. C. 15 : 1917 Pat. 80.

——S. 102—*Tax—Suit for.*

A suit to recover *katiari* or a tax for homestead paid by the followers of certain traders is a Small Causes suit and no second appeal lies under S. 102. (*Chamier, C. J. and Sharfuddin, J.*) MAHBOOB MOMIN *v.* BHAGWATI PRASAD.
1 Pat. L. W. 541 : 39 I. C. 949 : 1917 Pat. 250.

——S. 102—*Small Cause nature—Test of—Relief regarding matter cognizable by Civil Court abandoned in second appeal—No second appeal.*

Where a plaintiff sues for cancellation of document as well as damages against the defendant but drops his case regarding cancellation in second appeal, the whole second appeal becomes incompetent as the remaining claim is one cognizable by a Court of Small Causes only. (*Mullick, J.*) RAMTAHAL SAHU *v.* GANOO SAHU.
34 I. C. 909.

——S. 102—*Marriage contract—Suit for recovery of presents made on a promise of marriage—Small Cause suit—Act IX of 1887, Pro. Sm. C. Courts Act.*

A suit can be brought for recovering presents made on a promise in marriage, when the marriage itself does not take place owing to the refusal of the party to whom they are given ; but such a suit does not lie in a Small Cause Court and consequently a second appeal is maintainable. (*McColl, A. J. C.*) NGA LA *v.* NGA THAN.
14 I. C. 837: 5 Bur. L. T. 57.

——S. 103 and O. 41, R. 25—*Powers of High Court on second appeal—Finding of fact.*

To avoid gross miscarriage of justice resulting from the omission by the lower appellate court to determine any issue of fact or to come to definite conclusion on a set of facts, the High Court has the power of determining the issue left undetermined by the lower appellate court on the evidence on record, or of remitting the case to the lower court for a finding on that issue with liberty to the parties to adduce additional evidence. 43 M. 567 Ref. (*Mr. Ameer Ali.*) SRI CHIDAMBARA SIVAPRAKASA PANDARA SANNADHIGAL *v.* VEERAMA REDDI.
45 Mad. 586: 43 M. L. J. 640: (1922) M. W. N. 749 : 16 L. W. 102: 68 I. C. 538: 49 I. A. 286 : 31 M. L. T. 54 (P.C.) 37 C. L. J. 199 : 27 C. W. N. 245 : 1922 (P. C.) 292.

——S. 103—*Findings called for by High Court not returned—Power of High Court to find on the evidence.*

C. P. CODE (V OF 1908), S. 103.

In a suit by a landlord (ryotwari *pattadar*) to eject his tenants, the latter claimed permanent occupancy rights. The District Court on first appeal gave a decree to the landlord. The High Court on Second Appeal called for revised findings from the District Court as to whether the tenants had occupancy rights but the District Judge failed to appreciate the point of view suggested by the High Court and did not make a satisfactory return. The High Court then examined the evidence and found that the tenants had proved their claim to occupancy rights and dismissed the plaintiff's suit. *Held*, that the High Court had power under S. 103 of the C. P. Code to make decree. (*Sir Lawrence Jenkins.*) SETURATNAM AIYAR *v.* VENKATACHALA GOUNDAN.
43 Mad. 567: (1920) M. W. N. 61: 25 C. W. N. 485: 27 M. L. T. 102: 11 L. W. 399: 38 M. L. J. 476: 22 Bom. L. R. 578: 18 A. L. J. 707: 56 I. C. 117: 47 I. A. 76 (P. C.)
[On appeal from 24 M. L. J. 571: 13 M. L. T. 450: 20 I. C. 374: (1913) M. W. N. 434.]

——S. 103 and O. 41, R. 25—*Powers of second Appellate Court.*

When the lower Court has not framed the appropriate issue, the second Appellate Court may raise and decide it itself if there is sufficient evidence on record for deciding it. (*Viscount Haldane.*) DAMUSA *v.* ABDUL SAMAD.
47 Cal. 107: 46 I. A. 140: 17 A. L. J. 700: 15 N. L. R. 97: 37 M. L. J. 36: (1919) M. W. N. 505: 21 Bom. L. R. 920: 51 I. C. 177: 10 L. W. 310: 24 C. W. N. 81 (P. C.)

——S. 103—*Decision on issue not decided by lower Court—Power of High Court.*

Where in a pre-emption suit the lower appellate court has not decided the issue of acquiescence, the High Court in second appeal can decide the question on facts proved and hold that the plaintiff knew of and acquiesced in the sale. (*Richards, C. J. and Tudball, J.*) ANCHAL *v.* DALIP SINGH.
47 I. C. 400: 16 A. L. J. 779.

——S. 103—*Second appeal—Power to determine question of fact.*

The High Court in second appeal can dispose of a question of fact not determined by a lower appellate court. (*Griffin and Chamier, JJ.*) SRI RAM *v.* RAM LAL.
18 I. C. 878: 11 A. L. J. 255.

——S. 103—*Remand on plea of usage.*

Where the judgment of a court of appeal is reversed on a question of custom or usage on a preliminary point, the High Court should not take in itself to examine the evidence as to usage as if it were hearing the first appeal but should remand the case for disposal on the merits by the lower appellate court. (*Ayling and Seshagiri Iyer, JJ.*) PANKAIAMMAL *v.* SECRETARY OF STATE.
40 Mad. 1108 5 L. W. 346: 32 M. L. J. 237: 40 I. C. 516: 21 M. L. T. 411.

——S. 103—*Finding of fact—Power of High Court.*

When the Lower Court has not given any finding on a question of fact the High Court can

C. P. CODE (V OF 1908), S. 103.

under S. 103 arrive at a finding on the evidence on record. (*Sadasiva Iyer and Spencer, JJ.*) GANGESETTI *v.* RAMAMURTHI. 28 I. C. 673: 1 L. W. 249.

———S. 103—*Evidence not considered—Question of fact.*

The High Court is competent to determine a point of fact in second appeal if it appears from the judgment of the lower appellate court that it failed to consider all the evidence on the record relating to that point. (*Lindsay, J. C.*) KUNJ BEHARI PRASAD *v.* BASDEO PRASAD 47 I. C. 950: 5 O. L. J. 464.

———S. 103—*High Court can determine issue not determined by court below.*

Per *Jwala Prasad, J.*—S. 103, C.P.Code, which has been newly added, has widened the power of the Appellate Court to go into evidence and determine any issue not determined by the Court below. (*Miller, C. J. and Jwala Prasad, J.*) LOCHAN RAI v. LALA SANT PRASAD. 3 Pat. L. T. 303 : 65 I. C. 536 : 1922 P. 417.

———S. 104 and O. 43, R. 1—*Order of Court—Right of appeal.*

Where a Court is seized with a matter under a particular rule and an order thereunder is appealable, then the order actually made by the Court in that matter is also appealable (*Macleod, C. J. and Heaton, J.*) SHRINIWAS KUPPUSAMY MUDALIAR *v.* M. C. WAZ. 45 Bom. 99 : 59 I. C. 421 : 22 Bom. L. R. 1126.

———S. 104 and O. 43—*Order overruling objections to award—Appeal.*

No appeal lies against an order overruling objections to an award. (*Johnstone, J.*) NARAPAT RAI *v.* DEVIDAS. 1 P. L R. 1911 : 9 I. C. 385 : 12 P W. R. 1911.

———S. 104—*Order under R. 90 of O. 21—No second appeal.*

No Second Appeal lies against the order passed in appeal on an application under O. 21, R, 90 but when a Second Appeal is competent under S. 47 in respect of the allegation relating to the notice under O. 21, R. 22 the High Court will deal with the entire case; for the remedy of the losing party affected by the decision of the lower Appellate Court cannot be divided into parts, particularly when the application was *prima facie* barred by limitation. (*Jwala Prasad and Adami, JJ.*) DASS NARAYAN SINGH *v.* MIR MAHAMED, 2 Pat. L. T. 401: 6 Pat L. J. 319.

———S 104 and O. 21, R. 66 (4)—*Appeal.*

Order under O. 21, R. 66 (4) is not appealable. 16 C. W. N. 970, foll. (*Fox, C. J. and Parlett, J.*) N. C. CHATTERJEE *v.* R. M. K. KARPAN CHETTY. 8 L. B. R. 350: 36 I. C. 402: 10 Bur. L. T. 115.

———S. 104—*Arbitration Act, S. 19—Appeal from order.*

No appeal lies under section 104, C. P. C. from an order passed under Section 19 of the Arbitration Act staying a suit.

1 S. L. R. 86 F. B: 28 A, 349, Foll. 45 B 245 : 16 S. L. R, 174 Appr. (*Kincaid, J. C. Aston, J. Madgavkar, A. J. C.*) FIRM OF MENGHRAJ KHIALDAS *v.* MESSRS. LANGLEY BILLIMORIA AND CO. 1923 S, 38.

C. P. CODE (V OF 1908), S. 104.

———S. 104—*No appeal from order under S. 19, Arbitration Act.*

No appeal lies from an order staying a suit under S. 19 of the Arbitration Act. (*Kincaid, J C. and Madgavkar, A. J. C.*) SODAWATERWALA *v.* VOLKAT BROTHERS. 1923 Sind, 25.

———S. 104 (1) (a)—*Award—Appeal.*

Unless an award is superseded, S. 104 (1) (*a*) bars an appeal and if the Court in superseding an award has adopted a procedure not authorised by law a revision will lie. 37 P. R. 1895 Fol. (*Reid, C. J.*) BUDA SINGH *v.* RAM NATH. 251 P. W. R. 1912: 17 I. C. 388: 125 P. R. 1912.

———S. 104 (1) (c)—*Appeal—Order modifying award.*

S. 104 (1) (*c*) of the C. P. C. does not confer an unrestricted right of appeal and when an order has been made modifying or correcting an award, the validity of the whole award cannot be called in question in an appeal preferred against that order as the appeal is allowed against the order only in so far as it modifies the award. (*Mookerjee and Carnduff, JJ.*) RAJBANS SAHAY *v.* SOORJA LAL. 15 I. C. 519: 17 C. W. N. 617.

———S. 104 (1) (d) and (f)—*Application of, to arbitration proceedings.*

Neither clause (*d*) nor (*f*) of S. 104 of the C. P. C. sanctions an appeal against an order of a Court in arbitration proceedings. (*Johnstone, C. J. and Shadi Lal, J.*) RAM JAWAYA MAL *v.* DEVI DITTA MAL. 107 P W R. 1916 : 117 P. R. 1916 : 34 I. C. 192: 70 P. L. R. 1917.

———S. 104 (1) (d).

An agreement to refer to arbitration made by certain parties to the suit and the order thereon is appealable under the new Code as under the old Code. (*Ayling and Spencer, JJ.*) T. VENKATACHELLAM REDDI *v.* V. T. RANGIAH REDDI. 36 Mad. 353 : 21 M. L. J. 990 : 10 M. L. T. 248 : 12 I. C. 372 : (1911) 2 M. W. N. 249.

———S. 104 (1) (e)—*Agreement to refer to arbitration—Finding of trial Court.*

Where a Subordinate Judge decided that no agreement to refer had been entered into by the plaintiffs, and that therefore the suit was not liable to be stayed under para. 18, Sch. II, C.P.C. *Held*, the decision was one that the Court was competent to arrive at and is appealable under S. 104 (*e*) C.P.C. (*Shadi Lal and Broadway, JJ.*) FIRM SHEO PRASAD RADHA KISHNA *v.* INDORE MALWA UNITED MILLS. 65 P. W. R. 1917 : 39 I. C. 508 : 62 P. R. 1917.

———S. 104 (1) (e)—*Appeal—Order rejecting application for reference to—Right of appeal.*

Where a court refuses an application by a party in a pending suit for reference to arbitration, since one of the defendants was unwilling to agree to a reference being made, despite the plaintiff's readiness to discharge that unwilling defendant from the array of parties, there is no appeal against the order of rejection. (*Lindsay, C. J.*) JANKI PRASAD *v.* BALMUKUND. 27 I. C. 721.

C. P. CODE (V OF 1908). S. 104.

———S. 104 (1) (e)—*Order granting stay of a suit—Appeal.*

Under S. 104 (*e*) of the C. P. Code an appeal lies from an order granting or refusing stay of a suit, where there is an agreement to refer to arbitration whether under the C. P Code or under the Arbitration Act. (*Pratt, J. C. and Couch, A J. C.*) MESSRS. KODUMAL KALUMAL *v.* MESSRS. VOLKART BROS. **48 I. C. 434 : 12 S. L. R. 34.**

———S. 104 (1) (f)—*Order refusing to file award under Arbitration Act is appealable.*

An order refusing to file an award made under the Arbitration Act, is appealable under S. 104 (1) (*f*) of the Civil Procedure Code. (*Piggott and Walsh, JJ.*) NAIN SUKH DAS *v.* GAJANAND.
43 All. 348 : 61 I. C. 269 : 19 A. L. J. 132.

———S. 104 (1) (f) and O. 43, R. 1 (d)—*Order refusing to set aside* ex parte *decree.*

An order refusing to set aside an *exparte* decree passed in accordance with an award is appealable. (*Piggott and Walsh, JJ.*) NEHAL SINGH *v*, KHUSHAL SINGH. **38 All. 297 : 33 I. C. 80 : 14 A. L. J. 332.**

———S. 104 (1) (f)—*Order refusing to set aside award, if appealable.*

An order refusing to set aside an award is a judgment within Cl. 15 of the Letters Patent and is therefore appealable. There is no right of appeal against such an order under S. 104 (*f*) C.P. C, which has no application to the finding of an award under S. 11, Cl. (2) of the Arbitration Act. (*Sanderson C. J, and Woodroffe, J.*) CAMPBELL R. CO. *v*, JESHRAJ GRIDHARI LAL.
46 I. C. 687 : 45 C. 502.

———S. 104 (1) (f) and (2) and Sch. II, paras 20 and 21 cl. (2)—*Arbitration pending litigation without intervention of Court—Filing—Award—Appeal—Revision, if lies.*

An appeal lies against an order directing an award to be filed : and no further appeal lies to the High Court. (*Carnduff and Richardson, JJ.*) RAHIM MAUGHI *v*, STAIKH EKBAR.
22 I. C. 690.

———S. 104 (1) (f), Sch. II, para. 21, cl. (2)—*Private arbitration—Appeal.*

An appeal lies against an order filing an award in an arbitration out of Court even after a decree on the award is passed, as the validity of the decree depends upon the validity of the order directing the award to be filed. (*Chatterjee and Teunon, JJ.*) KHETTER NATH GANGULY *v*, USHABALA DASI. **22 I. C. 391 : 18 C. W. N. 381.**

——— S. 104 (1) (f)—*Order filing the award—What is.*

An order filing an award from which an appeal is provided for in S. 104 (*f*) C. P, Code is one which is passed after objections to the award have been disposed of. It does not mean the order by which the arbitrators are directed to bring the award to Court. (*Harrison, J.*) GHULAM MUSTAFA *v*, GHULAM SADIQ. **73 I. C, 820.**

———S. 104 (1) (f) and Sch. II, Paras. 19 and 21—*Award on reference by Court—No second appeal—Appeal.*

C. P. CODE (V OF 1908), S. 104.

Under S, 104 (1) (*f*), an appeal lies from an order filing or refusing to file an award without the intervention of Court, but no appeal lies from an order filing an award made in pursuance of an order of reference by a Court and filed under Para. 19. The section applies to an award filed under Para. 21. (*Shadi Lal, C. J. and Wilberforce, J.*) TEHLAMAL *v.* DHANAMAL.
60 I. C. 590.

———S. 104 (1) (f) and Sch. II, Paras 1 and 15—*Order refusing to file award—Appeal—Reference through Court—Order setting aside award under Para.* 15—*Interlocutory order—Appeal—Revision,*

Cl. (1) of S. 104 of the C, P, Code refers to cases where a matter has been referred to arbitration without the intervention of the Court, There is an inherent difference between orders refusing to file an award on a matter referred to an arbitration without the intervention of the Court and those referred to under Sch. II para 1, C. P, Code. In the former case, the Court refuses to file an award, and its order amounts to a formal adjudication in the matter of controversy and conclusively determines the rights of the parties. In the case of orders setting aside an award under para. 15 of Sch. II, the order is only of an interlocutory nature and is in no way a conclusive adjudication of the matter in dispute. Consequently such an order is not open to revision. (*Wilberforce, J*) BEHARI LAL *v*. KHAN CHAND,
47 I. C. 171 : 154 P. W. R. 1918.

———S. 104 (1) (f), Cl. (2)—*Second appeal—Order on an application to file private award.*

The decision of a Court on an application to file a private award, part of it being on a matter outside the scope of the arbitration, is an "order" and it is open to second appeal. S. 104 C. P. C,, Sub-section (2) prohibits a second appeal from an appeal under it. (*Shadi Lal and Le Rossignol, JJ.*) AHMAD DIN *v*. ATLAS TRADING CO.
66 P. R 1915 : 31 I. C. 80 : 146 P. W. R, 1915.

———S. 104 (1) (f) and (2)—*Appellate Court allowing award to be filed—Appeal or Revision.*

An order passed by an appellate Court under Sch, II Para. 20, C, P C. allowing an award to be filed and directing the first Court to pass a decree in accordance therewith is not open to appeal. It is exceedingly doubtful even if a revision lies. (*Ratligan and Scott Smith, JJ.*) SUNDAR DOSS *v*. MANICK CHAND. **280 P. L R. 1914 : 27 I. C. 332 : 143 P. W. R, 1914.**

———S. 104 (1) (f)—*Decree based on —Award without intervention of Court—Appeal—Revision.*

S. 104 (1) (f) C. P, Code provides an appeal from an order filing an award and so an application for revision of the final decree passed on an award out of court can be heard as an appeal though no appeal is provided against the decree. (*Kensington and Beadon, JJ.*) GHULAM MUSTAFA *v*. MUSAMMAT HALIMA BIBI. **176 P. W, R, 1913 : 21 I, C. 298 : 310 P, L. R, 1913.**

———S. 104 (1) and (f), Sch. II, Paras, 16 and 17 to 21—*Proceedings and decree under paras .17 to 19—Appeal.*

C. P. CODE (V OF 1908), S. 104.

The words " without the intervention of the court " in S. 104 (1) (*f*) of C. P. C. apply only to those proceedings which are taken under paras 20 and 21 and not the proceedings taken under paras 17 to 19 of the second sch. A decree passed in obedience to an award, as the result of the proceedings under paragraphs 17 to 19, cannot be appealed against. (*Kensington and Beadon, JJ.*) JAGAN NATH *v.* NANAK CHAND. **9 P. R. 1913 : 16 I. C. 996 : 243 P. L. R. 1913.**

——S. 104 (1) (f) and Sch. II, Para. 21 (1) and (2).

An appeal lies under S. 104 (*f*) of the Code of C. P. C. from an order filing an award made in an arbitration without the intervention of the court in spite of the fact that the Court has proceeded to pronounce a decree under Cl. 21 (1) of Sch. II. C. P. C. The provisions of S. 104 (*f*) are clear and are not subject to paras 21 (1) and 21 of Sch II. (*Reid, C. J., and Kensington, JJ.*) RAM DITTI *v.* AMAR SINGH. **103 P. W. R. 1911 : 172 P. L. R. 1911 : 10 I. C. 512 : 123 P. R. 1912.**

——S. 104 (1) (f)—*Order directing filing of award—Whether appealable.*

An order directing an award to be filed is appealable, even though the decree following the same is not and even though the order also embodies a decree in accordance with the award. (*White, C. J. and Phillips, J.*) PALLI BANDAB SITARAMAYYA *v.* PATTRI BANDAB SICHAYYA. **(1911) 2 M. W. N. 223 : 12 I. C 269 : 21 M L J. 1005.**

——S. 104 (1) (f) and Sch. II, paras 15 and 16 —*Appeal—Misconduct of arbitrator— Objection disallowed after inquiry—Decree in conformity with award.*

A reference to arbitration was made in a pending litigation. The award was challenged on the ground of arbitrator's misconduct. After making an inquiry into the allegations of misconduct, the court refused to allow the objections and passed a decree in accordance with the award. *Held*, that the order disallowing the objections and the decree passed on the basis of the award were not appealable. 18 A 422 foll. (*Piggott, J. C.*) SUMITRA *v.* GANESHA. **16 I. C. 595 Oudh.**

——S. 104 (1) (f) and Sch 11, para 21 (2)—*Decision as to filing of award—Right of appeal —Distinction between the two provisions.*

The effect of section 104 (1) (*f*) seems to give a right of appeal against the decision of the Court on the question whether the award should be filed or not. Paragraph 21 (2) of the second schedule allows an appeal also if the decree of the Court does not correctly interpret the award and on an appeal under this provision the decree can be corrected so as to bring it in accordance with the award. But when the decree does correctly interpret the decree in other words when an award has lawfully been made there is no appeal against the decision of the arbitrators. (*Carr, J.*) MAUNG TUNU *v.* MAUNG PO SHOCK. **1 R. 265 : 1923 R. 139.**

——S. 104 (1) (f) and (2)—*Appeal—Award—Setting aside.*

C. P. CODE (V OF 1908), S. 104.

No appeal lies from the order of an Appellate Court setting aside the order of the lower court refusing to file an award made without intervention of the Court. (*Hartnoll, Offg. C. J. and Ormond, J.*) MA KYAING *v.* MA SHWE THIN. **7 L. B. R. 277 : 25 I. C. 7 : 8 Bur. L. T. 44.**

——S. 104 (1) (f) and Sch II, para 20—*Arbitration—Award—Conditional purchase of outstandings by one partner.*

Where certain disputes were referred to arbitrators and an award was made directing the purchase of the partnership outstandings at a certain valuation by the plff. partner and holding the deft. responsible for any error on accounts regarding the outstandings. *Held*, the award did not finally determine the questions referred to for arbitration (*Parlett, J.*) SUBRAMANIAN CHETTY *v.* VELLIAN CHETTY. **7 Bur. L. T. 287 : 24 I. C. 132 : 8 L. B. R. 58.**

——S. 104 (1) (f)—*Scope.*

Section 104 (1) (*f*) applies to arbitrations under the Code. (*Fox, C J, and Hartnoll, J.*) RIPLEY *v.* NAHAPIET. **5 Bur. L. T. 155 : 17 I. C. 902 : 6 L. B. R. 88.**

——Ss. 104 (1) (g) and 95 — *Small Cause Court—Appeal.*

No appeal lies against an order of a Small Cause Court under S. 95. 26 I. C 359, diss. (*Oldfield and Seshagiri Aiyar, JJ.*) ARUMUGAM ASARI *v.* GURUNATHA ASARI. **36 M. L. J. 435 : 50 I. C. 886 : (1919) M. W. N. 490.**

——S. 104 (1) (g) and 95—*Refusal to compensate for improper attachment—Appeal.*

An appeal lies under S. 104 (g) from an order refusing relief under S. 95 of the C. P. Code as well as from one granting such relief. (*Oldfield and Sadasiva Aiyar, JJ.*) NARAHARI AYYAR *v.* VAITHINATHA IYER. **25 M. L. T. 46 : 49 I. C. 86 : 9 L. W. 69.**

——Ss. 104 (1) (g) and 95—*Compensation for improper attachment—Order awarding, if appealable.*

An appeal lies against an order awarding compensation for improper attachment under Ss. 491 and 497 C. P. C. 1882. (*Benson and Sundara Aiyar, JJ.*) KANDAPPA CHETTY *v.* CHINNAPPA GOUNDEN. **11 I. C. 349 : 21 M. L. J. 460.**

——Ss. 104 (1) (*h*) 42, 145 and 47—*Surety—Appeal by.*

Though a surety for failing to satisfy a decree is arrested under S. 104 Cl. (*h*) yet he is given a right to appeal under Ss. 42, 47 and 145 of C. P. Code. (*Woodroffe and Chatterjee, JJ.*) ADHAR CHANDRA GOPE *v.* PULIN CHANDRA SHAHA. **30 I. C. 684 : 19 C. W. N. 1085.**

——S. 104 (1) (h)—*Execution—Order directing arrest of judgment-debtor—Appeal, if lies.*

An order passed in execution of a decree under S. 9 of the Specific Relief Act is not appealable. Therefore an order passed in execution of such a decree directing the arrest of the judgment-debtor is not appealable either as a decree

C. P. CODE (V OF 1908), S. 104.

or as an order under S. 104 (1) h C. P. C, (*Shadi Lal, J.*) JEHANGIR SINGH *v.* HIRA SINGH
5 P. W. R. 1917 : 39 I. C. 379 : 18 P. L. R. 1917 : see also. 39 I. C. 375.

———**S. 104 (1) (*h*) and O. 43, R. 1 (*r*)**—*Order under O. 39. R. 2 (3)*

An appeal lies against an order refusing to take action under O. 39, R. 2 (3) (*Wallis, C. J., Abdur Rahim and Srinivasa Iyengar, JJ.*) OTTAPURAKKAL THAZATH *v.* ALABI MASHUR KOYANNA.
39 Mad. 907 : 3 L. W. 430 : 30 M. L. J. 523 : 19 M. L. T. 314 : 34 I C. 588 : (1916) 1 M. W. N. 328.

———**S. 104 (2) and O. 21, R. 90**—*Execution sale —Order refusing to set aside—Appeal to Privy Council—Maintainability—C. P. Code* (1882 Ss. 2) 588 *and* 595.

Orders under O. 21, R. 90 of the C. P. Code, S. 311 setting aside or refusing to set aside sale on appeal by the High Court deal finally with the rights of parties and are appealable to the Privy Council, (*Lord Moulton,*) TEKAIT KRISHNA PRASAD SINGH *v.* MOTI CHAND.
40 Cal. 635 ; 40 I. A. 140 : 17 C.W. N. 637 : (1913) M. W. N. 487 : 11 A. L. J. 517 : 15 Bom. L. R. 515 : 14 M. L. T. 37 : 17 C.L.J. 573 : 19 I.C. 296 : 25 M. L. J. 140 (P. C.).

———**S. 104 (2)**—*Order in appeal setting aside the order for return of plaint—Further appeal does not lie.*

An order in appeal setting aside the order of the lower Court, returning the plaint for presentation to the proper Court is not open to Second Appeal nor is such order open to revision, though it may be erroneous in law or in fact. (*Piggott and Walsh, JJ.*) CHANDULAL *v.* KOKAMAL.
43 All. 334 : 61 I. C. 36 : 19 A. L. J. 110.

———**S. 104 (2) and O 21, R. 90**—*Application to set aside execution sale— Order—Second appeal, if lies—Letters Patent (Allahabad), S. 10.*

Under S. 10 of the Letters Patent (Allahabad) no appeal lies from the order of a single Judge of the High Court dismissing an appeal from an order of the executing Court on an application under O. 21, R. 90 to set aside an execution sale. 14 A 226 Foll. (*Richards, C.J., and Banerjee, J.*) PIARE LAL *v.* MADHAN LA L. **39 All. 191 : 39 I. C. 460 : 15 A. L. J. 46.**

———**S. 104 (2) and O. 21, R. 72**—*Second appeal —Order of the appellate Court—Setting aside sale.*

No second appeal lies from an order of the Appellate Court against an order passed under O. 21, R. 72 (3) of the Code. (*Chamier and Piggott, JJ.*) MAHABIR SAHU *v.* BHIRGU RAI. **28 I. C. 270 : 13 A. L. J. 351.**

———**S. 104 (2) O. 43 R. 1 (j) and O 21, Rr. 90 and 92**—*Order setting aside a sale—Second apeal.*

No second appeal lies from an appellate order setting aside a sale under O. 21, R 90. But the High Court may regard an appeal as a revision if the case calls for further consideration. (*Knox and Griffin, JJ.*) KUARRADHKA RAMAN *v.* GULZARIKUAR. **13 I. C. 147.**

———**S. 104 (2) and O. 43, R. 1 (a) and (w).**

No appeal lies from an order passed in appeal remanding for trial on merits a case in which the plaint had been returned for presentation, 2 A. L. J. 119, ref. (*Stanley, C. J. and Banerjee, J.*) NANBAT SINGH *v.* BALDEO SINGH. **33 All. 479 : 9 I. C. 666 : 8 A. L. J. 12.**

———**S. 104 (2), and O. 43**—*Suit dismissed for want of process in—Suit restored by Appellate Court.*

There is no appeal from the order of an appellate Court restoring suit dismissed for want of process fee. (*Knox, C. J. and Karamat Hussain, J.*) ABDUR RAHIMAN *v.* SUGHRA BEGAM. **9 I. C. 484.**

———**S. 104 (2), 47 and O. 21, R. 90**—*Second appeal.*

Impeachment of sale proclamation in execution by a judgment debtor on the ground of fraud antecedent to publication is not by itself a ground for a second appeal. *Quaere* :—whether the decision of a question of fraud before the execution and conduct of an execution sale brings the case within the scope of S. 47, C.P.C. (*Mookerjee and Cuming, JJ.*) FULSUMMANNESSA BIBEE *v.* HALAMADDI MOLLA. **40 I.C. 426 : 25 C.L.J. 399.**

———**S. 104 (2) O. 21, R. 90 and O. 43, R 1 (j)**—*Execution sale before new Code—Alienation to set aside after new code— Right of appeal—No vested right in procedure.*

Procedure cannot be the subject of a vested right in favour of any litigant. An application presented after an enactment of a new code must be treated as having been presented under the new code. Where an application was made after the C. P. Code of 1908 had come into force, to set aside a sale held before the new code came into force. *Held*, that the new code governed the application and that a second appeal was barred under S. 104 sub-Sec (2). (*Mookerjee and Beachcroft, JJ.*) NILMONI SINGH *v.* BINDA DASYA. **16 I.C. 436.**

———**S. 104 (2) and O. 21, R. 90 and O. 43, R. 1, (J)**—*Execution sale—Application setting aside —Fraud.*

There is no second appeal against an appellate order confirming an order refusing to set aside a sale on the ground of fraud under S. 104 (*c*) (2) and O. 21, R. 90 read with O. 43, R I. (*j*) (*Brett and Carnduff, JJ.*) RAJ MOHAN PAL *v.* GOBINDA CHANDRA. **14 I.C. 53 : 17 C.W.N. 524: See also 15 I.C. 679 : 16 C.W.N. 1051.**

———**S 104 (2), O 43, R. (1) (j) and O. 21, R 89.**—*Second appeal.*

No second appeal lies from an appellate order disallowing an application under O. 21, R. 89. (*Jenkins, C. J. and Coxe, J.*) ASIMUDDI SHEIKH *v.* SUNDARI BIBI. **38 Cal. 339 : 15 C.W.N. 844 : 10 I.C. 345 : 14 C.L.J. 224.**

———**S. 104 (2)**—*Scope of— Appeals under cl. 10 of the Letters Patent not affected.*

C. P. CODE (V OF 1908), S. 104.

It was not intended by S. 104 (2) C.P.C. to override the express provision of the Letters Patent or to take away by implication a right of appeal conferred thereunder. 14 A. 226; 39 A 191; 9 C. 482; 11 A. 375 : 26 C. 361 · 25 M. 555 Ref, (*Shadi Lal, C. J. and Harrison, J.*) RULDU SINGH *v.* SAWAL SINGH. **3 Lah. 188 : 67 I. C. 388 : 1922 Lah. 380 (2).**

———**S. 104—Cl. 2, 0, 43, R. (1) (j)**—*Second appeal where no first appeal lay.*

There can be no second appeal to the High Court on the decision in appeal which did not lie. (*Scott-Smith, J.*) GUL BANO *v.* MUHAMMAD ZEKAR KHAN. **3 Lah. L.J. 463.**

———**S. 104 (2)**—*Order in terms of compromise*

Order of District Court in appeal in terms of compromise is final and is inappealable. (*Le Rossignol and Campbell, JJ.*) GURUCHARAN SINGH *v.* SHIBEDEV SINGH. **3 Lah. 175 : 66 I C. 258 : 1922 Lah. 309**

———**S. 104 (2) and 0, 41, R. 1 (a) (u)**—*Order in appeal setting aside order returning plaint —No Second appeal,*

There is no second appeal against an appellate order setting aside an order returning a plaint to be presented to the proper court and remanding the case for trial on the merits 33 All. 479 and 101 P.L.R. 1913 foll. (*Broadway, J.*) FIRM OF BHAWANI SAHAI KANSHI RAM FEROZEPORE *v.* FIRM OF HARBANS SINGH GOPAL DAS. **68 I.C. 304 : 2 Lah. L.J. 587.**

———**S. 104 (2)**— *Plaint — Order returning Appeal—Order not open to Second Appeal.*

An order of an Appellate Court reversing an order of the Lower Court returning a plaint for presentation to the proper Court is not open to Second Appeal. (*Abdui Raoof, J.*) RAM LAL ISHAR DAS *v.* SALIG RAM. **59 I. C. 2 : 7 P. W. R. 1921.**

———**S. 104 (2), 0. 21, R. 92 and 0. 43, R. 1 (j)**—*Execution sale set aside—Appeal, second whether lies.*

Where an execution sale is set aside under O. 21, R. 92 and the right of appeal under O. 43, R. 1 (j) has been availed of, no second appeal is competent from the order of the Appellate Court. (*Broadway, J.*) JIWAN SINGH *v.* SAWAN LAL. **54 I.C. 941 (1) : 168 P. . 1919.**

———**S. 104 (2) 0, 43, R. (1) (J) and 0. 21, R. 92**—*Second appeal— Order on appeal by judgment-debtor refusing to set aside auction sale.*

An order of the appellate Court in appeal by the judgment debtor under O. 43, R. 1 (j) C.P.C. against the order of a Court refusing under O. 21, R. 92, to set aside, on his application under O, 21, R. 90, the auction sale of his immoveable property to the decree-holder, is not a decree and consequently no second appeal lies under S. 104 (2) against that order. (*Shah Din, J.*) BABU LAL *v.* CHANDA. **6 P.W.R. 1915 : 27 I.C 589 : 38 P.L.R. 1915,**

———**S. 104 (2) and 0. 7, R. 10, 0. 43, R. (1) (a)**—*Order in appeal setting aside order for return of plaint—Further appeal, if lies.*

C. P. CODE (V OF 1908), S. 105.

An order in appeal setting aside the order of the lower court returning the plaint for presentation to the proper court is not open to second appeal, (*Scott-Smith, J.*) CHHUBU MIAN *v.* HAR CHARN DAS. **119 P.R 1912 : 101 P.L.R. 1913 : 18 I.C. 529 : 48 P.W.R. 1913.**

———**S. 104 (2) and 0. 43, R. 1 (a).**

A plaint was returned for proper presentation under O. 7 R. 10, Plff. appealed under O. 43, R. 1 (a) and the appellate court remanded the case for trial on merits under O. 41, R. 23. The defendant filed a second appeal urging that it was an appeal against the order passed under O. 41, R. 23. *Held*, that the order was passed under O. 43, R. 1 (a) and that no appeal lay against that order under S. 104 (2). (*Reid, C.J.*). MANU LAL *v.* HAR CHARAN DAS. **10 I. C. 36 : 147 P. L. R. 1911 : 258 P.W.R. 1911.**

———**S. 104 (2) and 0. 43, R. i (j)** — *Second Appeal—Execution sale—Setting aside.*

No second appeal lies against an order passed in appeal upon a petition by an auction purchaser to set aside a sale on the ground that the judgment debtor had no saleable interest in the property. (*Spencer and Kumaraswami, Sasrti, JJ.*) SUNDARA SINGH *v.* PAZAMAHLAL PADAYACHI. **45 I.C. 701.**

———**S. 104 (2) and 0. 43**—*Appeal.*

No appeal lies against an appellate order setting aside an order of the court of first instance refusing to set a aside an *ex parte* decree. (*Munro and Sankaran Nair, JJ.*) VENKATACHELLAYA *v.* SUBRAMANIA. **9 I.C. 55 : 9 M.L.T. 269.**

———**S. 105**—*Interpretation of remand order.*

Where remand was ordered on one of the two points any one of which would have been sufficient to dispose off the case the remand order must be deemed to have confirmed the decision on the other point. (*Lord Phillimore,*) SRIPAT SINGH DUGAR *v.* RAI HARIRAM GOENK. **31 M.L.T. P.C. 38 ; 26 C.W.N. 739 : 74 I C. 597 : 16 L.W. 447 ; 4 U.P.L.R. P.C. 68 : 1922 M.W.N. 671 : 1922 P.C. 51.**

———**S. 105**—*Interlocutory order can be objected to—Appeal from final decree.*

Notwithstanding the dismissal of an appeal against an interlocutory order in a suit on the ground that no appeal lay against it, it is open to a party to complain of any defect or irregularity in the order in an appeal from the final decree itself. (*Walsh and Ryves, J.*) SHANKER LAL *v.* MAHOMED ALI. **44 All. 534 : 20 A.L.J. 349 : L.R. 3 A. 304 : 4 U.P.L.R, (A.) 97 : 66 I.C. 920 : 1922 All, 118.**

———**Ss. 105 and 115.**

The Court will not interfere in revision in a case of those interlocutory orders, against which though no immediate appeal lies, a remedy is supplied by S, 105, which provides that they may be made a ground of objection in an appeal against final decree. (*Knox, J.*) SHEOPAL SINGH *v.* BADRI SINGH. **38 I,C. 206.**

C. P. CODE (V OF 1908), S. 105.

——S. 105—*Plea not raised in Appellate Court.*

The mortgagees sued on a mortgage; but their suit was dismissed on the ground that no consideration for the mortgage passed. On appeal to the High Court, the consideration being held to be proved, the case was remanded under O. 41, R. 23 for a decision on merits. The defendants did not support the decision of the Lower Court on any other ground before the High Court; but raised the question of invalid attestation under S. 59 of the T. P. Act in the lower court on remand. The Lower Court again dismissed the suit on that ground, *Held* (1) that the Lower Court could not frame a fresh preliminary issue when the case is remanded, as the effect of the remand order was to send back the case to the first court to try the remaining issues. (2) That the technical plea of attestation ought to be treated as raised for the first time in appeal. The defendants having failed to raise the objection before the High Court precluded themselves from raising it at the subsequent stage of the same litigation either as *res judicata* or on the general discretion of the Appellate Court in dealing with substantially new pleading taken up in appeal for the first time and incapable of disposal without fresh evidence. (*Piggott and Lindsay, JJ.*) CHUNNI LAL *v.* HABIB ALI. 35 I.C. 571.

——S. 105—*Scope of.*

The policy of the Legislature in enacting S. 105, C. P. Code was to give finality to orders of remand (*Mookerjee and Rankin, JJ.*) BISAI NATH *v.* TARA NATH DEB. 72 I C. 588 : 1923 Cal. 385.

——S. 105, O. 6, R. 17—*Amendment of plaint —When not to be allowed.*

Where in an action for damages and injunction the plaintiffs had alleged in their plaint title to and possession of the land in dispute but the defendants having denied the latter fact the plaintiffs applied for an amendment by addition of a prayer for declaration of title. The court of first instance did not allow the amendment but the appellate Court did and remanded the case for retrial. In the course of retrial the plaintiff applied for another amendment with a prayer for recovery of possession. An objection was taken to the amendment that it altered the character of the suit and was illegal but the objection was disallowed, and the suit was decreed and the appellate court affirmed the decision. *Held* in 2nd appeal that the second amendment ought not to have been allowed and that the other party was not precluded from taking objection to it showing that they were prejudiced by it, even though not having appealed against the order of remand they could not question the validity of that order and consequently the validity of the first amendment. (*Chatterjea and Newbould, JJ.*) GYANENDRANATH *v.* PORESHNATHPAL. 26 C.W.N. 73 : 35 C L.J. 25 : 65 I.C. 39 : 1922 Cal. 255.

——S. 105—*Finding can be challenged in Lower Court.*

Where in a remand order, the High Court found that certain *kists* were barred, as it was not known that the lease was a registered one, *held* the plaintiff could put in the registered lease and prove that the *kists* were not barred, (*Holmwood and Teunon, JJ.*) AHAMA BUKSH *v.* BEPIN BEHARI SINGHA. 11 I C. 6.

C. P. CODE (V OF 1908), S. 105.

——S. 105 and O. 9, R. 13—*Order setting aside decree—Propriety of—Cannot be questioned.*

Not only can an order setting aside an *exparte* decree not to be questioned on appeal from the decree but any error in the proceedings is not one affecting the decision of the case within the meaning of section 105 of the Code. (*Harrison, J.*) SUNDAR SINGH *v.* NIGAHIYA. 72 I.C. 410 : 1923 Lah. 425 (1).

——S. 105, and O. 22, R. 9—*Abatement — Order setting aside—Objection to in an appeal from the decree, can be made.*

Where a Court sets aside the abatement of a suit under O, 22, R. 9, C. P. Code ignoring the objections of a party it is open to him on appeal from the decree passed in the suit to object to the orders setting aside the abatement. 31 M. 345 ; 13 M.L.J. 308 ; 34 A. 562 followed. (*Abdul Raoof and Moti Sagar, JJ.*) AJUDHIA PARSHAD *v.* IMAMUDDIN. 71 I.C. 587 : 1923 Lah. 230.

——S. 105—"*Affecting the decision of the case*"—*Meaning of.*

The phrase "affecting the decision of the case" in S. 105 means affecting the decision of the case with reference to its merits. An order superseding an arbitration is not an order affecting the decision of the case on merits and therefore even if it is erroneous, objection cannot be taken in an appeal from the final decree in the case. (*Martineau, J.*) FIRM BUDHU RAM HOUDA RAM *v.* RAMZAN. 3 Lah. L.J. 59 : 59 I.C. 676 : 33 P.W.R. 1921.

——S. 105, and O. 43, R. (1) (a)—*Punjab Courts Act, S.* 41 (3)—*Remand order on a point of custom—Right of appeal.*

No appeal from an order of remand as to the existence or non-existence of a custom lies. Where however parties are admittedly governed by customary law, the order of remand should be set aside and a decree must be passed by the Appellate Court for what the plaintiff was entitled to, by custom. (*Chevis, J.*) ALI AKBAR SHAH *v.* BARKHAT ALI SHAH. 76 P.W.R. 1917: 39 I.C. 775 : 109 P.L.R. 1917.

——S. 105—*Remand order—Not appealed against—If appellate court can go subsequently into the question.*

Where an order of remand by the appellate court on the question of the maintainability of a suit is not appealed against, the appellate court cannot subsequently go into the question of the form of suit as it is not open to discussion any longer. (*Kensington, Offg, C.J. and Ratligan, J.*) SHER SINGH *v.* DEVI DAYAL. 302 P.I.R. 1913, 20 I.C. 761 : 210 P.W.R. 1913.

——S. 105 and O, 41, R. 23—*Punjab Courts Act* (*XVIII of* 1884). *Ss* 40 *and* 70—*Order of remand, when appealable,*

An order of remand is appealable only in cases where the decree which the Appellate Court would have passed, if, instead of remanding the

C. P. CODE (V OF 1908), S 105.

case, it had decided it itself, is appealable under Punjab Courts Act, Ss. 40 and 70. But where it is impossible to say whether the order is or is not appealable, the order is presumed to be not appealable, no express provision for appeal having been made. (*Ratligan and Chevis, JJ.*) FAIZ AHMAD *v.* BADAR DIN.
50 P.R. 1911: 137 P.W.R. 1911 : 11 I.C. 315 : 210 P.L.R. 1911.

———S. 105—*Scope—Obiter.*

The principle of S. 105 is applicable not only to decrees and interlocutory orders but also to orders and interlocutory orders leading to the final decree. (*Seshagiri Iyer, J.*) ALAGAPPA CHETTY *v.* ANNAMALAI CHETTY.
35 I.C, 74: 4 L, W. 411.

———S. 105—*Order, previous and subsequent—Reversal of previous order—Effect of.*

The reversal of the previous order has the effect of nullifying the final order. (*Sundara Aiyar and Phillips, JJ.*) LAKSHMI *v.* MARUDEVI.
37 Mad. 29 : 10 M.L.T. 437 : 12 I.C. 664: 21 M.L.J. 1063.

———S. 105—*Scope—Incidental findings,*

S. 105 is only one of the several rules which are covered by the heading of *res judicata.* An order from which an appeal is allowed, but no appeal is filed in time, is binding as also all the findings and decisions forming an essential part of the basis of that order but not those merely incidental thereto. (*Hallifax, A.J.C.*) KEKRA *v.* SADHU.
23 I. C. 238 : 10 N.L.R. 28.

———S. 105, O. 41, R. 23, and Sch. II, Para. 3—*Award—Supersession of—Merits, if affected—Remand, if valid.*

The arbitrators signed the award on the evening of 19th December, the date fixed for submitting the award and filed it on 21st December. The court superseded and decided the case. In appeal the case was remanded. It was held that the award was in time though filed late and that the order of supersession by the Court was one affecting the merits of the case within S. 105 and that the order of remand was correctly made. (*Jwala Prasad, J.*). RADHA KANT *v.* JALADHAR JHA.
37 I.C. 844.

———S. 105—*Amendment of plaint—Improper order—Appeal.*

Though an appeal lies against an order allow an amendment, objection to an amendment can be raised on appeal against the decree, (*Hayward, J.C., and Crouch, A. J. C.*) GULRAJMAL *v.* PAMANMAL.
27 I.C. 344 : 8 S.L.R. 69.

———S. 105 (1,) O. 22, R. 9 (2) and O 43—*Abatement—Defect or error—Irregularity.*

The words "error, defect or irregularity, in S. 105 mean error, defect or irregularity affecting the decision of the case on the merits and when an order of abatement was set aside under O. 22, R. 9 no appeal lies against that order 25. All 280, foll. (*Banerji and Piggott, JJ.*) NIDDHA LAL *v.* COLLECTOR OF BULANDSHAR.
35 I.C. 209: 14 A.L.J. 610.

C. P. CODE (V OF 1908), S. 105.

———S. 105 (1)—*Interlocutary order, compliance with—Appeal.*

A plaintiff does not lose his right to raise a question of the propriety of an intermediate order with which he has complied, for the right under S. 105, C. P. C. is not a qualified right. (*Bevan Petman, J.*) SHAH JAHAN *v.* INAYAT SHAH.
53 I.C. 644 : 1 L. 54.

———S. 105 (1) and O. 43, R. (d)—*Order refusing to set aside* ex parte *decree, if appealable—Order setting aside* ex parte *decree, appeal against, if lies—Affecting the decision of the case*—Ex parte *decree set aside.*

Under O. 43, R. 1 (d), an appeal lies against an order refusing to set aside an *ex parte* decree; but no appeal lies against an order setting aside such a decree. Under S. 105 (1) (d) any error made by a Court in setting aside an *ex parte* decree is not an error "affecting the decision of the case" and cannot be set forth as a ground of objection in the memorandum of appeal. (*Johnstone, C. J.*) FAZAL *v.* HASHMATI.
133 P. W. R. 1916 : 31 I. C. 914 : 40 P. R. 1916.

———S. 105 (1) O. 22, R. 5—*Decision as to legal representative—Appeal whether lies.*

An order under O. 22, R. 5 which brings on record two rival claimants as the legal representatives of a party to a suit, without adjudicating on the relative claims of both though not in itself appealable, can be attacked in an appeal against the decree under S. 105, C. P. C. because it affects the decision of the suit. 27 B. 162, Diss. (*Oldfield and Phillips, JJ.*) APTAB SHAH *v.* MOYAN.
5 L W. 266 : 39 I. C. 371 ; (1917) M. W. N. 148.

———S. 105 (1)—*Affecting the decision of the case.*

An order extending time fixed for payment by a preliminary decree in a foreclosure suit may be assailed in an appeal from the final decree, as the question of extension is one affecting the decision of the case. (*Drake-Brockman, J. C.*) PANDHARI *v.* MAHADEO.
12 I. C. 795 : 7 N. L. R. 162.

———S. 105 (1)—*Affecting the decision of the case.*

An order setting aside an *ex parte* decree cannot be subsequently questioned in appeal from the decree passed after restoration, as that order does not affect the decision of the case on its merits. (*Holms, S. M.*) MAHAMAD ALI MAHAMAD *v.* SHAUKAT ALI.
34 I. C. 713 : 3 O. L. J, 231.

———S. 105 (2) — *Interlocutory matter — Appeal.*

Independently of the doctrine of *res judicata* a decision in a suit given on an interlocutory matter whether appealable or not, if not appealed from, is binding upon the parties in every proceeding in that suit. 6 A. 269 (P.C.) foll. (*Walsh and Stuart, JJ.*) HANS RAJ *v.* BIJAI RAM SINGH.
40 I. C. 621.

C. P. CODE (V. OF 1908), S. 105.

——S. 105 (2)—*Applicability.*

S. 105 (2) does not apply to appeals to the Privy Council. (*Stanley, C. J. and Banerjee, J.*) AHMAD HUSSAIN *v.* GOBIND KRISHNA NARAIN.
33 All. 391 : 9 I. C. 932 : 8 A. L. J. 192.

——S. 105 (2)- *Decree after Remand—Appeal—Remand order cannot be questioned.*

Where a decree after remand is appealed against, the appellant cannot question the correctness of the remand order. (*Chatterjea and Panton, JJ.*) MURARI CHANDRA DE *v.* DINA NATH CHANDRA.
63 I. C. 845.

——S. 105 (2) *Remand—Decree after remand—Appeal from decree—If order of remand can be challenged.*

In an appeal from a decree passed after a remand by the High Court, the order of remand cannot be challenged. (*Fletcher and Smither, JJ.*) AJA NASYA *v.* KAIRMBAKSH SARKAR.
46 I. C. 816.

——S. 105 (2)—*Order of remand—Appealability—C. P. Code O. 41, R. 23.*

Where an order of remand purports to be made under O. 41, R. 23, C. P. Code, it is the duty of a party adversely affected to appeal against the order. Otherwise the order would be final. (*Scott Smith, J.*) MUSSAMMAT NIAMAT BIBI *v.* MAHOMED FAIZ.
65 I. C. 745.

——S. 105 (2), O. 43, R. 1 (*u*)—*Remand, order of—Appeal, when lies.*

Where an Appellate Court confirms the dismissal of the suit by the lower Court, as to a part, and remands the case for a retrial as to the other part, such an order of remand is appealable under O. 43, R. 1 (*u*) of the Code. (*Broadway and Wilberforce, JJ.*) KARAM SINGH *v.* VIR SINGH.
3 Lah. L. J. 426 : 68 I. C. 776 : 2 Lah. 252.

——S. 105 (2)—*Power to reconsider.*

The court remanding the case after deciding certain points can afterwards refuse to re-consider those issues. (*Richardson and Mullick, JJ.*) HIRA LAL PAL *v.* ETWAR MANDAL.
20 C. W. N. 43 : 32 I. C. 866 :
See also 46 I. C. 922.

——S. 105 (2) and O. 41, R. 23—*Scope—Decree by first Court—Appeal from remand order without appealing from decree.*

Where a suit has been remanded on appeal, an appeal from the order after the suit has been finally disposed of is incompetent. 32 C. 1023, 12 C. W. N. 590, foll. 30 A. 479, Diss. 32 M. 83 Dist. S. 105(2) of the new C.P.C. has no bearing on this question but applies to the converse case. (*Chitty and Chatterjee, JJ.*) JANKI NATH ROY *v.* PROMOTHA NATH ROY.
10 I. C. 514 : 15 C. W. N. 830.

——S. 105 (2)—*Remand—Order not appealed against—Finality of.*

An order for remand is final if not appealed against and cannot be questioned by the Lower Appellate Court. (*Scott Smith, J.*) KARAM NARAIN *v.* SALAMUT LAL.
57 I. C. 52 : 2 U. P. L. R. (L) 120.

C. P. CODE (V OF 1908), S. 105.

——S. 105 (2)—*Scope of.*

S. 105 (2) only prevents a party from agitating in an appeal a question which he could have objected to in the appeal against an order. The test is not whether a decision has been given upon the points raised in the appeal against the order (*Spencer and Seshagiri Aiyar, JJ.*) NANU NAIR *v.* KANTAN ASHTA MOORTHI.
29 M. L. J. 772 : 29 I. C. 386 : 2 L. W. 509.

——S. 105 (2)—*Order of remand.*

Where on appeal by the plaintiff the case is remanded on the ground that the burden of proof was on the defendants and not on the plaintiff, section 105 (2) precludes the defendants from questioning the correctness of that decision in second appeal. (*Hallifax, A. J. C.*) DAU *v.* RAMPRASAD.
1923 Nag. 283.

——S. 105 (2)—*Order of remand—Propriety of, not to be questioned by lower Court—Waiver.*

Unedr S. 105 (2) of the C. P. Code a lower court cannot treat an order of remand of the appellate court as a nullity owing to the want of jurisdiction in the latter to pass it. A party who omits to raise the question of the jurisdiction of the appellate court at the hearing of an appeal and to appeal from the decision reached, cannot be allowed to object to that decision in the subordinate court to which the matter in dispute is remanded.(*Drake-Brockman, J. C.*) DHARAMCHAND *v.* GORE LAL.
47 I. C. 886.

——S. 105 (2)—O. 43, R. 1 - *Appeal—Remand order—Disposal of suit on remand before institution of the appeal.*

Under the Code of Civil Procedure 1908 the right of appeal against a remand order is unaffected by the disposal of the suit on remand before institution of the appeal. (*Stanyon, A. J. C.*) VITHOBA *v.* TANBA.
14 I. C 673 : 8 N. L. R. 42.

——S. 105 (2), O. 41, R. 23 and O. 43, R. 1 (4)—*Remand—Appeal against — Decision of first court on remand.*

If an appeal is preferred against an order of remand by a court of appeal, setting aside the decision of the first Court on a preliminary point, the fact of the case being decided by the Court of first instance in accordance with the remand order before the appeal comes on for hearing is no bar to its being heard and disposed of. 12 A. 510, 3 A. L. J. 40 Rel. A court hearing an appeal against an order of remand has power not only to decide whether the order of remand is in accordance with law or not but also whether the decision is correct or not and to dispose of the suit accordingly. 16 A. 252, 3 A. 675, 5 C. 144. 20 M. 152 foll. (*Evans, J. C.*) GIRDARI LAL *v.* JASWANT SINGH.
15 I. C. 181 : 15 O. C. 33.

——S. 105 (2)—*Remand order, whether can be ignored.*

There is no appeal under the Letters Patent of the Patna High Court against an order of a single Judge directing the trial of certain issue and a Judge before whom the case comes up for final hearing with the findings after remand can disregard the order of remand and dispose of the

C. P. CODE (V OF 1908), S. 105.

appeal on the original findings of the Appellate Court. (*Chamier, C. J., Chapman and Jwala Prasad, JJ.*) BARA ESTATE LTD., *v.* ANUPCHANDAR. 2 Pat. L. J. 669 : 1917 Pat. 342 : 41 I. C. 337 : 2 Pat. L. W. 71

——S. 105 (2)—*Order of remand—Failure to appeal—Effect.*

Where it was open to the persons aggrieved by an order of remand to appeal against it but they failed to do so they are precluded from further contesting the correctness of that order. (*Brown, A. J. C.*) MAUNG PO KAING *v.* MA TOK.
1 Bur. L. J. 231 : 4 U. B. R. 93 : 70 I. C. 893 : 1923 Rang. 29.

——S. 107—*Appellate Court—Power to examine parties.*

The Judge of an appellate Court is competent to examine any of the parties for ascertaining the facts of the case, if he considers it necessary to do so for the ends of justice. (*Bannerji and Walsh, JJ.*) JANG BAHADUR *v.* RAJ KUMAR.
42 All. 48 : 52 I, C. 289 : 17 A.L. J. 945.

——Ss. 107 and 99—*Sch. II, part of the Code—Authority of Appellate Court to make reference.*

An appellate Court is bound to refer matters in dispute to arbitration if the parties agree to do so: omission to do so is not cured by S. 99. Schedule II is part of the Code itself. (*Karamat Hussain and Chamier, JJ.*) DATTA *v.* KHEDU.
33 All. 645 : 11 I. C. 935 : 8 A. L. J, 678.

——S. 107 and O. 41, R. 23—*Scope.*

A general power of remand cannot be inferred from the absence of S. 564 of the Old Code in the new : such a provision is out of place as the High Courts can under the present code make rules where necessary. (*Scott, C. J. and Shah, J.*) NARAYAN BHAT BHIMBHAT JOSHI *v.* AKKUBAI MANOHAR BHAT JOSHI. 33 I. C. 576 : 18 Bom. L. R. 27.

——S. 107, O. 41, R. 23—*Remand—Powers of Appellate Court*—(S. 562 *of Code of* 1882.)

The powers of remand under the new Code are far wider than those conferred by the old Code. The power may be exercised when important questions were disallowed during examination of witnesses resulting in a want of trial in the first Court. (*Chatterjee and Newbould, JJ.*) SUSTHIR BALA DUTTA *v.* CHANDRA KUMAR.
36 I. C. 813.

——S. 107—*Power to remand of High Court.*

The powers of the High Court as to remand are not restricted by the provisions of O. 41, Rr. 23 and 25 and the High Court can always make an order of remand if the exigencies of the case require it. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) J. B. Ross *v.* C. R. SCRIVEN.
43 Cal. 1001 : 34 I. C. 235 : 20 C. W. N. 1192.

——S. 107 and O. 41, Rr. 23 and 25—*Appellate Court—If may remand cases otherwise than under.*

The general power given by S. 107 of the Code to the Appellate Court, of remanding cases for trial by the original Court is not governed or

C. P. CODE (V OF 1908), S. 107.

limited by O. 41 alone, but it is subject to such conditions and limitations as may be prescribed in the rules and orders, such as an amendment of a plaint and addition of parties in a Court of Appeal. (*Holmwood and Imam, JJ.*) MEAH UZIR ALI SARDAR *v.* SAVAI BEHARA 43 Cal. 938 : 32 I. C. 791 : 20 C. W. N. 547.

——Ss 107 and 151—*Appellate Court—Inherent power to remand.*

An appellate Court has an inherent power to remand even cases not coming within O. 41, R. 23 of the C. P. Code. 44 Cal. 929, 36 Mad, 492, rel. (*Seshagiri Aiyar and Odgers, JJ.*) ATHAPPA CHETTY *v.* RAMANATHAN CHETTY.
37 M. L. J, 536 : 53 I. C 417 : 10 L. W. 359.

——S. 107 and O. 41—*Scope of.*

C. P. C., S. 107 does not confer powers not conferred by O. 41. Appellate court can entertain application to have *ex parte* decree set aside, where the applicant is a party to appeal from the whole decree. (*Abdur Rahim and Kumaraswami Sastri, JJ.*) RAMACHANDRA MALLAYA *v.* NARAYAN HEGADE. (1917) M. W. N. 808 : 22 M. L. T. 480 : 42 I. C. 972 : 7 L. W. 10.

——S. 107—*Remand by consent of parties—Power of appellate court.*

The appellate Court can pass an order of remand by consent of parties in excess of its powers under the code. (*Sadasiva Iyer and Spencer, JJ.*) MUTHUSWAMI ODAYAN *v.* KOLANDAVELU ODAYAN.
22 I. C. 41 : (1914) M. W. N. 90.

——S. 107 and O. 7, R. 10—*Appellate Court.*

O. 7, R. 10 applies to appeals by virtue of S. 107. (*Hallifax, A. J. C.*) NARAYAN *v.* TUKARAM.
74 I. C. 33 : 1923 Nag. 310.

——S. 107—*Interlocutory orders—Revision of.*

Even where an appeal from the final decree lies, interlocutory orders may be dealt with under the court's powers of superintendence and revision to avoid irreparable injury to the parties. (*Miller, C. J., and Mullick, J.*) RAMESHWAR NARAYAN SINGH *v.* RIKNATH KOERI.
5 Pat. L. J. 550 : 58 I. C. 281 : 1 P. L. T. 668.

——Ss. 107 and 151—*Adding parties in appeal—Inherent power.*

An appellate court has power under Ss. 107 and 151 to add a new party in an appeal. (*Mullick and Thornhill, JJ.*) HEMANIGINI DEBI *v.* HARIDAS BANERJEE. 5 Pat. L. W. 216 : 3 Pat. L. J. 409 : 46 I C. 398 : 1918 Pat. 276.

——S. 107 (1) (b)—*Remand—Onus of proof—Shifted by Appellate Court.*

Where the first court placed the onus on the defendant who produced no evidence and the plaintiff also produced no evidence and the Chief Court on appeal shifted the onus on to the plaintiff. *Held*, that the case should be remanded to enable the plaintiff to produce further evidence. (*Shah Din and Chevis, JJ.*) GOBIND RAM *v.* SURAJ KAUR. 131 P. L. R. 1914 : 24 I. C. 470 : 114 P. W. R. 1914.

C. P. CODE (V OF 1908), S. 107.

———S. 107 (2)—*Appellate Court—Power to add party and remand.*

An appellate court has power to add a necessary party on appeal and remand the case. (*Sir John Edge.*) ANANDA GOPAL GOSSAIN *v.* NAFAR CHANDRA PAL CHOWDHRI. **18 C. W. N. 259 : 21 I. C. 928 : 26 M. L. J. 86. (P. C.) Affirming 35 Cal. 618 : 8 C. L. J. 168 : 12 C. W. N. 545.**

———S. 107 (2) and O. 7, R. 10—*Plaint returned for presentation to a proper Court—Appeal—Whether lies—Revision.*

No appeal lies against an order returning memorandum of appeal for presentation to proper court. Revision however is competent. (*Smith J.*) KARAM ILAHI *v.* HAKIM SHAH. **56 I. C. 865 : 2 Lah. L. J. 366.**

———S. 107 (2) and O. 39, R. 2 (3).

In spite of the words "the Court granting an injunction may order" in the wording of O. 39, R. 2 (3) C. P. C. which were substituted for "in cases of disobedience, injunction might be enforced" the appellate Court can pass the order which the Court of first instance might have passed. (*Wallis, C. J., Abdur Rahim and Srinivasa Iyengar, JJ.*) OTTAPURAKHAL THAZATH *v.* ALABI MASHUR KOYANNA. **39 Mad. 907 : 3 L. W. 430 : 30 M. L. J. 523 : 19 M. L. T. 314 ; 34 I. C. 588 : (1916) 1 M. W. N 328.**

S. 109.—

Award.
Consent Decree.
Decree or order.
Final Order
Fit Case.
"On appeal" Meaning of.
Substantial question of law.

Award.

———Ss. 109 and 111—*Award—Decree of High Court in accordance with—Certificate of leave to appeal—Privy Council.*

The certificate cannot be refused on the ground that no appeal lies against a judgment pronounced in accordance with an award and a decree following it. Sch. II, para. 21 (2) of the C. P. Code does not affect appeals to the Privy Council. (*Pigott, J. C. and Lindsay, A. J. C.*) AMEER BEGAM *v.* BADRUDDIN HUSAIN. **15 I. C. 2 : 15 O. C. 55.**

Consent decree.

———Ss. 109 and 110—*Consent decree.*

An appeal being allowable only in case of decree made against the consent of the parties, a consent decree is not appealable to His Majesty in Council. (*Miller, C. J. and Mullick, J.*) LACHIMI NARAYAN *v* BALMUKUND. **5 Pat. L. J. 383 : 57 I. C. 245 : 1 P. L. T. 599 : (1920) Pat. 349.**

Decree or order.

——S. 109 (c)—'*Decree or order*'—*Interlocutory order.*

The words "order" referred to in S. 109 (*c*) of the C. P. Code is intended to be not merely a final order but it is wide enough to include an interlocutory order. It does not mean the same thing as "final order" referred to in S. 109 (A). 48 I. A. 31 : 28 A. 227 : 21 C. L. J. 281 Ref. (*Sanderson, C. J. and Richardson, J.*) SHIVA PROSAD *v.* RANI PRAYAG KUMARI DEBI. **26 C. W. N. 819 : 70 I. C. 519 : 49 C. 967 : 1922 Cal. 130.**

C. P. CODE (V OF 1908), S. 109—Final order.

——S. 109—"*Decree or order.*

The words "any decree or order" in S. 109 (*c*) of the C. P. Code do not mean any decree or order other than the decree or final order passed on appeal by a High Court or by any other court of final appellate jurisdiction. (*Smart and Lyle, A. J. Cs.*) SHEO BAHADUR SINGH *v.* BENE BAHADUR SINGH. **54 I. C. 828 : 6 O. L. J. 664.**

Final order.

———S. 109 (a) and (b)—*Final order—Order of remand—Appeal to His Majesty in Council.*

Semble. Where the High Court on appeal reverses the decision of the Court below and directs certain accounts to be taken not because his liability was established but for the purpose of determining his liability, the order is a "final order" from which an appeal would lie to His Majesty in Council. (*Sir Lawrence Jenkins.*) SANYASI CHARAN MANDAL *v.* KRISHNADHAN BANERJI. **49 Cal. 560 : 43 M. L. J. 41 : 16 L. W. 536 : (1922) M. W. N. 364 : 26 C. W. N. 954 : 35 C. L. J. 498 : L. R. 3 (P. C.) 133 : 30 M. L. T. 228 : 20 A. L. J. 409 : 24 Bom. L. R. 700 : 67 I. C. 124 : 49 I. A. 108 (P. C.) (1922) P. C. 237.**

———S. 109—*Final order— Meaning of — Order refusing to stay proceedings under S. 19 of the Arbitration Act—Not appealable.*

In a suit for damages under contracts (which contained an arbitration clause) appellants applied to the Court under S. 19, Indian Arbitration Act (1899) to stay the proceedings in order to refer the issues to arbitration under the clause. The Appellate Court refused to stay but granted leave to appeal to His Majesty in Council holding that their order refusing to stay was a "final order" within S. 109 (*a*) C. P. C. *Held*, that an order is final only if it finally disposes of the rights of the parties and as the order refusing a stay did not finally dispose of those rights, but left them to be determined by the Courts in the ordinary way, it was not 'final'. (*Viscount Cave.*) FIRM OF RAMCHAND MANJIMAL *v.* THE FIRM OF GOVERDAN DAS VISHIN DAS RATAN CHAND. **47 I. A. 124 : 24 C. W. N. 721 : 18 A. L. J. 591 : 22 Bom. L. R. 606 : 39 M. L. J. 27 : 12 L. W. 15 : 2 U. P. L. R. (P. C.) 94 : (1920) M. W. N. 407 : 56 I. C. 302 : 28 M. L. T. 87 (P. C.).**

——S. 109 (a)—*Final order—Execution sale—Order of High Court setting aside or refusing to set aside a sale.*

An order of the High Court on appeal setting aside or refusing to set aside a sale in execution is a final order and is appealable to the Privy Council. (*Lord Moulton.*) TEKAIT KRISHNA PRASAD SINGH *v.* MOTI CHAND. **40 Cal. 635 : 40 I. A 140 : 17 C. W. N. 637 : (1913) M. W. N. 487 : 11 A. L. J. 517 : 17 C. L. J. 573 : 15 Bom. L R 515 : 19 I. C. 296 : 14 M. L. T. 37 : 25 M. L. J. 140 (P. C.)**

C. P. CODE (V OF 1908), S. 109—Final order.

——S. 109—*Final order—Order for a personal decree in mortgage suit—Appeal to Privy Council.*

In an execution appeal which arose out of a mortgage decree, the decree holders were the appellants in the High Court. They had obtained execution of their mortgage decree in a somewhat uncommon but perfectly lawful manner. They had exhausted the whole of the property covered by the decree, and they alleged that a very considerable portion of the decree still remained unsatisfied. They applied to the Court below to prepare a decree covering this unsatisfied balance, under the provisions of O. 34, R. 6, of the Code of Civil Procedure. The office report prepared at the time the application was made showed that the amount due under the decree on the date of the said report, namely, the 23rd of May 1918, was Rs. 32,119-7-6, and that the total amount realised by the sale of the mortgaged property was only Rs.18,600. The judgment-debtors objected that the application for a decree under O. 34, R. 6 was statute-barred under appropriate article of the Indian Limitation Act, The execution Court upheld this contention and dismissed the application of the decree holders. On appeal, a Bench of the High Court held that the application was within time. The order of the Court below, was then set aside and the execution Court was ordered to re-admit the application of the decree holders on to its file of pending applications and to dispose of it according to law. *Held*, that under the circumstances this amounted to a direction that a decree under Order 34, Rule 6, should be prepared, the details of which were left for the execution Court to settle, and that the order of the High Court was a final order against which leave to appeal to the Privy Council should be granted. (*Mears, C. J. and Piggott, J.*) SANTI LAL *v.* RAJ NARAIN. **21 A. L. J. 686 : 45 A. 741 : 9 O. & A. L. R. 832 : L. R: 4. A. 577 Civ. : 1924 All. 119.**

——S. 109 and O. 45, R. 3— *Final order — "Otherwise fit" for appeal—Order of remand.*

Where the High Court on appeal remanded the suit holding there was no fraud on the part of the mortgagee in the registration so as to render the suit on the mortgage liable to dismissal. *Held*, that the decision of the High Court was not a final order within S. 100 C, P. C. and an appeal did not lie to the Privy Council from that decision. But the question whether fraud of the mortgagor would vitiate registration and disentitle the mortgagee to enforce his mortgage was a substantial question of law and therefore the case was fit for appeal to the Privy Council. (*Mears, C. J. and Banerjee, J.*) DIRGPAL SINGH *v.* PAHLADI LAL **2 U. P. L. R. (H. C.) 99 : 54 I. C. 528. : 18 A. L. J .137.**

——S. 109 (a) — *Final decree or order — Decision that suit is not barred by* res judicata.

Appeals on matters interlocutory in their nature should be allowed to preferred to His Majesty in Council only when their decision will put an end to the litigation and finally decide the rights of parties. When a suit is dismissed by the Subordinate Judge as barred by *res judicata* but the decision was reversed by the High Court which remanded the case, leave to appeal to Privy Council should not be given. (*Mears, C. J. and Banerji, J.*) M. SAJJID ALI KHAN *v.* M. OSHAQ KHAN. **1 U. P. L. R. (H. C.) 168 : 54 I. C. 504 : 18 A. L. J. 83.**

C. P. CODE (V OF 1908), S. 109—Final order.

——S. 109 (a)—*Final order—Appeal.*

An order refusing to extend time for deposit of court fees in an appeal is not a final order under S. 109 C. P. C. and hence not appealable, (*Richards, C.J. and Rafique, J.*) BARFI *v.* KISORI LAL. **50 I. C. 79 : 17 A. L. J. 443.**

——S. 109—*Final order—Refusing to restore a dismissed appeal.*

A High Court's order refusing to entertain an application for restoring an appeal which was dismissed for default, is not appealable to His Majesty in Council. (*Richards, C. J. and Bannerjee, J.*) BISMILLAH BEGAM *v.* HIRA LAL. **37 I. C. 832.**

——S. 109 (a)—*Final order.*

An order of remand made by the High Court which decided only one issue out of several, raised in the first court is not a "final order" within the meaning of S. 109 (*a*). (*Richards, C J., Tudball and Rafique, JJ.*) NURI MIAN *v.* GANGES SUGAR WORKS, LTD. **14 A. L. J. 50 : 32 I. C. 360 ; 38 All. 150.**

——S. 109—*Final order—Order of remand.*

An order of remand is not a decree or final order within the meaning of S. 109 and is consequently not appealable. 10 M. I. A. 340, 8 B. 548, 17 A. 112: 23 A 220 con. (*Stanley, C. J. and Banerji, J.*) AHMED HUSSAIN *v.* GOBIND KRISHNA NARAIN. **33 All. 391 : 9 I. C. 932 : 8 A. L. J. 192.**

——S. 109 (a)— *Final order—Interlocutory order.*

The substantial portion of the order which the applicants complained of in their petition for leave to appeal to His Majesty in Council was really passed on the Civil Extraordinary application, but it did not finally dispose of the rights of the parties and the suit was left at practically the stage at which it was when filed.

Held, it cannot be said that this is a final order within the meaning of S. 109 (*a*) or that it is a final judgment within the meaning of Cl. 39 of the Letters Patent. (*Shah and Crump, JJ.*) SHRINIWAS *v.* HANMAT. **1923 Bom. 39.**

——Ss. 109 and 110—"*Final order*"—*Meaning of.*

The word "final" in S. 109, C.P. Code is used in its ordinary sense and therefore means an order which puts an end to the litigation between the parties, or at all events disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision. A suit ended in a compromise decree passed on a compromise entered into between plff. and deft. No. 2. The other defendant appealed against the order recording the compromise and the High Court on appeal set aside the order and directed a trial of the suit on the merits. On an application for leave to appeal to the Privy

Council against the order, *Held* that the order of the High Court was not a final order and that therefore leave could not be granted for an appeal to the Privy Council. (*Shah, A. C. J. and Crump, J.*) SHANKAR BHARATI *v.* NARASIMHA BHARATHI
24 Bom. L. R. 925 : 69 I. C. 80 : 47 Bom. 106 ; 1922 Bom. 383.

——S. 109—*Final Order—Suit dismissed on preliminary point.*

An order of the High Court, in an appeal from an order dismissing a suit on a preliminary point, setting aside the dismissal and remanding the suit for trial of the remaining issues, is a decree or final order within S. 109. (*Sanderson, C.J. and Richardson, J.*) KHAGENDRA NANDAN ASRAM *v.* SAHAYRAM CHAKRAVARTHI.
62 I. C. 776 : 25 C. W N. 896.

——S. 109—*Final order.*

An order of the High Court remanding a case for trial with the direction that a person should be sued as a residuary legatee, is not a final decree or order within the Code. (*Sanderson, C. J. and Woodroffe, J.*) BIRENDRA NATH *v.* NRIPENDRA NATH. 46 I. C. 681 : 22 C. W. N. 640.

——S. 109—*Final order— Meaning of—Temporary injunction—Refusal to issue.*

The term "final order" denotes an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. An order of the High Court, made in reversal of the order of the Court of First instance, refusing to issue a temporary injunction against the execution of a mortgage decree is not a final order and cannot be appealed against to the Privy Council. In a case where leave to appeal to His Majesty in Council is applied for on the ground of the case being a fit one for appeal, no question of the order being final arises. (*Mookerjee and Beachcroft, JJ.*) DANERA COAL CO. *v.* BENARES BANK. 28 I. C. 569 : 21 C. L. J. 281.

—— S. 109 and O. 9, R. 8—*Final order—Suit dismissed for default—Order setting it aside*

An order which deprives a party of the benefit of a final decree and directs the suit as against him to be tried again is a final order and an appeal lies to the Privy Council. (*Mookerjee and Beachcroft, JJ.*) MEAGHRAJ *v.* BIDYABATI KOER.
28 I. C. 567 : 21 C. L. J. 279.

——S. 109—*Final order—Order of remand*

An order of remand merely remitting the case for retrial on the merits without deciding any question as to the right in dispute is not a final order and is not appealable. (*Jenkins, C. J. and Mookerjee, J.*) KRISHNA CHANDRA GHOSH *v.* RAM NARAIN SINGH. 21 I. C. 430 : 18 C. L. J 124.

——S. 109—*Final Order—Privy Council appeal—Order of High Court in revision, reversing order granting leave to sue in* forma pauperis *if a final order—Appeal to Privy Council, if lies.*

An order of the High Court in revision, which reverses the order of the lower court entitling a person to sue *in forma pauperis* is a 'final order' and an appeal from it lies to the Privy Council, where the application is rejected on the ground

that the plaint showed no cause of action and not on the ground that the petitioner is not a pauper. (*Mookerjee and Caspersz, JJ.*) HARISH CHANDRA *v.* NAWAB BAHADUR OF MURSHIDABAD.
13 C. L. J. 688 : 11 I. C. 65 : 15 C. W. N. 879.

——S. 109 (a) and (c)—*Final order.*

An order by the High Court refusing the stay of execution under O, 41, R. 5 is not a final order passed on appeal within the meaning of S, 109 (*a*) nor is it a case covered by S, 109 (*c*). (*Mookerjee and Caspersz, JJ.*) SHRINBASH PROSAD SINGH *v.* KESHO PROSAD SINGH.
10 I. C. 444 : 13 C. L. J. 681.

——S. 109 (a)—*Final order.*

A final order in S. 109 (*a*) means an order which finally decides any matter directly at issue in the case in respect of the rights of the parties. An order appointing a receiver is not a final order. (*Mookerjee and Caspersz, JJ.*) MUSAJI *v.* AHMED MUSAJI MAHOMED. 10 I. C. 439: 13 C. L. J. 507.

——S. 109—" *Final order.*

" Final order" under S. 109 is one which finally decides any matter directly at issue in respect of the rights of the parties. (*Mookerjee and Cox, JJ.*) SECRETARY OF STATE FOR INDIA *v.* BRITISH INDIA-NAVIGATION CO. 13 C. L. J. 90 : 9 I. C. 183 : 15 C. W. N. 848.

—— S. 109—*Final order.*

An order of remand is interlocutory and therefore not subject of appeal to His Majesty in Council; it can be a final order if it decides some cardinal point in the suit but an order of remand which merely decides that a suit is maintainable in the form in which it is brought is not final. (*Scott-Smith and Broadway, JJ.*) MEHRCHAND *v.* LABHU RAM. 60 I. C. 522: 2 Lah. 106.

——Ss. 109, and 110—*Final order—Meaning of—Suit for dissolution of partnership and accounts.*

To find out whether an order is a "final order" within S, 109, C. P. C, it is the effect of the order as determining the disputed right of a party not as formally concluding the proceedings which must be regarded as decisive. Where a suit for dissolution of partnership and accounts was dismissed as barred by limitation by the trial court but on appeal the High Court reversed that decision and remanded the case for the passing of a preliminary decree. *Held* that the order of the High Court as it finally declared plaintiff's right to an account, was a final order and was therefore appealable to the Privy Council. (*Oldfield and Ramesam, JJ.*) SATHAPPA CHETTY *v.* SUBRAMANIAN CHETTY,
16 L. W. 718 : 43 M. L. J. 758 : 71 I. C. 334 : 31 M. L. T. 385 (H.C.) : 1922 M. 510.

——S. 109—*Final order—Remand by High Court—Judgment, final as regards one of the properties only—Leave, if can be granted.*

When the High Court on appeal remanded a suit to the Lower Court for further trial on the merits, it would not amount to a final judgment within S. 109 cl. (a) to enable leave being granted to appeal to the Privy Council. When every issue of fact has been found by the Appellate Court and the remand is directed solely with a

C. P. CODE (V OF 1908), S. 109—Final order.

view to give the consequential reliefs dependent upon the conclusions of the Appellate Court, the judgment would be final but it will not necessarily be final though the remand is not on a preliminary point. Leave will not be granted when the judgment is final only regarding one set of properties in dispute but not about the other. (*Ayling and Seshagiri Ayyar, JJ.*) MANGAYA *v.* VENKATARAMANAMURTHY. **48 I.C. 132: (1918) M W. N. 844.**

——**S. 109**—*Final order—Remand order—Preliminary point—Leave to appeal to Privy Council—If could be given.*

Where the High Court remanded a case as having been decided on an erroneous view of the pleading and another on account of a wrong application of O. 2, R. 2, C. P. C. both were remand orders on a preliminary point. There being no final orders, leave to appeal to Privy Council was refused. (*Miller and Sadasiva Aiyar, JJ.*) NAYARI VENKATARANGA ROW *v.* KEESARA VENKATARAMA NARASIMHA RAO.

38 Mad. 509 : 14 M. L. T. 560 : (1914) M W. N. 64 : 21 I. C. 842 : 26 M. L. J. 96.

——**S. 109 and O. 41, R 23**—*Final order—Remand order—If can be considered in appeal from final decree on remand—Appeal to His Majesty in Council—If lies from order of remand.*

An order of remand under O 41, R. 23 C. P. C. is not a final order within S. 109 (*a*) and is not appealable to His Majesty in Council. An order under O. 41, R. 23 cannot be reconsidered in a subsequent appeal from the decision on remand. 25 M. L, J. 148 P. C. dist. (*Prideaux and Kotval, A. J. Cs.*) SULTAN BEG *v.* CHUNNILAL MALURAM.

46 I. C. 922.

——**S 109**—*Final order, meaning of—Order determining the competency of a person to apply is not final order.*

An order to be final must finally determine the rights of the parties. An order which only determines the competency of an incorporated body as a judicial person, to apply for probate but does not determine whether it would be entitled to a grant of it if it applies is not final within S. 109. (*Lindsay, J. C. and Wazir Hasan A. J. C.*) SRI KRISHNA DAS *v.* BENARES HINDU UNIVERSITY.

60 I. C. 208 : 23 O. C. 324

——**S. 109 (a)**—*Final order—Remand.*

Where an appellate court reverses the decree of the lower court which had dismissed the suit on the plea of limitation and remands it for retrial the order of remand was a final order within S. 109 of the C. P. Code. Having regard to the nature of the questions involved in the appeal and the value of the subject matter of the suit, leave to appeal to His Majesty in Privy Council should not be refused. (*Kanhaiyalal and Daniels, A. J. Cs.*) HYDER MEHDI *v.* BADSHAH KHANAN.

6 O. L. J. 270 : 49 I. C. 520 : 21 O. C. 336.

——**S. 109**—"*Final order*"—*Meaning of order of remand,*

An order of remand by the High Court directing the disposal on the merits of a suit dismissed by the Court below on preliminary issues without taking evidence is not a final order under S. 109

C. P. CODE (V OF 1908), S 109—Final order.

C. P, C. because such an order has no effect on the ultimate decision of the case. (*Kanhaiya Lal and Stuart, A. J. Cs.*) RAGHUBAR DAYAL *v.* CHAMPA KUNWAR. **33 I. C. 756 : 43 I. C. 290 : 19 O. C. 36 : *See* also (1918) Pat 1 : 4 P. L. W. 342.**

——**S. 109, cl. (a)**—*Final order—Privy Council appeal—Order rejecting an application for review, if appealable.*

An order rejecting an application for review is not an order appealable under S. 109 (*a*). (*Kanhaiya Lal and Sabonadaire, A, J. Cs*) MAHABIR BAKSH SINGH *v.* SHEORAJ SINGH.

22 I. C, 259 : 16 O, C, 264.

——**Ss. 109 and 110**—*Final order—Substantial question of law—Co-decree holder allowed to join as executing decree holder.*

The High Court declined to interfere in revision with an order of the lower court allowing a co-decree holder to join in executing the decree. On an application for leave to appeal to His Majesty in Council. *Held* that the order of the High Court was not a final order determining the rights of the parties in any matter in controversy between the parties and that leave to appeal should be refused. (*Miller, C.J. and Mullick, J.*) PRAKASH CHANDARA SARKAR *v.* BRINDABAN CHANDRA SARKAR,

4 U. P. L. R, (Pat) 93 : 3 Pat. L, T. 781 : 1922 P. 611 : 67 I. C. 911 : 1922 Pat, 296.

——**S. 109**—*Final order—Order of Subordinate Court dismissing a partition suit—High Court's order setting aside,*

An order of the High Court setting aside an order of the Subordinate Court dismissing a partition suit for default after preliminary decree has been passed is a final order within S, 109. (*Miller, C. J. and Adami, J.*) LACHMI NARAIN *v.* BAL MUKUND,

2 Pat. L. T, 155 : 60 I, C, 479 : 6 Pat. L. J. 116.

——**S. 109**—*Final order—Order dismissing an appeal.*

No appeal lies from an order dismissing an appeal in default of the appellant's compliance with the rules of the Court as to the composition of the paper book in the case, (*Miller, C J. and B. K. Mullick, J*) RAJENDRA KISHORE *v.* KAMAKHYA NARAIN SINGH.

2 Pat. L. T. 112 : 5 P. L. J. 719 : 60 I,C. 285 : 1921 Pat. 97.

——**Ss 109 (a), 2 and 47**—*Final order—Decision on jurisdiction of Court to execute decree, if a final order—Leave to appeal.*

An order of the High Court, holding that the court below had jurisdiction to execute a decree and directing the subordinate court to proceed with the execution is not a final order nor is the order a decree under Ss. 47 and 2 C. P. C. (*Miller C. J. and Coutts, J.*) GIRWAR PRASAD SINGH *v.* RAMESWAR LAL BHAGAT.

52 I. C. 461 : 4 Pat. L. J, 461.

C. P. CODE (V OF 1908), S. 109—Final order.

———S. 109, O. 41, R. 23—*Final order—Preliminary point--Decree reversed—Not a final order—Not appealable.*

Where a High Court sets aside a decision of the lower Court that the subject matter of a suit being *res judicata* cannot be heard again and directs a trial on the merits of the case, the order is nothing more than an ordinary order of remand deciding no question except that the bar of *res judicata* does not exist and such an order not being a final order cannot be appealed against in the Privy Council. (*Chamier. C. J. and Sharfuddin, J.*) G. P. DANBY *v.* TAFAZUL HOSSAIN
1918 Pat. 1 : 45 I. C. 290 : 4 P. L. W. 342.

———S. 109—*Final order—Appeal to Privy Council—Decree—Execution proceedings—Order in—Remand.*

A decision on a question relating to execution, discharge or satisfaction of a decree is a decree provided the judgment conclusively determines the rights of the parties. An order of remand can be appealed against to His Majesty in Council provided the order decides a cardinal point in the case. (*Miller, C.J., and Chapman, J.*) BAJNATH GOENKA BAHADUR *v.* RAMESHWAR SINGH.
3 Pat. L. J. 339 : 5 Pat. L. W. 45 : 45 I. C 192 : 1918 Pat. 81.

———S. 109—*Final order—Prob. and Admn. Act, S. 86--Order by High Court on appeal.*

An order passed by the High Court upon an appeal made to it under S. 86 of the Prob. and Admn. Act is final and no appeal lies to the Privy Council 40 Cal. 21 Rel. (*Twomey, C.J. and Maung Kin, J.*) POKIN *v.* MA SEIN TIN **12 Bur. L. T. 87 : 51 I. C. 596 : 10 L. B. R. 22.**

Fit case.

———Ss. 109 and 110--*Fit case--Certificate conclusive—Order in Council about—Conclusiveness repealed by another—Effect.*

The ruling provision as to certificates of value applicable, at the time the appeal was filed, was No. 2 of Sch. 1 Order in the Council of 10th April 1838, which as to the effect that the certificate shall be deemed conclusive of value and not liable to be questioned on appeal by any party. As therefore on the date of the appeal this order was operative and accordingly governed the case, so far as the Board is concerned, the certificate is conclusive. As to the certificate subsequent to the date of the Order in the Council of 9th February of 1920, it is not conclusive and the Board is free to differ from High Courts as to value of the subject-matter. (*Lord Shaw*). RATHA KRISHNA AYYAR *v.* SUNDERSWAMY IYER.
49 I. A. 211 : 45 Mad. 475 : 43 M. L. J. 323 : 27 C W N 1 : 20 A. L. J. 937 : 36 C. L. J. 450 : 16 L. W. 18 : 74 I. C. 584 : 31 M. L. T. 31. (P. C.) : 1922 P. C. 257.

———S. 109 (c)—*Fit case—Certificate under—Nature.*

A certificate granted S. 109 (c) must show on its face that the discretion conferred by that section has in fact been exercised. (*Lord Buckmaster.*) RADHAKRISHNA AYYAR *v.* SWAMINATHA AIYAR.
44 Mad. 243: 48 I. A. 31: 19 A. L. J. 161: 23 Bom. L. R. 718: 25 C. W. N. 630: 40 M. L. J. 229: 33 C. L. J. 277: 13 L. W. 321: 29 M.L.T. 418: 60 I.C. 85: (1921) M.W.N. 119 (P.C.).

C. P. CODE (V OF 1908), S. 109—Fit case.

———Ss. 109 and 110—*Fit case—Appeal—Valuation of suit above Rs.* 10,000—*Appeal valued at less than Rs.* 10,000—*Leave—Question of Law.*

If the original valuation of a suit exceeded Rs. 10,000 but on appeal by one of the defts. to the High Court, the contest was for a sum less than Rs. 10,000, the case for the purpose of leave of appeal to His Majesty in Council does not come within S. 110, C. P. C. The question whether the omission to implead one of the plffs. as party in an appeal to the High Court, is fatal to the appeal is not a question of law to justify a certificate that the case is otherwise a fit one for appeal to His Majesty in Council. (*Mears, C. J, and Bannerjee J.*) SHEIK MUHAMMED HASHIM *v.* RAM SAHAI.
54 I. C. 450.

———S. 109—Sp. Rel. Act, S. 45—*Fit case—Letters Patent Bom. Cl.* 39.

Where the petitioners applied to the High Court for an order under S. 45 of the Sp. Rel Act directing the Chief Revenue Authority to refer a case for the decision of the High Court under S. 51 of the Income Tax Act, 1918 and the application was refused by a Division Bench of the High Court, leave to appeal to the Privy Council ought to be granted, where the Division Bench entertained an appeal from the judgment of the Single Judge of the High Court. (*Macleod, C. J. and Shah, J.*) ALCOCK ASHDOWN & Co., *v.* CHIEF REVENUE AUTHORITY.
64 I C. 959: 23 Bom. L R. 1132.

———S. 109 (c)—*Fit case.*

Application of S. 109 (c) of the C. P. Code applies to cases involving questions of public or private importance or precedents governing numerous other cases. Mere questions of law are not sufficient. (*Scott, C.J. and Beaman, JJ.*) HIRJI BHAI *v.* JAMSHEDJI. **21 I.C. 783: 15 Bom. L.R. 1021.**

———S. 109 (c)—*Fit case.*

Clause (*c*) of S. 109 is intended to cover special cases and the discretion to be used for granting the certificate is judicial discretion. (*Mookerjee and Caspersz, JJ.*) MOHOMED MURAJI *v.* AHMED MUSAJI. **10 I. C. 439 : 13 C. L. J 507.**

———S. 109 (c)—*Fit case—Construction of agreement--Question affecting rights of considerable private importance*

The construction of an agreement which would affects rights of great public or private importance is a matter regarding which leave to appeal to the Privy Council can be given under S. 109 (c). (*Schwabe, C. J., and Coleridge, J.*) NATTU KESAVA MUDALIAR *v.* U. S. GOVINDACHARIAR.
18 L. W. 348: 1924 M. W. N. 3: 76 I. C. 811: 45 M. L. J. 514 : 1924 M. 231.

———Ss. 109 (c) and 110—*Fit case—Question of general importance—Valuation—Plaintiff if can go behind his own valuation in the plaint and appeal—Indirectly affecting property over* Rs. 10,000 *in value.*

To come within S. 109 (c, C. P. Code it must be shown that the decision sought to be appealed against might result in a precedent governing numerous other cases or decides a right of great public or private importance. 21 I. C. 783, Ref.

C. P. CODE (V OF 1908), S. 109—Fit case.

The question whether a decree involves in directly a claim or question to property worth more than Rs. 10,000 in value must be decided with reference to actual circumstances at the time and not to circumstances which are remote, and not in particular to a mere possibility that future suits as to all or part of a large extent of the property alleged to be concerned may be instituted at some time in the future. 15 L. W. 140; 24 A. 236 ; 35 A. 445 ; 8 C. 210: 4 C. L. R. 125 Ref. Where the plaintiffs had estimated the market value of the property in dispute at Rs. 2,500 for purposes of court fee in the Court of first instance and on appeal, they could not be allowed to change their valuation for the Privy Council. (*Oldfield and Spencer, JJ.*) ALAGAPPA CHETTY *v.* NACHIAPPAN.
16 L. W. 517: 43 M. L. J. 728 : (1922) M. W. N. 683 31 M. L. T 335: (H. C.) : 69 I. C. 385 : 1923 M. 125.

——Ss. 109 and 110—*Fit case—Valuation—Conditions for grant of certificate.*

Under para. 1 to S. 110, the real value of the right of an easement, which is the subject matter of the suit, for the purpose of an appeal to the Privy Council can only be ascertained on the basis of the detriment or injury which the party claiming the right would maintain by its being negatived. Under para. 2 to S. 110, C. P. C. the suit must involve rights and claims to property worth Rs. 10,000 and upwards; that the rights affect properties whose value is Rs. 10,000 and upwards is not sufficient. Under para 3 to Sec. 110 the case must involve a question of law of general interest or importance and not the application of the law to the particular facts of the case. *Per Sadasiva Iyer, J.*—'Property' in para 2 means rights in property inferior to full ownership where such rights alone are in dispute. (*Sadasiva Iyer and Spencer, JJ.*) APPALA RAJA *v.* RANGAPPA NAICKER. **(1917) M. W. N. 414: 6 L. W. 12: 40 I. C. 680 : 33 M. L. J. 481.**

——S. 109, Cl. (a) and (c)—*Fit case—Leave to appeal to the Privy Council - Order of remand—When appealable.*

Ss 97 and 105 of the C. P. Code do not regulate the right of appeal to His Majesty in Council, for an order which the Code declares to be final may yet be open to an appeal to His Majesty in Council, if the effect of the order is to negative the right of a party to continue the suit. Such an order would have the effect of finally determining the rights of the parties. The nature of the order in each case would determine whether it was final or interlocutory. If the order finally disposes of the rights of the parties, it ought to be treated as final order, but if it did not it is an interlocutory order from which no appeal could be entertained. Where the order in question did not finally determine the rights of the parties but merely disposed of a subsidiary issue, the determination of which would require the continuation of the trial, *held* that if the suit ultimately failed on the merits an appeal to the Privy Council might become wholly unnecessary and that leave to appeal to the Privy Council could not be granted, To determine whether special leave should be given it must be borne in mind that what is contemplated in S. 109 (c) of the C. P. C. is a class of

C. P. CODE (V OF 1908), S. 109—Fit case.

cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or in which, while the right in dispute is not exactly measurable in money, it is of great public or private importance. Cases reviewed. (*Kanhaiya Lal, J.C. and Dalal, A.J.C.*) MAHOMED KARIM KHAN *v.* SADIQ HUSAIN. **71 I. C. 339: 10 O. L. J 289.**

——S. 109 (c)—*Fit case—Applicability—No question of general interest.*

Where there is no question of general interest but merely a question affecting the parties alone S. 109 (*c*) C. P. C. is inapplicable, (*Kanhaiya Lal, and Daniels, A.J.C.*) SHANKAR BAKSH SINGH *v.* UDIT NARAIN SINGA.
61 I. C. 131: 8 O. L. J. 1.

——S. 109 (c)—*Fit case—Different conclusions on vital matters—Leave to appeal.*

Under S. 109 (*c*) C. P. C. a High Court can, if convinced that a case is a fit one for appeal to the Privy Council, grant leave to appeal in any case even upon a question of fact. Where two Judges have arrived at diametrically opposite conclusions on the vital question on which the suit should be decided, the case is a fit one for appeal. (*Stuart and Lyle, A C.J.*) SHEO BAHADUR SINGH BENI BAHADUR SINGH **54 I.C 828: 6 O. L. J. 664.**

——S. 109 (c)—*Fit case—Question of general interest.*

Where a plff's. application for setting aside the order of dismissal for default was rejected by both the courts below and the High Court in revision ordered re-admission of the case, the defts. applied for leave to appeal to Privy Council. *Held*, that no question of law of general interest or importance was involved and a special certificate for appeal to Privy Council could not be granted (*Piggott, J. C. and Lindsay, A. J. C.*) JAIDAYAL *v.* BRIJ NATH PRASAD. **24 I. C. 620.**

——S. 109—*Fit case—Legal Practitioner—Refusal to enrol.*

An order of High Court refusing to enrol a person as legal practitioner comes under its disciplinary or administrative powers and no leave to appeal to His Majesty can be granted. 4 Pat. L. J. 423 foll. (*Miller, C.J. and Adami, J.*) SUDHANSU BALA HAZRA *In re*, **1 P. 590 : 4 Pat. L. T. 229 : 70 I. C. 172 : 1922 P. 603.**

——S. 109—*Fit case—Construction of statute.*

A decision upon the construction of a section of a Tenancy Act, incidentally affecting the right of those who have tenures subject to the Act, is not enough to entitle a High Court to grant special leave to appeal to His Majesty in Council under S. 109 of the Code. (*Miller, C. J. and Adami, J.*) MRITUNJOY *v.* BALMUKUND.
2 Pat. L. T. 657: 61 I. C. 663: 6 Pat. L. J. 125.

——S. 109—*Fit case—Question of law—Whether leave can be granted.*

The mere fact that the appeal involves questions of law does not bring the case under S. 109 (*c*) : it must involve decision of matters of public

C. P. CODE (V OF 1908), S. 109—Fit case.

or private importance. The question whether a suit is maintainable to set aside *ex parte* decree obtained by perjured evidence has been now settled : if plaintiff's application under O. 9, R. 13 is dismissed, he is debarred from re-opening the controversy as there must be some finality to litigation. (*Miller, C. J. and Adami, J.*) KRIPASINDHU PANIGRAHI *v.* NANDA CHARAN PANIGRAHI.

1 Pat. L. T. 239: 56 I. C. 615: 1920 Pat. 209.

——S. 109 (c)—*Fit case—Leave to appeal to Privy Council, when certificate granted.*

A certificate for leave to appeal to Privy Council should be granted when the decision is of general importance or affects a large body of persons or threatens civil or religious rights of a community and not when it is merely to serve as a precedent for subsequent cases. (*Pratt, J. C. and Kemp, A. J. C.*) TAHILRAM MANIRAM *v.* J. A. BLACKWELL. **23 I. C. 793: 7 S. L. R. 92.**

"On appeal"—Meaning of.

——S. 109 (a)—*On appeal, meaning of.*

A decree of the High Court dismissing an appeal with costs on the ground that it was out of time, after refusing an application under Limitation Act, S. 5, is one 'passed on appeal'. (*Sanderson, C. J. and Woodroffe, J.*) PROMOTHO NATH ROY *v.* LEE. **62 I. C. 216: 33 C. L. J. 128.**

——S. 109—*'On appeal'—Meaning of.*

An order refusing to admit an appeal as time-barred is an order "on appeal" within S. 109. (*Johnstone, J.*) BRIJ TUDAR SINGH *v.* KANSHI RAM. **127 P. W. R. 1917: 42 I. C. 893 : 131 P. L. R. 1917.**

Substantial question of Law.

——S. 109—*Substantial question of law.*

Position of holder of certificate under the Succession Certificate Act, 1889, is a "substantial question of law" to support grant of leave to appeal to the Privy Council. (*Richards. C. J. and Rafique, J.*) NAJMUNNISA BEEBI *v.* AMINA BIBI.

38 All. 188: 33 I. C. 345: 14 A. L. J. 143.

——S. 109 (c)—*Substantial question of law—Provincial Insolvency Act, Ss.* 15, 46 *and* 47.

A petition of insolvency was dismissed by the District Judge and an appeal to the High Court was dismissed under O. 41, R. 11. An application for leave to appeal to the Privy Council was granted as the assets and debts exceeded Rupees ten thousand and as the question of competency of the District Judge to dismiss the petition under S. 15 of the Act was a substantial question of law. (*Jenkins, C. J. and Mullick, J.*) CHATTRAPAT DUGAR *v.* KHARAJ SINGH. **40 Cal. 685: 17 C. L. J. 547: 19 I. C. 435 ; 17 C. W. N. 752.**

——S. 109 (c), 110 and 45, R. 4—*Substantial question of law—Different suits involving substantially same questions—Separate judgment in the first Court—Same judgment on appeals—Latter judgment.*

Two suits involving substantially the same questions were decided by distinct judgments in the first Court. There were two appeals to the High Court which were disposed of originally by one judgment. Afterwards in one of the appeals a

C. P. CODE (V OF 1908), S. 109—Substantial question of law.

review petition was filed and eventually that appeal was reheard on review and another judgment was given which adopted the original judgment in appeal to the extent to which it still stood. On an application for leave to appeal to the Privy Council in the High Court in the latter case and for consolidation for the purpose of pecuniary valuation. *Held*, that consolidation could not be ordered under O. 45, R. 4 of the Civil Procedure Code, as the judgments which decided the suits were different in the first Court and on appeal. The fact that leave to appeal was given in the other case does not bring the latter case within the terms of S. 109 (c) of the Code. 5 I. C. 583 not followed. For leave to appeal to the Privy Council being granted under S. 109 (c) of Code some substantial question of law of general importance must be involved in the case. 24 A. 174: 30 M. 185 Referred to. (*Oldfield and Krishnan, JJ.*) B. RAJA RAJESWARA SETHUPATHI *alias* MUTHU RAMALINGA SETHUPATHI AVERGAL *v.* ARUNACHALAM CHETTIAR. **44 M. L. J. 424: 73 I. C. 217 (2) : 1923 Mad. 602.**

——Ss. 109 (c) and 110—*Substantial question of law—Land tenure—Forfeiture on alienation.*

The question whether the permanent tenures known asKaramkuri and Adimayavana in Malabar have the incident of forfeiture on alienation attached to them by custom is a substantial question of law and one of general interest in Malabar sufficient to justify the grant of leave to appeal to the Privy Council even though the valuation is less than Rs. 10,000. 45 Mad. 394 followed. (*Krishnan and Venkatasubba Row, JJ.*) ZAMORIN OF CALICUT *v.* KANNAN NAIR.

17 L. W. 445 : 72 I. C. 918: 1923 Mad. 443.

——S. 109 (c)—*Substantial question of law—What is—Costs of appeal to Privy Council—Order as to.*

S. 109 (c) of the Code of Civil Procedure, contemplates a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or, in which, while the right in dispute is not exactly measurable in money, it is of great public or private importance.

Where the point in issue appears to be of general importance to the appellant but not of sufficient importance to the proposed respondent to warrant the High Court in putting him to the expense of an appeal to the highest tribunal, the High Court must refuse leave to appeal to His Majesty in Council.

The High Court has no power, in granting leave to appeal, to impose a condition that the appellant should, in any event, pay all the costs of the other party. (*Schwabe, C. J., Coutts Trotter and Kumaraswami, Sastri, JJ.*) RAJA RAJESWARA SETHUPATHI *v.* TIRUNEELAKANTAM SERVAI.

44 M. L. J. 217 : 17 L. W. 775 : (1923) M. W. N. 415 : 32 M. L. T. (H. C.) 126: 72 I. C. 250 : 1923 Mad. 232.

——S. 109 (c)—*Substantial question of law.*

To come within S. 109 (c), C. P. Code, it must by shown that the decision sought to be appealed against might result in a precedent governing numerous other cases or decides a right of great

C. P. CODE (V OF 1908), S. 109—Substantial question of law.

public or private importance. 21 I. C. 783 Ref. (*Oldfield and Spencer, JJ.*) ALAGAPPA CHETTY *v.* NACHIAPPAN. **16 L. W. 517 : 1922 M. W. N. 683 : 43 M. L. J. 728 : 31 M.L.T. 335 (H.C.) : 69 I C. 385 : 1923 Mad. 125.**

———**Ss. 109 (c) O. 45, Rr. 2, 3 and 8**—*Substantial question of law—Appeal to Privy Council—Leave.*

Leave to appeal to the Privy Council in cases below the appealable value, ought not to be granted unless a substantial question of law is involved. 24 A. 174 (P. C.) : 27 B. 415 : 30 M. 185, foll. (*Sadasiva Iyer and Napier, JJ.*) AYYA RAGHUNATH *v.* THIRUMALAI ECHAMBADI. **18 M. L. T 366 : 2 L. W. 992 : 31 I. C. 46 : (1915) M. W. N. 916.**

———**S. 109 (c)**—*Substantial question of law—Question of general importance.*

In order to obtain leave to appeal to the Privy Council where the valuation is not above Rs. 10, 000 application must show that the questions involved are generally important in the way that the decision of them will affect a large number of persons. (*Batten, J. C, and Haliffax, A. J. C.*) MOHANLAL BALBHADRA *v.* BISSESARDAS. **73 I. C. 221 : 1923 Nag. 272.**

———**S. 110.**

Affirming or Reversing Judgment.
Connected appeals, Suits and Cross. Appeals.
Decree or consent decree.
Disciplinary Proceedings.
Leave to appeal.
Substantial question of law.
Valuation.

Affirming or Reversing Judgment.

———**S. 110**—*Affirming judgment—Modification of decree in favour of party seeking to appeal—Appeal directed against part which was affirmed.*

A decree on a mortgage bond which was passed by the Court of first instance was affirmed in appeal with a modification as to the rate of interest : the mortgagor claimed a right to appeal to the Privy Council on the basis of this modification, but wanted to impeach the genuineness and validity of the mortgage deed, as to which both the Courts has concurred.

Held, the subject matter of the appeal not being the modification as regards interest, and there being an affirmance of the decree of the Court below on the question of the validity of the mortgage deed, the application for leave to appeal must fail. (*Mears, C.J. and Banerji, J.*) KAMAL NATH *v.* BITHAL DAS. **44 A. 200 : 20 A. L. J. 9 : L. R. 3 A. 83 : 64 I. C. 916 : 1922 All. 89.**

———**S. 110**—*Affirming judgment—Modificaon of First Court's decree is not affirmation.*

A decree of the High Court which modifies that of the Lower Court to whatsoever extent is not a decree of affirmance within S. 110 of the Code and the party prejudiced is entitled to the grant of leave to appeal to the Privy Council. (*Mears, C. J. and Gokul Prasad, J.*) BHAGWAN SINGH *v.* ALLAHABAD BANK. **43 All. 220 : 19 A. L. J. 3 : 64 I. C. 3 : 2 U. P. L. R. (A.) 363.**

C. P. CODE (V OF 1908), S. 110—Affirming judgment.

———**S. 110**—*Affirming Judgment—Appeal dismissed for default—Effect.*

A decree of the High Court dismissing an appeal for want of prosecution is a decree affirming the decision of the Court below within S. 596, C P.C, 20 A. 367, Foll. (*Tudball and Rafique, JJ.*) RAM KARAN *v.* MADHUKAR PRASAD. **29 I.C. 469 : 13 A. L. J. 623.**

———**S. 110**—*Affirming judgment—Modification of Lower Court's decree with consent of Vakil for appellant.*

Where the High Court varied a decree of the Lower Court at the instance of the Vakil for all the appellants with the result that one of the appellants was benefited at the expense of all the appellants and it was not suggested that the Vakil in making the application made any reservation as to the rights or position of the other appellants. *Held*, that the decree was a decree of affirmance. (*Sanderson, C. J. and Richardson, J.*) UMA CHURN *v.* KANAI LAL. **66 I. C. 621 : 25 C. W. N. 775.**

———**S. 110**—*Affirming judgment — High Court—Variation of decree as to costs.*

Where the High Court dismisses an appeal on the merits, but varies the Lower Court's decree as to costs, the decree is still one of affirmance and a party is not entitled to appeal to the Privy Council. (*Sanderson, C. J. and Mookerjee, J.*) CHAITANYA CHARAN *v.* MOHAMMED YUSUF. **34 C. L. J. 299 : 66 I. C. 407 : 1922 Cal. 316.**

———**S. 110**—*Reversing Judgment—Court immediately below—Meaning of—Letters Patent, Cls.* 15 *and* 36.

A reversal by the High Court in an appeal under cl. 15 of the judgment of a single judge of the High Court, setting aside the decree of a lower appellate court has the effect of affirming the decision of the latter court. *i. e.*, the court immediately below within the meaning of S. 110. (*Jenkins, C. J. and Chatterjea, J.*) DEBENDRA NATH DAS *v.* BIRUDHENDRA MANSINGH. **33 I. C. 745: 43 Cal. 90.**

———**Ss. 110 and 149**—*Affirming Judgment—Dismissal for insufficiency of court fee.*

A decree of the High Court dismissing an appeal on account of insufficiency of Court fee is one affirming the decree of the first Court within S. 110, C. P. C. A refusal by the High Court to extend time under S. 149, C. P. C. is not a question of law. (*Scott-Smith and Wilberforce, JJ.*) MUSAMMAT SATTO *v.* AMAR SINGH, **2 U.P.L.R. (L) 27: 1 P. L. R. 1920 : 54 I. C. 400: 16 P. W. R. 1920.**

———**S. 110 and O. 45, R. 2**—*Affirming judgment.*

Where the Chief Court affirms in part a decree of the District Judge, a petition for leave to appeal to the King in Council cannot be granted, as the decree of the Chief Court is a decree of "affirmance" within the meaning of S. 110 of the Code. (*Rattigan and Le Rossignal, JJ.*) BHAGAT SINGH *v.* JAIRAM. **22 P. R. 1915: 19 P. W. R 1915: 26 I. C. 402: 66 P. L. R. 1915**

C. P. CODE (V OF 1908), S. 110—Affirming judgment.

——S. 110 (3)—*Affirming judgment—Variation in decree regarding costs.*

A variation, not touching the merits of the case but relating only to costs, does not make the decree anything other than an affirming decree. (*Spencer and Krishnan, JJ.*) VADIVELU AMMAL *v.* RAJARATNA MUDALIAR. **30 M. L. T. 337 (H. C.) 16 L. W. 262: 1923 M. 30.**

——S. 110—*Reversing judgment—Partial reversal, whether confirming decree.*

Partial reversal of a decree is not confirming of a decree. Benefit of doubt must go to the petitioner. (*Ayling and Phillips, JJ.*) VIKRAMA DEO GARU *v.* MAHARAJA OF JAIPUR. **18 M. L. T. 387 : 31 I. C. 272 : (1916) 1 M. W. N. 122.**

——S. 110 and O. 45, R. 3 (1)—*Affirming Judgment—Substantial question of law—Appeal to Privy Council.*

Where a High Court has affirmed the decree of a Lower Court and the value of the subject-matter is above Rs. 10,000 it is essential for granting leave to appeal to Privy Council that some substantial question of law must be involved. (*Sadasiva Iyer and Napier, JJ.*) MULRAJU LAKSHMI VENKAYAMMA RAO *v.* VENKATADRI APPA RAO. **30 I. C. 372.**

——S. 110—*Affirming Judgment—Dismissal of time barred appeal.*

Where the result of an appellate Court's order lets the lower court's order stand unaltered, it is one affirming the decision of the lower Court within the meaning of S. 110. The order dismissing an appeal declining to exercise the discretionary power to excuse delay in preferring an appeal within time is one affirming the decision of the lower Court, and in order to certify such orders as fit for appeal to the Privy Council, a substantial question of law must be involved in the dismissal order itself. The legal question in such appeals to be determined will be whether they are right or wrong. The involving of a substantial question of law in the original decision in such cases is insufficient to hold that the legal question is involved in the appeal too. (*Miller and Abdul Rahim, JJ.*) KRISHNASWAMI PANEKONDAR *v.* RAMASWAMI CHETTIAR. **23 M. L. J. 219: 12 M. L. T. 260: 16 I. C. 486: (1912) M. W. N. 962.**

——S. 110—*Affirming judgment.*

The decision of the appellate court affirms the decision of the court below if the decree is affirmed, even though the appellate court may have reached the same conclusion on different grounds. (*Daniels and Lyle, A. J. Cs.*) MAHOMED ALI KHAN *v.* GHAZANFAR ALI KHAN. **70 I. C. 283: 25 O C. 277 : 1923 O. 49.**

——S. 110—*Affirming judgment.*

It is enough for the purpose of S. 110 of the Code, for the High Court in order "to affirm the decision of the Court below" to affirm the decree of the Trial Court, even though on grounds quite different from those of the trial Court. (*Kanhaiya Lal and Daniels, J. Cs.*) AHMAD MIRZA BEG *v.* ABADI BEGUM. **63 I. C. 292: 24 O. C. 164.**

C. P. CODE (V OF 1908), S. 110—Connected appeals.

—— —— S. 110—*Reversing judgment—Modification of part of decree.*

Where the decree of the lower Court is not wholly affirmed by the judgment of the High Court but is varied only in one particular and the value of the subject matter in appeal is above Rs.10,000 the party is entitled as of right to a certificate of appeal to His Majesty in Council. 8 C. W. N. 294, 62 P. W. R. 1908, not foll. 10 O. C. 65 foll. (*Evans and Piggott, A. J. Cs.*) NARPAT SINGH *v.* KALKA BUX SINGH. **9 I. C. 1040.**

——S. 110—*Affirming judgment.*

The word decision means the decision of the suit by the court. It is not necessary that the appellate court should also affirm the grounds of fact upon which the judgment was based. It is immaterial that appellate court comes to a different conclusion on the question of fact. (*Robinson, C. J. and Macgregor, J.*) SEN S. N. *v.* ABDUL AZIZ TAR MD. **1 Bur. L. J. 215 : 11 L. B. R, 410 : 1923 R. 55.**

Connected Appeals—Suits and Cross Appeals.

——S. 110 and O. 45, R. 4—*Connected Suits—Privy Council appeals—Certificate.*

Where in two connected suits the points are identical but one only exceeds Rs. 10,000 in value and is certified as fit for appeal to the Privy Council, the other suit should also be similarly certified though its subject-matter is less than Rs. 10,000 in value. (*Mears, C. J. and Gokul Prasad, JJ.*) BHAGWAN SINGH *v.* BHAWANI DAS, **43 All. 223 : 18 A. L. J. 1119 : 59 I. C. 794 : 2 U. P L R (All.) 411.**

——S. 110—*Cross appeals—No substantial question of Law.*

The Court of first instance decreed a suit in part and dismissed it in part. There were cross appeals by the plaintiffs and the defendants. The High Court decreed the defendant's appeal reversing the judgment and decree of the Court below. The plaintiff applied for leave to appeal against the judgment of the High Court reversing the first Court's decree and the application was granted. On an application for leave to appeal against the portion of the judgment affirming the first Court's decree. *Held*, that leave could not be granted inasmuch as there was no substantial question of law. (*Richards, C. J. and Tudball, J.*) CHIRANJILAL *v.* BEHARI LAL. **48 I. C. 124 : 16 A. L. J. 864.**

——S. 110—*Connected suits—Privy Council appeal—Leave to appeal—Grant of.*

Certain suits for declaration of ownership were tried together and were valued in all above Rs. 10,000 They being dismissed, an appeal was filed to the High Court in respect of one suit in which the claim was above Rs. 5,000. On the appeal being allowed, defendant applied for leave to appeal to Privy Council as a claim or question to property above Rs. 10,000 was involved. Leave was not granted as the value of the defendant's interest was less than Rs. 10,000. (*Richards, C. J. and Rafique, JJ.*) JAIKARAN *v.* JANKI SAHU. **33 I. C. 369 : 18 A. L. J. 1075.**

C. P. CODE (V OF 1908), S. 110—Connected appeals.

———S. 110—*Connected appeals—Certificate given in one.*

Where of two connected appeals arising in the same suit the High Court granted leave to appeal to the Privy Council in the appeal in which it reversed the decision of the Court below, the unsuccessful party in the other connected appeal in which the High Court confirmed the decision of the Court below was also held entitled under the special circumstances to get leave to appeal to the Privy Council and that this would be covered by the words "otherwise a fit one for appeal to the Privy Council." (*Richards, C. J. and Banerji, J.*) MAHOMED WALI KHAN *v.* MOHAMAD MOHIUDDIN KHAN. **37 All. 124 : 27 I. C. 378 : 13 A. L. J. 57.**

———S. 110—*Connected suits—Variation in part—Meaning of.*

Where there is part variation and part affirmation of a decree, it is not an affirmance within S. 110, C.P.C. In a joint decree granting damages and declaratory relief, both should be considered in deciding the value of the subject matter. Two decrees of the same court, between same parties but filling opposite characters, may be joined for granting certificate to appeal. 8 C. W. N. 294, Ref. (*Sanderson and Woodroffe, JJ.*) LEGAN DEO PROSAD SINGH *v*, D. G. REID. **50 I, C. 760 : 23 C. W. N. 582.**

———S. 110 and O. 45, R. 4—*Connected suits—Pecuniary valuation—Appeal to Privy Council.*

For the purposes of pecuniary valuation for an appeal to His Majesty in Council, cases tried together and decided by the same Judgment should be treated as consolidated if the fundamental question regarding the matter in such cases is common to all, notwithstanding the fact that the substantial question of law does not arise in all the cases. (*Mookerjee and Coxe, JJ.*) BANGA CHANDRA DHAV *v.* JAGAT KISHORE ACHARYYA CHOWDHURY. **10 I. C. 967 (1) : 13 C. L. J. 503.**

Decree or Consent Decree.

———Ss. 110 and 96—*Consent decree—No appeal.*

No appeal lies againt a consent decree to His Majesty in Council and leave to appeal cannot be granted. (*Miller, C. J. and Mullick, J.*) LACHMI NARAIN MARWARI *v.* BAL MUKUND MARWARI. **5 P. L. J. 383 : 1 P. L. T. 599 : 57 I. C. 245 (2) : 1920 Pat. 349.**

———S. 110—*Decree or Consent decree—Consent order.*

An order of the High Court passed after contest as to whether an order recording a compromise is valid, is not a consent order and if it otherwise complies with the requirements of law forms a fit subject for appeal to His Majesty in Council. (*Miller, C.J. and Adami, JJ.*) RAJ KISHORE DAS *v.* RAM GAULAM SAHU. **6 Pat. L. J. 171 : 62 I. C. 235 : 1921 Pat. 193.**

Disciplinary Proceedings.

———S. 110—*Disciplinary proceedings—Letters Patent (Cal.) cls. 10 and 39.*

S. 39 Letters Patent empowers the High Court to declare the fitness of an appeal in a non-criminal matter, if it is a final judgment or order, of

C. P. CODE (V OF 1908), S. 110—Leave to appeal.

the Court, made on appeal or in the first instance. A proceeding under cl. 10, Letters Patent does not fall under any of the jurisdictions specified in the Letters Patent, Cl. 39 and therefore no leave to appeal could be granted. (*Imam and Chapman, JJ.*) PUBLIC PROSECUTOR OF CALCUTTA *v.* PORESH CHANDRA GHOSE. **41 Cal. 734 : 15 C. L. J. 52 : 19 C. W. N. 593 : 22 I. C. 324.**

Leave to Appeal.

———S. 110—*Leave to appeal— Discretion—Exercise of.*

Where leave to appeal is granted the certificate granting leave should show on its face, that discretion of the Court was invoked and exercised. (*Lord Buckmaster.*) MAHARAJ BAHADUR SINGH *v.* BALCHAND CHOWDHURY. **25 C. W. N. 770 : 6 Pat. L. J. 163 : 2 P. L. T. 132 : 1921 M. W. N. 87 : 62 I. C. 320 : 13 L. W. 365. (P.C.).**

———S. 110—*Leave to appeal—Grounds--Point not allowed to be raised for the first time in second appeal—Appeal.*

In a second appeal arising out of a suit for specific performance filed on the last day of limitation a point was for the first time raised in the High Court that specific performance ought not to be granted as there was extraordinary delay in filing the suit and also because damages had been alternatively asked for. The Court refused the point to be raised at that late stage.

Held, the question of procedure involved was not a proper one for appeal to His Majesty in Council. (*Mears, C. J. and Piggott, J.*) OUDH NARAYAN SINGH *v.* KAULESHWER SINGH. **76 I. C. 516 : 1923 All, 463.**

———S. 110—*Leave to appeal — Decree of High Court partly affirming and partly reversing decree of lower Court.*

When a portion of the decree of the High Court was in reversal of the decree of the lower court and in favour of the applicant for leave to appeal to His Majesty in Council, and the remaining portion of the decree was in confirmation of the decree of the lower court and against the applicant for leave, he is not entitled to leave as a matter of right under S. 110, C.P. Code. 8 C.W. N. 294 : 20 A. L. J. 9 Ref. (*Mears, C. J. and Banerji, J.*) CHANDER SEKHAR *v.* MT. AMIR BEGAM. **66 I. C. 721 : 1922 All, 243.**

———S. 110—*Leave to appeal—New position.*

If the appellant takes up a new position while appealing to Privy Council leave cannot be granted. (*Mears, C. J. and Tudball, J.*) MAINA BIBI *v.* WASI AHMAD. **58 I. C 179 : 2 U. P. L. R. (A) 402.**

———S. 110—*Leave to appeal—Valuation—Indirectly affecting property—Question of public importance.*

It is not possible to hold that a decree directly or indirectly involves a claim or question respecting property of the statutory value where it is necessary to investigate the terms and conditions of leases in respect of lands which are not included in the suit. Before it could be held that a decision between a landlord and tenant involves a question of wide public importance, there should

C. P. CODE (V OF 1908), S. 110—Leave to appeal.

be some evidence that the rights of landlords and tenants in a locality or province are, generally speaking, dependent on the same facts as appear in the suit and that the terms of the leases regulating such leases are also similar. (*Sanderson, C.J. and Ghose, J.*) BUPENDRA NARAYAN SINGH *v.* NURPUT SINGH.

27 C. W. N. 204 : 1923 Cal. 451.

——— S. 110—*Leave to appeal* in forma pauperis.

The High Court has no jurisdiction to grant leave to appeal to the Privy Council *in forma pauperis.* (*Miller, C. J. and Chapman, J.*) RAMKISHEN LAL *v.* MAUNA KUMRI.

44 I. C. 731 : 3 Pat. L. J. 179.

[Also *Oldfield and Phillips, JJ.*) PADMAVATI *v.* SRINIVASA KAMPTHI.

42 Mad. 32 : 35 M. L. J. 258 : 24 M. L. T. 207 : 47 I. C. 646 : 8 L. W. 460.

———S. 110—*Leave to appeal—Defendant not taking interest in the proceedings.*

Where a defendant does not take interest in the prosecution of the suit and leaves it entirely to his co-defendant he cannot separately prefer an appeal to His Majesty in Council, (*Miller, C. J. and Adami, J.*) NIBARAN CHANDRA *v.* PRATAP UDAI NATH SAHA.

2 Pat. L. T. 173 : 60 I. C. 500 : 1921 Pat. 129.

———S. 110—*Leave to appeal—Similar decree in both Lower Courts—Value less than Rs.* 10,000.

If the value is less than Rs. 10,000 and the would be appellant to His Majesty in Council, has lost his case in both the Lower Courts he cannot, except in very exceptional cases, get a certificate though a substantial question of law is involved. (*Robinson, C. J. and Macgregor, J.*) ALIBHAI MAHOMED *v.* B. I. S. N. Co.

62 I. C. 71 : 10 L. B. R. 307.

Substantial Question of Law.

———S. 110—*Substantial question of law—Abatement.*

In a suit for possession by a Hindu widow the defendant pleaded that the suit was not maintainable inasmuch as a previous suit by the predecessor-in-interest of the plaintiff had abated under O. 22, R. 9 of the Civil Procedure Code and that the plaintiff having adopted a son during the pendency of the suit she was not competent to continue it without bringing the adopted son on record. The High Court held that the previous suit had not abated and that in view of an agreement between the widow and the father of the adopted boy by vesting the management of the estate of the widow during the minority of the boy the widow could continue the suit in her own name: *Held* that the decision involved no substantial question of law of general importance within the meaning of the section 110 of the Civil Procedure Code and leave to appeal to His Majesty in Council should not be granted. (*Mears, C. J. and Piggott, J.*) BU ALI KHAN *v.* RANI SUJAN KUAR. 45 A. 667 : 21 A. L. J. 665 : 75 I. C. 100 : L. R. 4. A. 298 : 1924 A. 66.

——— S. 110—*Substantial question of law.*

To justify the grant of a certificate for leave to appeal to the Privy Council a substantial question

C. P. CODE (V OF 1908), S. 110—Substantial question of law.

of law must be involved in the case. *i. e.*, question of law in respect of which there is a difference of opinion. (*Mears, C. J. and Banerji, J.*) PARSHOTTAM SARAN *v.* HARGU LAL.

43 All. 513 : 63 I. C. 837 : 19 A. L. J. 462.

———S. 110—*Substantial question of law—Question of general importance—Interpretation of Privy Council decision.*

When there is a conflict of opinion as to what was intended to be laid down in a decision of the Privy Council and as to the effect of the decision, the question is one of general importance and justifies the grant of a certificate under S. 110, C. P. C. for leave to appeal to the Privy Council. (*Mears, C. J. and Banerjee, J.*) BRIJ NARAIN RAI *v.* MANGALA PRASAD RAI.

56 I. C. 526 : 2 U. P. L. R. (A) 149.

———S. 110—*Substantial question of law—Question of law—General importance.*

Where the subject-matter is less than R. 10,000 in value and the sole question is one of evidence the point is not one of general interest and importance to justify the grant of a certificate. (*Mears, C. J. and Banerjee, J.*) MUZAFFAR ALI *v.* MUHAMMAD JAWAD. 54 I. C. 463.

———S. 110—*Substantial question of law—Construction of document—Semble.*

The construction of any particular document is not a substantial question of law within the meaning of S. 110 of C. P. C. (*Richards, C. J. and Banerji, J.*) KALLYAN SINGH *v.* KANHAIYALAL.

40 I. C. 110.

———S. 110—*Substantial question of law—High Court dismissing appeal on appellant's failure to furnish security.*

Where an appeal was dismissed by the High Court on the ground of the appellant's failure to furnish security for costs as directed and appellant thereupon applied for permission to appeal to the Privy Council, the permission was not granted as the appeal did not involve a question of law. (*Richards, C. J. and Banerji, J.*) GAFFOOR KHAN *v.* SECRETARY OF STATE. 36 All. 325: 23 I. C. 532 : 12 A. L. J. 451.

——— S. 110—*Substantial question of law.*

A case is a fit one for appeal to the Privy Council where a substantial question of law of general importance is in question, *e. g.*, the extent to which a mortgage without necessity by a manager of a Hindu family is binding (*Richards, C. J., and Banerji, J.*) ANANT RAM *v.* SHEORAJ SINGH. 18 I. C. 305.

———S. 110—*Substantial question of law—Presentation for registration.*

Whether a document was validly presented for registration is a substantial question of law. (*Richards, C. J. and Banerji, J.*) JAMBU PRASAD *v.* AFTAB ALI KHAN. 18 I. C. 126.

———S. 110—*Substantial question of law—Construction of document—Mortgage by conditional sale.*

The question whether a document creates a mortgage by conditional sale or a sale with an option to purchase is a substantial question of law

C. P. CODE (V OF 1908). S. 110—Substantial question of law.

within the meaning of S. 110 of the C. P. C. 22 A 149 P.C. ref. to. (*Knox and Chamier, JJ.*) JHANDU SINGH. *v.* WAHIUDDIN. **14 I. C. 269.**

———S. 110 (3)- *Substantial question of law--Discretionary matter—Practice.*

The question of rightful or wrongful exercise of its discretion by the High Court does not involve any substantial question of law within S. 110 (3) of the Civil Procedure Code. The High Court declined to grant a certificate for leave to appeal to the Privy Council, where the only appeal which the appellant could make would be to ask the Privy Council to hold that the High Court had wrongly exercised its discretion in refusing to grant leave, under Cl. 12 of the Letters Patent, to file an additional statement. (*Macleod, C. J. and Shah, J.*) GOVIND LAL BANSILAL *v.* BANSILAL MOTILAL. **46 Bom. 249 : 24 Bom. L. R. 196 : 1922 Bom. 11.**

———S. 110 (3)—*Substantial question of law—Decree of High Court dismissing appeal, yet varying decree of lower court—Effect.*

Where the High Court dismissed an appeal with costs, but yet made one substantial variation which amounted to overruling the decision of the lower court on that point, it cannot be held there was an affirmance of the decision of the court below. Hence a substantial question of law was not necessary for appealing to the Privy Council. (*Sanderson, C. J. and Richardson, J.*) NAGENDRABALA DASI *v.* DINANATH.

26 C. W. N. 651 : 70 I. C. 933 : 1923 C. 215.

———S. 110—*Substantial question of law—Laches in filing paper book.*

Where the only question for the Judicial Committee was whether the High Court was right in dismissing the appeal on the ground that the appellant was guilty of laches in filing the paper book of his appeal, there is no substantial question of law. (*Sanderson, C. J. and Mookerjee, J.*) MARIUM BEGHM *v.* BANKU BEHARY BOSE.

62 I. C. 205 : 33 C. L. J. 131.

———S. 110—*Substantial question of law—Appellate decree confirming original decree on different grounds.*

A substantial question of law should be involved for an appeal to lie to the Privy Council against an appellate decree which confirms the original decree but on different grounds. (*Mookerjee and Coxe, JJ.*) BANGA CHANDRA DHAR *v.* PUKAI BEPARI. **11 I. C. 159 : 13 C. L. J. 501.**

———S. 110—*Substantial question of law—Time to make up Court-fee.*

The Court has discretion to grant or refuse to grant time for making up deficient Court-fee, and whether a Court has used proper discretion in a particular case is a substantial question of law. (*Shadi Lal, C. J. and Moti Sagar, J.*) SAGAR CHAND *v.* DEWAT RAM. **63 I. C. 222.**

———S. 110—*Substantial question of law—Incidental conclusion—Appreciation of evidence.*

Where the decision only incidentally involves a decision on the question of interpretation to be put on certain documents it cannot be regarded as a substantial point of law directly involved in the case. Misappreciation of the value of documentary

C. P. CODE (V OF 1908), S. 110—Substantial question of law.

evidence is not the same as a misconstruction or misinterpretation of a document and does not involve a question of law. (*Shadi Lal and Broadway, JJ.*) BHAWANT SINGH *v.* NARINJAN SINGH. **129 P. W. R. 1917 : 41 I. C. 781: 133 P. L. R. 1917.**

———S. 110 and O. 45, R. 3—*Substantial question of law—Question of fact.*

No certificate can be granted to appeal to P. C. when the Chief Court affirms the decision of the court next below solely on facts as there was no substantial question of law and the case was not "otherwise fit" for appeal to P. C. (*Rattigan and Jones, JJ.*) VERSINGH *v.* TERATH RAM. **15 P. L. R. 1917 : 35 I. C. 583 : 64 P. R. 1916.**

———S. 110—*Substantial question of law—Interest.*

An award of interest at 9 per cent. per annum by the Court is not such an arbitrary and unwarrantable exercise of the discretion of the Court as to involve such a substantial question of law as is contemplated by S. 110 of the Code. (*Rattigan and Le Rossignol, JJ.*) BHAGAT SINGH *v.* JAI RAM. **22 P. R. 1915 : 19 P. W. R. 1915 : 26 I. C. 402 : 66 P. L. R. 1915.**

———S. 110, Cl. 3—*Substantial question of law.*

What the last clause of S. 110, C. P. C., requires is substantial questions of law and not mere question of law. (*Spencer and Krishnan, JJ.*) VADIVELU AMMAL *v.* RAJARATNA MUDALIAR. **30 M. L. T. 337 (H. C.) : 16 L. W. 262: 1923 M. 30.**

———S. 110—*Substantial question of law—Misconstruction of evidence.*

Misconstruction of a part of the evidence concerning certain facts is not a "substantial question of law" within the section. (*Sadasiva Iyer and Napier, JJ.*) MULRAJALAKSHMI VENKAYAMMA RAO *v.* VENKATAUDRI APPA RAO. **30 I. C. 372.**

———S. 110 (2)—*Substantial question of law—Construction of deed.*

Mere questions of construction of particular documents cannot be treated as questions of general importance or substantial question of law within the meaning of S. 110. (*Kanhaiya Lal, J.C. and Simpson, A. J.C.*) SARSUTI PRASAD *v.* MUHSHI EHTISHAM LAL.

25 O. C. 349 : 13 I. C. 407 : 1922 Oudh 214.

———S. 110—*Substantial Question of law—Exercise of discretion in S. 90 of Evidence Act.*

The exercise of discretion under S. 90 of the Evidence Act is not a substantial question of law within the meaning of S. 110 of the Code. (*Kanhaiya Lal, and Daniels, A. J. Cs.*) SHANKAR BAKSH SINGH *v.* UDIT NARAIN SINGH. **61 I. C. 131 : 8 O. L. J. 1.**

———S. 110—*Substantial question of law—"Involved," meaning of.*

A question of law is not deemed to be involved in an appeal under S. 110, if it need not be decided for the disposal of appeal or if such question may arise in certain contingencies. The word "involved" in S. 110 implies a considerable degree

C. P. CODE (V OF 1908), S. 110—Substantial question of law.

of necessity. (*Kendall and Mahomed Ali, A. J. Cs.*) GHISA SINGH *v.* GAJRAJ SINGH.
36 I. C. 807 : 19 O. C. 131.

——S. 110—*Substantial question of law — Point covered by precedents.*

No appeal lies to the Privy Council, if the question of law, which is the ground for appeal, has already been decided by the Privy Council. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) NISAR HUSAIN *v.* ASHRAFUNNISSA.
30 I. C. 239 : 2 O. L. J. 214.

——S. 110—*Substantial question of law — What is.*

Where there has been a difference of opinion on a question of law, between the various High Courts and among the judges of the same court the question must be considered a substantial question of law within S. 110 of the C. P. C. (*Piggott, J. C. and Lindsay, A. J. C.*) BHOLA SINGH *v.* JAI GOBIND. 18 I. C. 327.

——S. 110—*Substantial question of law—Several decisions of Court—Point of law.*

There has been a number of cases beginning in the year 1868 and going down to the year 1913 all to the same effect, namely, that the claims for malikana being claims in respect of an interest in land did become barred absolutely by limitation under the provisions of the statute before the Act of 1871 and that the statutes of 1871 and 1877 did not have the effect and could not have the effect of reviving the claim which had already become barred. *Held* that owing to this long consensus of opinion on the question the High Court would not treat it as a substantial question of law remaining to be determined but should refuse the present application for leave to appeal to the Privy Council on the ground that there is no substantial question of law, and if the appellant wished to have this question brought before their Lordships of the Privy Council he would have to make a special application to that effect. (*Miller, C. J. and Kulwant Sahay, J.*) BABU RAMNIRANJAN CHAUDHURY *v.* BABU GOBARDHAN THAKUR. 1 Pat. L. R. 314 : 1924 P. 271.

——S. 110—*Substantial question of law — Limitation.*

The applicability of Limitation Act to suits by minors against administrators for accounts is a substantial question of law within S. 110, C. P. C. (*Miller, C. J. and Mullick, J.*) JANANDAN PRASAD *v.* THAKURAIN. 45 I. C. 182.

——S. 110 and 48—*Substantial question of law—Applicability of S. 48 of Code of 1908 to decree passed under Code of 1882.*

S. 48 of C. P. C. (1908), applies to a decree passed under Code of 1882 ; but the question whether the section so applies to a decree passed under Code of 1882 is not a substantial question of law within S. 110, C. P. C. (1908). (*Chamier, C. J. and Sharfuddin, J.*) KESHO DAYAL GIR *v.* SAKINA BIBI. 39 I. C. 141.

——S. 110—*Substantial question of law.*

The power of co-heirs in respect of alienation of joint and undivided property is well settled and

C. P. CODE (V OF 1908), S. 110—Valuation.

is not a question of general importance. For the grant of special leave the question involved must be not merely substantial but must be of great public or private importance which did not exist in the case. 27 A. 174, 6 B. 403, 39 Mad. 843 foll. (*Robinson, C. J. and Macgregor, J.*) MAUNG THWE *v.* A. L. A. R. CHETTY FIRM. 1 Bur. L. J. 62 : 11 L. B. R. 335 : 68 I. C. 690 : 1923 R. 71.

——S. 110—*Substantial question of law — Findings of fact.*

Leave to appeal to the King in Council in the face of concurrent findings can only be granted if a substantial question of law is involved : and it is impossible to say that a question which only arises if the concurrent findings of fact of the Courts in India are disregarded, is a substantial question of law which the appeal to the Privy Council involves. (*Hartnoll, C. J. and Young, J.*) THEIN NGO *v.* RAMASAWMI CHETTY.
25 I. C. 922 : 7 L. B. R. 103.

——S. 110—*Substantial question of law — Decree—Setting aside.*

That a suit to set aside a decree obtained by fraud was brought by a person who was not a party to the suit in which that decree was passed is not a question of such public importance as to justify the issue of a certificate under S. 110, C. P. C. (*Hartnoll, C. J. and Twomey, J.*) TAN GAW ROK *v.* SUNDARESAN CHETTY.
14 I. C. 626 : 5 Bur. L. T. 13.

Valuation.

——S. 110—*Valuation—Annuity.*

S. 110 of the Code of Civil Procedure applies to the value of an annuity which is sought to be recovered, not the value of the property upon which that annuity is charged. (*Lord Atkinson.*) MAIRZA ABID HUSSAIN KHAN *v.* AHMAD HUSSAIN.
45 M. L. J. 253 : 1923 M. W. N. 590 : 26 O. C. 216 : 33 M. L. T. 232 (P. C.) : 10 O. L. J. 283 : 9 O. & A. L. R. 484 : 28 C. W. N. 289 : 75 I. C. 502 (1) : 18 L. W. 146 : 1923 P. C. 102 (P. C.).

——S. 110—*Valuation of subject-matter—Counter-claim more than Rs.* 10,000.

Plaintiff and defendant each alleged breach of contract by the other making claims and counter-claims. Plaintiff's contention that defendant's counter-claim was not admissible under the C.P. Code being overruled, a decree was passed in defendant's favour, but plaintiff did not re-open the question in the Appellate Court which reversed the first court's decree and made a partial decree in favour of the plaintiff.

Held, that the question of the admissibility of the counter-claim must be taken to have been decided between the parties in accordance with the contention of the defendant and the plaintiff could not be permitted to raise it for showing that defendant's claim in appeal could not come to Rs. 10,000 in value. (*Lord Phillimore*). PIERCE LESLIE AND CO. *v.* GIRIAH CHETTIAR.
46 I. C. 576 : 22 C. W. N. 282 (P.C.).

——S. 110—*Valuation—Appeal from portion of the decree—Effect of.*

From a mortgage decree for Rs. 38,000, one of the defendants who was not a party to the

C. P. CODE (V OF 1908), S. 110—Valuation.

mortgage, but who subsequently became owner of one-tenth share of the hypotheca, applied for leave to appeal to the Privy Council. The one tenth share of the hypotheca was worth less than Rs. 10,000. *Held*, that the subject-matter of the appeal to the Privy Council was the value of the shares claimed by the appellant and the High Court erred in granting a certificate on the basis that the subject-matter was the amount of the decree. (*Lord Buckmaster.*) RADHA KUNVAR *v.* REOTI SINGH. **38 All. 488 : 14 A. L. J. 100 : 20 C. W. N. 1279 : 20 M. L. T. 211 : (1916) 2 M. W. N 200 : 31 M. L. J. 571: 18 Bom. L. R. 850 : 24 C. L. J 303 : 35 I. C. 939 : 5 L. W. 456 (P.C.).**

——S. 110—*Valuation—Future interest.*

Where in a suit for sale on a mortgage the plaintiff claimed Rs. 9,300 with interest pending the suit and the plaintiff got a decree for more than 10,000 rupees, the case satisfies the requirements of S. 110 C. P. C. as ragards the valuation. (*Mears, C. J. and Piggott, J.*) GAJADHAR MAHTON *v.* AMBIKA PRASAD TIWARI. **45 A. 133 : 69 I. C. 645 (1) : 20 A. L. J. 903 : 1923 A. 78.**

——S. 110 — *Valuation—Decree upheld in part.*

The part decreed by the High Court could not be included for purposes of valuation by plaintiff. (*Tudball and Rafique, JJ.*) MUHAMMAD HABIBULLAH *v.* UMAR DARAZ ALLI. **57 I. C. 40 : 2 U.P.L. R. (A.) 155.**

——S. 110—*Valuation--Addition of interest.*

In calculating the value of the subject-matter for appeal to the Privy Council the appellant is not entitled to add the subsequent interest to the decretal amount. (1879) L.R. 4 A. C. 270 dist. (*Mears, C. J. and Rafique, J.*) SAHU RAM KUMAR *v.* MUHAMMAD YAKUB. **42 All. 445 : 2 U. P. L. R. (A) 142 : 55 I. C. 976 : 18 A. L. J. 445.**

——S. 110—*Valuation — Other property affected.*

The mere fact that the history of the property in dispute was the same as another valued at more than Rs. 10,000, would not bring it under S. 110 of the C. P. C. so as to give the applicant a right of appeal to His Majesty in Council. (*Richards, C. J. and Banerjee, J.*) KULSUM UNNISA BIBI *v.* CHAUBE BASDEO. **26 I. C. 6.**

——S. 110—*Valuation — Subject-matter in appeal less than Rs.* 10,000—*Amount indirectly involved more than Rs.* 10,000.

Where the value of the proposed appeal to Privy Council was less than Rs. 10,000 but it raised a question as to the validity of an award affecting property exceeding Rs. 10,000 in value the case fell within S. 110 (2) and leave to appeal should therefore be granted. (*Richards, C J. and Banerji, J.*) SRI KISHNA LAL *v.* KASHMIRO. **35 All. 445 : 21 I. C. 617 : 11 A. L. J. 654.**

——S. 110—*Valuation—Claim or question in respect of property worth more than Rs.* 10,000 *Directly or indirectly involved in a suit—Appeal to the Privy Council.*

C. P. CODE (V OF 1908), S. 110—Valuation.

Where the plaintiff claimed under a deed of gift the value of the subject-matter of which was more than Rs. 10,000 though however the claim of the plaintiff was worth less than Rs.10,000 but the defendant denied the validity of the deed and certain other donees under the same deed were made defendants. *Held* that a question respecting the whole property was indirectly involved in the case and it was a fit one to be heard in the Privy Council (*Richards, C. J. and Banerji, J.*) SIBT HUSAIN *v*, MUNWARULNISSA. **16 I. C. 431 (1).**

——S. 110—*Valuation.*

Paintiff sued for possession of two houses and for an injunction restraining defendant from using a well and compound. He was awarded possession of one house and a portion of the other and he got a decree jointly with defendant for the user of the well and the compound. The relief with respect to the house was valued at Rs. 5,000, Though the value of the well and compound was more than Rs. 5,000 plaintiff's share in them was below 5,000 in value. On an application by the plaintiff for leave to appeal to the Privy Council, *Held*, that for purposes of S. 110, C.P. Code, the value of the subject-matter was in excess of Rs. 10,000 and leave should therefore be granted. (*Macleod, C.J. and Fawcett, J.*) APPAYA PADDAYA GARU *v.* LAKHAM GOWDA. **25 Bom. L.R. 77 : 72 I.C. 127: 1923 Bom. 176.**

——S. 110—*Valuation—Decree for more than Rs.* 10,000—*Value of the property involved less.*

The High Court reversed the decree of the trial Court and granted a declaration that the deed in question was void, and that the plaintiff was entitled to the possession of the property mentioned in the deed. *Held*, it is not necessary for the purpose of an application for leave to appeal His Majesty to inquire into the question as to whether the property actually handed over to deft. applicant is worth Rs. 10,000 or not if, whatever the value of that property may be, it is clear that the whole of the property as to which the question arose in the appeal and in respect of which the decree has been passed in High Court is worth more than Rs. 10,000. (*Shah and Crump, JJ.*) PYARIBIBI MARD MUNZI MAHOMED BAHADUR *v.* HASANALLI MIR ABDULALLI INAMDAR, **1923 Bom. 59.**

——S. 110—*Valuation—Proceedings under the Bombay Rent Act.*

Plffs. sought to eject their tenant in order that they might occupy the premises themselves while the tenant sought the protection of the Bombay Rent Act. The monthly rent of the premises was Rs. 275 and capitalised at 20 years, purchase the value of the property would be over Rs. 10,000. The plff. got a decree and deft. applied for leave to appeal to the Privy Council. *Held* that the decree involed directly a claim or question to or respecting property over Rs. 10,000 and leave to appeal must be granted. (*Macleod, C.J. and Coyajee, J.*) HIRALAL D. NANAVATI *v.* KASTURBHAI MANIBHAI. **24 Bom. L. R. 350 : 67 I. C. 938 : 1923 B. 23.**

C. P. CODE (V OF 1908), S. 110—Valuation.

———S. 110—*Valuation—Easement.*

Where the subject-matter of a suit is an easement the value of which is less than Rs. 10,000, there is no right of appeal to the Privy Council although the easement affects property worth over Rs. 10,000. (*Macleod, C. J. and Fawcett, J.*) MANILAL JUGALDAS *v.* BANUBAI FRAMJI.

63 I.C. 583 : 23 Bom. L.R. 374.

———S. 110—*Valuation—Test of—Date of the High Court's decree.*

For the purpose of S. 110, C.P. Code, the value of the share which the appellant claims and not the value of the entire family property is the test. Such value ought to be taken as at the date of the decree of the High Court under appeal. (*Shah and Hayward, JJ.*) RAOJI BAIKHJI KONDKAR v. LAKSHMIBAI ANANT KONDKAR. **44 Bom. 104 : 55 I.C. 972 : 22 Bom. L.R. 243.**

———S. 110—*Valuation—Suit for injunction and declaration in Bom. Presidency in a second class sub-judge's court.*

In the Bom. Presidency a plff. can sue for a declaration and injunction in a second-class sub-judge's court, in spite of the pecuniary limit of the Judge's jurisdiction (Rs. 5,000) being exceeded by the property to be affected by the injunction. And so a plff. in such a case is not, by reason of the suit being decreed, to be taken to make any representation to the deft. regarding the real or market value of the property to be affected. 15 Bom. L. R. 1021 applied. (*Batchelor and Shah, JJ.*) MOHANLAL NAGJI *v.* BAI KASHI.

40 Bom. 477 : 37 I.C. 371 : 18 Bom. L.R. 469.

———S. 110— *Valuation—Test of—Suit for accounts.*

The value of the subject-matter of a suit cannot exceed the pecuniary jurisdiction of the court of institution and the value in appeal cannot be greater than that of the suit from which it arises. The real market value of the matter in dispute is not the test to decide if an appeal lies to the Privy Council. Where a suit for accounts is valued at Rs. 101 and tried in the court of a second class sub-judge the value of the subject-matter of the suit for purpose of appeal to the Privy-Council cannot exceed Rs 5,000 in any event. Para. 2 of S. 110, C.P.C., has no application where the suit is for money and the plff. seeks the same relief in appeal. Where the pecuniary conditions have not been satisfied, no leave to appeal to Privy Council could be granted even though the case involves some substantial question of law. (*Scott, C. J. and Beaman, J.*) HIRJI BHAI *v.* JAMSHEDJI. **21 I. C. 783 : 15 Bom. L.R. 1021.**

———S. 110—*Valuation of subject-matter — Substantial question of law—Suit for rectification.*

A person who had obtained a decree on a mortgage sued for rectification of that decree on the ground that a share of the property which had been purchased by the 8th defendant in the suit had by mistake been omitted from the decree owing to a mis-description in the mortgage deed. The Court below as well as the High Court decreed the suit as brought. On an application by the 8th defendant for leave to appeal to the

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Privy Council the plaintiff objected that the value of the subject-matter on appeal to His Majesty in Council was the market value of the share of the property claimed by the 8th defendant which was less than Rs. 10,000. It was also objected that there was no question of law in the case. *Held* that the claim of the plaintiff against the 8th defendant was part and parcel of the mortgage transaction and as there was no claim by title paramount set up by the 8th defendant, the value of the appeal to His Majesty in Council was not the value of the share of the 8th defendant but was the entire value of the mortgage suit which was about the appealable value. *Held*, further that the question whether the plaintiff was entitled to have the decree rectified was a substantial question of law. (*Sanderson, C.J. and Ghose, J.*) BEPIN KRISHNA ROY *v.* PRIYABRATA BOSE.

71 I. C. 371 : 1923 Cal. 387.

———S. 110—*Valuation—Appeal.*

For the purpose of valuation for a Privy Council appeal, the value at the date of decree is to be considered and not the value at the institution of the suit. (*Sanderson, C. J. and Mookerjee, J.*) SURENDRA NATH *v.* DWARKA NATH.

44 Cal. 119 : 24 C. L. J. 350 : 35 I. C. 605 : 21 C. W. N. 530.

———S. 110—*Valuation—Subject-matter—Appeal to P. C.*

In a suit for foreclosure where the mortgagor is not made personally liable, the value of the subject-matter in dispute is the amount claimed if it be less than the value of the property and the market value of the property if that is less than the amount claimed. (*Mookerjee and Capersz, JJ.*) BENOY LAL ROY *v.* KAMALAPATT BANERJEE.

10 I. C. 990 : 13 C. L. J. 505.

———S. 110—*Valuation must be according to market.*

The rules under the Suits Valuation Act in accordance with which the land is valued for the purposes of jurisdiction do not apply in determining the value for the purpose of Section 110 of the Civil Procedure Code, but it is the market value which has to be ascertained. (*Abdul Raoof and Martineau, JJ.*) NAWAZ ALI *v.* ALLU.

6 L. L. J. 44 : 75 I. C. 520 : 4 Lah. 185 : 1924 Lah. 82.

———S. 110—*Valuation—Subject-matter.*

Where the subject-matter of the suit was the question whether the applicants were permanent tenants of the site, or mere tenants at will, and the plaintiff laid no claim whatever to the buildings on the site, *Held* the matter in dispute between the parties was solely the nature of the tenancy of the site. The second paragraph of S. 110 means that the suit must involve rights and claims to property which rights and claims were worth Rs. 10,000 or upwards, not that the rights affected properties whose value was Rs. 10,000 or more. (*Broadway and Abdul Qadir, JJ.*) DHANNA MAL *v.* RAI SAHIB LALA MOTI SAGAR.

75 I. C. 654 : 1923 Lah. 286 (2).

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——S. 110—*Valuation—Suit for declaration of status—Valuation fixed by plaintiff not conclusive.*

Plff, sued for a declaration that he was a Rajput by caste and valued his suit for purposes of jurisdiction at Rs. 11,000. His suit was decreed by the Subordinate Judge, but dismissed by the High Court. On an application for leave to appeal to His Majesty in Council. *Held*, that the suit was not one to which any special money value could be attached, and that the value of the subject-matter of the suit could not be said to amount to Rs. 10,000 or upwards or that the decree involved directly or indirectly any claim or question to or respecting property of like amount or value, 18 Cal. 378, foll. 60 P. R. 1905, 15 Mad. 237 (F.B.). 25 Cal. W. N. 269 (P.C.) Dist. (*Chevis and Scott-Smith, JJ.*) GHULAM RASUL KHAN *v.* SECRETARY OF STATE.
2 Lah. 297 : 26 P. L. R. 1922 : 65 I. C. 239 : 1922 Lah. 131.

——S. 110— *Valuation—Partition decree—Execution.*

In execution of a decree in a partition suit involving property of the value of Rupees ten lakhs the applicants disputed their liability to 4/6ths of an item of Rs. 11, 709. *Held* that the case did not satisfy the conditions set forth in S. 110, cl (1) or (2). Consequently leave to appeal to the Privy Council therefrom could not be granted. 10 M. I. A. 252 : 10 C. W. N. 564 : 6 C, W. N. 41 dist. (*Le Rossignol, J.*) DEVI DAS *v.* NARPAT RAI.
60 P. W. R 1915 : 29 I. C. 759 : 140 P. L. R. 1915.

——S. 110—*Valuation—Question directly or indirectly involved as between parties.*

Under S. 110 (2) C. P. C. the question directly or indirectly involved must be one between the parties to the suit. (*Sha Din and Beadon, JJ.*) BAKSH ABDUL KARIM *v.* ALLAH BAKSH.
90 P. R. 1913 : 340 P. L. R. 1913 : 21 I. C. 624 : 229 P. W. R. 1913.

——S, 110—*Valuation—Interest subsequent to suit—Inclusion.*

For the purpose of ascertaining the pecuniary value of an appeal for purposes of leave to appeal to His Majesty in Council, interest subsequent to the date of plaint and up to the date of the decree must be included in the subject-matter. 16 L. W. 18 Rel. 39 M. 843 dist. (*Oldfield and Ramesam, JJ.*) RAGHUNATHASWAMI IYENGAR *v.* GOPAUL RAO.
16 L. W. 682 : 43 M. L, J. 622 : 74 I. C. 596 : 32 M. L. T. 1 : 1922 M. W. N. 652 : 1923 M. 135.

——S. 110—*Valuation.*

The question whether a decree involves indirectly a claim or question to property worth more than 13,000 rupees in value must be decided with reference to actual circumstances at the time and not to circumstances which are remote, and not in particular to a mere possibility that future suits as to all or part of a large extent of the property alleged to be concerned may be instituted at some time in the future. 15 L. W 140 ; 24 A. 236 ; 35 A. 445 ; 8 C. 210 ; 4 C. L. R. 125 Ref. Where the plaintiffs had estimated the market value of the property in dispute at Rs. 2,500 for

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purposes of court-fee in the Court of first instance and on appeal, they could not be allowed to change their valuation for the Privy Council. (*Oldfield and Spencer, JJ.*) ALAGAPPA CHETTY *v.* NACHIAPPAN.
1922 M. W. N. 683 : 43 M. L. J. 728 : 31 M. L. T. 335 : 69 I. C. 385 : 16 L. W. 517 : 1923 Mad. 125.

——S. 110 (1)—*Valuation— Cause of action different against defendants.*

In a suit against several persons where the cause of action against each is quite distinct and different from the others, the fact that a joint suit is brought cannot make the subject-matter of the appeal the same as that of the joint suit. The valuation will depend upon the relief claimed against the particular defendant. (*Spencer and Krishnan, JJ.*) VADIVELU AMMAL *v.* RAJARATNA MUDALIAR.
16 L. W. 262 : 30 M. L. T. 337 : 1923 Mad. 30.

——S. 110 and O. 45, R. 5—*Valuation—Single suit on different causes of action—Several defendants — Separate appeals by defendants—Single appellate decree—Subject matter of each appeal.*

Plaintiffs as reversioners sued for recovery of possession of properties alleged to have formed part of the estate of the last male owner and in the possession of different alienees who were impleaded as defendants. Plaintiff had really different causes of action against various defendants but they were allowed according to a well established practice to join all of them in one suit. The first Court gave a decree in favour of plaintiffs. The several defendants filed separate appeals to the High Court as regards the properties in their possession. Only one appellate decree was drawn up by the High Court in accordance with R 105 of the Rules of Practice. *Held*, that leave could be granted only in those cases whose subject-matter was of the value of Rs. 10,000 or upwards, under S. 110 of the C. P. Code. (*Wallis, C. J. and Seshagiri Aiyar, J.*) VAITHILINGA MUDALIAR *v.* SRIRANGATHANNI.
42 Mad. 228 : 36 M. L. J. 119 : 25 M. L. T. 190 : 49 I C. 434 : 10 L. W. 13.

——S. 110—*Valuation—Test of—Court fee.*

Under S 110, the value of the subject-matter of the suit is real market value. The fact that for the purpose of stamp duty the plaintiff under the option given to him by S. 7 of the Court Fees Act valued it at less than its market value cannot deprive him of his right to appeal to the Privy Council. 15 M. 237 : 31 C. 401, foll. Where for the cancellation of a deed of sale, plaintiff valued the suit at Rs. 5,250 and paid court-fee thereon but as a matter of fact the market value of the property was more than Rs. 10,000: *Held*, that for the purposes of S, 110, C. P. C. the value of suit was more than Rs. 10,000. (*Abdur Rahim, O. C. J. and Burn, J.*) POOSA THORAI *v.* KANNAPPA CHETTY.
5 L. W. 542 : 39 I. C. 911: (1917) M. W. N. 422.

——S. 110—*Valuation—Indirectly affecting future claims for more than Rs.* 10,000—*Amount swelled by interest.*

C. P. CODE (V OF 1908), S. 110—Valuation.

A decision having been given with regard to a claim of legacy under a will of less than Rs. 10,000 in value, the probability of the decision affecting future claims of other legatees of more than Rs. 10,000 does not give a right of appeal to the Privy Council under S. 110 (2), C. P. C. : the second clause of the section refers only to something in the decree affecting the larger subject-matter. 35 A. 445, 5 W. R 34 P. C. ref. to. The subject-matter of a suit being below Rs. 10,000, the mere fact of the decree amount having been swelled, on the date of the application for leave to appeal, to more than Rs. 10,000 by the addition of subsequent interest gives no right of appeal to the Privy Council. (*Oldfield and Seshagiri Aiyar, JJ.*) RAJAMANNARU *v.* LINGAMALLU RADHAKRISHNIAH. **37 I. C. 502 : 32 M. L. J. 400.**

——S. 110—*Valuation—Value of subject-matter in the Court of first instance less than Rs* 10,000.

The value of the subject-matter of the suit in the Court of first instance must also be Rs. 10,000 or upwards. 24 A. 174, foll. (*Wallis, C. J. and Srinivasa Iyengar, J.*) SUBRAMANIA AIYAR *v.* SELLAMMAL. **39 Mad. 843 : 30 M. L. J. 317 : 31 I. C. 296. : 18 M. L. T 450 : 2 L. W. 1057 : (1915) M. W. N. 941.**

——Ss. 110 and 109—*Valuation— Aggregate value Rs.* 10,000 *but each suit below Rs.* 10,000—*Appeal will not lie.*

Where one common judgment is delivered in a number of suits and although the aggregate value is over Rs. 10,000, but each suit separately is below Rs. 10,000, appeal to Privy Council will not lie. (*Wallis C.J. and Seshagiri Iyer, J.*) KAKARLA PUDI RAMACHANDRA *v.* CHEEPURAPALLI APPAYYA **30 I. C, 895 : 2 L. W. 916.**

——S. 110 and 109 — *Valuation — Total amount recoverable above* Rs. 10,000.

Where decrees obtained in a number of rent suits follow a single judgment and the total amounts recoverable are more than Rs. 10,000, though the amount involved in each decree is small, the condition as to pecuniary value, is satisfied and special leave can be granted. (*Ayling and Sadasiva Iyer, JJ.*) JAGAVEERA RAMA VENRATESWARA *v.* SAPPANASAR. **22 I. C. 390 : (1914) M. W. N. 162.**

——S. 110 — *Valuation — Interest on the amount decreed.*

The suit was based on a mortgage deed for Rs. 7,000 and the amount claimed was Rs. 9,776 together with interest to the date of the decree and further interest to the date of payment. The plaint was presented on the 11th December 1916, and was returned to be signed by plantiffs personally. It was again presented to the Subordinate Judge on the 2nd February 1917, The first hearing was on the 16th January 1917, and the suit was decided on the 17th November 1919, when a preliminary decree for sale was granted. The decree was for Rs. 9,776 and 3, 451-6 3 compound interest at 9 per cent per annum up to the 17th May 1920, the day fixed for payment, together with interest on the total amount at 6 per cent per annum up to the date of the actual payment. The

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appeal was filed in the High Court on the 20th February 1920, and decided on the 21st December 1921. *Held* on an application for leave to appeal to His Majesty in Council the case satisfied the requirements of section 110 C. P. Code as to amount and nature, since on the date of the decree the amount to be paid on the date fixed already included together with interest an amount exceeding Rs. 10,000 and a decree including interest up to the date of the decree had been asked for in the plaint. (*Batten, A. J. C. and Hallifax, A. J. C.*) SETH MAGAN LAL *v.* DARBARI LAL CHOWDHURY. **72 I. C. 395 : 1923 Nag. 239.**

——S. 110—*Valuation—Admission.*

Defendants who accept the value of property for purposes of jurisdiction cannot be heard to question that value subsequently. The value of the property is a question of fact. It is not proper for a party by an admission as to a lower valuation to suffer an appeal to be heard by a single judge and then to claim a higher valuation for the purpose of obtaining an appeal to the Privy Council. (*Ashworth and Simson, A. J. Cs.*) BHAGWATI PRASAD *v.* ACHHAIBAR SINGH. **9 O. L. J. 531 : 74 I. C. 214 : 26 O. C. 24 ; 1923 Oudh 93.**

——S. 110—*Valuation—Mortgage suit.*

Plaintiff sued to redeem his mortgaged property. He claimed that all the money due had been paid from the usufruct and that there was a large surplus which was due to him. The trial Court held that the entire mortgage money had been paid and decreed plaintiff's claim for possession and for a surplus amount of Rs. 9,012-12-8. The defendant appealed to the High Court to be relieved of the surplus awarded to plaintiff and claimed a sum of Rs. 2,073 due on the mortgage. The decree of the trial Court was modified in the High Court to the extent of reducing the surplus awarded to Rs. 7,910-11-7. The defendant then applied for leave to appeal to His Majesty. *Held* that the value of the subject-matter, including the surplus awarded *viz.* Rs. 7,910-11-7 amounted to Rs. 983-11-7 since in the memorandum of appeal to the High Court the defendant had claimed only Rs. 2,073 on the mortgage and had not claimed possession of the property. It not being alleged that the appeal affected a question relating to property exceeding Rs. 10,000 in value, no leave to appeal could be granted under S. 110 although the decree of the High Court varied the decree of the Court below. (*Kanhaiya Lal, J.C. and Simpson, A.J.C.*) SARSUTI PRASAD *v.* MUASHI EHTISHAM ALI. **25 O. C. 349 : 73 I. C. 407 : 1922 Oudh 214.**

——S. 110—*Valuation—Variation on appeal.*

The trial court decreed a suit by a Hindu reversioner to set aside an alienation by the limited owner as having been effected without justifying necessity. On appeal to the High Court the decision of the lower court was varied, the court finding that out of a total sum of Rs. 3,800 the purchase price, Rs. 1,412 was justified by legal necessity at the time of transfer, Accordingly the High Court varied the decree of the trial court by ordering that the plff's title to the property in question should be declared and that he should recover possession thereof upon condition

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that he first paid to defts. Rs. 1,412 with interest from the date of decree. *Held* that the value of the appeal did not come up to the statutory requirements and that leave to appeal to the Privy Council could not be granted. (*Miller, C. J. and Mullick, J.*) BISHUN PRASAD SINGH *v.* NACSINGH DAS. **3 Pat. L. T. 550 : 68 I. C. 663 : 1922 P. 555.**

———S. 110—*Valuation—Future mesne profits, must be included.*

Future mesne profits, should be taken into consideration in assessing the value of the subject-matter for the purposes of S. 110 of the Code. (*Miller, C. J. and Adami, J.*) IMAMUDDIN *v.* KISHUNDEO. **6 Pat. L. J. 246: 63 I. C. 492: 2 Pat. L. T. 675.**

———S. 110—*Valuation—Future interest not included.*

A suit was instituted to enforce a mortgage-bond for Rs. 3,000, which with interest up to the date of decree, amounted to Rs. 9,325. The suit was decreed with interest at the contract rate up to the days of grace which was Rs. 198, the total amount being Rs. 9,523. After that period interest was calculated at 6 per cent. per annum up to the date of realization. The defts. appealed and the High Court allowed the appeal. *Held*, that the provisions of S. 110 (1) were not satisfied and so S. 110 (2) did not apply. (*Miller, C. J. and Coutts, J.*) RAMNAD SINGH *v.* RAMBILAS SINGH. **2 Pat. L. T. 463: 62 I. C. 959: 1921 Pat. 229:**

———S. 110—*Valuation — Partition suit—Share or whole property as the basis of valuation.*

Where a decree in a partition suit affects the share of the plff. as well as of the deft. who would share the property along with plff. if his case be decreed, the value for purposes of S. 110 is the value of the whole property and not only the share claimed by the plff. (*Miller, C. J. and Adami, J.*) KULDIP NARAYAN SINGH *v.* RAGHUNANDAN SINGH. **60 I. C. 844: 2 Pat. L. T. 386.**

———S. 110—*Valuation—Value how determined.*

The value of the subject-matter must be taken to be the amount or value which the plff. obtained or would have obtained had he been successful, at the time when the decree was passed. (*Miller, C. J. and Adami, J.*) MATHURA PRASAD SINGH *v.* RAM PRASAD TEWARY. **3 U. P. L. R. (Pat.) 32: 60 I.C. 523: 2 Pat. L. T. 340.**

———S. 110—*Valuation —Application to set aside sale by a person interested in portion of the property sold.*

To determine the value prescribed by S. 110 of the C. P. Code the decree has to be looked at, as it affects the interests of the parties prejudiced by it. Where the detriment to the party seeking relief is estimated at less than Rs. 10,000 then the matter in dispute in appeal is not of the prescribed value and the decree itself does not involve any claim or question to or respecting property of the prescribed value. 6 Bom. L. R. 403 foll. (*Miller, C. J. and Coutts, J.*) GOSAIN BHAUNATH GIR *v.* BIHARI LAL. **4 Pat. L. J. 415 : 52 I. C. 723: 1919 Pat. 257.**

C. P. CODE (V OF 1908), S. 110—Valuation.

———S. 110 — *Valuation— Subject-matter of of suit less than Rs.* 10,000—*Value increased at time of application for leave to appeal.*

The plff. valued their suit at Rs. 7,590 but at the time of the application for leave to appeal to His Majesty in Council plffs. valued the property at Rs. 12,000. *Held*, that the increase in value *pendente lite* would not be sufficient to bring the case within S. 110 of the C. P. Code. (*Miller, C J. and Coutts, J.*) RASH MOHAN LAL *v.* RAM MOHAN LAL. **51 I. C. 975: 1919 Pat. 241.**

———S. 110—*Valuation—Mesne profits.*

The value of a suit for possession of land and mesne profits for the purpose of S. 110, C. P. C. is the actual value of the land and the mesne profits up to the date of the appellate decree. (*Miller, C.J. and Mullick, J.*) MAHABIR PRASAD SINGH *v.* ANUP NARAIN SINGH. **5 Pat. L. W. 327: 3 Pat. L. J. 377: 46 I. C. 137: 1918 Pat. 246.**

———S. 110—*Valuation—Subsequent interest —Arrears of pension.*

In determining the value of the subject-matter of a suit for leave to appeal to the Privy Council, the interest payable until realisation of the decree as well as the arrears of pension accrued due since the decree, could not be taken into consideration. (*Miller, C. J. and Mullick, J.*) KESHO PRASAD SINGH *v.* SHEO SARAN LAL. **4 Pat. L. W. 240: 44 I. C 475: 3 Pat. L. J. 317.**

———S. 110 and O. 45, R, 2—*Valuation—N. W. P. and Assam Civil Courts Act, S.* 21.

When the plff. in his plaint alleged the value of the subject matter to be Rs, 3,000 but the Dt. Judge on appeal held it to be Rs. 24,000 under S. 21, N. W. P. and Assam C. C. Act, an application for leave to appeal to P. C. must be dismissed, (*Chamier, C. J. and Sharfuddin, J.*) RAGHUNATAH PRASAD SINGH *v.* YAHYN HUSSAIN. **42 I. C. 966: 1917 Pat. 301.**

———S. 110—*Valuation—Substantial question of law.*

To enable an applicant to obtain leave to appeal to the Privy Council it must be shown that the value of the subject-matter in the Court of first instance was Rs. 10,000 at the date of the decree of that Court. A decision as regards the validity of a particular alienation by a co-heir of properties worth less than Rs. 10,000 does not affect other alienations made by other co-heirs to different persons. (*Robinson, C.J. and Macgregor, J.*) MAUNG THWE *v.* A. L. A. R. CHETTY FIRM. **1 Bur. L. J. 62: 11 L. B. R. 35: 68 I. C. 690: 1923 Rang. 71.**

———S. 110—*Valuation—Suit for damages.*

A suit for damages exceeding Rs. 10 000 was brought in respect of loss of crops caused by an inundation due to the defendant's tortious acts. The first court decreed Rs. 8,000 and odd but on appeal the appellate court dismissed the suit. On an application for leave to appeal, *Held* that as regards the valuation and other matters the case was a fit one for appeal to the Privy Council. In granting leave the correct principle is to

C. P. CODE (V OF 1908), S. 111.

look at the judgment as it affects the interests of the parties, who are prejudiced by it, and who seek to relieve themselves from it by an appeal. 6 Bom. L. R. 403 ; 6 Pat. L. J. 415 , 15 Moo. P. C 181 ; 3 C. L. J. 257 ; 35 A. 445 Foll. Per *Robinson, C. J.*—The second paragraph of S. 110, C.P.C. is intended to deal with property other than that forming part of the actual subject-matter in dispute and which would be affected by the final decree or order. If the decree affects the petitioner's rights in or to such other property, that may be taken into consideration in estimating the amount or value of the subject-matter in dispute on appeal to His Majesty in Council. 39 M. 843 foll. (*Robinson C J. and Duckworth, J.*) MAUNG BYA *v.* MAUNG KYI NYO. **66 I.C. 606: 11 L.B R. 152.**

——S. 111—"*Single Judge*"—*Meaning of.*

S. 111 applies to a single judge of a High Court established under the Charter Act, 1861. (*Johnstone, J.*) BRIJ TUDAR SINGH *v.* KANSHI RAM. **127 P.W.R. 1917 : 42 I.C. 893 : 131 P.L.R. 1917.**

——S. 111—*Appeal from single judge acting in revision does not lie.*

There is no appeal to His Majesty in Council from the order made by a single judge in revision under S 115, C.P.C. and S. 107, Govt. of India Act. (*Krishnan and Wallace, JJ.*) SRI RAJAH BOMMA DEVARA VENKATA SATYANARAYANA *v.* VENKATA BHASHYAKARULU. **46 Mad. 958: 18 L.W. 655 : 75 I.C 604 : 46 M.L.J. 117 : 1924 Mad. 399.**

——S. 113, O. 46, R. 1—*Reference to High Court—Power of Collector acting under S. 23 to make reference.*

The Collector is not a Collector trying a suit or appeal or executing a decree. He has no power of reference to the High Court under S. 113 of the C. P. Code. (*Scott, C. J. and Batchelor, J.*) DALPAT ZOPDOO PATIL *v.* MAHADU UKA. **14 I.C. 782 (2): 14 Bom, L.R. 259.**

——S. 113 and O. 46, R. 1—*Reasonable doubt.*

Where it was perhaps somewhat difficult to hold that the judge making the reference entertained any reasonable doubt as to what his decision should be or as to what decision was correct, but the respondent withdrew any objection on this ground, as he said the questions that arose would affect a very large number of cases and must affect a very large amount of money, reference was entertained. (*Robinson, C.J. and May Oung J.*) E. E. DAWOODJEE AND SONS *v.* THE MUNICIPAL CORPORATION OF THE CITY OF RANGOON. **1 R. 220 : 1923 R. 193.**

——S. 114 and O. 47, R. 1—*Sanction to prosecute—Leave to appeal to Privy Council granted.*

If sanction is granted to the Public Prosecutor to prosecute an attorney, an appeal against that sanction is an attack on his power to prosecute. The order granting leave to appeal is an order affecting his authority to prosecute the appellant and hence he can apply for review of the order granting leave. (*Imam and Chapman, JJ.*) PUBLIC PROSECUTOR CALCUTTA *v.* PORESH CHANDRA GHOSH. **41 Cal. 734: 19 C.W.N. 593 : 15 Cr L.J. 52 : 22 I.C. 324.**

C. P. CODE (V OF 1908), S. 115—Addition of parties.

——S. 114—*Review—Grounds for Reversal of High Court's decision in a connected case by the Privy Council—Not a sufficient cause.*

Reversal of High Court's decision in a connected case by the Privy Council is not a sufficient cause for review. (*Kumarsamisastri, J.*) GANNALATHULA VENKAMMA *v.* GANNALATHULA RANGARAO. **43 M.L.J. 33 : 15 L.W. 593 : 1922 M.W.N. 304 : 70 I.C. 741 : 31 M.L.T. 473 ; 1922 M. 227.**

——S. 115.—

Addition of parties.
Amendment of decree.
Amendment of plaint.
Amendment of pleadings.
Appeal.
Arbitration,
Award.
Case.
Court fee.
Criminal prosecution.
Delay.
Discretion.
Error of law.
High Court.
Illegality.
Interference.
Interlocutory order.
Jurisdiction.
Leave to sue.
Liberal interpretation,
Material irregularity.
Misconstruction.
Mistake of fact.
New plea.
Order.
Other remedy.
Petition.
Revision.
Right to apply.
Scope of.
Subordinate court,
Withdrawal of suit.

See also C. P. CODE, S. 107. and S. 151.

Addition of parties.

——S. 115 and O. 1. R. 10 (2)—*Addition of parties—Striking out party.*

No revision lies from an order of a Court. O. 1, R. 10, striking out a deft., as such an order does not decide anything between the parties. 32 A, 623, foll. (*Karamat Husain and Tudball, JJ.*) BHIKABMER DAS *v.* THAKUR. **14 I. C. 263.**

——S. 115 and O.1, R.10—*Addition of parties—Revision—Discretion.*

It is not a case of failure to exercise jurisdiction justifying interference in revision if the lower Court rejects an application under O. I. R. 10, C.P.C., on the ground that it was made too late. (*Richardson, J.*) RAM CHARAN MOHAJAN *v.* JIBAN CHANDRA SARMA. **64 I. C, 563.**

C. P. CODE (V OF 1908), S. 115—Addition of parties.

———**S. 115 and O. I R, 13**—*Addition of parties—Non-joinder of parties—Revision.*

Where the right to raise an objection as to non-joinder came into existence during the suit, and such objection was not taken in the trial court, it cannot be raised in revision. (*Richardson and Beachcroft, JJ.*) NILMONI DE *v.* SOORENDRA NATH MITRA. **46 I. C. 648.**

———**S. 115, O. 1, R 10 (2) and O.31. R.2**—*Addition of parties—Government of India Act*, S. 107.

In a suit by a widow as the administratrix, a person claiming as adopted son of her husband applied to be made a co-plff. on the ground that the widow was guilty of laches and collusion. The widow admitted the fact of adoption but denied authority. *Held*, that the applicant ought to have been joined as co-plff. and the High Court could interfere under S. 115 of the C, P. Code or S. 107 of the Government of India Act. 14 C. W. N. 703, foll. (*Teunon and Newbould, JJ.*) JUGAL KRISHNA MULLICK *v.* PHULKUMARI DASSI **44 I. C. 564.**

———**S. 115 and O.1, R.10**—*Addition of parties—Order refusing to make a transposition of parties when open to revision.*

Though the High Court will not interfere in revision with an order of a Lower Court refusing to make a transposition of the parties, a revision will lie when such an order of refusal is expressly based on a supposed jurisdiction in the court. (*Chatterjee and Beachcroft, JJ.*) BROJENDRA KUMAR DAS *v.* GOBIND MOHAN DAS. **34 I. C. 186 : 20 C. W. N. 752.**

———**S. 115 and O. 1, R. 10**—*Addition of parties—Refusal—Interference in revision.*

Where in a suit for partition among co-sharer, landlords the Court below refused to add the tenants as parties in the exercise of its discretion. *Held*, that there was no case for interference by the High Court. (*Odgers, J.*) RATNACHALAM AIYAR *v.* SIVACHIDAMBARAM PILLAI. **18 L. W. 198 : (1923) M. W. N. 403 : 45 M. L. J. 703 : 1923 Mad. 690.**

———**S. 115 and O.1, R.10**—*Addition of parties—Scheme suit—Persons claiming to be trustees.*

The High Court in revision set aside an order of the Lower Court refusing to add persons *bona fide* claiming to be trustees as parties to a scheme suit. The framing of a scheme would mean the loss of their right. (1917) M. W. N. 550, foll. (*Krishnan, J.*) MULAKUTLA RAMA MURTHI *v.* CHILLARA BHASKAR AYYA. **50 I. C. 58.**

———**S. 115**—*Addition of parties—Interlocutory order—High Court's powers—Revision.*

The High Court will interfere even with an interlocutory order directing addition of parties passed by a subordinate Court if it is not a mere exercise of discretion but want of jurisdiction which might cause injustice to the party, in spite of the fact that there is a remedy by way of appeal against the final judgment in a suit. (*Srinivasa Aiyangar, J.*) SITARAMAYYA *v.* RAMAPPAYYA. **39 I. C. 160: 5 L. W. 207.**

C. P. CODE (V OF 1908), S. 115—Amendment of decree.

———**S. 115**—*Addition of party—Scheme suit.*

The action of a Court in a suit under S. 92. C.P.C., refusing to implead as a party defendant, the son of a hereditary trustee, amounts to an illegality and the High Court has power to interfere under S. 115, C.P. C. and S. 107, Govt. of India Act. (*Ayling and Seshagiri Aiyar, JJ.*) VAITHILINGAM *v.* RAMALINGAM PILLAI. **6 L. W. 9 : 38 I. C. 133: (1917) M. W. N. 550.**

———**S. 115 and O. 1, R. 3 and O. 2, R. 3 (1)**—*Addition of parties--Causes of action—Suit by co-mortgagee against mortgagor and co-mortgagee for foreclosure or share of amount paid—Cause of action—Same transaction—Revision.*

A, a co-mortgagee brought a suit against the mortgagor for foreclosure and joined the other co-mortgagee as defendant who refused to join as plaintiff and claimed against him his share of the amount which the mortgagor was alleged to have paid. The plaintiff was ordered to amend the plaint as the causes of action were improperly joined and the parties were improperly joined. It was held that the order for amendment was wrong and could be set aside in revision and that the cause of action against both co-mortgagee and mortgagor was one as the main question was what payments were made to the co-mortgagee. (*Drake-Brockman, J.C.*) MAHADEO *v.* NAGO. **12 I. C. 357 : 7 N. L R. 130.**

———**S. 115 and O. 1, R. 10**—*Addition of parties—Revision.*

A person cannot be impleaded on allegations based on hearsay. Illegal and improper impleading of a person is a ground for revision by High Court. (*Lindsay, J. C., and Stuart, A. J. C.*) ALLAHABAD BANK *v.* MAHAMMAD RAZA KHAN. **16 I. C. 592 : 15 O. C. 304.**

———**S. 115 and O. 1, R. 10**—*Addition of parties—Improper refusal.*

Where an application under O. 1, R. 10 of the C. P. Code asking that a certain person be added as a party-defendant to a suit and praying for permission to amend the plaint accordingly is rejected, no appeal lies against the order rejecting the application. Where, however, it appears that the Court has exercised wrong discretion in rejecting the application, the High Court can interfere in revision or under S. 107 of the Government of India Act. (*Mullick and Thornhill, JJ.*) ABDUL HAQUE *v.* MAHAMMAD YAHYA KHAN. **47 I. C. 725.**

Amendment of decree.

———**Ss. 115, 151 and 152**—*Amendment of decree—Refusal—Revision.*

Upon an application by the mortgagor for the amendment of the decree, the Court refused to order the amendment as "uncalled for". *Held*, that the order was tantamount to a refusal to exercise the jurisdiction and the High Court's interference in revision was justified. (*Richards, C. J. and Tudball, J.*) PULE BISHUNATH RAI *v.* BRAHMANAND SWAMI. **47 I. C 830: 16 A. L. J. 749.**

———**S. 115**—*Amendment of decree—Rejection of amendment petition—No irregularity.*

C. P. CODE (V OF 1908), S. 115—Amendment of decree.

A Sub-Judge rejecting a petition for amendment of a decree holding that the expression "future interest" in the decree means interest from the date of decision not from the date of institution of suit, commits no irregularity and the High Court cannot interfere in revision whether his decision is right or wrong. (*Chamier and Piggott, JJ.*) KANHAI LAL *v.* MUL CHAND. 26 I. C. 808.

——S. 115—*Amendment of decree.*

An order under S. 152 (S. 206 of C. P. C., 1882.) directing amendment of a decree, not in conformity with judgment, is not a decree and therefore not appealable but revision lies. (*Chevis, J.*) BAWAL SINGH *v.* LACHANMAN SINGH. 24 P. R. 1911: 186 P. L. R. 1911: 10 I. C 850: 56 P. W. R. 1911.

——S. 115—*Amendment of decree—Original Court—Appellate decree.*

There is no appeal against an order of amendment of an appellate decree by the original Court but the High Court will interfere in revision. 32 A. 295, foll. (*Hannay, J.*) KRISHNA UPADHYA *v.* GANAPAYE UPADHYA. 28 I. C. 586.

——S. 115—*Amendment of decree—Power to correct—Costs.*

The High Court can correct an incorrect figure entered in a decree as vakil's fee owing to a mistaken calculation, but not an omission to enter proportionate costs which could have been corrected by an appeal. (*Sadasiva Aiyar and Seshagiri Iyer, JJ.*) SANKURATRI JIMMAYYA *v.* UPPALAPATI. 24 I. C. 878.

Amendment of Plaint.

——S. 115—*Amendment of plaint.*

The High Court has power to interfere under S. 115 of the Code with an order directing that a plaint should be amended as being bad for misjoinder. (*Batten, A. J. C.*) SHANKAR *v.* SONOO. 63 I. C. 419 : 4 N. L. J. 58.

——S. 115—*Amendment of plaint—Order refusing—No interference.*

Plaintiff asked for permission to amend the plaint by substituting a new genealogical table for that given already but the Court rejected the application. The High Court declined to interfere with the discretion of the Court below in revision. (*Rafique and Piggott, JJ.*) GANGA PRASAD *v.* LACHMAN DAS. 16 I. C. 404.

——S. 115—*Amendment of plaint.*

Amendment of plaint if not allowed can be allowed in revision. (*Martineau, J.*) SUNDER *v.* PURAN SINGH. 1922 Lah. 394 (1)

——S. 115 and O. 6, R. 17—*Amendment of plaint—Revision.*

An order refusing leave to amend the plaint under O. 6, R. 17 can be set aside in revision. (*Broadway, J.*) IMDAD ALI SHAH *v.* SYED ALI. 40 I. C. 65 : 26 P. R. 1917.

——S. 115—*Amendment of plaint—Revision.*

An erroneous order refusing to allow a petition for amendment of a plaint is not open to revision. 22 I. C. 39, foll.; 8 I. C. 8, not foll. (*Sadasiva Aiyar, J.*) KAJIRA BEEVIAMMAL *v.* FATHENA BIVIRIAMMAL. 24 I. C. 779 : 1 L. W. 230.

C. P. CODE (V OF 1908), S. 115—Appeal.

——S. 115—*Amendment of plaint—Order allowing—Revision.*

An amendment of the plaint is in the discretion of the Court and, if wrongly allowed, the defendant could attack the order on appeal if the decision is against him. The High Court will not interfere in revision with the order especially when it does not change the character of the suit or cause material injustice to the defendant. (*Odgers, J.*) RAMA KRISHNA PILLAI *v.* KRISHNA SWAMI PILLAI. 15 L. W. 667 : (1922) M. W. N. 521: 68 I. C. 167: 1922 M. 321.

——S. 115—*Amendment of plaint—Revision.*

Where a Dt. Judge refused to amend the plaint as such amendment materially altered the nature of the suit and passed an order under O.VI, R.17, C. P. C., the High Court cannot interfere in revision, even though the Dt. Judge exercised his discretion wrongly unless he acted with such material irregularity as to justify interference in revision. (*Phillips, J.*) V. VENKATASUBBIAH *v.* SESHACHALLAM. 22 M. L. J. 136: 10 M.L.T. 549: 12 I. C. 173 . (1911) 2 M.W.N. 257.

——S. 115—*Amendment of plaint—Refusal.*

Where a Court dismisses a suit refusing an opportunity to amend the plaint, if necessary, the High Court can interfere under S. 115, C. P. C. An error of procedure resulting in a failure of justice is a material irregularity in the exercise of jurisdiction. (*Das, J.*) MAHARAJA SIR RAMESHWAR SINGH BAHADUR *v.* SADANAND JHA. 1 Pat. L T. 188 : 2 U.P.L.R. (Pat) 29 : 55 I. C. 445: 1920 Pat. 29.

Amendment of Pleadings.

——S. 115—*Amendment of pleadings—Other remedy—Appeal—No revision.*

Where there is another remedy open to a party such as an appeal, if eventually the judgment is passed against him, the High Court would not entertain revision under S. 115, C. P. C. or S. 15 of the Charter Act and so no revision can be allowed against an order refusing permission to amend the pleadings. (*Woodroffe and Carnduff, JJ.*) CHANDI ROY *v.* KIRPAL ROY. 10 I. C. 308: 15 C. W. N. 682.

——S. 115—*Amendment of pleading—Revision.*

A Court is not empowered to accept additional written statement to meet allegations not raised in the plaint. The proper course is to amend the plaint, if allowable, direct filing of written statement, frame issues and decide. (*Kumaraswami Sastri, J.*) POOSAPATHI RAMACHANDRA *v.* VENKATA SUBBAYAMMA. 30 I. C. 41: 29 M. L. J. 53.

Appeal.

——S. 115—*Appeal—Lower appellate court having no jurisdiction—Order of dismissal of suit for not securing service on deft.*

The High Court in revision set aside the order of a District Judge who allowed an appeal against an order of dismissal of a suit by the First Court for plff's not securing service on deft. on the ground that no appeal lies from an order dismissing a suit for plff.'s failure to secure service of

C. P. CODE (V OF 1908), S. 115—Appeal.

process on one or more defendants. (*Knox, J.*) MASOOD ALI *v.* CHUNNI LAL. 39 I. C. 464 : 15 A. L. J. 520.

——S. 115—*Appeal — Incompetent appeal entertained by Appellate Court—Revision.*

Where a lower appellate Court erroneously entertains an appeal against an order under O. 21, R. 101, C.P. Code, the High Court can interfere in revision and set aside the decision of the lower appellate Court. (*Macleod, C. J. and Crump, J.*) BAI MANI *v.* RANCHODLAL. 25 Bom L. R. 147: 72 I. C. 256 : 1923 Bom. 214.

——Ss. 115 and 104, Cl. (1)—*Appeal—Case decided in which no appeal lies.*

An order passed under S. 104, cl. (1) is a "case decided in which no appeal lies" within S. 115, and is therefore open to revision. (*Batchelor and Hayward, JJ.*) BAI ATRANI *v.* LEEPSING BARIA. 40 Bom. 86 : 33 I. C. 358 : 17 Bom. L. R. 1097.

——S. 115—*Appeal—Conversion into revision—Interference.*

Where it would amount to a denial of justice to the appellant to refuse relief and it appears that no appeal lies against the decision of the Court below, the High Court would convert the appeal into a revision petition and interfere. Where the lower Court had erroneously and without jurisdiction purported to amend a final decree, the High Court set aside the order in revision. (*Ghose and Panton, JJ.*) NAWABKHAJEH HABIBULLA *v.* GOLA ASMOTER KHATUN. 37 C. L. J. 395 : 74 I C. 575 : 27 C, W. N. 720 : 1923 Cal. 612.

——S. 115—*Appeal—Conversion into revision.*

The High court is entitled in the exercise of its discretion to convert a second appeal into a revision and interfere. (*Teunon and Abdul Majid, JJ.*) MAHATAP DASI *v.* MADHU SUDAN SAHA. 64 I. C, 712.

——S. 115—*Appeal—If can be converted into one for revision.*

A petition of appeal presented to the High Court in a case where no such appeal lay may, in a proper case, be treated as an application for revision under S. 115 of the Code. (*Shamsul Huda, J.*) DINABANDHU *v.* JAGABANDHU. 63 I. C. 520 : 33 C. L. J. 384

——S, 115—*Appeal against order refusing application for revision of a decree of Small Cause Court.*

An order of a single Judge of the High Court refusing revision of the decree of a Small Cause Court under S. 115 is not appealable either under the Code of Civil Procedure or the Letters Patent. (*Jenkins, C. J. and Woodroffe, J.*) PEARY LALL DAW *v.* BANAMALI DEY. 30 I. C 862 (1) : 22 C. L. J. 40.

——S. 115—*Appeal—Converted into revision.*

It is open to the High Court to treat a second appeal as petition in revision when a ruling has been misapplied owing to the imperfect understanding of its circumstances. (*Le Rossignol, J.*) MOHFUZ ALI *v.* BIRJI NAND KIRAT. 45 P. L. R. 1915 : 28 I. C. 282: 201 P.W R. 1915.

C. P. CODE (V OF 1908), S. 115—Award.

——S 115—*Appeal—Converted into revision.*

Where the Lower Court had made an order without jurisdiction, the High Court converted an appeal from that order into a revision petition and set it aside. (*Spencer and Krishnan, JJ.*) MANDAVILLA RAMA RAO *v.* SIVANARAYANA. 25 M. L. T. 153 : 49 I. C. 629 : 9 L. W, 81.

——S. 115—*Appeal—Converted into revision—Question of jurisdiction—Mad. Est. Land Act, S. 192.*

The High Court has power to treat an appeal as a revision under S. 115, C. P. C., especially when the question in issue is one of jurisdiction. S. 115, C. P. Code, is not controlled by S. 192 of the Mad. Est. Land Act. (*Spencer and Kumaraswami Sastri, JJ.*) VENKATA RAMAYYA *v.* CHAKALAI VEERASWAMI GADU. 41 Mad. 554 : 34 M. L. J. 309 : 23 M. L. T. 251 : 7 L. W. 508 : 45 I. C. 471 : (1918) M. W. N. 327.

——S. 115—*Appeal—No revision, if appeal lies.*

Where a decree is appealable to the Dist. Court and to the High Court in second appeal, S. 115, C. P. C., cannot apply. 24 M. 646 and 26 I. C. 19 relied on. (*Sadasiva Aiyar and Moore, JJ.*) SUPPU NAYAKAN *v.* PERUMAL CHETTY. 19 M. L. T. 364 : 30 M. L. J. 486 : 34 I. C. 372 : (1916) 1 M. W. N. 301.

——S. 115—*Appeal—Converted into revision,*

Where a second appeal is filed but does not lie under the law, it can be treated as an application for revision. (*Kanhaiya Lal, A.J.C.*) BHAGWATI PRASAD SINGH *v.* GOVIND DAT. 41 I. C. 125 : 4 0, L. J. 374.

Arbitration.

——S. 115—*Arbitration—Revision.*

Where in arbitration proceedings an appeal is not allowed, revision would be still more objectionable. (*Johnstone, J.*) NARPAT RAI *v.* DEVIDAS. 1 P. L. R. 1911 : 9 I. C. 385 : 12 P. W. R. 1911.

Award.

——S. 115 and Sch. II, para. 15—*Award—Private inquiries authorised by agreement—Not Misconduct—Order superseding award—Revision.*

Where the parties to an arbitration agreed to abide by the arbitrator's decision in whatsoever manner he might see fit to arrive at it, and he made private inquiries into the dispute behind the back of the parties, *held*, it did not constitute misconduct ; in superseding the award in such a case, the court acted illegally and with material irregularity and hence the High Court could interfere in revision. (*Piggott and Walsh, JJ.*) HUSAIN BAKHSH *v.* LACHHMAN DAS MATHRA DAS. 20 A. L. J. 125 : 64 I.C. 934 : 1922 All 69.

C. P. CODE (V OF 1908), S. 115—Award.

——S. 115—*Award—Material irregularity—Extension of time for filing award.*

A Court has jurisdiction to extend the time for filing an award and such an extension is not therefore a material irregularity. The mere fact that the Court has used threatening language towards an arbitrator is not a ground for interference under S. 115 in the absence of proof that the arbitrator was thereby forced to arbitrate against his will. (*Sulaiman and Kanhaiya Lal, JJ.*) BASUDEO MAL *v.* KANHAIYA LAL. 43 All. 101 : 59 I. C. 667 : 18 A. L. J, 952.

——S. 115 and Sch. II. Para 15—*Award—Setting aside for misconduct—Revision.*

Where a Court sets aside an award of arbitrators on the ground of misconduct on the part of the arbitrators its order is not open to revision under S. 115, C. P. Code, 25 B. 551 foll. (*Macleod, C. J. and Crump, J.*) CHIMANBHAI *v.* KESHVLAL. 25 Bom. L R. 443 : 47 Bom. 721 : 73 I. C. 464 : 1923 Bom. 402.

——S. 115—*Award—Decree on —Appeal—Revision.*

The High Court has power to set aside a decree on an award under S. 115 of the Code, as no appeal lies against the decree. (*Macleod. C. J. and Fawcett, J.*) RAVJI BHAI KASHIBAI *v.* DAHYABAI ZAVERBHAI. 22 Bom. L. R. 1454 : 59 I. C. 811 : 45 Bom. 832.

——S. 115 and Sch. II, Para. 10—*Award, decree based on—Interference.*

Where no notice was given of the filing of the award as required by Para. 10, the High Court can interfere in revision with a decree passed in terms of the award. (*Teanon, J.*) GOPI NATH MUKERJI *v.* NARESH CHANDRA MITRA, 63 I. C 243.

——S. 115 and Sch. II, para. 16—*Award—Notice of objections not given—Effect.*

Where a Court decides the objections to an award without notice to the objector of the date of hearing, it acts with material irregularity and its order is liable to be revised. (*Abdul Raoof, J.*) DARBARI RAM *v.* BHIKHA RAM. 64 I. C. 394.

——S. 115 and Sch. II, para 16—*Award—Revision—Competency of.*

If a Court passing a decree on an award has committed an error in procedure or has misused the jurisdiction prescribed by Sch. II, C. P. C., there is a revision against the decree. (*Martineau, J.*) DELHI CLOTH AND GENERAL MILLS, CO. *v.* FIRM KIDARI PERSHAD CHIEDI LAL, 22 P. L. R. 1922 : 64 I. C. 363 ; 4 U. P. L. R. (L). 15.

——S. 115—*Award — Setting aside—Revision.*

The High Court can revise proceedings of a Lower Appellate Court setting aside an award by an arbitrator, to whom reference was made in a suit but who filed it after the suit was restored on an application to set aside the order of dismissal for default, the parties not having objected to his authority though no fresh reference was made to him after restoration. (*Johnstone, C. J. and Shadi Lal, J.*) HARI SINGH *v.* ALLAH BAKHSH. 38 I. C. 769 : 115 P. R. 1916.

C. P. CODE (V OF 1908), S. 115—Award.

——S. 115—*Award—Jurisdiction—Failure to exercise.*

In an arbitration award in which there is no appeal, a revision lies when the Court has acted without jurisdiction or refused to exercise jurisdiction or proceeded illegally or with material irregularity. (*Johnstone, C. J. and Shadi Lal, J.*) RAM JAWAYA MAL *v.* DEVI DATTA MAL. 117 P. R. 1916: 107 P. W. R, 1916 : 34 I. C. 192 : 70 P. L. R. 1917.

——S. 115—*Award—Material irregularity—Court giving advice to arbitrators.*

It is not an irregularity in the Court to help the arbitrators with advice and orders when they came to it in difficulty (*Johnstone, C. J., and Chevis, J.*) KANHAIYA LAL *v.* NARAIN SINGH. 28 P. R. 1916 : 11 P. W R. 1916 : 31 I. C. 700.

——S. 115 and Sch. II, para 10—*Award—Objections—Order rejecting—Revision.*

An order rejecting the objections to an award without adequate enquiry into them cannot hold good and hence liable to be aside in revision. (*Shah Din, J.*) SAHIB RAI *v.* CHAIT RAM. 96 P. L. R. 1915 : 28 I. C. 427 : 30 P. W. R. 1915.

——S, 115 and Sch. II, para 16—*Award—Revision.*

Interference in revision is not rightful where there is no irregularity in the proceedings or error in procedure or misuse of a jurisdiction and the decree of the court is passed according to an award of arbitrators. (*Kensington and Beadon, JJ.*) JAGAN NATH *v.* NANAK CHAND. 9 P. R. 1913 : 16 I. C. 996 : 248 P. L. R. 1913.

——S. 115 and Sch. II, para. 16—*Award—Revision——Other remedy open.*

A decree which is not in accordance with an arbitration award being appealable, no revision lies to the High Court, if there has been no appeal against such a decree. (*Reid, C. J.*) GHASITA MAL *v.* JAMIYAT RAI. 120 P.W.R. 1912 : 14 I.C. 284 (2) : 118 P.L.R, 1912.

——S, 115—*Award—Filing of—Award not containing a decision on a point, in dispute.*

Per Sadasiva Iyer, (*Sundara Iyer J. Contra.*)—The Court on filing an award not containing decision on a point in dispute cannot be considered to have exercised a jurisdiction not vested in it by law or failed to exercise a jurisdiction vested in it by law,. (*Sadasiva Iyer and Sundara Iyer, JJ.*) PURUSHOTAMA DAS PRAGJI SAIT *v.* JETA BHAI NAGJI, 17 I. C. 33 : (1912) M. W. N. 1076.

——S. 115—*Award—Revision.*

The High Court should not interfere with the award if no illegality is apparent and the irregularities in procedure are formal. (*White, C. J. and Phillips, J.*) PATHI BANDAL SITARAMAYYA *v.* PATHI BANDAL PICHAYYA, (1911) 2 M. W. N. 223 : 12 I. C. 269. 21 M. L. J. 1005.

——S. 115—*Award—Objections —Refusing to give opportunity to party to produce evidence.*

When a party to a suit objects to the award of arbitrators to whom the suit was referred, he should be given an opportunity to support his objections by appropriate evidence ; and it is a

C. P. CODE (V OF 1908), S. 115—Award.

material irregularity not to afford such opportunity. (*Lindsay, J. C.*) BETANA *v.* KEDAR NATH. **37 I. C. 400 : 3 O. L. J. 583.**

——S. 115—*Award—Filed out of time—Revision.*

S. 115, C P. C. would not necessarily apply though the Court accepting an award has erroneously decided some of the mixed questions of law and fact, as to the validity of an award delivered out of time. (*Atkinson and Das, JJ.*) PATTO KUMARI *v.* UPENDRA NATH,
50 I. C. 52 : 4 Pat. L. J. 265.

——S. 115—*Award—Revision--Minor parties —Want of sanction.*

The absence of Court's sanction to a reference to arbitration on behalf of certain minor parties does not, of itself, render the award void but only voidable and if the court negatives the objection that the award is void for want of such sanction and passes decree on the award, it is not open to revision under S. 115, C. P. Code, 40 M. 793 (P. C.) Ref. (*Kennedy, J. C. and Raymond, A. J. C.*) EMNABAI *v.* FAKIR MAHOMED.
65 I. C. 50 : 15 S. L. R. 165 : 1922 Sindh 1.

——S. 115—*Award—Revision.*

The High Court has power to revise the proceedings of the Lower Court after the delivery of the award to it and can rectify any illegality or material irregularity in the lower courts' procedure in dealing with the award. (*Pratt, J. C. and Boyd, A. J, C.*) SRIKISHIN *v.* RELUMAL PARIOMAL. **34 I. C. 845 : 9 S. L. R. 183.**

Case.

——S. 115—"*Case decided*"—*Meaning of—Order under S.* 10 *of the Rel. End. Act—Revision —Powers of interference.*

If the remaning members of a temple committee have been ordered by the Civil Court to forthwith fill up a vacancy in their body under S, 10 of Act XX of 1863, on their failure to hold an election within three months, the Civil Court has thereafter no jurisdiction to make an order declaring valid, an appointment made on election by the persons interested. If it does so, the order is open to revision under S. 115, C P.C. A proceeding of the Civil Court under S. 10 of Act XX of 1863 is a judicial and not merely an adminstrative or ministerial act. In such matters the Civil Court exercises its powers as a Court of law not merely as a *Persona Designata* whose determinations are not to be treated as judgments of a legal tribunal. S. 115, C P. C., applies to jurisdiction alone, the irregular exercise, or non exercise of it or the illegal assumption of it; it is not directed against conclusions of law or fact in which jurisdiction is not involved. "Case" is not defined in the Code, It cannot be confined to litigation in which there is a plaintiff who seeks to obtain a particular relief against a deft. before the Court but includes an *exparte* application praying that persons in the position of trustees or officials should perform their trust or discharge their judicial duties. (*Lord Atkinson*). BALAKRISHNA UDAYAR *v* VASUDEO AYYAR,
40 Mad. 793 : 44 I. A. 261 : 15 A. L. J. 645 : 2 Pat. L. W. 101 : 33 M. L. J. 69 : 19 Bom. L. R. 715 : 1917 M. W. N. 628 : 6 L. W. 501 : 22 C. W. N. 50 : 40 I. C. 650 : 11 Bur. L. T, 48 : 26 C. L. J. 143 (P. C.)

C. P. CODE (V OF 1908), S. 115—Case.

——S. 115—*Case—Refusal to adjourn.*

The refusal by a court to adjourn the hearing of a suit in order to enable the applicant to pay the court fee is not an order which should be revised by the High Court. (*Piggott and Walsh, JJ.*) CHAKHAN LAL *v.* KANHAIYA LAL.
20 A. L. J. 1005 : 69 I. C. 921 : 9 O. and A. L. R. 146 : 45 A. 218 : 1923 A. 118.

——S. 115—*Case—Minority.*

Where the defendant claimed to be a minor but refused to produce any evidence and the plaintiff swore that he was major. *Held* no revision lies from the order of the judge in which defendant was held to be major there being before High Court no record of the suit or case decided in the court below. (*Piggott and Walsh, JJ.*) AMOLAK CHAND *v.* BHAGWAN DAS.
1922 All. 334.

——S. 115 —'*Case decided*'— *Meaning* — *Decision of a single issue.*

Per *Piggott, Ryves and Gokul Prasad, JJ* : The decision on a single issue by a Subordinate Court in a suit which is still pending in that Court is not a 'case decided'. Per *Rafique, J* :—'Case' includes an order that deals with an issue or question, raised between the parties and 'decided' includes any adjudication, on such question or issue, whether the adjudication finally determines the suit or not. (*Rafique, Piggott, Walsh, Ryves and Gokul Prosad, JJ.*) BUDDHOO LAL *v.* MEWA RAM, **43 All. 564 : 63 I. C. 15 : 19 A. L, J. 558 (F. B.)**

——S. 115—"*Case decided*"—*Interlocutory order staying suit under S.* 10, *C.P.C.—Revision.*

An application under S. 10, C. P. C., for the stay of a suit is not a "case" and an order for stay passed on that application is not the decision of a case within S. 115 of the Code, and no revision lies from such an order. The word "case" in S. 115 is not confined to a suit but it cannot be construed to mean an interlocutory order in a suit although the order may be of such a nature that it cannot be interfered with even under S. 105 of the C. P. Code when an appeal is preferred from the final decree in the suit. 32 All. 623 appl. (*Banerji, J.*) SALTANAT JAHAN BEGAM *v.* SUNDAR LAL. **18 A. L. J. 431 : 58 I.C, 90 : 42 A. 409.**

——S. 115—"*Case decided*"—*Meaning of.*

Where a judge has delivered judgment and all that remains is his preparation of a formal decree the case must be deemed to have been decided and if an appeal lies against this decree, the High Court will not interfere in revision under S. 115 C. P. C. even though a remedy by way of an appeal may be a most expensive proceeding. (*Chamier, J.*) MOTILAL *v.* GANGADHAR.
29 I. C. 176: 13 A. L. J. 435,

C. P. CODE (V OF 1908), S. 115—Case.

———S 115—*Case—What is — Interlocutary order—Powers of interference—Bombay Regulation II of* 1827, *S.* 5.

In a suit which relates to a municipal election two first preliminary issues were raised and decided whether the Government was a party and secondly has the Court jurisdiction to hear the suit. *Held*, the decision amounted to the decision of a case and could be raised both under S. 115 and under S. 5 of Regulation II of 1827. Case law reviewed. (*Shah, A.C.J. and Coyajee, J.*) SECRETARY OF STATE *v.* NARSIBAI DADABAI PATEL.
25 Bom. L. R. 992 :
77 I. C. 241 : 48 Bom. 43 : 1924 Bom. 65.

———S. 115—"*Case*"—*Meaning of.*

The word "case" in S. 115 is a word of wider import than such words as "suit" or "appeal"; (*Batchelor and Hayward, JJ.*) BAI ATRANI *v.* LEEPSING BARIA. 40 Bom. 86 :
33 I. C. 358 : 17 Bom. L. R. 1097.

———S. 115—*Case*—"*Decided*"—*New Code and old Code.*

However modified in language, the word "decided" in S. 622 of the old Code of Civil Procedure is similar in its purport to the word "decided" in S. 115. (*Greaves*, J.) UDOY CHAND *v.* MULLA REASAT HOSSAIN. 70 I. C. 484 : 1922 Cal. 58

———S. 115 and O. 23, R. 1—*Case decided—Withdrawal of suit.*

A High Court cannot interfere under S. 115 of the C. P. C. or under the Charter Act with an order of the Lower Court allowing a suit to be withdrawn with liberty to bring a fresh suit because an order allowing a withdrawal is not a decision of a case. (*Coxe and D. Chatterjee, JJ.*) BANSI SINGH *v.* KISHUN THAKUR.
26 I. C. 203 : 41 Cal. 632 :

———S. 115—*Order under S.* 10, *C. P. Code—Interference in revision.*

An order staying a suit under section 10 of the Civil Procedure Code is not "a decision of a case" within the meaning of section 115 of the Civil Procedure Code any more than a decision by a Subordinate Court in a case in which the only question is whether it has or has not jurisdiction to go on with a suit. In order to come to a findingas to whether the requirements of section 10, C. P. Code have or have not been fulfilled, the Court is bound to determine certain matters mentioned in the sec tion, and if it does, it cannot be said that the Court has acted illegally in the exercise of its jurisdiction which was vested in it by law. (*Moti Sagar, J.*) FIRM OF RAMCHAND DIVANCHAND *v.* FIRM OF PRITHVICHAND & CO.
73 I. C. 247 : 1923 Lah. 615:

———S. 115—*Case—Decision as to jurisdiction of the Court.*

Where on the objection, of the defendant that the Court has no jurisdiction to entertain the suit the Court decides it has jurisdiction, the order of the Court does not amount to a decision of a case and no revision lies against it. 40 P. W. R. 1921 : 41 A. 43, 42 A. 564, referred to. (*Abdul Raooff, J.*) COLONY FLOUR MILLS CO., LTD *v.*

C. P. CODE (V OF 1908), S. 115—Case.

FIRM OF SANT SINGH.
5 L. L. J. 140 : 71 I.C. 487 :
1923 Lah. 414.

———S. 115—*Case—Refusal to issue interrogatories.*

The refusal to issue interrogatories for the examination of witnesses does not amount to "a case decided" within the meaning of S. 115, C.P. Code, and hence the order is not revisable. (*Scott-Smith J.*) ROOP CHAND *v.* THE CHURCH MISSIONARY TRUST ASSOCIATION.
39 I. C. 417 : 1923 Lah. 282 (2.)

———S. 115—*Case—Order staying suit.*

Semble :—There is no revision against an order of the lower court staying the trial of a suit. 42 A. 409 ; 42 C. 926 ; 27 M. L. J. 494 ; 15 C. W. N, 666 Ref. (*Abdul Raoff, JJ.*) MELA RAM *v.* RIKHI SINGH.
69 I. C. 111 :
33 P. W. R. 1922 : 1923 Lah. 69.

———S. 115—*Case—Meaning of—Order refusing stay of suit under S.* 10, *C. P. C.*

An order of lower court refusing to stay the trial of a suit under S. 10, C. P. Code, is not open to revision under S. 115, C. P. Code, inasmuch as there is no 'case decided.' 42 A. 409 ; 60 P. R. 1897 (F. B.) foll. (*Martineau, J.*) FIRM OF ISHAR DHARAM CHAND *v.* FIRM OF BUTA MAL DURGA DAS.
4 Lah. L. J. 425 :
67 I. C. 870 : 1922 Lah. 54.

———S. 115—*Case—Meaning of—Order under S.* 10 *of Act XIV of* 1920.

The expression "Case" in S. 115 of the C. P. Code, does not necessarily mean the whole case and includes a particular branch of the case which is quite distinct. An order directing the defendant to deposit money under S. 10 of the Charitable and Religious Trusts Act, is open to revision by the High Court. (*Brasher, J.*) MAHANT KIRPAL SINGH *v.* NARINJAN SINGH.
69 I. C. 658.

———S. 115—*Case—Order directing verification of pleadings—Order for costs.*

A mere direction that the defendant should sign the pleas and verify them according to law would probably not be open to revision, but when that direction is accompanied by an order that the defendant is to pay a certain sum as costs the order is a decision of a "case" with which the High Court can interefere in revision. (*Martineau, J.*) BALWANT SINGH *v.* TEJ BHAN.
64 I. C. 207.

———S. 115—'*Case*'—*Meaning of—Jurisdiction—Revision.*

The word 'case' in S. 115 does not mean necessarily the whole case, but may mean a particular branch of a case, having a separate remedy or procedure. The order of a Court, deciding that it has jurisdiction to entertain a suit is not a decision of a 'case' under S. 115, and no revision lies against the order. (*Martineau, J.*) SAWANMAL *v.* KANHAYA LAL. 59 I. C. 680 : 40 P. W. R. 1921.

———S. 115—*Case decided — Guardians and Wards Act, S.* 34—*Order under—Revision.*

C. P. CODE (V OF 1903), S. 115—Case.

Orders under S. 34 of the Guardians and Wards Act are open to examination by the High Court on revision side. (*Broadway, J.*) RAM DAS *v.* CHANI. 55 I. C. 587.

———Ss. 115 and 144—*Case—Decision as to payment of court-fee.*

An order of the appellate court directing the appellant to pay *ad valorem* court-fee is a case decided within the meaning of S, 115, C. P. Code and the High Court can revise the order. (*Oldfield, J.*) SUDALAI MUTHU PILLAI *v.* SUDALAI MUTHU PILLAI. 17 L. W. 623 : (1922) M. W. N. 831 : 71 I. C. 173 : 1923 Mad. 270.

———S. 115—*Case decided—Summary dismissal of appeal.*

Order dismissing an appeal summarily is a decree and is open to revision by High Court, if there is no second appeal provided for. (*Abdur Rahim and Sundara Aiyar, JJ.*) VENKATARAMA DEO *v.* RAGHUNATHA PATRO. 36 Mad, 128: 10 M. L. T. 261 ; 21 M. L. J. 887: 12 I. C. 73 : (1911) 2 M. W. N. 237.

———S. 115—*Case—Refusal to sue in* forma pauperis.

A refusal of leave to sue in *forma pauperis*, is " a case decided " within S. 115 C. P. Code. and hence capable of being raised. (*Baker, O. J. C. and Hallifax, A. J.C.*) ACHAL SINGH *v.* SETH JAWANDAS. 19 N. L. R. 165 : 75 I. C. 993 : 1924 Nag. 44,

———S. 115—*Case—' Decided,' meaning of — Withdrawal of suit—High Court, power of.*

Where a Court allows or refuses to allow a suit, to be withdrawn with liberty to bring a fresh suit, it 'decides' within the meaning of S. 115 of the Code and the High Court has jurisdiction to interfere. (*Batten, A, J, C.*) SINGHAI *v.* KANHAI. 61 I. C. 584

———S, 115—*Case decided—Illegal action.*

The word " case " in section 115 must be understood in its broadest and most ordinary sense, Where a Court improperly orders an amendment of the plaint or permits joinder of defts,, it is a case of illegal action under section 115 (*C.*) *Drake Brockman, J. C.*) MAHADEO *v.* NAGO. 12 I. C. 357 : 7 N. L. R, 130,

———S. 115—*Case—Adjournment granted on damages being paid.*

An order requiring the plaintiff to pay certain damages on condition of getting an adjournment, with an order that the case will not be taken up unless the amount is paid does not constitute the decision of a case within the meaning of the section. If the amount is not paid and the case dismissed, there is a right of appeal and the interlocutory order can be attacked therein. (*Daniels J. C.*) NARENDRA BAHADOR SINGH PANDE *v.* PEARY LAL. 64 I. C. 211 : 24 O, C. 215

———S. 115—*Case decided—Proceedings under the Legal Practitioner's Act—No power to revise.*

C. P. CODE (V OF 1908), S. 115—Court-fee.

The High Court cannot in its revisional jurisdiction interfere under S. 115 with an order under S. 36, Legal Practitioner's Act. The enquiry under the Legal Practitioner's Act is in the nature of a departmental inquiry and it may be conducted in such a way that the officer inquiring, acts with substantial justice and gives the person against whom the proceedings are being taken, an opportunity to defend himself. (*Kennedy and Raymond A. J. Cs.*) *In re.* MULCHAND. 56 I. C, 433 : 21 Cr. L. J. 449 : 13 S. L. R. 212.

Court-Fee

———Ss. 115 and 149—*Count-fee—Order for payment of additional Court-fee—Revision.*

An order under S. 149 of the C. P. Code requiring the plff, to pay additional Court-fee is not open to revision under S. 115 of the C, P. Code. There is another remedy to the plff. in case of dismissal of his suit for non-payment of the additional court-fee by way of appeal. (*Walmsley and Huda, JJ.*) GOBINDU DAS NATH *v.* NITYA KALI DASI 51 I. C. 581.

———S. 115—*Court-fee — Valuation—Prejudice—Revision.*

Where the Court below has arrived at a conclusion though wrongly, either on the facts or on proper judicial consideration of the matters placed before it, the Court would not interfere in revision. But where the Court below failed to grasp the point which really had to be determined, *viz*,, whether, under the provisions of the Court Fees Act and the Suits Valuation Act, the valuation of the suit given by the plff. was correct, the High Court should interfere, even though there is no prejudice to parties. if it is satisfied that the decision of the Court below was wrong. 11 C. 6, 1 C.W.N. 626, ref. 32 C. 634, dist. No question of prejudice to parties arises in the case. (*Brett and Sharfuddin, JJ.*) PORT CANNING AND LAND IMPROVEMENT CO., LTD. *v.* BOSAN ALI. 15 I. C. 46 : 17 C. W N. 160,

———S. 115—*Court-fee—Order as to.*

The Chief Court would not interfere in revision with an order calling on plff. to make up court-fee on his plaint, (*Chevis, J.*) CHUNNI LAL *v.* ROSHAN LAL. 53 I. C, 427 : 120 P, R. 1919.

———S. 115—*Court-fee— Erroneous demand,*

Revision lies to the High Court from an erroneous order for payment of additional court fee and the plff. need not wait for the dismissal of the suit by disobeying the order and then move the High Court in appeal or revision. 12 C. L. J. 211, foll, (*Srinivasa Iyengar, J.*) DODDA SANNEKAPPA *v.* SAKRAYYA. 36 I. C. 831.

———S. 115—*Court-fee—Revision,*

The High Court will not revise an interlocutory order demanding *ad valorem* Court-fee on a plaint, as the order of rejection of the plaint is appealable. The general practice of the High Court is not to interfere under S- 115 of the C. P. C. when another remedy is available to the petitioner. (*Coutts and Adami, JJ.*) MUSSAMMAT LACHMIBATTI KUMARI *v.* NANDKUMAR SINGH. 5 Pat. L. J, 400 : 56 I. C. 649 : 1 Pat, L. T. 268

C. P. CODE (V OF 1908), S. 115—Court-fee

———S. 115—*Court-fee—Interlocutory order—Other remedy open.*

Where the Lower Court decided an issue about court-fees and called upon plff. to pay deficit court-fee calculating it *ad valorem*, the High Court will not interfere under S. 115 as there was another course open by way of appeal and no irremediable harm was suffered by the interlocutory order. There was a right of appeal against the order rejecting the plaint. (*Roe and Jwala Prasad, JJ.*) BHUBANESHWARI PRASAD *v.* MOHAN LALL. **55 I. C. 786 : 1 Pat. L. T. 5.**

———S. 115—*Court fee—Revision.*

The High Court has power to interfere in revision with interlocutory orders of lower Courts, *e. g.*, direction to pay court-fee. (*Chapman and Atkinson, JJ.*) WAURATAN LAL *v.* WILFORD JOSE H. STEPHENSON. **50 I. C. 470 : 4 Pat. L. J. 195.**

Criminal Prosecution.

———S. 115—*Criminal Prosecution—Sanction—Refused by Munsif and granted by District Judge—Revision lies.*

Where the District Munsif refused sanction to prosecute but on an application under S. 195 (6) Cr. P. Code, the District Judge granted sanction an application for revision to the High Court lies under S. 115 C.P.C. and not under S. 195 (6). Cr. P. Code (*Lindsay, J.*) RAM NARAIN *v.* HARBANS SINGH. **71 I C 617: 1923 A. 490 (1).**

———S. 115—*Criminal Prosecution—Criminal Procedure Code, S. 476—Offence under S. 193, I. P. C.—Revision of order.*

An order of a Judge passed under S. 476, Cr. P. Code directing the trial of a person under S. 193 I. P. C. is open to revision only under S. 115 C. P. Code. (*Ryves, J.*) R. SIMEON *v.* EMPEROR. **66 I. C. 515: 23 Cr. L. J. 291 : 1922 All. 432.**

———S. 115—*Criminal prosecution—Sanction by Officer exercising Small Cause powers.—S. 182 I. P. C.—Civil matter—Revision.*

A Cantonment Magistrate exercising the powers of a Small Cause Court ordered the prosecution of a decree-holder for an offence under S. 182, I.P.C. committed in the execution proceedings. *Held*, that the matter was of a civil nature and should not be brought upon the criminal side. Treating it as a civil matter it was impossible under S. 115 of the C.P.C. to interfere. (*Tudball, J.*) RAM PRASAD *v.* EMPEROR. **16 A L. J. 921: 48 I. C. 499: 20 Cr. L. J. 19.**

———S. 115—*Criminal prosecution—Collector's order under S. 476, Cr. P. C.*

Prosecution order of Collector under S. 476, Cr P. C. while acting under S. 70 C. P. C., cannot be revised by High Court. (*Knox J.*) ASHARFILAL *v.* EMPEROR. **38 I. C. 419 : 18 Cr. L. J. 307 : 14 A. L. J. 1077.**

———S. 115—*Criminal prosecution—Charges to be specific and not general.*

The High Court can revise an order under 476 Cr, P. C. passed by a Civil Court if it fails to specify the charges. (*Rafiq ue, J.*) KASHI SHUKAL *v.* EMPEROR. **38 All. 695 : 36 I. C. 836: 18 Cr. L. J. 4 : 14 A, L. J. 814.**

C. P. CODE (V OF 1908), S. 115—Criminal prosecution.

———S. 115—*Criminal prosecution—Sanction—Refusal by Civil Court—Revision—Delay.*

An order of a Dt. Munsif or a Dt. Judge refusing to grant an application for sanction to prosecute cannot be revised by the High Court under S. 439 bu. under S, 115, C. P. C or S. 15 of the Charter Act. When a prosecution is undertaken at the instance of the Government, mere delay in applying for sanction cannot be taken as suggesting *mala fides*. (*Fletcher and Beachcroft, JJ.*) THE DEPUTY LEGAL REMEMBRANCER AND PUBLIC PROSECUTOR, BEHAR AND ORISSA *v.* RAM UDHAR SINGH. **28 I C. 334 : 16 Cr. L. J. 286 : 19 C. W. N 447 : 21 C. L. J. 198.**

———S. 115—*Criminal prosecution—Order under S. 476, Cr. P. Code—Revision — High Court.*

When action is taken by a Civil or a Revenue Court under S. 476, Cr. P. C., its proceedings are open to revision by the High Court under S. 115, C. P. C. on any of the grounds mentioned therein, or under S. 15 of the High Courts Act. (*Jenkins, C J., Harrington, Stephen, Mookerji and Holmwood, JJ.*) HAR PRASAD DASS *v.* EMPEROR. **40 Cal. 477: 17 C. L. J. 245: 14 Cr. L. J. 197: 19 I. C. 197: 17 C. W. N. 647: (F. B.)**

Contra 33 I. C. 824.

———S. 115—*Criminal prosecution—Sanction—Revision of proceedings of a Civil Court under S. 195, Cr. P, C.*

A petition to revise proceedings under S. 195, Cr. P. C. of a Civil Court should not be under S. 115 of C.P.C. but under S. 439, Cr. P. C. (*Oldfield and Sadasiva Aiyar, JJ.*) NALLAPPARAJU VENKATARAMARAJU *v.* MEDI SETTI ACHAYYA. **17 Cr. L. J. 184 : 33 I. C. 824 :**

Contra 19 I. C, 197: 40 Cal, 477.

———S. 115—*Criminal prosecution—Cr. P. C. S. 476—Perjury—Action taken before suit ended—Revision—Charter Act, S. 15.*

Where in the course of trial of a suit the Court ordered the prosecution of plff. for perjury on the basis of a statement which he made during negotiations for compromise and which he contradicted in the witness box later on. *Held, per Abdur Rahim, J.* (*Ayling, J. contra.*) Not only were the proceedings of the Dt Munsif highly irregular, bringing the case within S, 115, but also amounted to an abuse of the powers which the law vested in him justifying an interference under S. 15 of the Charter Act. (*Abdur Rahim and Ayling, JJ.*) *In re* KARRI VENKANNA PATRUDU. **17 Cr. L. J. 42 : 32 I. C 330 : 18 M L. T. 591.**

———S. 115—*Criminal prosecution—Sanction—Dismissal—Interference.*

A Court cannot dismiss for default and non-payment of process fees, an application made under S. 195 of the Cr. P. C.; when a Court therefore restores to its file, an application so dismissed, the High Court will not interfere as its effect will be to perpetuate a wrong order. (*Miller, J.*) MARUDAPPA GOUNDEN *v.* BOMMANNA GOUNDEN. **15 Cr. L. J, 71: 22 I. C. 423.**

———S. 115—*Criminal prosecution—Cr. P. C., S. 476—Order by Civil Court—Revision,*

C. P. CODE (V OF 1908), S. 115—Criminal prosecution.

An order passed by a Civil Court under S. 476, Cr. P. C. can be revised only under S. 115, C. P. C. and not under S. 439, Cr. P. C. (*Mitra and Kotwal, A. J. Cs.*) BABULAL *v.* EMPEROR.

21 Cr.L. J. 270 : 55 I. C. 286 : 16 N. L. R. 23

——S. 115—*Criminal prosecution—Revision—Costs,*

Having regard to the accepted view that a revision against an order granting sanction to prosecute should be treated as one under S. 115 of the C. P. Code, it is competent to the Court to award costs of the petition. (*Daniels, A. J. C.*) MT. FEROZA JAN *v.* MIRZA AMIR ALI.

9 O. & A. L R. 103: 24 Cr. L. J. 781: 9 O. L. J. 593: 74 I. C. 445: 1923 Oudh 119.

Delay.

——S. 115—*Delay—Fatal.*

Revision is a privilege and not a right and it corresponds to the remedies in England known as *Certiorari* and *Mandamus*. The invariable rule in these cases is that a party aggrieved must come to the High Court for relief at the earliest possible moment and also must come with no ulterior purpose. (*Walsh and Stuart, JJ.*) JHAMMAN LAL *v.* MANNI RAM.

39 I. C. 570.

——S. 115—*Delay—No interference.*

Where a plaint was returned for presentation to the proper court and plff. applied for revision of the trial Court's order long after the dismissal of his appeal by the Lower Appellate Court, the High Court refused to interfere in revision on account of the plff.'s laches. (*Kanhaiya Lal, A. J. C.*) BIHARILAL *v.* RAM NIRINJAN DAS.

43 I. C. 470: 4 O. L. J. 551.

——S. 115—*Delay—Power of High Court to interfere with orders passed years back.*

The High Court should not interfere in revision with an order passed a long time back, unless it feels that its interference is necessary in the interests of justice to all parties. (*Mookerjee and Beachcroft, JJ.*) ASITA MOHAN GHOSE *v.* SHAH HABIBUL RASUL. **22 I. C. 801: 19 C. L. J. 9**

——S. 115 and O. 22, R. 2—*Delay in bringing legal representatives—Revision.*

Where an application to bring on record the legal representative of a deceased defendant is presented out of time on the ground of ignorance of the death on the part of the applicant and the Court below excused the delay. *Held*, that the Court ought to have considered whether the applicant's ignorance of the death was justified and afforded sufficient cause for the belated application. (*Wallace, J.*) GOPALASWAMI IYER *v.* RAMACHANDRA IYER.

(1923) M. W. N 159: 32 M. L. T. (H. C.) 293: 72 I. C. 137: 1923 Mad. 503.

——S. 115—*Delay—Limitation.*

As a general rule the High Court does not entertain revision petitions after 3 months, but the High Court may in a proper case excuse the delay in the exercise of its discretion. (*Devadoss, J.*) YAGNASWAMI AIYAR *v.* CHIDRAMBARANATHA MUDALIAR. **(1922) M.W.N. 130 : 16 L.W. 760 : 65 I.C. 732 : 1922 Mad. 63.**

C. P. CODE (V OF 1908), S. 115—Discretion.

——S. 115—*Delay—No interference.*

Where an order was sought to be set aside by a petition presented more than 8 months from the date of the order and after 5 months of inexcusable delay, *held* there was no reason to excuse the delay. 24 M. 646, dist. (*Tyabji, J.*) VAZHAKUTTIA KUTTI *v.* MAMMI KUTTI, **24 I.C. 56.**

——S. 115—*Delay—Dismissal of petition.*

A railway company relying on a technical defect to defeat just claim of the public, filed a revision petition after a long delay. The High Court did not interfere and rejected it. (*Phillips, J.*) S. I. R. CO. *v.* VENGU. **10 M.L.T. 382 : 12 I.C. 169 : 21 M.L.J. 1061.**

Discretion.

——Ss. 115 and O. 41, R. 27—*Discretion—Additional evidence—Refusal to admit by appellate Court*

Where an appellate Court in the exercise of the discretion vested in it by O. 41, R. 27 of the C.P. Code refused to admit additional evidence offered three days after the argument was closed, the High Court would not interfere with its order in revision. (*Suhrawardy and Cuming, JJ.*) HARICHARAN KARANJAI *v.* BAHAR SHEIKH.

67 I.C. 252.

——S. 115—*Discretion—Review.*

The discretion of a judge as to whether he should or should not have reviewed his judgment cannot be revised. (*Fletcher and Newbould, JJ.*) BHABASINDU HALDAR *v.* KESAB CHANDRA HALDAR. **40 I.C. 463.**

——S. 115—*Discretion—Non-exercise of powers under S 151.*

Exercise of powers under S. 151 of the Code is purely discretionary with a court and if the lower appellate Court refused to exercise these powers their non-exercise is not a good ground for revision, 11 Mad. 793 foll. (*Moti Sagar, J.*) THE PUNJAB BANKING CO: LTD *v.* DIWAN DHANPAT RAI. **75 I. C. 487 : 1923 Lah. 506 (2).**

——Ss. 115 and 151—*Discretion—Inherent power—Refusal to exercise—Revision.*

Where the lower court with all the facts before it refuses to exercise its discretionary power under S. 151, the Chief Court would not interfere in revision. (*Rattigan and Shah Din, JJ.*) SHAM PRASAD *v.* RAM CHAND. **10 P.R. 1914 : 279 P.L.R. 1913 : 217 P.W.R. 1913 : 20 I. C. 203 : 25 P.W.R. 1914.**

——S. 115—*Discretion—Order as to mesne profits.*

The High Court will not interfere in revision with the lower court's order directing the commissioner to ascertain mesne profits. (*Spencer, J.*) HUSSAIN SAHIB *v.* HAMMAD SAHIB.

16 L.W. 312 ; 31 M.L.T. 180 : 1922 M.W.N. 562 : 74 I.C. 812 : 1923 M. 43.

——S. 115—*Discretion*

Where a subordinate court not only has made a mistake in law but has entirely misunderstood the nature of the judicial discretion it was called upon to exercise, the High Court will interfere in

C. P. CODE (V OF 1908), S 115—Discretion.

revision under S 115. (*Oldfield and Ramesam, JJ.*) SHANMUKA NADAN *v.* ARUNACHALAM CHETTIAR.
14 L. W. 642 : (1921) M.W.N. 799 : 42 M.L.J. 97 : 30 M L T. 172 : 69 I. C. 961 : 45 M. 194 : 1922 M 332

——S. 115 and O. 22, R, 9—*Discretion —No interference.*

The High Court will not interfere in revision with an order of the lower court refusing to extend time for setting aside an abatement under O, 22, R. 9, or, for an application for review. (*Sadasiva Aiyar and Spencer, JJ.*) KRISHNASWAMI IYER *v.* SEETHALAKSHMI AMMAL.
25 M.L.T 116 : (1918) M.W.N 888 : 49 I.C. 268 : 9 L.W. 166.

——S. 115— *Discretion — Interference by High Court—Principle of.*

Where discretion is to be exercised by a subordinate Court, a High Court will not ordinarily interfere, if there are other remedies open but where want of jurisdiction in the subordinate Court is established no question of discretion arises. (*Seshagiri Aiyar, J.*) RAMASWAMI NAIDU *v.* VENKATARAMANULU NAIDU.
26 M L. J. 467 : 23 I C. 572 : (1914) M. W. N. 368.

——S. 115—*Discretion—Subordinate Court —Interference—When justified*

A High Court ought not to interfere with every exercise of discretion by the court below, even if no appeal is allowed but must do so only where there has been a wanton abuse of process. The issue or a refusal to issue by a subordinate Court, a commission to examine certain witnesses is not an abuse of process warranting an interference by the High Court. (*Seshagiri Aiyar, J.*) SABAPATHI GOUNDEN *v.* CHINDU SAMBANDA MOORTHI, **23 I.C. 522 : 15 M.L.T. 339.**

——S. 115— *Discretion — Interference when justifiable,*

Where a judge uses his discretion to grant or refuse leave to institute a suit he does not act illegally nor with material irregularity nor is any question of jurisdiction involved. (*Sadasiva Aiyar, J*) *In re* MANJESHWAR PADMANABHA BATTA. **17 I. C. 400 : 12 M. L. T. 359.**

——S. 115 — *Discretion — Non appealable cases.*

Though revision is allowed only when no other remedy is available yet the remedy is discretionary and revision may be granted though other remedy is open. (*Hallifax, A.J.C.*) NILKANTH *v.* KASUBAI.
63 I. C 46 : 4 N. L. J. 55.

——S. 115—*Discretion— Adjournment costs —Excessive and unreasonable.*

The High Court will not interfere in revision with an order for payment of adjournment costs not complying with a provision of law, when the amount awarded is neither excessive nor unreasonable. (*Kotwal, A, J. C.*) NANDLAL *v.* GOVINDLAL, **57 I.C. 506.**

C. P. CODE (V OF 1908), S. 115—Error of law.

——S. 115 and O. 47, R. 1—*Discretion— Review—Refusal to grant—Revision.*

The grant of review is a matter peculiarly within the discretion of the Judge who passed the decree and a Court would not interfere in revision with the exercise of such discretion when a review has been refused. (*Daniels, A. J. C.*) JAG MOHAN SINGH *v.* MATA BADAL.
9 O,L J. 623 : 74 I. C, 351 (1) : 1923 Oudh 153.

——S. 115—*Discretion—High Court's interference.*

The High Court's interference with the discretion of a court in confined only to an ignorant or perverse exercise of it. (*Sharfuddin and Roe, JJ.*) GANGA PRASAD *v.* SANDU RAM.
20 C.W N. 1080 : 1 Pat. L.J. 465 : 37 I C. 129 : 3 Pat L W. 55.

——S. 115—*Discretion.*

Ordinarily the exercise of discretion by a lower Court in awarding compensation in breaches of contracts of service should not be questioned in revision. (*Parlett, J.*) KUMBHA HAJI *v.* MOTICHAND MAKANJI SHAH, **39 I. C. 121.**

Error of law.

——S. 115— *Error of law— Erroneous decision on point of limitation—Interference.*

An erroneous decision on a question of limitation can be amended if the order results in an improper refusal to exercise jurisdiction, *e.g.*, to execute a decree. (*Kanhaiya Lal, J.*) SURAJMAN CHAUBE *v.* ANORE SHUKUL.
21 A.L.J. 861 : L.R 4 A. 591: 9 O. and A.L.R. 989 : 46 All. 73 : 1924 A. 263

——S. 115—*Error of law— No ground for revision.*

Where the Judge in the Court below has applied his mind to the question of law arising in the case but had decided it wrongly there is nothing to attract the interference of the High Court under S. 115, C.P.C. (*Daniels, J.*) BHOLA NATH *v.* RAM SAHAI. **75 I. C. 472 : 1923 A. 465 (2).**

——S. 115—*Error of law—No ground for revision.*

Where in the exercise of its jurisdiction the lower court commits an error of judgment this is not a matter upon which revision can lie. (*Banerji, J.*) GANESH PRASAD SAHU *v.* DUKH HARAN SAHU. **66 I. C. 509 : 1922 All. 441.**

——S. 115—*Error of law—No ground for revision.*

If there is no question of jurisdiction or of the court having acted illegally and without jurisdiction, an application for revision is not maintainable though the court below had committed an error of law. (*Banerjee, J.*) HAR SHAI MAL. *v.* BRIJ LAL. **18 A. L. J. 373 : 58 I. C. 182 : 2 U. P. L. R. (All.) 86.**

——S. 115—*Error of law—Limitation—Not a ground.*

The High Court will not interfere in revision on the ground that the court below has wrongly decided a question of limitation. (*Banerjee, J.*) HASHMAT ALI *v.* MOHAN, **55 I. C. 871 : 2 U. P. L. R. (All.) 72.**

C. P. CODE (V OF 1908), S. 115—Error of law.

——S. 115—*Error of law—No revision*

The finding of a lower Court in a suit on a note executed by defl. that the defl. executant is a minor but that as he fraudulently misrepresented his age he is liable, is a mistake of law and is hardly a ground for interference in revision by the High Court. (*Richards, C. J. and Banerjee, J.*) DHARA SINGH *v* GAYAN CHAND.
45 I. C. 761 : 16 A. L. J. 441

——S. 115—*Error of law—Limitation—No revision.*

Where an appeal lies to the Dt. Judge from an order passed under O. 21, R 72 (3), C. P. C., the High Court will not interfere in revision with the order merely because the Lower Appellate Court decided a question of limitation wrongly (*Chamier and Piggott, JJ.*) MAHABIR SAHU *v.* BHIRGURAI. **28 I. C. 270 : 13 A. L. J. 351.**

——S 115—*Error of law—Wrong decision on a question of* res judicata—*No revision.*

Ordinarily a wrong decision on a question of *res judicata* will not be a ground for revision. (*Piggott, J.*) GANESH *v.* KUNDAN. **15 I. C. 33.**

——S. 115—*Error of law—Limitation.*

A wrong decision on a question of limitation does not furnish any ground for revision under S. 115, C.P.C. (*Hussain and Tudball, JJ.*) BISESAR DAYAL *v.* HAR GOVIND. **14 I. C. 52.**

——S. 115—*Error of law—Failure of justice.*

The High Court will interfere in revision if the Lower Court has committed an error of law leading to failure of substantial justice. (*Tudball, J.*) JANKI PRASAD *v.* THAKUR DAS.
13 I. C. 21.

——S. 115—*Error of law—No ground for revision.*

A mere error of law does not justify the court in interfering under S. 115, C. P. Code. (*Greaves, J.*) GOLAM SOBHAN *v.* ALI HOSSAIN BAHADUR.
65 I. C. 696 : 1923 Cal 322 (1).

——S. 115—*Error of law—Not a ground of revision.*

Where a matter is entirely within the jurisdiction of the lower court, a mere error of law in arriving at a finding is no ground for revision by High Court. 41 C. 32 Ref. (*Newbould and Panton, JJ.*) RAJENDRA NATH ROY *v.* SHEIKH ABDUL, **68 I. C. 430 : 1923 Cal. 280.**

——S. 115—*Error of law—Interference.*

Where there is error of law, there is no ground to exercise the powers of revision under S. 115, C. P. Code. (*Cuming, J.*) HARI CHARAN ROY CHAUDHURI *v.* BIRENDRA NATH SAHA.
70 I. C. 541 : 35 C. L. J. 327.

——S. 115—*Error of law—No revision*

Even if the lower court had committed an error of judgment or of law the High Court cannot interfere under S. 115, C. P. Code. (*Suhrawardy and Ghose, JJ.*) GURUDAS KUNDU CHOWDHURY *v.* DASARATHI HALDAR. **65 I. C. 512.**

——S. 115—*Error of law—Construction of document.*

C. P. CODE (V OF 1908), S. 115—Error of law.

A question as to the meaning and effect of a document is one of law with which the High Court will not interfere in revision. (*Richardson, J.*) RAM CHARAN MOHAJAN *v.* JIBAN CHANDRA SARMA. **64 I. C. 563.**

——ss. 115 and 148—*Error of law—Powers of High Court to extend time allowed by Lower Court.*

It is not for the High Court in exercising the special powers given by S. 115 of the C. P. Code to enter into the question whether upon the facts a particular order is right or wrong. It is doubtful whether the High Court, as a Court of revision, has power to extend the time fixed by the Lower Court for the doing of a particular act. (*Sanderson, C. J., Chatterjea and Walmsley, JJ.*) JITTENDRA NATH CHATTERJEE *v.* ASOKE NATH MITTER, **52 I. C. 4 : 30 C. L. J. 64.**

——S. 115—*Error of law—No revision.*

The High Court will not interfere under S. 115, C. P. C. with a mere error of law. (*Newbould, J.*) ABINASH CHANDRA CHOUDHURI v. OSMAN BISWAS.
54 I. C. 757.

——S. 115—*Error of law—Material irregularity or illegality—Interference with—Pres. Sm. C. Court.*

Mere decisions in matters of law and fact are not within the scope of S 115 of the C. P. Code. Cls. (*a*) and (*b*) of that section deal with the question of jurisdiction and Cl. (*c*) refers to illegal processual acts. 41 Cal. 323, ref. The trial of an issue in the form in which it was raised amounted to an error in law and not to an illegality or material irregularity in the procedure. Under the circumstances of the case, the mere fact that the onus was wrongly placed on defl., did not entitle the Court to interfere under S. 115. Inasmuch as there was some evidence on which the Court acted, there could not be any interference under the section. (*Sanderson, C. J., and Woodroffe, J.*) HARAN CHANDRA CHATTERJEE v. THE CORPORATION OF THE ROYAL EXCHANGE ASSURANCE.
52 I. C. 767 : 23 C. W. N. 759.

——S. 115—*Error of law—No revision.*

The High Court cannot interfere under S. 115 of the C. P. Code at the instance of the persons who complain of a decision on a point of law. (*Fletcher and Walmsley, JJ.*) BIBHUTI BHUSAN CHAKRAVARTY *v.* UMESH CHANDRA CHAKRAVARTHY. **48 I. C. 614.**

——S. 115—*Error of law—No revision.*

Error of law in construing a decree is no ground for revision. (*Mookerjee and Walmsley, JJ.*) KANAI LAL v JATINDRA NATH CHANDRA.
45 Cal. 519 : 26 C. L. J. 325 : 42 I. C. 711 : 22 C. W. N. 446.

——S. 115—*Error of law—Limitation.*

Mere erroneous decision on a limitation point by a Lower Court does not justify High Court's interference in revision under S. 115. (*Fletcher, J.*) RAMAGOPAL v. JOHARMALL KHEMKA.
15 I. C 547 : 39 Cal. 473.

——S. 115—*Error of law—No revision.*

Error of law is no ground for revision. (*Chitty and Beachcroft, JJ.*) RIVER STEAM NAVIGATION

C. P. CODE (V OF 1908), S. 115—Error of law.

COMPANY, LTD *v.* HAZARIMAL MULTAN MAL.
41 I. C. 919 : 27 C. P. J. 294
Also (*Lindsay, J. C.*) DIWAN SINGH *v.* BALDEO SINGH. 37 I. C. 19 : 3 O. L. J. 459.

———S. 115—*Error of law—No revision.*
An error of law committed by a Subordinate Court in deciding a case is not a ground for revision. (*Mookerjee and Beachcroft, JJ.*) JAMADAR SINGH *v.* JAGAT KISHORE. 34 I. C. 697 : 23 C. L. J. 557.

——S. 115—*Error of law—Limitation—Omission to decide question of law.*
The High Court will not interfere in its powers of revision under S. 115 in a case where the lower appellate court has decided an issue and committed an error of law in so deciding. But the High Court will interfere when the lower court has failed at all to consider some question of law. (*Mookerjee and Newbould, JJ.*) MOHIM CHUNDER PAL *v.* AHMAD ALI KHAN.
33 I. C. 346 : 22 C. L. J. 564.

——S. 115—*Error of law—Limitation.*
When a question of limitation is wrongly decided by Lower Court, interference of the High Court is not justified. The High Court can rightly interfere when the Lower Court has no jurisdiction in deciding the case. (*Chapman and Mullick, JJ.*) RAMPAT MAHATO *v.* RAM GHULAM SINGH.
32 I. C. 982.

——S. 115—*Error of law—Order beyond jurisdiction.*
The High Court will interfere when a Subordinate Court issues an order which is erroneous in law and as a result of that error the court acts beyond or in derogation of its jurisdiction. (*Mookerjee and Newbould, JJ.*) MADHU SUDAN PATITUNDA *v.* RASH MOHAN SEN PODDAR.
30 I. C. 38 : 21 C. L. J. 614.

——S. 115—*Error of law—Presy. Sm Cause Courts Act, S. 41—Application—Refusal—Whether High Court can interfere.*
Where a Presy. Small Cause Court Judge refuses an application under S. 41 of the Act on the ground that no relationship of landlord and tenant exists, his decision is on a question of law and High Court cannot interfere under S. 115, C. P. C. 20 Cal. 8 P. C. and 10 I. C. 527, dist. 11 C. 6 P. C. followed. (*Jenkins, C. J. and Woodroffe, J.*) SHEW PROSAD *v.* RAM CHANDER.
23 I. C. 977 : 41 Cal 323.

——S. 115—*Error of law—No ground.*
Taking an erroneous view of the law does not amount to the exercise of jurisdiction not vested by law or the exercise of jurisdiction illegally or with material irregularity. (*Jenkins, C. J. and Mullick, J.*) PEARY LAL GHOSH *v.* ANIL CHANDRA GHOSH. 19 I. C. 594

——S. 115—*Error of law—Execution sale—Material irregularity—No revision.*
An erroneous decision as to what constitutes material irregularity vitiating a sale is no ground for revision. (*Carnduff and Beachcroft, JJ.*) BEPIN BEHARI BEJALI *v.* KANTICHANDRA MANDAL. 18 I. C. 715.

C. P. CODE (V OF 1908), S. 115—Error of law.

——S. 115—*Error of law—Limitation.*
An error in applying the law of limitation is not a ground of revision, for in doing it the court has not failed to exercise jurisdiction vested in it by law or acted illegally or with material irregularity in the exercise of its jurisdiction. (*Carnduff and Chapman, JJ.*) BENODE BEHARI BHADRA *v.* RAM SARUP CHAMAR. 15 I. C. 679 : 16 C. W. N. 1015.

——S. 115—*Error of law—No interference—Justice done.*
Where substantial justice has been done, the Chief Court will not interfere in spite of an erroneous decision by the Lower Court. 125 P. R. 1907, 11 I. C. 445 Foll. (*Wilberforce, J.*) AMAR ALI *v.* HASHAM ALI. 49 I. C. 311.

——S. 115—*Error—Misconduct of arbitrator.*
A mistaken view by the Lower Court as to what amounted to misconduct of arbitrators is no reason for revision. (*Johnstone, C. J. and Shadi Lal, J.*) RAM JAWAYA MAL *v.* DEVI DITTA MAL.
117 P. R. 1916 : 107 P. W. R. 1916 : 34 I. C. 192 : 70 P. L. R. 1917.

——S. 115—*Error of law—Rejection of award.*
An error of law is not a material irregularity and is no ground for revision. Rejection of private award in toto where part of award is valid and is separable is at the most an error of law. (*Shadi Lal and Le Rossignol, JJ.*) AHMAD DIN AUIS'L RAHMAN *v.* ATLAS TRADING CO.
66 P. R. 1915 : 31 I. C. 80 : 146 P. W. R. 1915.

——S. 115, O. 21, R. 89—*Error of law—Dismissal of application—Revision.*
The High Court can exercise revisional powers with respect to the dismissal of an application under O. 21, R. 89 on the ground that a person is not entitled to apply as it falls under sec. 115. (*Wallis, C. J., Oldfield and Kumarasami Sastry, JJ.*) SUNDARAM *v.* MAMSA MAVUTHAR.
40 M. L. J. 497 : 13 L. W. 498 : 29 M. L. T. 269 : (1921) M. W. N. 272 : 63 I. C. 937 : 44 Mad 554 (F. B.).

——S. 115—*Error of law—No interference.*
A mere wrong decision on a question of law is not a ground for revision under S. 115 of the C. P. Code. (*Seshagiri Aiyar, J.*) KOPPAKA CHANDRAYYA *v.* ROBERTSON. 52 I. C. 641.

——S. 115—*Error of law—No revision.*
The High Court will not interfere in revision under S. 115, C. P. C. on the ground that it erred in law or fact in its appreciation of facts. (*Oldfield, J.*) *In re* KRISHNASWAMI IYER.
48 I. C. 128 : 35 M. L. J. 251.

——S. 115—*Error of law—No ground for revision—Government of India Act, S. 107.*
Error of law is no ground for interference under S. 115 of the C. P. Code or S. 107 of the Government of India Act. (*Abdur Rahim, J.*) KOMANDUR KRISHNAMACHARLU *v.* DANOGI.
35 M. L. J. 604 : 24 M. L. T. 482 : (1918) M. W. N. 716 : 48 I. C. 38 : 8 L. W. 592.

C. P. CODE (V OF 1908), S. 115—Error of law.

——S. 115—*Error of law—No ground.*

The High Court would not interfere under S 115 if the Lower Appellate Court has not exceeded its jurisdiction in the case. (*Seshagiri Iyer, J.*) ALAGAPPA CHETTI *v.* ANNAMALAI CHETTI.
35 I. C. 74 : 4 L. W. 411

——S. 115—*Error of law—No ground for revision.*

An erroneous decision on a question of law relating to limitation by the Presidency Court of Small Causes is not a ground for interference in revision by the High Court under Sec 115. (*Sadasiva Iyer and Napier, JJ.*) N. C. KUPPUSAMI IYENGAR *v.* N. C. NARAYANA AIYANGAR.
19 M. L. T 24 : 32 I C. 3 (1) : 3 L. W. 36.

——S. 115—*Error of law—Objection that proceedings have been erroneous.*

In a revision before a High Court an objection cannot be taken that the proceedings in the lower court have been throughout erroneous. Error of law as to limitation is no ground for revision. (*Napier, J.*) THOMAS PILLAI *v.* MUTHURAN CHETTY. **30 I. C. 264 : 2 L. W. 609.**

——S. 115—*Error of law—No revision.*

The High Court will not interfere in revision where there is an error in law and not on procedure. (*Spencer and Seshagiri Aiyar, JJ.*) SOMASUNDARAM CHETTY *v.* TIRUNARAYANA PILLAI, **25 I. C. 592 : (1914) M. W. N. 738.**

——S. 115—*Error of law—Limitation—Refusal to entertain appeal.*

An order refusing to excuse delay in presentation of an appeal is not open to revision even for showing that the appeal was in time. L. P. A. 82. of 1911 foll. (*Ayling, J.*) THANDAYUTHAPANI *v.* CHINNATHAL. **24 I. C. 872**

——S. 115—*Error of law—No revision.*

When interfering in revision the High Court will not allow an amendment of an application by the judgment-debtor into one by a purchaser. *Sadasiva Iyer, J.* The High Court will not exercise its power under S. 115 if the error on the part of the lower court is on a point of law merely. (*Sadasiva Aiyar and Spencer, JJ.*) ADAPA SUBBARAYADU *v.* TIPPABHOTLA LAKSHMINARASAMMA, **15 M. L. T. 98 : (1914) M. W. N. 147 : 22 I. C. 193 : 1 L. W. 59 : 38 M. 775.**

——S. 115—*Error of law—No ground.*

A mere error of law is no ground for revision. (*Sundara Iyer and Sadasiva Iyer, JJ.*) ANGADIPUDI KOYIL EROTH KUNLIMINA AMMA *v.* VALLATUKALA IBRAYAM HAJI.
(1912) M. W. N, 993 : 16 I. C. 405 : 12 M. L. T 264,

——S. 115—*Error of law—Whether ground for revision.*

A mere error of law is not a sufficient ground for revision ; there should be material irregularity in trying or deciding a case, (*Abdur Rahim and Sundara Iyer, JJ.*) VENKATARAGHAVALU CHETTY *v.* SABHAPATHI CHETTY.
10 M. L. T. 269 : (1911) 2 M. W. N. 253 : 12 I. C. 250 : 21 M. L. J. 1013

C. P. CODE (V OF 1908), S. 115—Error of law.

——S. 115—*Error of law.*

An alleged wrong view of law taken by the court is not a ground for interference in revision. (*Batten, J. C.*) MT. BARI BAHU *v.* KUNDAN SINGH.
71 I. C. 31 : 1922 Nag. 264.

——S. 115—*Error of law—Obvious mistake—Revision.*

Where the finding of the Lower Court is vitiated by an obvious error the High Court can interfere in revision. (*Drake Brockman, J. C.*) MANGU LAL *v.* MT NANHI. **5 N. L. J. 1 : 67 I. C. 806 : 1922 Nag, 104.**

——S. 115—*Error of law—No revision.*

There can be no revision under S. 115, C. P. C. on the ground that the Lower Court has arrived at a wrong conclusion of law. (*Mittra, A. J. C.*) BAPU BALAJEE *v.* DHANNU. **48 I. C. 160.**

——S. 115—*Error of law—When open to revision.*

An erroneous view of the law unless it involves a want or refusal of jurisdiction or any illegality or material irregularity of procedure is not revisable by the High Court. (*Stanyon, A. J. C.*) GANESHPRASAD *v.* REWA BAL.
41 I. C. 883 : 13 N L. R. 116.

——S. 115—*Error of law—No ground.*

An erroneous view of the law as regards ancestral property of a Hindu is no ground for revision. (*Drake-Brockman, J. C.*) MANYA *v.* DIWAKAR. **29 I. C. 740 : 11 N. L. R. 99.**

——S. 115—*Error of law—Wrong decision on question of* res judicata *—Revision.*

Held, further, that a wrong decision on a question of *res judicata* is not an exercise, by a Court, of jurisdiction not vested in it by law so as to entitle the person aggrieved by it to apply for revision. (*Daniels, J. C.*) KEDAR NATH *v.* SUKH NATH SINGH, **64 I. C. 209 : 24 O. C 213.**

——S. 115—*Error of law—No ground for revision.*

Where the Court below took a wholly erroneous view of the law of limitation, but at the same time its decision was one arrived at with jurisdiction, it cannot be reviewed under section 115, C. P. C. (*Mullick and Bucknill, JJ.*) MT, BIBI ZAINBAB *v.* PARAS NATH.
4 Pat. L. T. 491 : 1 Pat. L R. 361 : 2 Pat. 800 : 75 I. C. 430 : 1924 P. 37.

——S. 115—*Error of law—Misconstruction of rules made by the High Court.*

An erroneous construction of the rules framed by the High Court as regards costs of proceedings in subordinate Courts is no ground for revision. (*Das and Adami, JJ.*) RAMKISHUN DAS *v.* BENI PRASAD.
3 P. L. T. 314 : 65 I. C. 355 : 1923 P. 90.

——S. 115 and O. 21, R. 89—*Error of law—Not a ground for interference.*

An erroneous decision on a question of law or fact after jurisdiction has once been legally assumed is not a ground for interference but if the decision is the very basis and foundation of jurisdiction in its limited sense as distinguished

C. P. CODE (V OF 1908), S. 115—Error of law.

from powers, it at once comes within the purview of that section. 25 Bom. 337 and 22 C.W.N 20 ref. (*Mullick and Jwala Prasad, JJ.*) MUSSAMAT DHANWATI KUER *v.* SHEO SHANKAR LAL.
51 I. C. 873 : 4 Pat. L. J. 340.

——S. 115—*Error of law—No revision.*

Though the law enunciated by the Judge was wrong and the evidence adduced was inadmissible and misunderstood these are not errors involving any question of jurisdiction and the High Court will not interfere in revision. 22 C. W. N, 50, ref. (*Roe and Jwala Prasad, JJ.*) JANKI KUER *v.* KUKUR DUSADH. **48 I. C 930 : 1918 Pat. 347**

——S. 115—*Error of law—Limitation—Revision.*

The question whether a petition for the restoration of a suit is or is not barred by limitation, is within the province of the Court to decide and an error in this, whether of law or fact, would not entitle a party to move the High Court in revision. (*Roe and Iman, JJ.*) JHOTU LAL GHOSE *v.* GANOURI SAHA **46 I. C. 176 : 3 Pat. L. J. 376.**

——S. 115 and O. 41, R. 27—*Error of law—Admission of additional evidence,*

The High Court could not revise an order of the lower appellate court taking additional evidence under O. 41, R. 27 of the C. P. C., there being no defect of jurisdiction but merely an error of law. (*Mullick and Sultan Ahmad, JJ.*) GANGA SINGH *v.* NEMO SINGH. **1 Pat. L. T. 701**
(Also *Mullick and Sultan Ahmad, JJ.*) GAYA SINGH *v.* NAME SINGH. **56 I C. 983 : 5 Pat. L J. 263.**

——S. 115—*Error o law—Illegality.*

A mere error of law is not necessarily an illegality though a perverse and wilful error of law or fact may be. Where the Court states the law correctly but applies it to facts which are assumed to exist but which really do not exist the Court acts illegally. (*Saunders, J. C.*) MA KYAW *v.* MAUNG SAEIN GO **63 I. C. 838 : (1921) 4 U. B. R. 16.**

——S. 115—*Error of law—Failure to note a proviso to section - Powers of interference.*

An error of misconstruction of a proviso of a section is not illegal which justifies revision. (*Carr, J.*) MAUNG NYAN *v.* MAUNG SHWE NI.
2 Bur. L. J. 275.

——S. 115—*Error of law—No revision.*

If the facts of the case and the law applicable have been considered by the Dt. Court, the decision arrived at, though erroneous, will not be interfered with, in revision by High Court. (*Rigg, J.*) MAUNG SO *v.* MAOK **38 I. C. 129.**

——S. 115—*Error of law—No revision,*

The decision of a Lower Court arrived at after a due consideration of the facts and the law though erroneous cannot be interfered with in revision. (*Parlett, J.*) MAUNG LON GYI *v.* RAHMAN CHETTY. **12 I. C. 855 ; 4 Bur. L. T. 142.**

——S. 115—*Error of law—No ground.*

The High Court cannot interfere in revision merely because a Court has taken in the exercise of its jurisdiction a mistaken view as to what does or does not constitute misconduct in an arbitrator. (*Pratt, J. C. and Fawcett, A. J. C.*) KUNGEMAL *v.* THADHOMAL.
52 I. C. 864 : 13 S. L. R 98.

C. P. CODE (V OF 1908), S. 115—High Court.

——S. 115—*Error of law—No ground for—Revision.*

To give an erroneous decision on a question of law is not necessarily to act illegally or with material irregularity in the exercise of jurisdiction. (*Crouch and Boyd, A. J. Cs.*) KALIANBARTHI *v.* ROCHAN BAI. **27 I. C. 371 : 8 S .L. R. 190.**

High Court.

——S. 115—*High Court—Powers of.*

In exercising its powers under S. 115 of the C. P. Code, the High Court has power to make such order as the justice of the case requires. The Munsiff passed an order dismissing a suit for default, later on set the order aside and at a subsequent hearing passed a decree *ex parte*. In an application for revision of the last order the High Court set aside all the three orders. (*Piggott and Walsh, JJ.*) ABDUL AZIZ *v.* SHEKHAR CHAND. **42 All. 18 : 52 I. C. 263 : 17 A. L. J. 868.**

——Ss. 115 and 151—*High Court—Powers of—Abuse of process—Decree—Setting aside.*

A decree obtained by the abuse of judicial process can be set aside by the High Court under Ss. 115 and 151, C.P.C. (*Scott, C.J. and Batchelor, J.*) VELCHAND *v.* LIEUT LISTON,
38 Bom. 638 : 25 I. C. 371 : 6 Bom. L. R. 517.

——S. 115—*High Court, practice as to—Rateable distribution.*

Where in a suit for money certain property belonging to judgment-debtor was attached before judgment but released on two persons standing as sureties and they paid the amount in court just after a holder of another money decree applied for execution and for rateable distribution, *held* that the money was liable to be distributed. In such cases where no suit lies it is the practice of the High Court to interfere in revision. (*Richardson, J.*) GHISULAL AGARWALA *v.* TODURMAL,
26 C. W. N. 169 : 1922 Cal. 19.

——S. 115—*High Court—Nature of jurisdiction—Appellate.*

Under Letters Patent though the civil revisional jurisdiction is in reality an aspect of the civil appellate jurisdiction the criminal revisional jurisdiction is not included in the criminal appellate jurisdiction. (*Mookerjee and Sheepshanks, JJ.*) AKSHOY SINGH *v.* RAMESHAR BAGDI
20 C. W. N. 1071 : 35 I.C. 515 : 17 Cr. L. J. 339 : 43 Cal. 1143.

——S. 115 and O. 46, R. 7—*High Court Reference to.*

So long as a subordinate court has arrived at a finding based on evidence before it the High Court will not interfere when a reference of the matter is made to it by the District Judge under O. 46, R. 7 any more than it usually does when acting under S. 115, C. P. C. or S. 25 of the Small Cause Courts Act. (*Chatterjee and Newbould, JJ.*) RATAN BIPARI *v.* HIRALAL. **34 I. C. 527.**

C. P. CODE (V OF 1908), S. 115—High Court.

——S. 115—*High Court's powers—Examination of evidence.*

The High Court can investigate facts in revision if it is necessary in the ends of the justice. A Court of revision cannot in the name of revisional jurisdiction exercise appellate powers. In other words it may look into the evidence to see if the Lower Court has acted illegally or irregularly but cannot examine the evidence with a view to find out if that court has correctly appreciated its effect. (*Mookerjee and Beachcroft, JJ.*) RASHMONI DASI *v.* GANADA SUNDARI DASI.

20 C. L. J. 213 : 26 I. C. 275 : 19 C. W. N, 84.

——Ss. 115 and 109—*High Court—Nature of jurisdiction—Appellate.*

An order passed under S. 115 is one passed "on appeal" for the purposes of S. 109. (*Mookerjee and Coxe, JJ.*) SECRETARY OF STATE *v* BRITISH INDIA STEAM NAVIGATION CO **13 C. L. J. 90 : 9 I. C. 183 : 15 C. W. N. 848.**

——S. 115—*High Court.*

Enquiry into disputes regarding election is capable of being of revised by the High Court whose order is final. (*Spencer and Venkata subba Rao, JJ.*) VENKATARAMA AIYAR *v.* JANAB HAMID SULTAN MARACAYAR.

44 M. L J. 161 : 17 L.W. 656 : (1923) M.W N. 78 : 70 I. C. 987 : 32 M. L. T. 114 : 1923 M. 360

——S. 115—*High Court—Powers of revision.*

It is the privilege and prerogative of the High Court when once a record is brought before it which is so erroneous as manifestly to amount to an injustice, to exercise its powers of superintendence to revise such order or set it aside and direct such further proceedings to be taken as justice may require, but where no record is before it, but the High Court feels its necessity, it can at the instance of a party, send for it under powers conferred on it by S. 107, Government of India Act. (*Atkinson and Adami, JJ.*) BRINDABHAN CHANDER CHOUBE *v.* GOUR CHANDRA RAI.

1920 Pat. 56 : 56 I. C. 155 : 1 Pat. L. T. 467.

——S. 115—*High Court—Single Judge—Powers of.*

Quaere.—Whether a single Judge of the Patna High Court can entertain an application in revision without being empowered to do so by the Chief Justice ? (*Mullick, J.*) SUNDAR LAL *v.* UPENDRANATH SEAL. **35 I. C. 15 : 1 Pat. L J. 193.**

Illegality.

——S. 115—*Illegality -Void contract—Decree by Court—Revision.*

A court passing a decree for money upon a plaint which on the face of it sets up as its cause of action the breach of a contract which is void in law acts illegally in the exercise of its jurisdiction. 25 A. 509 ref. (*Piggott, J.*) RABI RAI *v.* DHARAMRAJ RAI. **15 I. C. 35.**

——S. 115 and O. 31, R. 1—*Illegality—Jurisdiction—Illegal exercise.*

Where in the heading of the plaint the plaintiffs' name appeared in their personal capacity but the plaint disclosed that the cause of action vested in them in their representative capacity as *shebaits*, and the court dismissed the suit merely on this ground, *Held* the court exercised its jurisdiction illegally and the proper procedure for the court to adopt was to allow the plaintiffs to add the name of the idol as additional plaintiff under O. 31, R. 1 or otherwise amend the plaint. It is sometimes difficult to distinguish between illegal exercise of jurisdiction within S. 115 and a mistake of law. (*Caspersz and Chitty, JJ.*) RAM CHANDRA SARMA *v* SHEIKH AMIR. **9 I. C. 132.**

C P CODE (V OF 1908), S 115—Interference.

——S. 115—*Illegality—Order under O. 16, Rr. 10 and 12—Revision.*

An order under O. 16, R. 10 or R. 12 of the Code is not appealable but if it is illegal, it is open to revision by the High Court under S. 115 of the Code. (*Seshagiri Iyer, J.*) RENGASAMI REDDI *v.* KONDA REDDI. **61 I. C 967 : 29 M. L. T. 95.**

——S. 115—*Illegality—Joinder of parties.*

Joinder of persons claiming adversely to each other under an order of Court is illegal and such an order is liable to be revised. (*Stanyon, A. J. C.*) AMBADAS *v.* PANDU. **57 I. C. 784.**

——S. 115 and O. 21, R. 2—*Illegality—Defiance of statute*

The High Court in revision can correct the illegality or material irregularity, committed by a Judge in doing an act forbidden by law by his erroneous decision of a law point. (*Piggott, J. C. and Lindsay, A. J. C.*) RAM SARUP *v.* JAGAN NATH PRASHAD. **15 I. C 523 : 15 O. C. 234.**

——S. 115 and O. 23, R. 1—*Illegality—Execution application—Withdrawal—Sale of property by court notwithstanding—Revision.*

Where the Court below rejected an application by the decree-holder withdrawing the execution proceedings which he had initiated and proceeded to sell the properties in execution notwithstanding such withdrawal, the order of the Court is without jurisdiction and can be set aside in revision. The order however is not open to appeal. 4 Mad. 217 : 32 C. 146 ; 28 A. 72 foll. (*Jwala Prasad and Ross, JJ.*) RAM PRASAD RAI *v.* MAHESH KANT CHOWDHURY. **65 I. C. 122 : 1922 P. 525.**

——S. 115—*Illegality—Refusal to issue Sale Certificate.*

The High Court can interfere when a Court refuses to grant a sale certificate to an auction-purchaser, when he is otherwise entitled to it and withholds it merely to compel him to meet the claim of a third party. (*Atkinson and Jwala Prasad, JJ.*) BAIKUNTI MISSIR *v* NARINDA SUNDARI DEBI. **1 Pat. L. J. 446 : 38 I. C. 576 : 3 Pat. L. W. 76.**

Interference.

——S. 115—*Interference—Interpretation of words in a document.*

On a mere question of interpretation of particular words in a document, where the words were clearly susceptible of more than one interpretation, the High Court would decline to interfere in revision. (*Piggott, J.*) KRISHNA DATT *v.* BRIJ LAL. **1923 All. 269.**

C. P. CODE (V OF 1908), S. 115—Interference.

———S. 115—*Interference—None on technical grounds.*

High Court will not interfere in revision only on technical grounds. (*Banerji, J.*) RAMRAJ SINGH *v.* RABI PROSAD. **63 I C. 140.**

———S. 115—*Interference—Ends of justice.*

The High Court can interfere in revision with the order of a Dt. Judge, although S. 115 does not strictly apply to the case, if such interference is necessary to meet the ends of justice. 28 A. 152 Foll. (*Knox, J.*) BHONDO *v.* SALIGRAM. **14 I. C. 810 : 9 A. L. J. 348.**

———S. 115 and O. 21, R. 58—*Interference—Claim to mortgaged property—Mortgage decree for sale—Claim once allowed but disallowed on fresh application for sale.*

A claim is not entertainable under O. 21, R. 58 of the Civil Procedure Code to property which has been ordered to be sold under a mortgage decree; and where such a claim was once allowed but subsequently the decree-holder having again applied for execution of the decree by sale of the property, a further claim to the property by the successful claimant was disallowed by the executing Court. *Held*, on an application for revision under S. 115 of the Civtl Procedure Code that the High Court could not interfere. 14 Cal. 631 Ref. (*Sanderson, C. J. and Richardson, J.*) MAHABIR PRASAD SINGH *v.* JOGENDRA NATH MONDAL. **68 I.C. 271; 26 C. W. N. 50.**

———S. 115—*Interference—Grounds for affidavit of pleader's clerk.*

The High Court will not interfere in revision when the applicant has suffered no prejudice and the order complained against does not affect his interests. Nor would the High Court act on the affidavit of a pleader's clerk and interfere. (*Suhrawardy and Ghose, JJ.*) SURAJ NARAIN DAS *v.* AMIRUDDIN MAHOMED. **66 I. C. 127.**

———S. 115 and O 47, R. 1—*Interference—Review—Rejection of an application—Revision.*

Excepting cases where an obvious injustice has to be remedied the High Court need not intefere in revision with an order rejecting an application for review. 26 A 573: 35 P. R, 1911 referred to. (*Broadway, J.*) TOLA RAM *v.* CHANDU MAL TOTA RAM. **71 I. C. 160.**

———S. 115—*Interference—Substantial justice—Mandatory injunction.*

The question of substantial justice arises more truly where a case been decided and where the High Court is of opinion that any technical error, which might have been urged in an ordinary appeal, is not a sufficient ground for interference on revision unless injustice has been caused thereby or the petitioners have been prejudicad. (*Harrison, J.*) THE LAHORE ELECTRIC CO. *v.* BOMBAY MOTOR AND CYCLE CO. **67 I. C. 742.**

———S. 115—*Interference—Substantial justice.*

A defect in the jurisdiction not leading to failure of justice is not necessarily open to revision. (*Beadon, J.*) JODHA *v.* HERA. **106 P. L. R. 1913 : 18 I.C. 251: 116 P. W. R. 1913.**

C. P. CODE (V OF 1908), S. 115—Interference.

———S. 115—*Interference in revision—Limits of.*

The revisional powers of the High Court cannot be exercised *ultra vires* and without authority. (*Reid, C. J.*) SHAHABDIN *v* SIRAJUDDIN. **47 P. R. 1913: 17 I. C. 418: 25 P. W. R. 1913.**

———S. 115—*Interference— Substantial justice.*

The High Court will not interfere in revision if it finds that the Lower Court has erred on a technical point but substantial justice has been done to the parties. (*Chevis, J.*) ABDUL RAHMAN *v.* BHAGWAN DAS. **59 P. W. R. 1912 : 13 I. C. 720: 120 P. L. R. 1912.**

———S. 115—*Interference—Ends of justice.*

Revision will be granted only when the decision is substantially unjust. (*Johnstone, J.*) AMIR DIN *v.* MEGHA. **9 I. C. 744 : 17 P. W. R. 1911.**

———S. 115—*Interference—Proceedings under S. 36 of the Legal Practitioners Act—Power of High Court to interfere.*

The High Court will not interfere in revision under S. 115 to quash the pending proceedings where a Court is taking proceedings under S. 36 of the Legal Practitioners Act. (*Venkatasubba Rao, J.*) VARADACHARIAR *v.* KALYANA SUNDARAM AIYAR. **16 L. W. 795: 69 I.C. 433: 23 Cr. L. J. 705: 44 M. L. J. 437 : 1923 M. 188 (2).**

———S. 115—*Interference — Temporary injunction—Grant of.*

Interference in revision in granting temporary injunction is not justified under S. 115. (*Kumaraswami Sastri, J.*) KADANKOLATHIL SAIDALI KUTTI *v.* GODAN NAMBUDRI **1922 M. W. N. 303: 16 L. W. 238: 70 I. C. 713 : 1922 M. 172.**

———S. 115—*Interference—Merits of the case to be looked into.*

Where no injustice has been caused by the irregular procedure of the Court below the High Court will not interfere in revision. (*Devadoss, J.*) YAGNASWAMI AIYAR *v.* CHIDAMBARANATHA MUDALIAR. **(1922) M. W. N. 130: 16 L W. 760: 65 I, C. 732: 1922 Mad. 63.**

———S. 115—*Interference—Remand—Improper order—Revision—Interference by High Court.*

The High Court can interfere in revision when an improper order of remand is passed. (*Devadoss, J.*) PERICHERLA SURYANARAYANA RAJU *v.* GANAPATHY RAJU. **30 M. L. T. 314 : 16 L. W. 593 : 70 I. C. 665 : 1923 Mad 113.**

———S. 115—*Interference—Justice of the case.*

Per *Curiam*:—Whether a Land Acquisition Judge has jurisdiction to review an order passed by him under the Land Acquisition Act or not. the High Court will not interfere with the order passed in review on the ground of want of jurisdiction if such interference will result in substantial injustice to any of the parties. (*Ayling and Srinivasa Aiyangar, JJ.*) MULAMBATH KUNHAMMAD *v.* ACHARATH PARAKAT KATHIRI KUTTI. **31 M. L. J. 827 : 38 I. C. 373 : 5 L. W. 472.**

C. P. CODE (V OF 1908), S. 115—Interference.

———S. 115—*Interferenoe—Ends of justice —Merits of the case.*

The High Court cannot refuse to interfere on the ground that moral as opposed to legal justice is in favour of the view of the lower court. Mere errors of procedure not affecting the justice of a case will not be encouraged by a Court of rev'sion. (*Sundara Aiyar, J.*) MOTTI REDDY *v.* THANNAPPA REDDY. **26 I. C. 181: 37 Mad. 385.**

———S. 115—*Interference—No prejudice — Irregularity.*

On addition of new defendants the suit was not amended so as to set forth a cause of action against them and the parties proceeded taking the plaint as if it was amended and the defendants were not prejudiced thereby. Under such circumstances High Court should not interfere as there was no material irregularity. (*Ayling and Hannay, JJ*) NILAMBARI THACHARAKKAVIL *v.* MANJERI PUTTEN. **25 I. C. 607: 1 L. W. 775.**

———Ss. 115 and 105 (1)—*Interference of High Court in revision—Order refusing to allow amendment of plaint—Revision if lies.*

The High Court has no power to interfere in revision under S. 115 of the C. P. Code where a party has another effective remedy; an order refusing to allow amendment of a plaint can be interfered under S. 105 (1) of the C. P. C, and no revision to the High Court would lie. (*Sadasiva Iyer and Spencer, JJ.*) PENUMARLI VASANTARAYADU *v.* REDDI SUBBAMMA. **14 M. L. T. 588 : 22 I. C. 39: (1914) M. W. N. 98.**

———S. 115—*Interference—High Court, when will not interfere.*

Where the order of the Lower Court is good on the merits, the High Court will not interfere in revision and drive the parties to another suit even if the order of the Lower Court is irregular or illegal. (*Lindsay, J. C.*) DEO NARAIN SINGH *v.* RAM KHELWAN. **63 I. C. 545 : 8 O. L. J. 307.**

———S. 115—*Interferenoe—Compromise decree —Order extending time—Revision.*

An order extending time for payment of money under a compromise decree cannot be revised under S. 115, C.P.C. (*Mullick and Bucknill, JJ.*) MT. NAND RANI KUER *v.* DURGA DASS NARAIN **2 Pat. 906 : 1924 P. 387.**

———S. 115—*Interference—Rateable distribution—Order regarding.*

Order under S. 73, C. P. Code, are not ordinarily revisable under S. 115 C. P. Code. (*Mullick and Bucknill, JJ.*) BABU BISHUN MOHAN SAHAY *v.* NARAYAN PRASAD ASTHANA. **74 I. C. 140.**

———S. 115—*Interference—Ends of justice—Small Cause suit tried by a Court on its original side, and appeal from it decided by Dt. Judge—High Court's interference.*

The requirements of justice should guide the High Court's interference with the decrees of the Lower Courts in a case in which a Small Cause suit having been tried by a court on its original side without objection by the parties, the District Judge decided an appeal from the decree of that Court in the suit. 21 C. 249, 19 C. W. N. 900, rel.

C. P. CODE (V OF 1908), S. 115—Interlocutory Order.

on. 22 M 176, 33 M. 323, 25 B. 417, 34 B. 171. not Foll, (*Jwala Prasad, J.*) JADUNANDAN SAHAY *v* JUNG BAHADUR SAHAY. **37 I. C. 991 : 1 Pat L. W 232.**

———S. 115—*Interference — Just and proper order.*

An order, which is admittedly good on the merits will not be interfered with in revision. (*Crouch and Boyd, A J. Cs*) ISARDAS *v.* THAKUR DAS. **24 I. C. 831 : 7 S. L. R. 186.**

———S. 115—*Interference—Justice of the case.*

The High Court will regard not only the justice of the plff.'s claim but also the justice of his methods of enforcing it for purposes of interfering in revision. (*Pratt, J. C., and Crouch, A. J C.*) HARI DAS *v.* OTOOMAL. **16 I, C. 861 : 6 S. L. R. 89.**

Interlocutory Order.

———S. 115—*Interlocutory order — Arbitrary and unjustified—Revision.*

Where in a suit under O. 21, R. 63. the Court ordered deft. to deposit the decree amount. *Held*, in revision that the order was arbitrary and unwarranted by law. A revision lay inasmuch as the order was one which in the event of the plff.'s getting a decree, the applicant could not assail in appeal therefrom, as the order did not affect in any way the merits of the plff.'s case. The rule against entertaining revisions from interlocutory orders which could be contested in appeal did not apply. 4 All. 592, dist. (*Rafique, J.*) MURTAZA KHAN *v.* LALITA SINGH. **58 I. C. 729 : 18 A. L. J. 486.**

———S. 115—*Interlocutory order—Decision on preliminary issues--No revision.*

An application for revision cannot be entertained against an order deciding preliminary issues in a suit where such order would be appealable after the final decision of the suit. (*Rafique and Piggott, JJ.*) AIDAL SINGH *v* PEARY LAL. **56 I. C. 248 : 2 U. P. L. R. (All) 157.**

———S. 115 — *Interlocutory order — Govt. of India Act* (1915), S. 107.

Per Piggott, J.—The High Court cannot revise an interlocutory order in a suit as it does not decide the case and as the decision would be open to reconsideration on a regular appeal. *Per Walsh, J.*—A High Court can interfere with interlocutory orders though they are appealable, if such interference is needed in the interests of justice. (*Piggott and Walsh, JJ.*) DHAUDEI KUNWAR *v.* CHOTTALAL. **39 All. 254 : 38 I. C. 828 : 15 A. L J. 227.**

———S. 115—*Interlocutory order — Adjournment—Revision.*

An interlocutory order granting adjournment on payment of costs is not revisable under S. 115. (*Tudball, J.*) MUL CHAND *v.* JAGGI LAL. **25 I. C. 207 : 12 A. L. J. 460.**

———S. 115—*Interlocutory order — No interference.*

The High Court cannot in revision call for the record of any case which is under trial by a Court

C. P. CODE (V OF 1908), S. 115—Interlocutory Order.

subordinate to it, that is, it will not interfere with interlocutory orders passed by such Court while a suit is pending. (*Macleod, C. J. and Heaton, J.*) BAI RAMI *v.* JAGA DHULLABH.
22 Rom, L, R 801 : 57 I. C. 556 : 44 B. 619

——S. 115 and O. 26, R. 4 — *Interlocutory order,*

Where the lower Court wrongly refused to grant commission for examination of witnesses, the High Court will interfere and set aside the order. (*Mukerjee and Panton, JJ.*) SHARAT KUMAR *v.* RAM CHANDRA CHATTERJEE.
35 C. L. J. 78 : 68 I. C. 9 : 1922 C. 42.

——S. 115—*Interlocutory order—Guardians and Wards Act—Revision.*

The High Court reversed, though reluctantly, all improper orders of the District Court refusing payment of money to the guardian of the person ot a minor. (*Fletcher and Smither, JJ.*) SARPAT SINGH *v.* BUDH SINGH DUDHERA.
41 I. C. 240.

——S. 115—*Interlocutory order—Revision.*

The Court will, in exceptional cases, where the special facts and circumstances require it, reverse in revision the interlcoutory orders of subordinate courts. (*Mookerjee and Beachcroft, JJ.*) YATINDRA NATH *v.* HARI CHARAN.
26 I. C, 954 : 20 C. L J, 426.

——S. 115—*Interlocutory orders—Suit under S. 92, C. P. Code—Order directing party to give evidence.*

The High Court will not generally revise an interlocutory order, requiring (in a suit under S. 92 C. P. Code) the parties to give evidence about a compromise entered into between one of the plffs. and defts. though the objection was taken by the other plffs *Coxe J.*—It is doubtful if S. 115 covers an interlocutory order. (*Sharfuddin and Coxe, JJ.*) AHMED HOSSAIN *v.* ABDUL KARIM.
16 I. C. 3.

——S. 115—*Interlocutory order not open to revision.*

Interlocutory orders cannot or at any rate should not be interfered with in revision. (*Zafar Ali, J.,*) THE FIRM RAHMAT ULLAH-FAKHARUD-DIN *v.* THE FIRM RAHIM BAKHSH AUMAR-UD-DIN.
75 I. C. 107 : 1923 Lah. 301 (2).

——S. 115—*Interlocutory order — Revision when justified,*

The High Court would exercise its revisional power in the case of interlocutory orders where otherwise irremediable damage would result to the parties. (*Wilberforce, J.*) FIRM OF DURGA PROSAD MUTSADDI LAL *v.* FIRM OF RULIA MAL
4 Lah. L J. 176 : 65 I. C. 282 : 29 P. L. R. 1922 : 1922 Lah. 100.

——S, 115 and O, 6 R. 17—*Interlocutory order—Amendment—Refusal—Interference.*

Though the High Court would not generally interfere with interlocutory orders of the lower Courts yet if the interests of justice required the amendment which was refused the High Court may interfere. (*Scott Smith, J.*) JHARIA COAL COMPANY *v.* DIWAN CHAND COMPANY. 67 I. C. 335

C. P. CODE (V OF 1908), S. 115—Interlocutory Order.

——S. 115—*Interlocutory order—Appeal.*

In revision the High Court is not bound to interfere even in a case of defect of jurisdiction unless it is shown that there has been a failure of justice arising from such defect. 36 P. R. 1902 foll. There is no appeal from an interlocutory order in a suit and if the appellate Court entertains such an appeal it assumes a jurisdiction not vested in it. (*Broadway, J.*) GANDA RAM *v.* SUNDAR LAL, 67 I. C. 278 : 2 L. L. J. 673.

——S. 115 and O. 41, R. 25—*Interlocutory order—Discretion.*

It is only in exceptional cases that revisional powers are exercised in the case of orders of an interlocutory nature and even when the order is not of an interlocutory nature the High Court should not interfere except in cases where the order is not a final order such as one under O. 41 R 25 of the C. P. Code. (*Broadway, J.*) ALLAH BAKSH *v.* LAL KHAN. 67 I. C. 269 : 2 Lah. L. J. 662.

——S. 115—*Interlocutory order.*

Unless irreparable waste not only of time and money but of the time of the trying courts will be the result, the High Court will not interfere with an interlocutory order as an exceptional case. (*Leslie Jones, J.*) FIRM OF DAMRI SHAH *v.* FIRM OF RULLA MAL. 2 Lah L. J 555 : 64 I. C 387: 17 P. L R. 1922.

——S 115—*Interlocutory order.*

Plaintiff, resident of *A*, ordered goods from defendant who carried his business at *B*. Plaintiff sued the defendant at *A* for damages on the ground that the goods supplied were not of the quality and quantity contracted for *Held*, the cause of action arose at *B* and the Court at *A* could not try the suit and that the High Court could in revision set aside the interlocutory order. (*Abdul Raoof, J.*) HAR PRASAD SINGH *v.* SIVA RAM JADO RAI. 60 I. C. 481.

——S. 115—*Interlocutory order allowing a party to adduce evidence after closing case.*

Revision of interlocutory orders is justified only in cases where irremediable damage is likely to result. An order allowing a party to produce fresh evidence on an issue, after closing the case was held as not open to revision in this particular case. (*Wilberforce, J.*) THE FIRM OF MAKHAN LAL TEJ PAL *v.* THE FIRM OF JAI NARAIN BIRJ RAJ.
59 I. C. 450 : 17 P. W. R. 1921.

——S. 115—*Interlocutory order—Issue as to jurisdiction of Court—Interference by High Court—Punjab Courts Act, S. 44.*

A High Court has power to interfere in revision with an interlocutory order. 26 P. R. 1917, foll. Interference is only permissible when an interlocutory order is so unjust and is likely to put things into so inconvenient a position that irreparable harm would be done to the applicant for revision. The High Court will interfere with an interlocutory order passed by a subordinate Court if the question involved is not one of the exercise of discretion but of want of jurisdiction and manifest injustice might otherwise be done.

C. P. CODE (V OF 1908), S. 115—Interlocutory Order.

When a Court comes to an erroneous decision that it has jurisdiction to try a suit, the High Court will interfere in revision so as to put matters right at the earliest possible stage. (*Broadway, J.*) SAWAN SINGH *v.* RAHMAN.
55 I. C. 739.

——S. 115—*Interlocutory order—Revision.*
Though the power of revision in the case of interlocutory orders is only exercised in exceptional cases it should be exercised in a case where *inter-alia*, the waste of time, money and trouble involved by the re-opening of the proceedings could never be repaired. (*Wilberforce, J.*) GAURI SHANKER *v.* GANGA RAM.
52 I. C. 859 : 77 P. R. 1919.

——S. 115—*Interlocutory order--Interference in exceptional cases.*
An interlocutory order should not be interfered with in revision save in exceptional circumstances where irreparable loss would otherwise occur. 26 Bom. 551 and 30 Cal. 397. foll. (*Broadway, J.*) THE FIRM OF NATHU MAL SARAN DAS *v.* MEHRCHAND. **49 I. C. 470 : 20 P. W. R. 1919.**

——S. 115—*Interlocutory orders—Revision.*
An interlocutory order will not be interfered with in revision when the applicant has another remedy open to him. (*Shadi Lal, J.*) LOUIS DREYFUS CO. *v.* KHITTU RAM.
46 I. C. 189 : 120 P. W. R. 1918.

——S. 115—*Interlocutory order—Revision.*
The Chief Court has powers to interfere in revision with interlocutory orders but such power should be exercised only in exceptional cases. (*Broadway, J.*) HARCHARAN DAS *v.* DHANPAT MAL DEWAN CHAND.
42 I. C. 221 : 164 P. W. R. 1917.

——S. 115—*Interlocutory order—Revision.*
The Chief Court will interfere in revision with interlocutory orders only in exceptional cases, *e.g.*, where the order is so unjust as to cause irreparable harm to the applicant. (*Broadway, J.*) IMDAD ALI SHAH *v.* SAYAD ALI.
40 I. C. 65 : 26 P. R. 1917.

——S. 115 — *Interlocutory order — Final decree of lower Court—Appealable.*
In general no revision lies to the Chief Court from an interlocutory order, where the final decree to be passed by the Lower Court would be appealable. (*Reid, C. J.*) NAWAB KHAN *v.* MEHR BANO.
36 I. C. 57 : 76 P. L. R. 1916.

——S. 115—*Interlocutory order—Revision.*
Interlocutory orders should not be interfered with, on revision as a matter of course. (*Broadway, J.*) GULAB CHAND *v.* SHER SINGH,
149 P. W. R. 1916 : 35 I. C. 608 : 8 P. L R. 1917.

——S. 115—*Interlocutory Order—No interference.*
In the absence of exceptional circumstances, the Chief Court will not interfere with the interlocutory orders passed by the Subordinate Courts.

C. P. CODE (V OF 1908), S. 115—Interlocutory Order.

(*Shah Din, J.*) MISRI *v.* CHAULI.
248 P. W. R. 1915 : 27 I. C. 640 : 10 P. L. R. 1915.

——S. 115—*Interlocutory order—Refusal to issue commission—Interference.*
In a case where a Court refused to examine a witness on commission, when it had no discretion to refuse it, the High Court will interfere in interlocutory proceedings rather than permit a trial to go on, on an illegal course which will entail unnecessary expenditure and waste of time. (*Wallace, J.*) JAGANATHA SASTRY *v.* SARATHAMBAL AMMAL.
46 Mad. 574: 17 L. W. 251 : 1923 M. W. N. 157 : 71 I.C. 530 : 44 M. L. J. 202: 1923 Mad. 321.

——S 115—*Interlocutory orders—Appeal is proper remedy.*
A regular appeal and not revision is the proper method of challenging the correctness of interlocutory orders made in the course of trial. (*Spencer J.*) HUSSAIN SAHIB *v.* HAMMAD SAHEB.
16 L, W. 312 : 31 M. L. T 180 : 74 I C. 812 : (1922) M, W. N. 562 : 1923 M. 43.

——S. 115—*Interlocutory order—Misjoinder of causes of action—Revision—Interference.*
The High Court will in the exercise of its revisional jurisdiction interfere when the lower court has wrongly held a suit as bad for misjoinder of causes of action and directed him to elect which cause of action he would proceed with in the suit. 5 L. W. 207 ; 6 L. W. 9 ; 42 M. L J. 97 foll. (*Oldfield and Venkatasubba Rao. JJ.*) ARUNACHELLAM CHETTIAR *v.* ARUNACHELLAM CHETTIAR. **43 M. L. J. 218 : 16 L. W. 175: (1922) M. W. N. 453 : 69 I. C. 966 : 1922 Mad. 436.**

——S. 115—*Interlocutory order—Revision—Interference when justified—Posting of case for argument on preliminary issues.*
It is impossible to say that in no case whatever will the High Court interfere with an interlocutory order of the lower court. But interference must be exercised with great diligence, the general rule being against such interference. Interference will be justified if the order sought to be revised is in fact preverse or irreparable injury will be caused unless the revision is allowed. 9 M. 256 ; 15 M. L. T. 339 : 5 L. W. 207 : 12 C. L. J. 505 : 12 C. L. J. 519 : 12 C. L. J. 525 : 39 M 195 F. B. Ref. Where the lower court posted a case for final hearing on preliminary issues of law, settled long before, High Court refused to interfere as the party had a remedy by appeal in case of injury or inconvenience. (*Odgers, J.*) RAMAKRISHNA PILLAI *v.* KRISHNASWAMI PILLAI. **15 L W. 667 : (1922) M. W. N. 521 : 68 I. C. 167 : 1922 Mad. 321.**

——S 115—*Interlocutory order—Misjoinder of parties and causes of action—Interference.*
The powers of the High Court in revision could be exercised in cases where the lower court held that a suit is bad for misjoinder of parties, nonjoinder of parties and misjoind r of parties, and causes of action. The use of the revisional

C. P. CODE (V OF 1908), S. 115—Interlocutory Order.

powers would be justified where the lower court has decided that the suit is not bad for misjoinder of parties and causes of action. 42 M. L. J. 43 ; 29 M. L. J. 53 ; 10 L. W. 652: 6 L. W. 9 ; 5 L.W. 207 foll. (*Venkatasubba Rao, J.*) VELAPPA NADAR *v.* CHIDAMBARA NADAR.

43 M. L. J. 277 : 1922 Mad. 174 : 1922 M. W. N. 316 : 70 I. C. 684 : 16 L. W. 186.

——S. 115—*Interlocutory order—Decision on preliminary issue.*

Whether the High Court can interfere with a Lower Court's ruling on a preliminary issue, in respect of maintainability of the suit is not yet settled. (*Seshagiri Iyer, J.*) KADIRVELU CHETTY *v.* NANJUNDAIYAR. **35 I. C. 88 : 3 L. W. 512.**

——S. 115—*Interlocutory order—Interference by High Court.*

The High Court will not interfere with an interlocutory order which can be attacked in an appeal against the decree in the suit. 22 I. C. 279, (1914) M. W. N. 95 foll. (*Sadasiva Aiyar, J.*) A. GAEBLE *v.* RAMAYI AMMAL.

24 I. C. 781 : 1 L. W. 232.

——S. 115—*Interlocutory order where appeal lies—Revision.*

Where an appeal lies against an interlocutory order High Court will not interfere under S. 115 unless the lower court has exercised jurisdiction improperly or refused to exercise it. (*Spencer, J.*) SAMBASIVA AIYAR *v.* GANAPATHY AIYAR.

23 I C. 564.

——S. 115—*Interlocutory order—Revision.*

The High Court can revise an interlocutory order under S. 15 of the Charter Act, if not under S. 115. (*Abdur Rahim, J.*) MANKOLAM VASUDEVAN *v.* MANKOLAM SANKARAN.

22 M. L. J. 60 : (1912) M. W. N. 546 : 12 I. C. 719 : 10 M. L. T. 451.

——S. 115—*Interlocutory Orders—"Case decided."*

Quaere :—Whether S. 115 applies to interlocutory orders. (*Abdur Rahim and Ayling, JJ.*) NAGARAJA PILLAI *v.* VAITHINATHA IYER.

9 M. L. T. 273 : 21 M. L. J. 484 : 9 I. C. 672 : (1911) 2 M. W. N. 369.

——S. 115—*Interlocutory order—Decision as to Court fee—Error of law—Revision.*

A decision of a subordinate Court determining the amount of Court fees payable by plaintiff is not open to interference in revision inasmuch as no case has been decided by the Court below. 43 A. 564 foll. A mere error of law though a ground for second appeal does not justify revision. (*Prideaux, A. J. C.*) GOVIND *v.* DAJI.

65 I. C. 327 : 1922 Nag. 128.

——S. 115—*Interlocutory order—Revision.*

The High Court will interfere with an interlocutory order if it goes to the root of the case and allows the continuance of a litigation which the Lower Court had no jurisdiction to allow to continue. (*Batten, A. J. C.*) AMOLAKSAO *v.* GOVINDRAO. **49 I. C. 34 : 15 N. L. R. 21.**

C. P. CODE (V OF 1908), S. 115—Interlocutory Order.

——S. 115—*Interlocutory order—Revision.*

Where a Subordinate Judge allowed a plaintiff to put in a replication conditional on the payment of a certain amount of costs and where the aggrieved party applied to the High Court in revision, *held*, that no revision lay as no case had been decided so far. (*Daniels, J. C.*) NARENDRA BAHADUR SINGH *v.* PEARY LAL.

64 I. C. 211 : 24 O. C. 215.

——S. 115—*Interlocutory order—Decision of issue as to jurisdiction*

No revision lies from an order deciding an issue as to jurisdiction against the defendant as such an order is an interlocutory order. (*Kanhaiya Lal, J. C. and Lyle, A. J. C.*) SHYAM SUNDER *v.* SHEOAMBER BAN

64 I. C. 92 : 24 O. C. 231.

——S. 115—*Interlocutory order—Revision.*

Where a case is still pending, interlocutory orders passed during the course of hearing cannot be made the subject of revision, unless those orders have the effect of determining the case, so far as the party applying for revision is concerned, or concluding the claim otherwise in a manner not open to appeal. (*Stuart and Kanhaiya Lal, A. J. Cs.*) BRIJ INDRA BAHADUR SINGH *v.* DEPUTY COMMISSIONER OF KHERI.

47 I. C. 676 : 5 O. L. J. 430.

——S. 115—*Interlocutory orders—Revision.*

An order issuing a warrant of attachment against the properties of witness is not open to revision under S. 115. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) KANIZ FATIMA *v.* MIAN BAKSH. **42 I. C. 42 : 4 O. L. J. 450.**

——S. 115—*Interlocutory order—Refusal to frame issue—Revision — Interference—Government of India Act, S. 107.*

As a general rule, except upon proof of irreparable injury the High Court will not interfere in revision under S. 115 of the Code of Civil Procedure, when there is another remedy open to the applicant. Interlocutory orders are not exempted. Where the Court below refused to raise an issue clearly arising from the pleading of the party, without assigning any reason whatever, the High Court interfered under S. 107 of the Government of India Act. (*Mullick and Ross, JJ.*) SHEO PRASAD SINGH *v.* SHUKHU MAHTO.

4 Pat. L. T. 401 : 72 I. C. 148 : 1923 P. 518.

——S. 115—*Interlocutory order—Appeal—Revision—Interference when justified.*

Where there is a right of appeal from the decree that might be passed in the suit, the High Court will not interfere in revision with the judgment on an interlocutory order passed by the Court below. (*Miller, C. J. and Foster, J.*) HARIHAR PRASAD SINGH *v.* KESHO PRASAD SINGH.

71 I. C. 911.

——S. 115—*Interlocutory order—Direction as to the mode of taking accounts—Interference in revision—Government of India Act.*

The High Court will not interfere under S. 115, C. P. Code or S. 107 of the Govt. of India Act with an interlocutory order unless it is shown to be so improper that unless it was varied or re-

C. P. CODE (V OF 1908), S. 115—Interlocutory Order.

versed immediately irreparable loss will result to the parties. The High Court refused to interfere with an order of the lower court giving directions as to the mode of taking accounts in a pending suit. (*Miller, C. J. and Mullick, J.*) RAI BAHADUR HARIHAR PRASAD SINGH *v.* MAHARAJAH KESHO PRASAD SINGH. **3 Pat. L. T 638 : 1922 P. 598.**

———S. 115—*Interlocutory orders—Interference in revision.*

Where the record of a case has been sent for by the High Court, it would not be exercising a wise discretion to refuse to interfere on the mere ground that the order is an interlocutory one. Where considerable delay had already occurred and was likely to occur if a remand was ordered, the High Court disposed of the question in revision. (*Chapman and Atkinson. JJ.*) NAURATAN LAL *v.* WILFORD JOSEPH STEPHENSON.
(1922) Pat. 79 : 1922 P. 359.

———S. 115—*Interlocutory order—Trial of case piecemeal—Procedure defective.*

The High Court will interfere with an interlocutory order directing the trial of certain issues in a case before trying others, as the trial of a case piecemeal is a serious evil to the parties or might involve heavy costs in Second Appeal or any other hearing. (*Das and Adami, JJ.*) SATYA NIRANJAN CHAKRAVARTI *v.* DAWARKANATH.
60 I. C. 528 : 2 Pat. L. T. 154.

———S. 115—*Interlocutory order—High Court, power of, to interfere.*

The High Court will not interfere under S. 115 with an interlocutory order when another remedy is open to the applicant and no irreparable harm will be suffered by the interlocutory order. (*Coutts and Adami, JJ.*) LACHINBATI *v.* NANDIKUMAR. **5 Pat. L. J. 400 : 56 I. C. 649 : 1 Pat. L. T. 268 : (1921) Pat. 166.**

———S. 115—*Interlocutory order—Appointment of guardian* ad litem—*Revision.*

The appointment of a guardian *ad litem* is a matter of procedure and an error therein is not ordinarily revisable. (*Mullick and Thornhill, JJ.*) MOHAMED ABDUS SALAM *v.* M. KAMALMUKHI.
46 I. C. 316 : 5 Pat. L. W. 92.

———S. 115 and O. 26, R. 2—*Interlocutory order—Interference in revision—Examination of witnesses.*

The High Court has power to interfere in revision with interlocutory orders not directly appealable so as to avoid irreparable damage or gross injustice. The High Court will not interfere with the discretion of the lower Court not perversely exercised. A dismissal of an application to examine witnesses on commission without considering whether their evidence would be relevant or not, is open to revision. (*Robinson, C. J. and Heald. J.*) S. R. M. M. CHETTY *v.* P L. N. N. NARAYANAN CHETTY. **64 I. C. 821 : 11 L. B. R. 65.**

———S. 115—*Interlocutory order—Revision.*

Interlocutory orders will not be interfered with in revision unless for the most cogent reasons and in order to prevent otherwise irremediable injuries. 29 I.C. 876 foll. (*Parlett, J.*) MAUNG POATAIK *v.* MAUNG SEIN BU. **43 I. C. 684.**

C. P. CODE (V OF 1908), S. 115—Jurisdiction.

———Ss. 115 and 105—*Interlocutory order—Appealable case.*

An interlocutory order passed by a lower court in an appealable case, cannot be revised ; but under S. 105 the order may be made a ground of objection in the appeal against the decree, (*Maung Kin, J.*) MA KYI *v.* MAUNG PAN U.
41 I.C. 942.

———S. 115—*Interlocutory Order—Refusal to frame additional issue.*

Even if the High Court can deal in revision with an interlocutory order in a suit, the exercise of the power is discretionary and will not be exercised unless substantial injury might be caused to the applicant if he is made to wait for the ultimate appeal from the decree. An order declining to frame an additional issue will not be interfered with. (*Twomey, J.*) V.V.M. CHETTY FIRM *v.* ARUNACHALLUM CHETTY. **29 I.C. 876 : 8 L.B.R. 77.**

———S 115—*Interlocutory order—Interogatories—Disallowance of.*

A party adversely affected by the disallowance of interrogatories has a right to appeal from the original decree ; and hence he cannot prefer an appeal from an order disallowing interrogatories which is not a decree, nor can he apply for revision. (*Kincaid, J.C. and Raymond, A.J.C.*) FIRM OF YUSUFALLY ALIBHOY KARUMJI *v.* FIRM OF HAJI MOHOMED HAJI ABDULLA
58 I.C. 721 : 14 S.L.R. 28.

Jurisdiction.

———S. 115—*Jurisdiction—Wrong exercise of—Evidence of title under O. 33, R. 6.*

The Court is not entitled to take evidence from the parties upon the question of the plaintiff's title before coming to the conclusion whether it would grant or refuse the application under rules 5 and 6 of O. 33. If it takes evidence on the question of title it exercises a jurisdiction not vested in it by law within S. 115. (*Banerji and Gokal Prasad, JJ.*) MT SHAURAN BIBI *v.* ABDUS SAMAD. **45 All 548 : 73 I. C. 538 : 21 A.L.J. 441 : L. R. 4 A. 252 : 1923 A. 577.**

———S. 115 and O. 21, R. 89—*Jurisdiction—Execution sale—Application to set aside—Sale of property by judgment-debtor* — Locus standi *to apply.*

After an execution sale of the properties of a judgment-debtor he sold them to a third person and deposited the execution sale price with 5 per cent. in addition as required by O 21, R. 89, C.P. Code. On a question arising as to whether the sale should be set aside the first Court held that it should be set aside and the Appellate Court held the contrary. On revision to the High Court, *held*, that the Court had jurisdiction to decide the question as it did, and that no revision lay. 40 M. 793 ; 43 A. 334 ; referred to 44 M. 554 ; 4 Pat L J. 340 dissented. (*Banerji, Piggott and Walsh, JJ.*) YAD RAM *v.* SUNDAR SINGH. **21 A. L. J. 313 : 45 A. 425 : L.R 4 A. 402 : 74 I. C. 778 : 1923 A. 392. (F.B)**

———S. 115—*Jurisdiction—Revision against decision of Kumaun High Court.*

C. P. CODE (V OF 1908), S. 115—Jurisdiction.

The High Court of Kumaun is not a Court subordinate to the Allahabad High Court for purposes of revisional jurisdiction. (*Piggott, J.*) SADAR SINGH KONDARI *v.* AMAR SINGH KONDARI **45 A. 383 : 71 I. C. 991 (2): 1923 A. 291 (2).**

——— **Ss. 115 and 151** —*Jurisdiction— General order of remand.*

A general order of remand by an Appellate Court which misunderstands its own duties and in substance declines jurisdiction is liable to be revised by the High Court. (*Walsh and Wallach, JJ.*) CHHAJJU MAL *v.* PYARE LAL. **63 I. C. 858.**

———**S. 115**—*Jurisdiction—Refusal to entertain—Review application.*

An appeal filed subsequent to the presenting of an application for review, does not bar the jurisdiction of the Trial Court to entertain the application for review. The refusal by a Court having jurisdiction, to entertain an application for review amounts to a refusal to exercise jurisdiction and the order is open to interference by High Court in revision. (*Piggott and Walsh, JJ.*) RAM PRASAD *v.* ASA RAM. **43 All. 288 : 61 I.C. 334 : 19 A.L.J. 24.**

———**S. 115**—*Jurisdiction, proper exercise of.*

Where the Lower Court exercises jurisdiction in a proper manner, the High Court will not interfere. (*Piggott and Walsh, JJ.*) RATAN LAL *v.* HAMIDULLAH KKAN. **19 A.L.J. 47 : 2 U.P.L.R.(A). 403 : 60 I.C 899 : L.R. 2 A. 5,**

———**S. 115**—*Jurisdiction — Assumption of— Suit cognizable by Revenue Court — Civil Court taking cognizance.*

The High Court can interfere in revision when a Civil Court has wrongly entertained a suit cognizable by a Revenue Court. (*Knox, J.*) TAJAMMAL HUSSAIN *v.* ALI BAHADUR KHAN. **56 I. C. 946 : 23 O. C. 281.**

———**S. 115**—*Jurisdiction.*

Where a lower Court refused to set aside a sale on the ground that the decretal amount was not paid by the judgment-debtor and the appellate court reverses the order, *Held* it has jurisdiction also to set aside the sale. (*Banerji. J.*) GAJADHAR DAS *v.* RAM SUMIRAN DUBE. **52 I C. 161 : 17 A.L.J. 991.**

———**S. 115**—*Jurisdiction, want of —Plea to be substantiated by evidence.*

It is the duty of a person who applies for revision, relying upon want of jurisdiction, to provide himself first with the materials proving the allegation which he relies on and to lay then before the Court, either by affidavit if they consist of statements which do not prove themselves, or by production of the record if they consist of statements, proved by the record. (*Pggott and Walsh, JJ.*) LALA DARBARI LAL *v.* ROSHAN LAL. **52 I. C. 32 : 1 U.P.L.R. (H.C.) 18**

———**S. 115**— *Jurisdiction—Evidence may be examined.*

Where an objection to the place of suing is overruled and embodied in a formal order the

C. P. CODE (V OF 1908), S. 115—Jurisdiction.

High Court has power to revise the order. Where a Subordinate Court is alleged to have assumed jurisdiction which it did not possess the High Court in revision may look into evidence. 26 I. C. 275 and 40 A. 674, Ref. (*Rafique and Walsh, JJ.*) BHARGAVA CO. *v.* JAGANNATH BHAGWAN DAS. **41 All. 602 : 17 A.L.J. 718 : 51 I.C. 331 : 1 U.P.L.R.(H.C.) 120.**

———**S. 115**—*Jurisdiction—Question of law or fact—Interference.*

The refusal of a Court to entertain an application under O. 21, R. 89, C. P. Code properly presented amounts to a refusal to exercise jurisdiction. When a question of jurisdiction is involved the High Court is competent to revise a conclusion of law or fact which bears on a question of jurisdiction. 40. Mad. 793, expl. (*Ryves, J.*) BEHARI LAL *v.* BALDEO NARAIN. **40 All. 674 : 48 I.C. 14 : 16 A.L.J. 717.**

———**S. 115**—*Jurisdiction--Declining of—Refusal to try.*

Where a judge refused to try the issues raised before him, he has declined to exercise a jurisdiction vested in him by law and the High Court can interfere. (*Piggott and Walsh, JJ.*) DALIP SINGH *v.* NAWAL. **39 A. 297 : 38 I. C. 335 : 18 Cr. L.J. 303 : 15 A.L.J. 161.**

———**S. 115 and O. 23, R. 1**—*Jurisdiction—Failure to exercise—Omission to consider costs—Withdrawal of suit by plaintiff.*

Where a suit was withdrawn by the plaintiff without the Court's considering the terms of withdrawal especially as to costs, it was held that the omission to consider the question of costs which resulted in injustice to defendant is a failure to exercise the jurisdiction vested in the Court. (*Holms, S. M. and Campbell. J. M.*) HORI *v.* THAKURJI MAHARAJ. **31 I C. 617 : 13 A L. J. 10 (Rev).**

———**S. 115**—*Jurisdiction —Assumption of— District Munsiff exercising Small Cause jurisdiction when not invested with such powers— Revision.*

A District Munsiff exercising the powers of a Small Cause Judge when not invested with such powers exercises a jurisdiction with which he was not invested and the irregularity is such as to warrant the interference of the High Court under S. 115. (*Knox, J.*) SHAH BEHARI LAL *v* KALI. **22 I. C. 909: 12 A. L. J. 109,**

———**S. 115**—*Jurisdiction—Failure to exercise —Declining to hear appeal.*

In a suit under S. 95 of the Agra Tenancy Act, the defendant pleaded that he was a proprietor and the claim was partially decreed by Assistant Collector. The District Judge on appeal remanded the case for determining questions about rent. The first court dismissed the suit on the ground that it had then no jurisdiction to try it. The Dt. Judge did not also allow the appeal against it. It was held that the Dt. Judge could hear the appeal and his refusal was a failure to exercise jurisdiction vested in him by law and that the first court had no power after remand to decide that the suit did not lie. (*Knox and Piggott, JJ.*) RAMCHARAN LAL *v.* MUHAMMAD SHAFI. **12 I. C. 107 : 8 A. L. J. 894.**

C. P. CODE (V OF 1908), S. 115—Jurisdiction.

——— S. 115 — *Jurisdiction—Want of—Discharge of surety—Premature order.*

Under S. 115 the High Court has power to interfere with a premature order of the Lower Court in discharging a surety either on the ground that the Lower Court had committed a material irregularity or that there was a total want of jurisdiction. (*Scott, C. J. and Heaton, J.*) CHANDULAL *v.* JESHANABHAI CHOTALAL. **41 Bom. 402 : 39 I. C. 88 : 19 Bom. L. R. 112.**

———S. 115—*Jurisdiction—Failure to exercise —Interference.*

Failure to exercise jurisdiction vested by the Calcutta Rent Act, can be interfered with under S. 115, C, P. Code. (*Greaves and Ghose, JJ.*) BASANTA CHARAN SINHA *v.* RAJANI MOHAN CHATTERJI. **26 C. W. N. 711 : 49 Cal. 928 : 1922 C. 514.**

———S. 115— *Jurisdiction — Execution sale —Deposit by person not entitled, allowed.*

Where the Court of execution allowed a reversioner to make a deposit he was not entitled to make, it exercised a jurisdiction not vested in it by law or was acting in the exercise of its jurisdiction illegally or with material irregularity within the meaning of S. 115 of the Civil Procedure Code. (*Sanderson, C. J. and Chotzner, J.*) MOHENDRA NATH NANDA *v.* BAIDYA NATH TRIPATHI. **26 C. W. N. 167 : 70 I. C. 127 : 1922 Cal. 95.**

———S. 115 and O. 21. R. 89—*Jurisdiction—Wrong exercise of.*

The High Court has jurisdiction to interfere with the wrong exercise by the courts below of powers vested in them under O. 21, Rr. 89 to 92 dealing with confirmation on setting aside of auction sale. The court has no iurisdiction to confirm the sale when the judgment-debtors had complied with all the provisions of law and deposited the necessary amount within the time prescribed for that purpose. (*Suhrawardy and Ghose, JJ.*) SANTOSH BALA DEBI *v.* RAMCHANDRA GHATI. **67 I. C. 286.**

———S. 115—*Jurisdiction—Absence of.*

Proceedings under O. 41, R. 23 instead of under O. 41, R. 25 does not create a point of jurisdiction as to justify interference. (*Newbould, J.*) ATULCHANDRA *v.* KOBAD ALI. **64 I. C. 436.**

———S. 115—*Jurisdiction—Finding of fact without evidence.*

A Court cannot come to a finding of fact without taking evidence especially where there is no affidavit on the record and the parties have not come to any agreement on the subject. (*Panton, J.*) JABAN SAHA *v.* SEBAK MONDAL. **64 I. C. 85.**

———S. 115—*Jurisdiction—Appeal erroneously entertained.*

Where an appeal does not lie the High Court has power under S. 115, to set aside the order of the Appellate Courts the remedy being by way of revision. (*Beachcroft, J.*) JOGAI DIDHUR FAKIR *v.* BARADA KANTA BOSE. **55 I. C. 653.**

C. P. CODE (V OF 1908), S. 115—Jurisdiction.

———S. 115—*Jurisdiction—High Court's interference.*

The High Court's interference under S. 115 C. P. C, is confined only to questions of jurisdiction. (*Sharfuddin and Roe, JJ.*) GANGA PRASAD *v.* NANDU RAM. **20 C. W. N. 1080 : 1 Pat. L. J. 465 : 37 I. C. 129 : 3 Pat. L. W. 55.**

———S. 115—*Jurisdiction—Failure to exercise —Admission of evidence.*

Ordinarily the question of admission of evidence is a question of law only. But when a document has some legal effect on the decision, its exclusion can be treated as a refusal to exercise jurisdiction. (*Holmwood and Chapman, JJ.*) PRAN HARI GUHA *v.* CHANDRA KUMAR GUHA. **25 I. C. 204.**

———S. 115—*Jurisdiction—Meaning of.*

(*Per Woodroffee, J.*) 'Jurisdiction" in S. 115 of C. P. C. means a jurisdiction local, pecuniary, personal or with reference to the subject-matter of the suit. (*Jenkins, C. J. and Woodroffe, J.*) SHEW PROSAD *v.* RAMCHUNDER. **23 I. C. 977 : 41 Cal. 323.**

———S. 115 and O. 47, R. 7—*Jurisdiction—Review—Insufficient stamp.*

A court has jurisdiction to hear an application for review though insufficiently stamped and the High Court will not interfere on that ground. (*Carnduff and Richardson, JJ.*) SURENDRA NATH *v.* SITANATH DAS. **21 I. C. 943 (Cal.)**

———S. 115—*Jurisdiction—Failure to exercise —Appeal—Omission to deal on merits.*

The omission of an Appellate Court to deal with an appeal before it on the merits is a failure to exercise jurisdiction vested in it by law. (*Chitty and Teunon, JJ.*) KARTIK CHANDRA OJHA *v.* GORA CHAND MAHTA. **40 Cal. 518 : 20 I. C. 420 : 17 C. L. J. 593.**

———S 115—*Jurisdiction—Failure to exercise —Limitation—Omission to decide.*

When the court below did not decide the question of limitation raised before it the matter comes within the purview of S 115 of C. P. C. (*Holmwood and Chapman, JJ.*) JAGABANDHU BISWAS *v.* SRINATH CHATTERJEE. **18 I. C. 892.**

———S. 115—*Jurisdiction—Failure to exercise —Limitation—Revision.*

If a court decrees a suit or allows an application, which was in fact time barred without even considering whether it was so or not the court fails to exercise jurisdiction vested in it by law. (*Carnduff and Chapman, JJ.*) PANGHU MANDAL *v.* ISAF. **18 I. C. 391 : 17 C. W. N. 667**

———S. 115— *Jurisdiction — Absence of, in lower appellate Court—Revision.*

Where the Munsiff tried two rent suits of less than Rs. 50 and decreed them and the Subordinate Judge affirmed the decrees in one appeal, the High Court has power to interfere in revision to decide if the Subordinate Judge had jurisdiction to try the appeal and that too in one petition (*Stephen and Richardson, JJ.*) SARAT CHANDRA BISWAS *v.* ASHRAF ALI. **15 I. C. 669.**

C. P. CODE (V OF 1908), S. 115—Jurisdiction.

——S. 115—*Jurisdiction—Refusal to exercise—Court misinterpreting S. 73 of the C. P. C. and consequently refusing help.*

The High Court will allow a revision if the L. C. has refused to exercise the jurisdiction vested in it, by law even if such refusal arises from a misapprehension of the true effect of statutory provisions on the subject. (*Mookerjee and Casperss, JJ.*) MAHARAJA OF BURDWAN *v.* APURBA KRISHNA ROY. **14 C. L. J. 50 : 10 I. C. 527 : 15 C. W. N. 872.**

——S. 115—*Jurisdiction—Question of—To try suit—Revision*

Ordinarily interference in revision is inadvisable in cases of decisions as to jurisdiction and should only be made in exceptional cases to remedy injustice. (*Motisagar, J.*) THE FIRM SITARAM *v.* THE FIRM BANARASI DAS. **1923 Lah. 565.**

——S. 115—*Jurisdiction—Suit dismissed for want of—Remand by first appellate Court—Revision.*

Where a suit was dismissed by the Court holding that it had no jurisdiction and the lower appellate court remanded the case to the trial court for taking action under O. 7, R. 10—*Held*, a revision lay from the order of remand. (*Broadway, J.*) DWARKA DAS *v.* RAHIM BAKHSH. **73 I. C. 755 : 1923 Lah. 524.**

——S. 115—*Jurisdiction — Erroneous decision of lower appellate Court as to jurisdiction of trial Court,*

The High Court has jurisdiction to interfere under Section 115 (*c*) when a lower appellate Court erroneously decides in the exercise of its admitted jurisdiction as an appellate court that the court of first instance has or has not jurisdiction to entertain a suit. In any case the High Court can take up under section 115(*b*) both orders of the court below read together on the question whether the first court has failed to exercise a jurisdiction vested in it. (*Campbell, J.*) DALIPA *v.* BARKET ALI. **76 I. C. 1010 : 1923 Lah. 412.**

——S. 115 and O. 22, R. 2—*Jurisdiction—Failure to exercise—Legal representative—Refusal to add.*

A court, rejecting an application by a widow to be brought on record as her husband's representative in a suit on a contract with him refuses to exercise jurisdicton vested in it by law. (*Martineau, J.*) LAIQ RAM *v.* THOLA SINGH. **50 I. C. 884 : 47 P. L. R. 1919.**

——S. 115 and O. 21, R. 58—*Jurisdiction—Assumption of—Interference in revision.*

Where a Court entertains an objection under O. 21, R. 58, of the C.P. Code, in execution of a mortgage decree which objection cannot be raised owing to the fact that no attachment is necessary in execution of a mortgage decree, the Court assumes a jurisdiction not vested in it and the order of the Court is open to revision. (*Leslie Jones, J.*) RATANLAL *v.* BALA PRASAD. **58 P. R. 1918 : 23 P. W. R. 1918 : 44 I. C. 986 : 113 P. L. R. 1918.**

C. P. CODE (V OF 1908), S. 115—Jurisdiction.

——S. 115—*Jurisdiction—Lower appellate court hearing incompetent appeal.*

In revision the Chief Court held that the appeal lay to the Divisional Court and set aside the order of the Dt. Judge as passed without jurisdiction and directed the memorandum of appeal to be returned to the proper Court. (*Scott Smith, J.*) MT. HIRAN DEVI *v.* JEWANMAL. **78 P. L. R. 1915.**

——S. 115—*Jurisdiction—Failure to entertain plea of illegality* suo motu.

A court is said to have failed to exercise a jurisdiction so vested where a court fails to entertain a plea of illegality *suo motu*, i.e., that a certain contract is opposed to public policy, and even refuses to allow the defendant to raise it. (*Phillips, J.*) KANDASAMI GOUNDAN *v.* NARAYANASWAMI GOUNDAN. **(1923) M. W. N. 566 : 76 I. C. 306 : 45 M. L. J. 551 : 1924 Mad. 159.**

——S. 115—*Jurisdiction—Declining of—Dismissal of execution petition as not sustainable.*

Where the lower appellate Court erroneously holds that the District Munsif had no jurisdiction to execute a decree and dismisses the execution petition as having been referred to a Court not having Jurisdiction, the lower appellate Court must be held to have declined to exercise a jurisdiction within the meaning of S. 115, C. P. Code. (*Oldfield and Venkatasubba Rao, JJ.*) MUTHUKARUPPA CHETTY *v.* PAIYA KAVUNDAN. **18 L. W. 17 : 45 M. L. J. 210 : 1923 M. W. N. 406 : 73 I. C. 956 : 1924 Mad. 32.**

——S. 115—*Jurisdiction—Failure to exercise—Limitation—Decision on.*

Where by reason of an erroneous decision on a question of limitation, a court does not entertain a proceeding, it is a failure to exercise a jurisdiction vested in the Civil Court and the High Court can entertain a revision under S. 115, C. P. Code. 44 M. 554 foll. (*Spencer and Venkatasubba Rao, JJ.*) THE BRITISH INDIA STEAM NAVIGATION CO. *v.* SHARAFALLEY. **46 Mad. 938 : 44 M. L. J. 100 : 17 L. W. 705 : 70 I. C. 888 : 1923 Mad. 435.**

——S. 115—*Jurisdiction—Erroneous decision on point of law—Revision.*

Where a Court assumes jurisdiction to pass an order for an erroneous view of the law, in a matter where it has infact no jurisdiction, it is a case for interference of the High Court under S. 115, C.P. Code. (*Krishnan and Venkatasubba Rao, JJ.*) RAMASWAMI GOUNDAN *v.* MUTHU VELAPPA GOUNDAN. **46 Mad. 536 : 44 M. L. J. 1 : (1923) M.W.N. 133 : 16 L. W. 848 : 71 I. C. 1039 : 1923 Mad. 192.**

——Ss. 115 and 10—*Jurisdiction—Stay of suit—Refusal by lower Court,*

Where a subordinate Court proceeds with the trial of a suit in contravention of S. 10, C.P. Code, it usurps a jurisdiction not vested in it by law and its order refusing to stay the suit, though interlocutory, is open to revision by the High Court. 42 A. 409 dist. (*Phillips, J.*) RAMA CHANDRAM PILLAI *v.* NEELAMBAL ACHI. **1923 M. 88. (1) : 70 I. C. 5 : 16 L. W. 607.**

C. P. CODE (V OF 1908), S. 115—Jurisdiction.

———S. 115—*Jurisdiction—Declining of—Refusal to entertain application.*

The order of a court wrongly refusing to entertain an application on the ground that it did not lie at all, is on account of the declining of jurisdiction, liable to be set aside. (*Seshagiri Iyer, J.*) RAMASWAMI PILLAI *v.* BADRA NAYAKAR.

38 M. L. J. 322 : 27 M. L. T. 99 : 11 L. W. 225 : 55 I. C. 267 : (1920) M. W. N. 270.

———S. 115—*Jurisdiction—Declining of—Suit by Receiver—Postponement of trial—Refusal to exercise jurisdiction.*

A Receiver who was appointed to take charge of certain jewels in a pending suit applied to the Court for an enquiry and for orders alleging that the jewels were in the possession of the respondent. The Court directed the Receiver to sue the respondent and on his suing postponed trial of suit pending disposal of the original suit. *Held*, that there was a clear refusal to exercise jurisdiction and that the Court was bound to assist the Receiver in getting possession of the jewels. (*Oldfield and Bakewell, JJ.*) RAMACHANDRA AIYAR *v.* VAITHINATHAN RAJU. **48 I. C. 139 : 8 L. W. 436.**

———S. 115—*Jurisdiction—Failure to exercise.*

Failure to deal with question of limitation arising in the case is no material irregularity requiring interference in revision. 18 I. C. 392. Not. Fol. (*Seshagiri Aiyar, J.*) DURAISAMI UDAYAN *v.* KADIRSA ROWTHEN, **32 I. C. 785 : 3 L. W. 176.**

———S: 115—*Jurisdiction —Declining of — Lim. Act, Art.* 158.

A Dt. Munsif's refusal to hear objections to an award as out of time when they were filed in time, is a refusal of jurisdiction which the lower court possessed and was bound to exercise and the High Court could interfere with such a decision under S, 115. C P. C. (*Coutts Trotter, J.*) RATNAN *v*, KOLANDAI RAMASWAMI CHETTY.

31 I. C. 536 : 2 L. W. 1115.

———S. 115—*Jurisdiction—Finding as to—Revision.*

When an appellate court finds or denies jurisdiction for a suit in Civil Courts, revision under S. 115 by the High Court is proper, 24 M.L.J. 112 foll. But no revision is possible when jurisdiction is based on a finding of fact, except when it is not based on any evidence whatever. The construction of a portion of the documentary evidence or ignoring of important evidence in a case is no ground for revision. (*Sadasiva Aiyar, J.*) KARRI NARASAYYA *v.* THAVVALA NAGESHWARA RAO.

31 I. C. 209.

———S. 115 and O. 47, R. 7—*Jurisdiction —Want of—Review on improper grounds.*

An order of the Lower court granting review was set aside by the Appellate Court on grounds other than those mentioned in O. 47. R. 7, C. P. C. The High Court set aside the appellate order in revision, as being without jurisdiction, 41 C. 746, foll. (*Spencer and Seshagiri Iyer, JJ.*) SRINIVASA AIYAR *v.* NATARAJA IYER,

28 I, C, 707 : 2 L. W. 366.

C. P. CODE (V OF 1908), S. 115—Jurisdiction.

———S. 115 & 41, R. 33—*Jurisdiction—Failure to exercise—Revision.*

The refusal to exercise the power to pass a further decree under O, 41, R. 30, C. P. C. must proceed on judicial considerations. No memorandum of objection is necessary with reference to the rule and where the District judge failed to pass such an order without even considering the evidence, he failed to exercise a jurisdiction vested in him by law and a revision lay to the High Court. (*Oldfield, J.*) IMHICHUNNI NAIR *v.* NARAYANA NAMBUDRI. **21 I. C. 767 : (1913) M. W. N. 1024.**

———S. 115—*Jurisdiction—Order returning plaint without prayer.*

An order directing a plaint to be returned for amendment without a prayer being without jurisdiction, is open to revision by the High Court, (*Sankaran Nair, J.*) VENKATACHELLA CHETTI *v.* NARAYANA AIYAR.

24 M. L. J. 455 : 19 I C. 672 : (1913) M. W. N. 399.

———S. 115—*Jurisdiction—Erroneous decision as to—Revision.—Evidence—Consideration of.*

By the Full Bench. An erroneous decision of the lower appellate court that the first court had or had not jurisdiction to entertain a suit, can be interfered with in revision. *Per Sadasiva Iyer, dissenting.* The words (acted illegally,) in S. 115, C. P. C. mean giving a wilfully perverse decison and not a mere erroneous decision on a question of law. *Per Wallis and Sundara Iyer JJ.* The High Court is empowered under S. 115 to keep subordinate courts within the bounds of their jurisdiction and to see that they do not refuse to exercise it. The Court of first instance by wrongfully assuming jurisdiction owing to an error of law acts without jurisdiction. Similarly the appellate court remitting for trial of the Lower court cases over which the latter has no jurisdiction, acts without jurisdiction. (*Wallis, Sundara Iyer and Sadasiva Iyer. JJ.*) NUPPULURI ATCHAYYA *v.* SIR KANCHUMARI VENKATASEETARAMCHANBRA RAO.

39 Mad. 195 : 13 M. L T. 60 : 18 I. C. 555 : 24 M. L. J. 112.

———S. 115—*Jurisdiction—Declining of—Review.*

The High Court can in revision interfere with the order of a Subordinate Court which refused to grant a review, where the Subjudge dismissed the suit for want of succession certificate when an application for succession certificate was pending and the proceedings were protracted for no fault of plff. and where on obtaining the certificate, the petitioner applied for review but it was refused. 26 A. 572, dis. (*Abdur Rahim, J.*) PERIA MADI *v.* FERNANDEZ.

10 M. L. T. 283 : 12 I. C. 172 : (1911) 2 M, W, N. 252.

———S. 115—*Jurisdiction—Declining of—Dismissal on ground of limitation.*

The High Court can interfere in revision under S. 115, C. P. C. where the lower court dismissed a suit or petition as barred on the ground

C. P. CODE (V OF 1908), S. 115—Jurisdiction.

that that court failed to exercise a jurisdiction vested in it by law. (*Phillips, J.*) NARAYA HEGDE *v.* VETLA PRABHU.
10 M. L. T. 281 : (1911) 2 M. W. N. 239 : 12 I. C. 75 : 21 M. L. J. 1020.

——S. 115—*Jurisdiction—Objection to—Trial of Small Cause Suit as a regular suit without objection.*

High Court would not interfere in revision, in a suit cognizable by a Small Cause Court, but tried by a District Munsiff and appeal suit heard by the district court without any objection. 21 C. 249 25 A. 135, Relied on. 33 M. 323 ; 25 B. 417 dist. (*Baker, O. J, C.*) KAM RUDDIN *v.* MY. INDIANI.
19 N. L. R. 179 : 75 I. C. 769 : 1924 Nag. 17.

——S. 115—*Jurisdiction—Declining of—No inquiry.*

When a lower court has not inquired into the question of limitation, but has wrongly held that it has no jurisdiction to go into the question, the High Court will interfere in revision. (*Batten, A. J. C.*) HABIBULLAH *v.* KARANI.
19 I. C. 425 : 9 N. L. R. 35.

——Ss. 115 and 10—*Jurisdiction—Declining of—Stay of a suit—Revision.*

An order under S. 10, staying a suit amounts to a decision that the court has no jurisdiction to try the suit. If wrongly used, it is a refusal to exercise jurisdiction and is open to revision under S. 115. (*Stuart, J. C, and Daniels, A. J, C.*) SITAL SINGH *v.* SITHA BAKSH SINGH.
50 I. C, 212 : 6 O. L. J. 96.

——S. 115—*Jurisdiction—Declining to exercise—Limitation.*

A refusal to entertain an application on the ground of limitation or a wrongful entertaining of an application which is barred by limitation is a good ground for interference in revision, the question of limitation in each case being virtually one of jurisdiction. (*Lindsay and Rafique, A. J. Cs.*) DEBI BAKASH SINGH *e.* HABIB SHAH.
14 I. C. 711.

——S. 115 and O 9, R. 9—*Jurisdiction—Want of—Dismissal of suit Setting aside without proof of allegations.*

The order of restoration by a court of a suit dismissed for default without proof of the allegations contained in an application for restoration is one made without jurisdiction and will be set aside in revision. (*Lindsay and Rafique, A.J. Cs.*) HABIB SHAH *v.* DEBI BAX SINGH. 14 I. C. 221.

——S. 115.—*Jurisdiction—Refusal to accept deposit.*

It is now the settled practice of the Patna High Court to treat a refusal to accept deposit tendered for the purpose of setting aside a sale as a refusal to exercise jurisdiction. (*Mullick and Macpherson, JJ.*) AULAD ALI *v.* ABDUL HAMID.
2 Pat. 715 : 74 I. C. 102 : 1923 P. 490.

——S. 115 and O. 21, R. 66—*Jurisdiction.*

When a date is appointed for the hearing of parties in order to ascertain valuation on sale proclamation, the court acts without jurisdiction in fixing valuation at an earlier date without hearing the parties. (*Coutts and Ross, JJ.*) SULARAJ BAHADUR *v.* DEVI BUKHSH 3 P. L. T. 342 : 65 I. C. 360 : 1923 P. 102 (1).

C. P. CODE (V OF 1908), S. 115—Jurisdiction.

——S. 115—*Jurisdiction—Failure to exercise—Omission to decree claim admitted.*

Where the lower court dismissed the plaintiff's suit for rent without considering whether he was entitled to a decree for the whole or a portion of the claim on the admission of the defendant, there is a failure to exercise jurisdiction with which the High Court will interfere in revision. (*Miller, C. J. and Mullick, J.*) RAJGIRI SINGH *v.* JADUNATH RAY. 1922 Pat. 355 : 4 P. L. T. 39 : 1923 P. 41.

——S. 115—*Jurisdiction— Order without—Revision—Interference.*

Under S. 115, C. P. Code, it is competent to the High Court to act in revision *suo motu* as it is bound to set aside orders of lower courts passed without jurisdiction. 4 M. 217 ; 32 C. 146 : 28 A. 72 foll. (*Jwala Prasad and Ross, JJ.*) CHAUDARY RAM PD. RAI *v.* MAHESH KANT.
3 P. L. T. 445: 65 I. C. 122: 1 P. 232: 1922 P. 525.

——S. 115— *Jurisdiction —Adjournment on payment of costs.*

A court granting an adjournment on condition costs are paid, and on failure to pay the same deciding the suit *ex-parte*, does not exceed its jurisdiction and the order is not open to revision. (*Das and Macpherson, JJ.*) CHOTU MIAN *v* PALTO GOPE. 1 Pat. L. R. 270.

——S. 115 and O. 34, R. 5 (2)—*Jurisdiction—Failure to exercise — Application for decree absolute—Declining to entertain objections.*

Where in a mortgage suit, plff. applied for a decree absolute under O. 34, R. 5 (2), and deft. filed objections which the court declined to entertain and passed a decree absolute. *Held*, that no revision lies to the High Court. (*Das and Adami, JJ.*) KUMAR GANGANAND SINGH *v.* RAI PIRTHI CHAND BHADUR. 5 Pat. L. J. 342.

——S. 115—*Jurisdiction — Assumption of—Appeal incompetent—Revision.*

The High Court has power to set aside the order of the Lower Appellate Court on the ground that no appeal lay to it at all. (*Sultan Ahmed, J.*) SAMHAUTTA SINGH *v.* BHAGWATI SINGH. 5 Pat. L. J. 97 : 55 I. C. 15 : 1920 Pat. 121.

——S. 115 and O. 9, R. 13—*Jurisdiction*—Ex-parte *decree -Setting aside—Rehearing.*

An order of the Appellate Court directing the rehearing of a suit without any finding as to the sufficiency of the cause for the non-appearance of the defendant is illegal and without jurisdiction. Where a Judge passes an order on the assumption of certain facts and those facts are found to be wrong and non-existent, the order is clearly without jurisdiction. (*Sultan Ahmed, J.*) RAMESH PRASHAD *v.* GULAB CHAUDHARY.
54 I. C. 965 : 1 Pat. L. T. 69.

——S. 115—*Jurisdiction — Declining of—Omission to consider plea.*

The failure of a District Judge to decide a plea amounts to a refusal to exercise a jurisdiction and his decision is liable to be set aside in revision. (*Jwala Prasad, J.*) MATHURA SINGH *v.* RATAN BARHI. 54 I. C. 662.

——S. 115, and O. 9, Rr. 2 and 8—*Jurisdiction—Want of—Order dismissing suit—Appearance of deft.—Revision.*

C. P. CODE (V OF 1908), S. 115—Jurisdiction.

O. 9, Rr. 2 and 8, require certain conditions to be satisfied in order to vest jurisdiction in a Court to pass an order thereunder. An order made by a Court, where these conditions are not fulfilled is open to revision by High Court under S. 115. (*Jwala Prasad and Foster, JJ.*) MUSSAMAT GOLAB KUER *v*, MUSSHUMMAT BIBI SAIRA.
53 I. C. 41.

——S. 115 and O. 21, R. 89—*Jurisdiction — Declining to exercise—Revision.*

Where a court declines to accept a deposit by the debtor under O. 21, R. 89, on the ground that he has sold his interest to a third party, it declines to exercise its jurisdiction and the order may be set aside. (*Mullick and Jwala Prasad, JJ.*) LACHMI NARAYAN *v.* KALI PROSONNO. **52 I.C. 344.**

——S. 115—*Jurisdiction.*

An erroneous decision on a question of law or fact after jurisdiction has been once legally assumed would not be a ground of interference under S. 115, C. P. C., but if the decision is the very basis and foundation of jurisdiction in its limited sense as distinguished from powers, it at once comes within the purview of the section. (*Mullick and Jwala Prasad, JJ.*) MUSST. DHANWANTI KUER *v.* SHEO SHANKAR LAL.
51 I. C. 873 : 4 P. L. J. 340.

——S. 115 and O. 9, R, 3 and O. 17, Rr. 2 and 3—*Jurisdiction—Failure to exercise—Dismissal of suit—No provision of law relied on.*

Where a Court dismisses a suit on plff's failure to amend the plaint without giving him an opportunity to continue the trial with the plaint as it was, it refuses to exercise jurisdiction and its order is open to revision. (*Mullick and Jwala Prasad, JJ.*) NAURANG RAM SAHU *v.* BHAKHORI MANDAR.
51 I. C. 189 : 4 Pat. L. J. 277.

——S, 115—*Jurisdiction—Want of—Parties not contesting can apply for revision.*

Where the order of the lower court was purely arbitrary being based neither on a compromise between the parties nor on a consideration of the evidence in the case, it is open to parties although they did not appear in the lower court to apply to the High Court to set aside an order made to their prejudice. (*Roe and Coutts, JJ.*) RAMANAND KURNI *v.* RAM NAGINA PATHAK.
49 I. C. 981.

——S. 115—*Jurisdiction—Failure to exercise—Interference.*

Where the right of appeal is barred, if the order of the Court below involves a question of jurisdiction, the High Court will interfere in revision. An order returning a plaint is open to revision in cases where it is not appealable. (*Atkinson and Manuk, JJ.*) CHANDRAMANI KOER v. BASDEO NARAIN SINGH. **49 I. C. 442 : 4 Pat. L. J. 57.**

——S 115—*Jurisdiction—Correcting decree—Inclusion of mortgage item—Interference.*

Where through omission one of the mortgage items was omitted in the plaint and a decree in a mortgage suit and the court corrects the mistake under S. 152, C. P. C., there is no ground for interference in revision. (*Duckworth, J*) MAUNG CHIT HLAING *v.* N A R. M. CHETTY.
74 I, C 1020 : 1924 Rang, 104.

C. P. CODE (V OF 1908), S. 115—Leave to sue.

——S. 115—*Jurisdiction—Want of, is a good ground for revision — Wrong decision not a ground for revision.*

On the mere ground that the decision was wrong, a High Court certainly will not interfere but where the lower court had no jurisdiction to enquire into the question, HighCourt has power to interfere in revision. (*Carr, J.*) MAUNG TUN v. MAUNG PO SHOK, **1 R. 265 : 76 I. C, 504 : 1923 R. 199.**

——S. 115 — *Jurisdiction — Time barred—Trial of—Powers of High Court,*

Where the lower court allows an application which is on its face time-barred ignoring S. 3 of the Limitation Act. the lower court acts without jurisdiction and the High Court has the right to interfere in revision and see that justice is administered according to the means which the law has provided and subject to the limitations imposed by that law or judicial authority. The fact that the deft. has not raised the plea of limitation, does not absolve the Court from looking into it when it is patent in the plaint. (*Maung Kin, J.*) KALIAPURAM PADIYACHI *v.* C. V. A. R CHETTY.
9 L. B. R 71 : 39 I. C. 154 : 11 Bur L. T. 73.

——S. 115 and Sch. II, Para 16—*Jurisdiction—Defect in—Interference—Other remedy open.*

To justify interference by the High Court under S. 115, C. P. C., on the ground of want of jurisdiction the facts ousting jurisdiction must be patent on the face of the record. The High Court will be slow to interfere in revision unless the party applying to the Court has no other remedy. 44 B. 595 foll. (*Kennedy, J. C. and Raymond, A. J. C.*) EMNABAI *v*, FAKIR MAHOMED.
15 S. L. R. 165 : 65 I. C. 50 : 1922 S. 1.

Leave to sue.

——S 115—*Leave to sue—Pauperism—Failure to consider—Question of title.*

In an application for leave to see in *forma pauperis* a court acts without jurisdiction in going into the evidence elaborately and trying the question of title in order to see if he has a good cause of action, so also failure to take evidence on the question of pauperism amounts to not exercising a jurisdiction vested in it by law and the order can be interfered with in revision. (*Banerji and Gokul Prasad, JJ.*) SHAURAN BIBI *v.* ABDUR SAMAD, **45 A. 548 : 21 A. L. J. 441 : L. R. 4 A. 252 : 73 I. C. 538 : 1923 All. 577.**

——S. 115—*Leave to sue—Pauper application—Order granting leave.*

No application in revision lies against an order admitting an application for leave to sue *in forma pauperis.* (*Piggott and Walsh, JJ.*) KANDHAIA SINGH *v.* MT. KUNDAN. **20 A. L. J. 471 : 67 I. C. 641 : 1922 All. 208.**

——S. 115 and O. 33, R. 5—*Leave to sue in* forma pauperis—*Rejection of application—Revision.*

Per *Walsh, J.* (*Piggott, J.* contra) :—An order rejecting an application for leave to sue *in forma pauperis* is not open to revision. 19. A. L. J. 558.

C. P. CODE (V OF 1908), S. 115—Leave to sue.

Rel. (*Piggott and Walsh, JJ*) MAHADEO SAHAI *v.* THE SECRETARY OF STATE FOR INDIA.
44 All. 248 : 20 A. L. J. 55 : 65 I. C. 255 : 1922 All. 1.

——S. 115 and O. 33, R. 5—*Leave to sue* in forma pauperis—*Refusal to grant leave—Revision.*

Quœre :—Whether an order dismissing an application for leave to sue *in forma pauperis* under O. 33, R. 5 is open to revision under S. 115, C. P. Code. (*Chitty and Walmsley, JJ.*) BARODA DASI *v.* UPENDRANATH MANDAL. **52 I. C. 562.**

——S. 115 and O. 33, R. 5—*Leave to sue* in forma pauperis—*Defective procedure—Revision.*

Where the primary court rejected an application for leave to sue as pauper and where there was a gross defect in procedure, the High Court went into the evidence and set aside the order. (*Mookerjee and Beachcroft, JJ.*) SAROJINI DASI *v.* BHOLA NATH DAS. **24 I. C. 792.**

——S. 115 and O. 33, R. 5—*Leave to sue as pauper—Dismissal of application—Revision.*

Where a Court dismisses an application for leave to sue as a pauper on the ground that the claim is unsustainable with regard to some properties, the High Court can interfere under S. 115. C. P. Code. If the Court dismisses the application as there was no subsisting cause of action, the High Court will not interfere. (*Sankaran Nair, J.*) MANGALESHERI ILATH KRISHNAN NAMBUDRI *v.* MANGALESHERI ILLATH KESWAN NAMBUDRI.
16 I. C. 612 : (1912) M. W. N. 38.

——S. 115 and O. 33, R. 1—*Leave to sue as pauper—Order granting.*

An order granting leave to sue in *forma pauperis* is not open to revision. The revisional power of the High Court can be invoked only when the case has been decided and there is no appeal. (*Stanyon, A. J. C.*) SITAI *v.* TANAI.
10 I. C. 471 : 7 N. L R. 49.

——S. 115—*Leave to sue* in forma pauperis—*Refusal—Interference in revision.*

Where the Court below refuses to grant leave to sue *in forma pauperis*, it is open to the High Court to interfere in revision. The order on an application for permission to sue *in forma pauperis* is a case decided within the meaning of S. 115 C. P. Code. 12 O. C. 381 followed, 43 A. 564 ; 44 A. 248 distinguished. (*Ashworth, J. C.*) SHEO NARAYAN LAL *v.* MT. MUNAQQA.
9 O. L. J. 610 : 74 I. C. 344 : 1923 Oudh 118.

Liberal interpretation.

——S. 115—*Liberal interpretation.*

S. 115 being merely an empowering section granting jurisdiction regulated by the discretion of the High Courts, it ought to receive a liberal rather than a narrow interpretation. (*Batchelor and Hayward, JJ.*) BAI ATRANI *v.* LEEPSING BARIA. **40 Bom. 86 : 33 I. C. 358 : 17 Bom. L. R. 1097.**

——S. 115—*Liberal construction—Powers of—High Court.*

The powers of the High Court under S. 115, C. P. Code, should be liberally utilized, especially

C. P. CODE (V OF 1908), S. 115—Material irregularity.

when the applicant has no remedy. (*Kennedy, J. C. and Madgaonkar, A. J. C.*) NARAINDAS *v.* JASSOMAL. **65 I. C. 37 : 15 S. L. R. 135.**

Material irregularity.

——S. 115—*Material irregularity—Sanction to prosecute based on—Irrelevant evidence.*

Where the Court below grants sanction to prosecute on evidence which is legally inadmissible, it acts with material irregularity and the order is open to revision by the High Court in revision. (*Rafique, J.*) PEARY LAL *v.* EMPEROR.
21 A. L. J. 399 : L. R. 4 A. 92 (Cr.) . 24 Cr L. J. 900 : 75 I. C. 148 : 1923 A. 601.

——S. 115—*Material irregularity—Setting aside order of abatement.*

An application to revise an order setting aside an order of abatement merely because the lower court had no sufficient material before it, does not fall within S. 115. In such cases it cannot be said that the Court acted without jurisdiction, or failed to exercise jurisdiction or acted illegally or with material irregularity. (*Tudball, J.*) BHUPAL KURMI *v.* PEARY LAL. **63 I. C. 230.**

——S. 115—*Material irregularity—Reversing order of reference.*

If the Court reverses the order of reference after the submission of award and sets aside the award on the ground of some supposed defect in the order, it amounts to material irregularity and the High Court will interfere. (*Piggott and Walsh, JJ.*) KANAHIYALAL *v.* JAGANNATH PRASAD HANUMAN PRASAD. **43 All. 305 : 60 I. C 857 : 19 A. L. J. 33..**

——S. 115—*Material irregularity—Order on appeal—'Application rejected.*

Where on appeal against an order sanctioning prosecution of the appellant, an order 'The application is rejected' is made, the order amounts to a refusal to consider the question and thus is a material irregularity within S. 115. (*Gokul Prasad, J.*) ABDUL AZIZ *v.* BOHRU TARA CHAND.
22 Cr. L. J. 304 : 60 I. C. 800 : 19 A. L. J. 291

——S. 115—*Material irregularity—Arbitrary order.*

An order passed by a Court on the application of an auction purchaser for depositing the money by the decree-holder in a declaratory suit in which the judgment-debtor, the decree-holder and the auction purchaser are impleaded as defts' by an objector is arbitrary and uncalled for and consequently is open to revision and not to appeal. (*Rafique, J.*) MURTAZA KHAN *v.* KALTA SINGH. **58 I. C. 729 : 18 A. L. J. 486.**

——S. 115—*Material irregularity—Rejection of application for adjournment.*

The rejection of an application for adjournment under O. 17, R. 1, without giving reasons is a material irregularity within S. 115. (*Piggott and Walsh, JJ.*) DURGA BAKSH *v.* FATEH BAHADUR SINGH. **33 I. C. 30 : 14 A. L. J. 425.**

——S. 115 and O. 41, R. 10—*Material irregularity—Dismissal of appeal—Revision.*

C. P. CODE (V OF 1908), S. 115—Material irregularity.

Where a notice under O 41, R. 10, directed the appellant to show cause why he should not be required to furnish security but did not require him to be ready with security in case he was not able to show cause, an order dismissing the appeal on the day fixed, on account of the non-appearance of the appellant is materially irregular. (*Chamier and Piggott, JJ.*) BHOLA NATH *v.* KARTIK PRASAD PANDI. **29 I. C. 59.**

——S. 115—*Material irregularity—Misapprehension of plaintiff's claim—Revision.*

A judge acts with material irregularity if he misapprehends the nature of the plaintiff's claim and holds it to be not cognizable by him. (*Rafique, J.*) INDRA MAL *v.* BUDHA.
27 I. C. 629 : 13 A. L. J. 58.

——S. 115 and O. 23. R. 1—*Material irregularity—Leave to withdraw.*

Where there is nothing to show that the judge had exercised any judicial mind or considered whether there is any ground on which he could grant permission to withdraw under O 23, R.1, the Court acted illegally or with material irregularity and the High Court would interfere in revision. 11 C. L. J. 45, 11 C. L. J. 512, ref, (*Knox, J.*) RAMKRISHNA *v.* RAM KIRPA. **14 I. C, 97 : 9 A. L. J, 358.**

——S. 115—*Material irregularity—Refusal of hearing—Interference.*

Whenever the court below has refused to hear a party on the merits without just grounds the High Court is entitled to interfere in revision. (*Macleod. C. J. and Kanga, J.*) BACHUBAI JHIRAD *v.* IBRAHIM ISAK. **24 Bom. L. R. 744 : 69 I. C. 169 : 47 B. 11 : 1922 Bom. 207.**

——S. 115—*Material irregularity—Point of law not raised in the lower court.*

If a party does not raise a point of law in the lower court, the lower court cannot be said to have acted with material irregularity if it has not considered that point. The High Court cannot entertain a point of law not raised in the Courts below. (*Macleod, C. J. and Crump, J.*) HARIDAS CHEKUBAI *v.* RATANSAY RAGHAVJI.
23 Bom. L. R. 802 : 62 I. C. 952 : 46 Bom. 56 : 1922 Bom. 149.

——S. 115 and O. 21, R. 89—*Material irregularity—Deposit of money under O. 21, R. 89 without application—Dismissal.*

The petitioner's property having been sold in execution of a decree against him, he deposited in Court, within thirty days, the decretal amount with interest on the purchase money : but he made at the time no application to set aside the sale. The sale was confirmed later and the Court gave notice to the applicant to take away the money. *Held*, that no application lay under S. 115. Even assuming that the application could be brought within S 115, the Court would be violating the principles under which the rules in O. 21 were framed for obtaining finality at an early date in such matters if it acceded to the application. (*Scott, C. J. and Hayward, J.*) RAOJI BABURAO. *v.* BANSILAL. **43 Bom. 735 : 53 I. C, 135 : 21 Bom. L. R. 835.**

C. P. CODE (V OF 1908), S. 115—Material irregularity.

——S. 115—*Material Irregularity—Court-fee—Refund.*

A refusal to issue a certificate for refund of court-fee on a remand is illegal and is open to revision. (*Beaman and Heaton, JJ.*) BHAUSING RAGHO *v.* CHAGANIRAM HARCHAND.
42 Bom. 363 : 45 I. C. 552 : 20 Bom. L. R. 348.

——S. 115 and O. 23, R. 1—*Material irregularity—Leave to withdraw— Non-production of documents.*

The court acted with material irregularity in the exercise of jurisdiction in permitting plaintiffs to withdraw for failure to produce documents which he was permitted to do after the closing of the case. (*Scott C. J. and Beaman, J.*) BAI KASHIBAI *v.* SHIDAPPA ANAPA PRIJARI.
37 Bom, 682 : 21 I. C. 23 : 15 Bom. L. R. 823.

——S. 115—*Material irregularity—Omission to draw up preliminary decree.*

In a suit for mesne profits, the judge first decided on issues relating to misjoinder, jurisdiction and limitation and directed the parties to give evidence on the romaining issues of accounts. Then he was asked to draw up a preliminary decree, but he refused. *Held*, the judge committed material irregularity in so refusing : that the decision on the first issue was sufficient to draw up a preliminary decree and that he should be directed to draw the same which then would be appealable. (*Scott, C. J. and Beaman, J.*) SIDHANATH DHONDEV GARUD *v.* GANESH GOVIND GARUD. **37 Bom. 60 : 17 I. C. 637 : 14 Bom. L. R. 916.**

——S. 115—*Material irregularity—Refusal to take evidence—Finding of fact.*

On a point of fact a Court cannot come to a finding without taking any evidence, especially where there is no affidavit on the record and the parties have not come to any agreement on the subject. (*Panton, J.*) JABAN SAHA *v.* SEBAK MONDAL. **64 I. C. 85.**

——S. 115—*Material irregularity—Evidence not considered,*

Where the Court rejected the application to set aside a sale in execution on the ground of fraudulent suppression of process and other irregularities, merely on the deposition of the applicant and without considering all other evidence in respect of the grounds, the Court was held to have acted with material irregularity. (*Teunon and Asutosh Chowdhury, JJ.*) BHUSHAN MANI DASI *v.* PRAFULLA KRISTA DEB.
60 I, C. 801 : 48 Cal 119.

——S. 115—*Material irregularity—Probate—Caveat.*

An application for probate of a will was opposed by the daughter's son's son of the grandfather of the testator and the propounder was a perfect stranger to the family. The District Judge held, that the caveators had no *locus standi*. *Held*, that the order of the District Judge was not appealable but could be revised under S. 115. A person having some relationship with the family should be allowed to be present. (*Chatterjee and Newbould, JJ.*) RADHA RAMAN CHAUDHURY *v.* GOPAL CHANDRA CHUKKERBURTY.
24 C. W. N. 316 : 56 I. C. 122 : 31 C. L. J. 81,

C. P. CODE (V OF 1908), S. 115—Material Irregularity.

———S. 115 and O. 9, R. 8—*Material irregularity—Dismissal for default—Appeal—Revision,*

Where a court dismisses a suit under O. 9. R. 8, C. P. C. before the receipt of the report of a Commissioner appointed in the suit, the order of dismissal is not appealable but can be set aside in revision under S. 115 or S. 107, Government of India Act. (*Chatterjee and Duval, JJ.*) SATINDRA NATH BANERJEE *v.* BANWARI MUKUNDA DASS.
54 I. C. 568.

———S. 115—*Material irregularity—Violation of statute— Attachment of provident fund—Provident Fund Act* (IX *of* 1897), *S.* 4 (1).

An error in law which amounts to a usurpation of authority in the act done by the court comes within S. 115. 29 Bom. 259 : 35 Cal. 641 : 8 All. 111 : 8 All 519 : 12 Cal. 295 : 18 Cal. 290 : 41 Cal 323 and 40 Mad. 793, ref. All cases of acting illegally are cases of error in law though the converse is not true. By the Provident Funds Act (IX of 1897). money in such fund is protected from attachment by creditors even after the death of the subscriber A Court which attaches such money in contravention of the statute, acts with material irregularity. (*Rankin, J.*) HINDLAY *v* JOYNARAIN MARWARI, 46 Cal. 962 :
54 I. C. 439 : 24 C. W. N. 288.

———S. 115—*Material irregularity—Discretion.*

An improper exercise of discretion by the lower court is not a ground for revision. (*Chatterjee and Newbould, JJ.*) ENDAY ALI *v.* BENODINI DUTT. 51 I. C. 233 : 29 C. L. J. 362.

———S. 115 and O. 9, Rr. 3 and 13—*Material irregularity*—Exparte *decree—Application to set aside—Dismissal for default without considering merits.*

Where the lower court dismissed for default an application for setting aside an *exparte* decree without considering whether there was sufficient cause for the non-appearance of the petitioner, the High Court set aside the order and directed the application for setting aside the *exparte* decree to be restored. (*Woodroffe and Huda, JJ.*) RAHAMATHUNNESSA KHANUM CHOUDARINI *v.* ABDUL SOBHAN CHOWDURY. 49 I. C. 745.

———S. 115—*Material irregularity—Error of law—Other remedy open— No interference—Government of India Act, S,* 107 (2).

A mistake of fact and a wrong decision based on it does not constitute illegality and irregularity within S. 115 (*c*) or under cl. 15 of the Charter Act. 41 Cal. 423 : 15 Cal. 446, 11 Cal. 6 foll. The High Court cannot interfere under S. 115 where the judgment-debtor has his remedy by review of judgment. The word 'Superintendence' in S. 107 of the Government of India Act should be construed very narrowly and should not be invoked in order to justify interference in a case so as to evade the bar of S. 115. (*Sanderson, C. J. Teunon and Walmsley, JJ.*) KUMAR CHANDRA KISHORE *v.* BASAT ALI CHOWDHURY. 22 C. W. N. 627 :
44 I. C. 763 : 27 C. L. J. 418.

———S. 115 and O. 23, R. 1—*Material irregularity— Withdrawal of suit with liberty to bring fresh suit—Plaint not defective.*

C. P. CODE (V OF 1908), S. 115—Material Irregularity.

An order allowed an appellant to withdraw his suit with liberty to bring a fresh suit on a petition alleging that some persons not named in the petition were necessary parties but had not been made parties, but the plaint was not really defective. *Held* the order is not legal. (*D.Chatterjee and Beachcroft, JJ.*) UPENDRA DE *v.* GIRISH CHANDRA DE. 32 I. C. 402.

———S. 115 and O. 41, R. 10—*Material irregularity—Order rejecting appeal under O,* 41, *R.* 10 (2)—*Refusal to set aside—Revision,*

An order refusing to set aside an order rejecting an appeal under O. 41 R. 10 (2) is not appealable. The High Court will not interfere in revision ordinarily with the order of the Lower Court determining that in its view there was no good ground for a review of its order rejecting an appeal under O. 41 R. 10 (2). (*Richardson and Imam, JJ.*) MEJAJENNESSA BIBI *v.* SHEIKH DIDARY. 32 I. C. 86.

———S. 115—*Material irregularity—Shutting out evidence and decision without enquiry.*

It is a material irregularity in the exercise of a Court's jurisdiction if it overrules an objection as to the judicial misconduct on the part of an arbitrator without inquiry and without admitting proper evidence material to the issue. (*Mookerjee and Roe, JJ.*) JUGGOBUNDHU SAHA *v.* CHAND MOHAN SAHA. 31 I. C 33: 22 C. L. J. 237.

———S. 115—*Material irregularity—Omission to decide question of limitation.*

A Court acts with material irregularity in the exercise of its jurisdiction in granting relief without adjudication on the question of limitation in respect of an application which on the face of it, is time-barred. (*Mookerjee and Roe, JJ.*) TARA SANKAR GHOSE *v.* NASARUDDI. 22 C. L. J. 589 :
29 I. C. 476 : 19 C. W. N. 970.

———S. 115 and O. 9, R. 13—*Material irregularity*—Exparte *decree—Setting aside—Revision.*

If knowing that an application for transfer of the case from his court was pending in the District Court, a Judge sets aside the *exparte* decree, he acts with material irregularity and his order must be set aside. (*Fletcher and Chatterjee, JJ.*) NARAYAN PRASAD MONDAL *v.* JOTINDRA NATH BHATTACHARJEE. 25 I. C, 79: 19 C. L. J. 258.

———S, 115 and O, 47, R. 1—*Material irregularity—Review—Application rejected without hearing applicant.*

Where the court rejected an application without hearing the applicant, it acts with material irregularity and its order is open to revision. (*D. Chatterjee and N. R. Chatterjee, JJ.*) JAYADHARI DASYA *v.* RASIK LAL SIKDAR. 24 I. C. 694.

———S. 115—*Material irregularity—Decision on evidence of witness examined in absence of parties.*

Examination of a witness without notice to the parties or their pleaders and without affording them an opportunity to cross-examine him or rebut his statements and decision on such evidence, is material irregularity within S. 115. (*Mookerjee and Beachcroft, JJ.*) PEARY LAL DAS *v.* PEARY LAL DAWN. 18 C. L. J. 646:
22 I. C. 407 : 19 C. W. N. 908

C. P. CODE (V OF 1908), S. 115—Material Irregularity.

———S. 115—*Material irregularity—Execution—Order prescribed by decree not followed.*

When the court expressly directs in its decree the sale of properties in a particular manner an execution sale in a different order is, though not without jurisdiction, yet a material irregularity in the exercise of the court's jurisdiction-(*Mookerjee and Beachcroft, JJ.*)MANASARAIN PARAI *v.* NAGENDRA NATH SAHU ROY. **16 I. C. 235 16 C. L. J. 557:**

———Ss. 115 and 151—*Material irregularity—Consolidation of different suits.*

A Court directed the consolidation of a mortgage suit and a money suit with a partnership suit on the ground that the substantial parties were the same and some of the points raised were common to them. The substantial questions in controversy were not identical and it was not likely that the questions in controversy between the parties in the money suit and in the mortgage suit could be covered by the decision in the partnership suit. *Held*, that the orderfor consolidation ought not to have been made. The Court acted with material irregularity in the exercise of its jurisdiction and irremediable mischief might be done if the High Court refused to interfere. 12 C. L. J. 537 at p. 544, rel.(*Mookerjee and Beachcroft, JJ.*) KALI CHARAN DUTT *v.* MONODAR BALA DASI.

17 C. W. N. 526 : 15 I. C. 897: 16 C. L. J. 691.

———Ss. 115, 151 and 0, 21, R. 58—*Material irregularity—Claim decided after execution sale—Revision.*

Where an order upon a claim petition was made after the execution sale, *held*, that the doctrine of inherent power did not apply and a revision lay, 14 M. I. A. 40: 2 C. L. J. 306 at 309: 36 C. 193. Ref. Where a subordinate Court has acted clearly in excess of its jurisdiction and in violation of an express provision of the code, the High Court has power to interfere in revision. (*Mookerjee and Carnduff, JJ.*) GOPAL CHANDRA MUKERJEE *v.* NOTOBAR KUNDU. **15 I. C. 53: 16 C. W. N. 1029.**

———S. 115 and O. 41, R. 25—*Material irregularity—Material issue not raised and tried.*

Where a suit for damages against a carrier for loss due to short delivery was decided by the Munsif without enquiry as to whether the notice under S. 10 of the Carrier's Act was served or not and the Sub-Judge on appeal reversed the decree and dismissed the suit, the failure of the Sub-Judge to frame and try an issue under O. 41, R. 25 was a material irregularity within S. 115. (*Jenkins, C. J. and Chatterjee. J.*) RAMJAS AGRAWALLA *v.* INDIAN GENERAL NANIGATION AND RAILWAY CO. **14 I. C. 627: 16 C. W. N. 424.**

———S. 115—*Material irregularity—Refusal of jurisdiction—Leaving issue undecided.*

Where the question in issue was whether deft. No. 2 had authority to bind defendant No. 1 and whether defendant No 1 had ratified the action of defendant No 2 and the Lower Court held that there was no authority given to defendant No. 2 and that there was no ratification, but did not come to any finding on the facts alleged, *Per Stephen, J.*—that the Lower Court did not decline

C, P. CODE (V OF 1908), S. 115—Material Irregularity.

jurisdiction nor did it act with material irregularity, to enable the High Court to interfere in revision ; *Per Chatterjee, J.*, that the Court left the most important issue undecided. (*Stephen and Chatterjee, JJ.*) BRIJ NATH *v.* JANG BAHADUR.

13 I. C. 657.

———S. 115—*Material irregularity.*

The High Court can interfere of its own motion and without an application to it by a party to the suit, when it is apparent on the face of the judgment that there has been an illegality and irregularity in the trial of the case, *i.e.*, the admission of evidence given in a prior suit not *inter partes* and a serious misappreciation of the facts. (*Woodroffe and Carnduff, JJ.*) SIBU SANT *v.* NETAI CHARAN DAS. **9 I. C 806: 15 C. L. J. 114.**

———S. 115—*Material irregularity—Dismissal for default—Revision.*

Where on an application to set aside a dismissal for default, the lower court disbelieved the plaintiff's story and dismissed the application, there is no scope for revision, as the lower court could not be said to have acted illegally or with material irregularity. (*Le Rossignol, J.*) FARIDA *v.* KHAIRA. **3 Lah. 79: (1922) Lah. 290 (1).**

———S. 115—*Material irregularity—Appellate judgment vitiated by irregularity—Surmises and conjectures.*

Where the judgment of the lower appellate Court is vitiated by inaccuracies and misunderstandings and it is entirely based upon them, the High Court would set it aside in revision, though it is reluctant to interfere on revision in arbitration cases. (*Wilberforce, J.*) THE FIRM OF KESAR MAL SHANKAR DAS *v.* THE FIRM OF HUKAM CHAND BADRI NATH. **2 L. L. J. 681: 67 I. C. 260 : 69 P. L. R. 1922.**

———S. 115—*Material irregularity—Petition under S. 44 of Act, IX of 1919.*

A wrong throwing of burden of proof constitutes a material irregularity which justifies interference in revision. 102 P.R. 1912, disapproved. (*Shadi Lal, C. J.*) JANDA RAM *v.* RENAHAH.

3 Lah. L. J. 417.

———S. 115—*Material irregularity—Omission to consider a question of estoppel.*

Omission by the Appellate Court, to consider a question of estoppel amounts to a material irregularity and the High Court will interfere in revision. (*Martineau, J.*) TEG BHAN *v.* WALI DAD.

60 I. C. 716: 3 Lah, L. J. 181.

———S. 115—*Material irregularity—Misapprehension of facts.*

The Lower Appellate Court's misapprehension as to the nature of the contract entered into by the plaintiff is a material irregularity and a revision will lie. (*Martineau. J.*) SAWAY RAM *v.* FATU RAM. **56 I. C. 489.**

———S. 115—*Material irregularily—Omission to decide real issue.*

If there has been no adjudication on a question of limitation, but a distinct burking of the issue and a refusal on the part of the Court to follow a statute of the Legislature, the High Court will be

C. P. CODE (V OF 1908), S. 115—Material irregularity.

justified in interfering in revision. (*Broadway, J.*) BANO MAL *v.* BANO MAL. **27 P. W. R. 1920 : 55 I. C. 55 : 116 P. L. R. 1920.**

——S. 115—*Material irregularity — Wrong decision—If illegal exercise of jurisdiction.*

A Court deciding a suit over which it had jurisdiction cannot be said to have exercised its jurisdiction illegally or with material irregularity simply because it has come to a wrong decision. 11 C. 6 (P. C.) Rel. (*Shadi Lal, J.*) LOUIS DREYFUS Co. *v.* KHITTU RAM. **46 I. C. 189 : 120 P. W. R. 1918.**

——S. 115— *Material irregularity — Misapprehension of precedents.*

The mere fact that the lower court has in its judgment noted a decision of the chief court as governing the case is not a material irregularity if the decision is not applicable to the case. (*Scott Smith, J.*) NASIB SINGH *v.* HARNAM SINGH. **18 P L. R. 1915 : 28 I. C. 919 : 242 P. W. R. 1915.**

——S. 115—*Material irregularity—Revision —Principle regarding.*

The general principle applicable in case of revision under S. 115, C.P.C., is that when a court has taken up a point of fact or law for decision and has decided that point wrongly, it has acted with full jurisdiction regularly and legally and no revision lies unless that decision itself affects the court's own jurisdiction. But when having jurisdiction, the court has failed or refused to take up the point for decision it has exercised its jurisdiction irregularly and the more the failure or refusal affects the exercise of its jurisdiction the greater the irregularity will be. A subordinate judge when dealing with an election concern under the Madras Municipal election rules set aside an election merely on account of non-compliance with rules without deciding whether such non-compliance had materially affected the election, *Held*, that he acted with material irregularity and the High Court had power to interfere in revision. (*Wallace, J.*) A. K. G. AHMAD THAMBI MARICAIR *v.* V. V. S. BABASA MARACAYAR. **16 L W. 898 : (1922) M. W. N. 813 : 44 M. L. J, 69 : 72 I. C. 902 : 46 M. 123 : 1923 M. 254.**

——S. 115 and O. 9, R. 13—*Material irregularity—Dismissal for default— Setting aside—Improper refusal—Revision.*

Where a court dismissed an application to set aside an order of dismissal of a suit for default without considering the existence of sufficient cause for non-appearance of the plaintiff the order is open to revision under S. 115, C. P. Code. (*Krishnan, J.*) KOWTHA SURYANARAYANA GARU *v.* YARUDALA VENKAYYA. **16 L. W 837 : 70 I. C. 38 : (1922) M. W. N. 822 : 1923 Mad. 177.**

——S. 115—*Material irregularity—Failure to add receiver as party to suit or execution proceedings.*

A receiver in a partition suit is entitled to be added as a party in execution proceedings in a mortgage suit concerning the properties in his possession and in refusing to add him as a party

C. P. CODE (V OF 1908), S. 115—Material irregularity.

the court acts with material irregularity within the meaning of section 115, C. P. C. (*Devadoss, J.*) FRASER *v.* KRISHNASWAMI IYER. **43 M. L. J 211 : (1922) M. W. N. 745 : 16 L. W. 322 : 71 I.C. 293 : 31 M. L. T. 290 : 1923 M. 144 (2).**

——S. 115 (c)—*Material irregularity— Refusal to frame issue—Court-fee — Valuation—Revision.*

Where the defendant in his written statement objected that the suit was grossly undervalued but the Court below instead of raising an issue thereon merely recorded the objection. *Held*, that the court below acted with material irregularity in refusing to raise an issue and decide it.(*Davadoss, J.*) VENKATACHALLAM CHETTIAR *v.* KRISHNASWAMI THEVAN. **(1922) M.W.N. 692 : 69 I. C. 542 : 1923 Mad. 134 (2).**

——Ss. 115 and 152, O. 20, R. 3—*Material irregularity—Judgment dictated in open Court—Transcript—Whether can be revised— Irregularity—Revision.*

A judge who has been empowered to pronounce his judgment by dictation to a shorthand writer in open Court should sign the transcript of the judgment so pronounced after such revision as is necessary but such revision cannot be of the effective part of the judgment and must be one relating to clerical or arithmatical mistakes arising from any accidental slips or omissions. The correction of the shorthand transcript so as to entirely change the effect of the judgment amounts to a material irregularity to the prejudice to the party affected by it and even though it can be remedied by suit under O. 21, R. 63, the High Court will interfere in revision against such judgment. (*Oldfield, J.*) HARIKRISHNA PILLAI *v.* ARUR PANDITHAR. **(1923) M. W. N. 354 : 72 I. C. 688 : 18 L. W. 105 : 1923 Mad. 663.**

——Ss. 115, 153 and O. 21, R. 94—*Material irregularity — Sale certificate — Amendment—Notice.*

If a Court amends a sale certificate, without giving notice of the application to the judgment debtor or other persons interested it acts with material irregularity. (*Devadass, J.*) YAGNASWAMI AIYAR v. CHIDAMBRANATHA MUDALIAR, **(1922) M. W. N. 130 : 16 L. W. 760 : 65 I. C. 732 : 1922 Mad. 63.**

——S. 115 and O. 41, Rr. 23 and 27—*Material irregularity—Remand— Improper order—Revision—Interference when justified.*

Where an appellate court thinks that reasonable and sufficient opportunity has not been given to the plaintiff—appellant for adducing evidence and instead of allowing additional evidence under O. 41, R. 27, C. P. Code, remands the case for retrial, the irregularity in procedure is not such as to justify interference in revision, 44 C. 929, 37 M.L.J. 536 Ref. (*Ayling, O. C. J. and Odgers J.*) SHEIK MAHOMED MARACAYAR *v.* RANGASAMI NAIDU. **31 M. L. T. 182 (H. C.) : 69 I. C. 826 : 16 L. W. 515.**

——S. 115 and O. 21, R. 2—*Material irregularity—Application for entering up satisfaction —Withdrawal of.*

C. P. CODE (V OF 1908), S. 115—Material irregularity.

Where there is an application for entering up satisfaction put in by the decree-holder the Court in allowing the application to be withdrawn acts with material irregularity especially when the judgment debtor pleads discharge. The permission to withdraw in such a case is a grave irregularity warranting the interference of the High Court in revision. Where injustice is done in the exercise of jurisdiction the High Court should interfere. (*Seshagiri Iyer, J.*) SOMU PATHAR *v.* RENGASWAMI REDDIAR. **51 I. C. 411 : 35 M. L. J. 252.**

——Ss. 115 and 73—*Material irregularity—Delay in payment—Irreparable loss.*

Where a fund in court standing to the credit of the judgment-debtor is attached by a decree-holder, he must be paid out under O. 21, R. 52. The court acts with material irregularity in postponing payment so as to invite claims for rateable distribution from other attaching creditors. 38 M. 221, not foll : 26 M. L. J. 364 foll. (*Oldfield and Seshagiri Aiyar, JJ.*) UMMA VENKATARATNAM CO. *v.* METHEWALA ADAMJI USMAN AND CO. **42 Mad. 692 : 26 M.L.T. 82 : 50 I. C. 925 : (1919) M. W. N 623.**

——S. 115—*Material irregularity*—Ex parte *procedure—Ascertainment of mesne profits without notice,*

Where an enquiry is ordered for mesne profits in a partition suit without specific notice to the opposite party it is competent to the High Court to interfere under S. 115 (*Oldfield, J.*) VENKAMIDI MAHALAKSHMAMMA *v.* VENKAIMMANEDI RAJAMMA. **43 I. C. 458.**

——S. 115—*Material irregularity —Limitation.*

Failure of an Appellate Court to adjudicate upon a plea of limitation not pressed before it is not a material irregularity so as to justify interference in revision. 8 B. 535 : 3 L. W. 176 rel. on. (*Phillips, J.*) BRITISH INDIA STEAM NAVIGATION COMPANY *v.* HUSSAIN KARIM SHETT. **42 I. C. 536.**

——S. 115 and O. 23, R. 1—*Material irregularity—Order for withdrawal of suit— Revision.*

Order permitting a suit in proper form to be withdrawn under this rule long after its institution, on the ground of insufficiency of evidence is illegal and irregular though passed with jurisdiction. (*Sadasiva Iyer, J.*) CHINTA RANGAYYA *v.* CHINTA BUTCHAMMA. **6 L. W. 1 : 41 I. C. 281 : (1917) M. W. N. 719.**

——S. 115 — *Material irregularity — Limitation, point of—Judgment of Appellate court not dealing with it.*

The mere fact that a judgment of an Appellate Court does not deal with a point of limitation in a case is not a material irregularity as to necessitate interference by a High Court in revision. (*Seshagiri Aiyar, J.*) DURAISAMI UDAYAN *v.* KADIRESA ROWTHEN. **32 I. C. 785 : 3 L. W. 176.**

——S. 115—*Material irregularity—Sale proclamation—Under-valuation.*

C. P. CODE (V OF 1908), S. 115—Material irregularity.

An under-valuation of property in the proclamation of sale is not a material irregularity within S. 115. (*Wallis, C. J. and Seshagiri Aiyar, J.*) HANSRAJ SOWCAR *v.* MOHIDEEN ROWTHER. **29 I. C. 745.**

——S. 115—*Material irregularity—Error of procedure—Succession certificate.*

Where the lower appellate court dealing with a suit of a small cause nature commits an error of procedure patent on the face of the record, the High Court will interfere in revision, The dismissal of a suit for non-production of a succession certificate when the objection was not taken anywhere (when the certificate was as a matter of fact unnecessary) is materially irregular. (*Spencer and Seshagiri Aiyar, JJ.*) AMMASI KUTTI GOUNDAN *v.* APPALU. **29 I. C. 234.**

——S. 115—*Material irregularity—Disposal of case without deciding real questions.*

Where a court has disposed of a case without deciding a question, *e. g.*, the question of possession in a claim case which under the code it is bound to decide for a proper disposal of the case, the High Court will interfere under S. 115. (*Sankaran Nair, J.*) RANGAMMAL *v.* SEVAUGAN CHETTI. **29 I. C. 228 : 28 M. L. J. 327.**

——S. 115—*Material irregularity—Meaning of—Revision.*

The words "acting illegally or with material irregularity" in the exercise of jurisdiction should be read as covering cases in which the Court below has failed to arrive at an obvious conclusion which the facts stated necessitate or has so misapplied the principles of law as to result in a perversion of justice. The words "jurisdiction" in cl. (3) should not be understood as merely indicating the pecuniary, local or other statutory limits of a forum before which proceedings are taken, The word is used in a larger sense than is attributed to it. It means the authority or power which a Court has to do justice in the causes of complaint brought before him. A judge acts illegally and irregularly in the exercise of his jurisdiction if the result of his decision deprives a party of the fruits of a prior proceeding. (*Seshagiri Iyer, J.*) SUBBRAMANIA PATTAR *v.* NARAYANA PATTAR. **28 I. C 189 : 2 L. W. 230.**

——S. 115—*Material irregularity—Illegality —Perverse decision.*

The test of perversity is applicable also when the error is of facts and the decision is in defiance of facts recognized by the lower court to have been established or where the decision is based upon assumption or inference unsupported by anything in fact or probability. A decision is perverse when it is a conscious deviation from a rule of law or procedure. (*Oldfield, J.*) VENKATACHELLAM PATTAR *v.* PARASU PATTAR. **16 M. L. T. 156 : 26 I. C. 106: (1914) M. W. N. 614.**

——S. 115—*Material irregularity—New defendants added—Plaint not amended—Revision.*

When on the addition of new defendants the plaint is not amended and both parties went on, with the trial as if it had been amended and the added defendants were not prejudiced by the omission, *Held*, it was a mere irregularity and no

C. P. CODE (V OF 1908), S. 115—Material irregularity.

revision will lie. 14 I. C. 503, Fol. (*Ayling and Hannay, JJ.*) NILAMBAR THACHARAKKAVIL KOVILAGATH MANAVIKKIRAN *v.* MANJERI PATTEN KAVILAGAM KARNAVAN. **25 I. C. 607 : 1 L. W. 775.**

——S. 115 and O. 9. R. 13—*Material irregularity*—Ex parte *decree—Setting aside—No sufficient cause—Revision.*

The High Court can interfere in revision where an *ex parte* decree is set aside without sufficient cause. 26 M. 604 ; 34 A 592, dist. 18 B. 26 Foll. (*Oldfield, J.*) KARUPAYEE *v.* CHINNAMMAL.
1 L. W. 537 : 25 I. C. 191 : 16 M. L. T. 101.

——S. 115—*Material irregularity — Citing oponent as witness—No revision—Practice—Procedure—Witness*

The practice of compelling the opposite side to give evidence as a witness is condemnable but not illegal and will not be interfered with in the revision. (*Tyabji, J.*) *In re.* RANGASWAMI IYENGAR.
21 I. C. 781 : (1913) M. W. N. 998.

——S. 115, O. 21, R. 89—*Material irregularity—Revision.*

An order of an appellate court rejecting an application under O. 21, R. 89, C. P. C., on the ground that applicant has no *locus standi* to apply is open to revision under S. 115. (*Benson and Sundara Aiyar, JJ.*) ANANTHA LAKSHMI AMMAL *v.* KUNNANCHAN KARATH SANKARAN NAIK.
13 M L. T. 123 : 24 M. L. J. 205 : 18 I. C. 579 : (1913) M. W. N. 101.

——S. 115—*Material irregularity—Procedure—Defects in—Madras High Court Rules, R.* 98—Ex parte *decree—Revision.*

Where a deft. in a case before the Presidency Small Cause Court produced evidence in support of his case, but subsequently failed to appear and the judge instead of acting under R. 98 of the High Court Rules disposed it as *ex parte*, the High Court can properly interfere in revision under S. 115, C.P.C. (*Benson and Sundara Aiyar, JJ.*) PATCHAPERUMAL CHETTY *v.* SAMPATHU CHETTY. **12 I. C. 97 : 10 M. L. T. 163.**

——S. 115—*Material irregularity—Perverse decision.*

Dismissal of a pro note suit, simply on the ground of discrepancies between the allegations in the plaint and the terms of the pro-note, amounts to a failure to exercise jurisdiction or at least to a material irregularity. (*Abdur Rahim, J.*) APPIAH MUKTAR *v.* MEDURI SURYANARAYANA.
21 M. L. J. 451 9 I. C. 32 : 9 M. L. T. 268.

——S. 115—*Material irregularity —Direct contradiction between evidence and finding.*

(*Obiter*) A direct contradiction between the evidence and the finding, constitute a material irregularity justifying interference in revision. (*Baker and Hallifax, O. J. Cs.*) ACHAL SINGH *v.* SETH JIWANDAS. **19 N. L. R. 165 : 75 I.C. 993 : 1924 Nag. 44**

——S. 115 (c)—*Material irregularity—Decision on imaginary facts—Perversity.*

Where the decision of the court below was based not merely on a forced and impossible construction of the facts that were before the court but on the importation of facts which were admitted by both parties not to exist, this is clearly a material irregularity in the exercise of jurisdiction of the sort contemplated by S. 115 (*c*), C. P. C. (*Hallifax, A. J. C.*) PANDURANG *v.* KALLU DAS.
65 I. C. 881 : 1923 Nag. 108.

——S. 115 and O. 23, R. 1—*Material irregularity—Withdrawal of suit—Inadequate grounds.*

The High Court has power to interfere in revision where withdrawal of suit has been allowed without reasons justified by O. 23, R. 1 (2), C. P. Code. To apply a provision of law to a case to which it has no application is to act illegally in the exercise of jurisdiction. (*Drake-Brockman, J. C.*) DOMA *v.* DAYARAM. **48 I. C. 1005.**

——S. 115 and O. 23, R. 1—*Material irregularity—Order granting leave to withdraw—Formal deject.*

The omission to state the formal defects justifying an order for permission to withdraw a suit with liberty to bring a fresh suit amounts to a material irregularity within S. 115. (*Stanyon, A.J. C.*) PUNDALIK *v.* CHANDRABHAN. **43 I. C. 346.**

——Ss. 115 and 151—*Material irregularity—Orders passed under inherent power—When it could have passed an appealable order.*

Where a Subordinate Court has express jurisdiction to pass an appealable order but has gone out of its way to invent a novel form of porcedure, and consequently makes an order for which no appeal is provided in the Code, the High Court will be ready to consider whether this course was really necessary, and will not hold itself precluded from setting aside the order by taking a strict view of the provisions of section 115. (*Dalal and Simpson, A. J. Cs.*) BHAGWAN BAKHSH SINGH *v.* SURENDRA BIKRAM SINGH.
10 O. L. J. 209 : 74 I. C. 335 : 1924 Oudh 11.

——S. 115—*Material irregularity—Transfer of case.*

When a Dt. Judge transfers an application by a party, cross suits pending in two different courts without issuing notice of the transfer, to a third court, he acts with material irregularity and his orders cannot stand, (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) ROOL QUDAR JANG BAHADUR *v.* MANAGER NANPARA ESTATE.
23 O. C. 216 : 7 O. L. J. 523 : 58 I. C. 667 : 2 U. P. L. R. (J.C.) 162.

——S. 115—*Material irregularity-Summary decision.*

Where a Court decides a case summarily without determining the question of jurisdiction one way or the other, the High Court will interfere in revision. (*Lindsay, A. J. C.*) HIRA LAL *v.* MAHOMED SHARAFIT ULLAH. **14 I. C. 2.**

——S. 115—*Material irregularity—Lower Court not considering point of limitation—Revision lies.*

Where there is nothing in the judgment of the lower court to indicate that it considered at all the point as to limitation in setting aside an *ex parte* decree, High Court will interfere in

C. P. CODE (V OF 1908), S. 115—Material irregularity.

revision. (*Das and Bucknill, JJ.*) MODE NARAIN SINGH *v.* BIKRAM SINGH.
4 P. L. T. 545 : 1924 P. 36.

——— S. 115—*Material irregularity—Defect of procedure—Revision.*

Where the Court disposed of a suit on a case not raised by the parties and to which evidence had not been directed, there was a substantial error or defect of procedure. (*Ross, J.*) GAYAN SAHU *v.* BALCHAND SAHU. **73 I. C. 41.**

———S. 115—*Material irregularity—Finding not based on evidence.*

A Court must base its decision on a consideration of the evidence before it. Where it founds its decision on a consideration that has no basis it acts with material irregularity and its decision is liable to be set aside under S. 115. (*Das, J.*) JANARDAN MISSIR *v.* BRIJINANDAN SINGH.
56 I. C. 982.

———S. 115 and O. 7, R. 11—*Material irregularity—Order dismissing suit as defective.*

An error of procedure resulting in a failure of justice is a material irregularity in the exercise of jurisdiction, under S. 115 (*c*). (*Das, J.*) MAHARAJA SIR RAMESHWAR SINGH BAHADUR *v.* SADANAND JHA. **1 Pat. L. T. 188 : 55 I.C. 445: 2 U. P. L. R. (Pat.) 29.**

———S. 115—*Material irregularity—Decision on conjecture.*

Mere conjectural findings of fact cannot be accepted in revision. (*Shadi Lal, J.*) KHEMCHAND *v.* MOHAMMAD YAR.
50 I. C. 805 : 22 P. L. R. 1919.

———S. 115—*Material irregularity—Refusal to go into evidence.*

The High Court will interfere in revision with an order of the lower court refusing to set aside an execution sale after refusing to take the evidence adduced by the applicant on the ground that it was necessary. (*Miller, C. J. and Mullick, J.*) NILMANINATH SAHI DEV *v.* PRATAB ASAINATH SAHI DEV. **49 I. C. 389 : 1919 Pat. 60.**

——— S. 115 and O. 23, R. 1—*Material irregularity—Order for withdrawal of suit—No formal defect.*

The existence of formal defect is a condition precedent to the exercise of jurisdiction under O. 23, R. 1, and the High Court would set aside in revision an order improperly made if it is prejudicial to the defendant. (*Mullick and Thornhill, JJ.*) NATHUNI RAM *v.* SHEO KOER. **5 Pat. L. W. 104 : 3 Pat. L. T. 460 : 46 I. C. 179 : 1918 Pat. 220.**

———S. 115 and O. 23, R. 1—*Material irregularity—Leave to withdraw—Interference.*

The High Court will interfere in revision with orders passed by Subordinate Courts permitting a party to withdraw a suit with liberty to bring a fresh suit in fit cases. (*Roe and Jwala Prasad, JJ.*) BISHESWAR AHIR *v.* BRIJ MISSER.
4 Pat. L. W. 233 : 44 I. C. 406 : 3 Pat. L. J. 630.

———S. 115—*Material irregularity—Omission to consider point arising in the case.*

Where a Court omits to take into consideration a material point which arises in the case, its

C. P. CODE (V OF 1908), S. 115—Material irregularity.

decision is liable to be revised. (*Maung Kin, J.*) SHWE HLA GYI *v.* SAN DWE.
64 I. C. 361 : 10 L. B. R. 332 :

———S. 115—*Material irregularity—Illegality—Jurisdiction.*

S. 115 is very limited in scope and its provisions must be construed strictly. A material irregularity or illegality is not in itself sufficient and there must have been at the same time a wrong or irregular exercise of jurisdiction. (*Pratt, J. C.*) MA E. KO. v. MA PWA HMI.
54 I. C. 501 : (1919) 3 U. B. R. 179.

———S. 115—*Material irregularity—Wrong decision on law—Revision.*

If a Judge arrives at a conclusion of law or fact without having considered the law or a material part of the evidence, or by misunderstanding or erroneously recording the statements of pleaders or witnesses, the method of arriving at such a conclusion is illegal and irregular and is a ground for revision, provided that the irregularity is material and the petitioner has suffered injustice thereby. (*Twomey, C. J. and Ormond, J.*) GOORIDUT BAGLA *v.* ROOKMAN,
12 Bur. L. T. 5 : 47 I. C. 781 : 9 L. B. R. 263.

———S. 115—*Material irregularity—Finding of fact—Failure of lower court to take into account material fact.*

An erroneous finding of fact will not be interfered with in revision unless it has been caused by not taking into account a material fact in evidence. 20 B. 630 : 2 L. B. R. 333 Ref. Where a Court imports into a case its alleged knowledge of witnesses as habitual givers of false evidence, etc., the Court acts improperly and with material irregularity. 9 Bur. L. R. 324 Ref. (*Maung Kin, J.*) IBRAHIM *v.* MOOSAJI AHMED. **39 I. C. 424.**

——— S. 115—*Material irregularity—Ignorance of law.*

A failure to take into accouut a provision of law as to which there can be no doubt, is a ground for revision. (*Maung Kin, J.*) MAANG BA YYAW *v.* JANALLI.
35 I.C. 426 : 10 Bur. L. T. 29.

———S.115—*Material irregularity--Disregard of statutory provisions.*

If the provisions of S. 74, Contract Act, are disregarded in assessing damages it is a material irregularity. (*Twomey, J.*) MAUNG THA *v.* SHWE ZAN. **27 I. C. 885.**

———S. 115—*Material irregularity—Mixing up legal concepts—Bailment—Ownership.*

The failure of the lower court to keep in view the distinction between a case where ownership had passed and a case where the goods were merely bailed, is material irregularity in the exercise of jurisdiction. (*Twomey, J.*) MAUNG MYAING *v.* MAUNG PO AMAN.
15 I. C. 431 : 5 Bur. L. T. 106.

———S. 115—*Material Irregularity.*

The High Court can exercise its revisional powers if it appears that the lower court has committed an error reaching the very root of the case and has failed to consider

the law applicable to the case and thus has acted with material irregulartiy. (*Twomey. J.*) MA HUIN U. *v.* OSMAN GANI. 15 I. C. 423 ; 5 Bur. L. T. 99.

Misconstruction.

——S. 115—*Misconstruction of section.*

A mere misconstruction by a subordinate court of S. 87 of the Negotiable Instruments Act, is not a ground for revision by the High Court under S. 115, C. P. C. (*Abdur Rahim, J.*) VENKATA SUBRAMANIAM *v.* KANCHI RAJU. 12 I. C. 138.

——S 115—*Misconstruction of rules made by the High Court.*

An erroneous construction of the rules framed by the High Court as regards costs of proceedings in subordinate courts, is no ground for revision. (*Das and Adami, JJ.*) RAMKISHUN DAS *v.* BENI PROSAD. 3 Pat. L.T, 314 : 65 I.C. 355 : 1923 P. 90.

Mistake of fact.

——S. 115 and O, 41, R. 11 (1)—*Mistake of fact—Order passed under—Revision.*

The Chief Court will interfere in revision with an order passed under O 41, R. 11 (1), under a mistake of fact. (*Kensington, C. J. and Rattigan, J.*) BISHEN SINGH *v.* BISHEN KAUR.
191 P. L. R. 1914 : 23 I. C. 902 : 116 P.W.R. 114.

New plea.

——S. 115—*New plea—Want of jurisdiction—Raised for the first time in the High Court.*

A question of want of jurisdiction dependent on the investigation of facts cannot for the first time be dealt with by the High Court in revision. (*Mookerjee and Beachcroft, JJ.*) SAHEBJADA FARIDU *v.* FAKIR MUHAMMAD. 24 I. C, 862.

——S. 115 and O. 6, R, 17—*New plea.*

Where the legal representative of a deceased plaintiff was allowed to set up a claim not open to original plaintiff, the High Court will interfere in revision and set aside the order. (*Kumaraswami Sastri, J.*) VENKATRAM RAW *v.* VENKATLINGAM NAYANIN. 42 M.L J. 43 : 30 M.L.T. 204 : (1922) M.W.N. 42 : 68 I. C. 703 : 15 L. W. 72 : 1922 M. 49.

Order.

——S. 115—*Order.*

No appeal lies from an order setting aside an order rejecting an appeal for failure of the appellant to give security for costs nor is the order open to revision when it is made in the interests of the justice. (*Piggott and Kanhaiya Lal, JJ.*) SUNDAR *v.* HABIBCHICK. 18 A.L.J. 838 : 2 U. P. L R. (All) 283 : 60 I. C. 81: 42 A. 626.

——S. 115—*Order—Rateable distribution—Order disallowing.*

The High Court will not interfere in revision with orders disallowing or allowing claims to rateable distribution except in very exceptional circumstances. (*Chevis, J.*) BHAGAT RAM KALYAN DAS *v,* MANGAT RAM SHIBBU RAM. 60 I. C. 371

——Ss. 115 and 73—*Order—Order in rateable distribution case—Revision.*

Orders in rateable distribution cases should not as a rule be interfered with in revision except

when they involve any question of jurisdiction. (*Sadasiva Iyer and Coutts Trotter, JJ.*) SUBBIER *v.* NACHIAPPA CHETTIAR. 14 L W. 582 : 70 I.C. 20 (2) ; (1921) M, W. N. 817.

——S. 115—*Order—Order of District Court—Religious Endowments Act (XX of 1863.)*

The order of a Dt. Court under the Religious Endowments Act recognising the validity of an election in a Temple Committee amounts to an adjudication on the election's legality and so open to revision by the High Court. (*White, C. J. and Oldfield, J.*) VASUDEVA IYER *v.* DEVASTANAM COMMITTEE OF NAGAPATAM.
38 Mad. 594 : 14 M.L.T. 354 : (1913) M.W.N. 842 : 21 I. C. 451 : 25 M. L. J. 536.

Other remedy.

——S. 115—*Other remedy—Setting aside ex parte decree—Revision.*

An order setting aside an *ex parte* decree, even if made without jurisdiction, is not open to revision by the High Court. (*Walsh and Wallach, JJ.*) SHEIKH KALLU *v.* NADIR BAKSH, 19 A. L. J. 907 : 64 I C. 527: 1922 A 441.

——S. 115—*Other remedy—Suit—C. P. Code, O. 21, R. 63—Revision.*

Where another remedy is open to a party, e.g., by a suit under O. 21, R. 63, C. P. Code, the court will not entertain an application for revision. (*Banerji, J.*) BASDEO SAHAI *v.* SARASWATI.
64 I. C. 469.

——S. 115—*Other remedy open to applicant.*

A High Court will not interfere in revision when there is another remedy open to the applicant and therefore no application for revision of an order of dismissal of a suit under S. 9 of the Specific Relief Act will lie inasmuch as the plaintiff has a remedy by a regular suit on title. (*Tudball, J.*) RAMANAND *v.* SHEO BALA.
63 I. C. 809.

——S. 115—*Other remedy—Appeal—No interference.*

Where an alternative remedy is open, the High Court will not entertain an application for the exercise of its powers of revision. An order of the lower court refusing to raise an issue at the instance of the deft's pleader is not open to revision. (*Rafique and Piggott, JJ.*) LALA KEDAR NATH *v.* LAL SHEO PRATAP. 52 I. C. 411 : 1 U. P. L. R. (H. C.) 72.

——S. 115—*Other remedy—Suit—Interference nevertheless.*

When there are no complicated questions of fact or law and the applicants were clearly entitled to possession by virtue of their purchase from the auction-purchaser, the High Court interfered in revision with the order dismissing the application for delivery of possession. (*Banerjee and Tudball, JJ.*) BUDDHU MISSIR *v.* BHAGIRATA KUAR.
40 All. 216 : 42 I. C. 936 : 16 A. L. J. 150.

——S. 115—*Other remedy— Suit—Revision, when to be sought.*

Where a party has another remedy by suit under O. 21, R. 63, open to him he cannot

C. P. CODE (V OF 1908), S. 115—Other remedy.

apply for revision of an order under O. 21, R. 58. (*Banerjee, J.*) BHAIRON *v.* RAJAINA. **38 I. C. 299.**

———S. 115—*Other remedy—Suit.*

Ordinarily no application for revision will lie when a remedy by suit is open to the applicant but each case depends upon its own peculiar circumstances. (*Richards, C. J. and Tudball, J.*) RAM NARAIN *v.* MUHAMMED SHAH.
12 A. L. J. 899: 26 I. C. 62.

———S. 115—*Other remedy—Suit—No revision.*

The High Court will not generally reverse any order where a remedy by suit is open, but every case should be decided on its circumstances. (*Richards. C, J. and Tudball, J.*) RAM NARAIN *v.* ALI MAHOMED, **24 I. C. 807.**

———Ss. 115 and 151—*Other remedy—Appeal*—Shana *delivering attached property—Order making him pay.*

An order of a Munsif making a *shana* pay a certain sum to the judgment-debtor, for having delivered attached property in his charge without permission, though irregular, cannot be interfered with either under S. 115 or 151, C.P.C. ; but the *shana*, if a servant of the court, can appeal to the Dt. Judge. (*Knox, J.*) TURSI RAM *v.* PARMA. **23 I. C. 907.**

———S. 115—*Other remedy—Appeal.*

Revision does not lie where an appeal is allowed by law. (*Banerji, J.*) GANGA CHARAN *v.* BADAL. **19 I.C. 736.**

———S. 115—*Other remedy--Appeal*—Ex parte *decree.*

The High Court will not revise an order setting aside an *ex parte* decree, though it can be impeached in appeal from final decree, 26 M. 604, foll. 22 C. 981, 9 C W. N. 584, diss. from. (*Knox and Karamat Hussain, JJ.*) NAND RAM *v.* BHOPAL SINGH. **34 All. 592 : 16 I. C. 1 : 10 A.L.J. 130.**

———S. 115—*Other remedy — Suit—Specific Relief Act* (I *of* 1877,) S. 9—*No revision.*

An order dismissing a suit under S. 9 of the Specific Relief Act is not open to revision as the aggrieved party has a remedy by suit open to him (*Knox and Piggott, JJ.*) RAM KISHEN DASS *v.* JAI KISHEN DAS. **33 All. 647 : 11 I.C. 814 : 8 A.L.J. 791.**

———S. 115—*Other remedy— Suit—No revision.*

Powers of revision under S. 115 are exercised only when the party applying to the Court has no other remedy. The Court will not exercise these powers where the proceedings which are sought to be revised are purely of a summary nature which do not finally decide the dispute between the parties. (*Mecleod, C.J. and Heaton, J.*) IRBASAPPA *v.* BASAN GOWNDA. **22 Bom. L.R. 746 : 57 I.C. 432 : 44 Bom. 595.**

———S. 115—*Other remedy— Revision—Interference.*

The High Court will not interfere in revision when the aggrieved party has a remedy by suit open to him except in cases where there would

C. P. CODE (V OF 1908), S. 115—Other remedy.

be a very serious miscarriage of justice if the High Court did not interfere. (*Suhrawardy and Cuming, JJ.*) GIRIBALA DASI *v.* PRIANATH PAL. **65 I. C. 476.**

———S. 115, O. 21, Rr. 58 and 63—*Other remedy open—No revision.*

Where an applicant in revision has other remedies by way of suit or otherwise and where the order of executing Court, if any, is at the most an error of law, the intervention of the High Court under S. 115 of the C.P. Code is not called for. (*Teunon and Cuming, JJ.*) RAJANI KANTA PAL *v.* KEDAR NATH BISWAS. **47 I.C. 190.**

———S. 115—*Other remedy — Appeal — No revision.*

The High Court will not exercise its revisional powers where the party has a remedy by way of second appeal. (*Mookerjee and Beachcroft, JJ.*) R. C, RAY *v.* MUHAMMAD HUSSEN, **20 I.C. 51.**

———S. 115—*Other remedy— Interference in revision.*

Although a High Court generally does not entertain an application for revision when there is another remedy open to a petitioner, there is nothing in the law which prohibits such court from interfering where grave injustice might have been done. 10 All. 119 ; 36 P.R. 1887 : 71 P. R. 1884 : 15 P.R. 1874 Ref, (*Abdul Raoof, J.*) RALLA RAM *v.* MT. RAJ. **4 Lah. L.J. 71 : 67 I.C. 945 : 1922 Lah. 63.**

———S. 115—*Other remedy—Appeal—Revision.*

The Chief Court may interfere by revision in appealable cases, to avoid irreparable damage or for some other pressing cause. The Chief court set aside an order directing the plff. to bring separate suits against the several defts. (*Broadway, J.*) RAHMAN *v.* GONESHI. **50 I. C. 797.**

———S. 115—*Other remedy—No revision—Sanction under O. 32, R. 7.*

Where another remedy exists to an aggrieved party the Chief Court will not interfere in revision. (*Jhonstone, C.J. and Le Rossigoll, J.*) MUSSAMMAT GULAB KHATUN *v.* CHAUDHURI.
99 P.R. 1915 : 32 I.C. 250 : 207 P.W.R. 1915.

———S. 115—*Other remedy—When a bar to revision.*

When another remedy not unduly cumbrous or expensive is open, revision should not be allowed. (*Chevis, J.*) RADHA KISHEN *v.* BHOLU MAL.
171 P.W.R. 1912 : 17 I.C. 254 : 176 P.L.R. 1912.

———S. 115—*Other remedy—Appeal—Returning plaint.*

An order returning a plaint is not open to revision. (*Rattigan and Shaw Din, JJ.*) GURDAS *v.* BHAG. **96 P.R. 1911 : 143 P.W.R. 1911 : 11 I.C. 231 : 216 P.L.R. 1911.**

———S. 115—*Other remedy—Suit—Order under O. 21, Rr. 98, 99, 101.*

A party against whom an order is made under O. 21, Rr. 98, 99 or 101, has the right to proceed by suit under O. 21, R. 103, and therefore, cannot be allowed to have the order rectified in revision. (*Rattigan, J.*) MATHU MAT *v.* AMBO.
129 P.L.R. 1911 : 10 I.C. 183 : 240 P.W.R. 1911.

C. P. CODE (V OF 1908), S. 115—Other remedy.

———S. 115—*Other remedy—Revision.*

It is no doubt the practice of this Court not to interfere in revision, when another remedy is available, but the High Court may interfere in exceptional cases especially where it is not clear that there is in fact another remedy, (*Oldfield, J.*) HARI KRISHNA PILLAI *v* ARUR PANDITHAR.

18 L.W, 105 : (1923) M.W.N. 354 : 72 I.C. 688 : 1923 Mad. 663.

———S 115—*Other remedy—High Court, if interferes.*

The High Court is slow to interfere in revision when there is a separate remedy open. (*Odgers, J.*) VENTALA VEERA RAZU *v.* KURUVELLA SUB BARAYUDU. **41 M.L.J. 378 : (1921) M.W.N. 507: 64 I.C. 493 : 15 L.W. 245 : 1922 Mad. 3**

———S. 115—*Other remedy—Appeal or suit—Interference.*

The High Court may interefere in revision though it may generally refuse where there is an appeal from the order or a regular suit can be brought. If a party can obtain complete and effective relief in revision the High Court may well grant it. (*Avling and Srinivasa Iyengar, JJ.*) MULAMBATH KUNHAMMA *v*, PARAKAT KATHIRI KUTTI. **31 M.L.J. 827 : 38 I. C. 373 : 5 L.W, 472.**

———S. 115—*Other remedy open—Suit—Revision:*

Where another remedy is open to an aggrieved party, interference by way of revision is unjustifiable. (*Oldfield and Sadasiva Aiyar, JJ.*) PONNU RANGAM PILLAI *v.* LAL KHAN SAHIB. **37 I.C. 348.**

———S. 115—*Other remedy open—Appeal—Revision—Practice.*

While the High Court will not generally interfere in revision where an equally efficacious remedy is open to the party by way of appeal, it will do so where it would be impossible to put the parties in the same position in appeal as they would have been if the irregularities had been set right in the lower court by a timely interference. (*Kumaraswamy Sastri, J.*) ABDUL RAHIM SAHIB *v.* KULLAPPA GOUNDEN. **30 I.C. 845 : 18 M .L. T. 243.**

———S. 115—*Other remedy—Appeal — Interference—Grounds for revision.*

The High Court should interfere with the proceedings of a lower court where patent irregularities are brought to its notice in directing or refusing amendment, when unnecessary expenses or delay or multiplicity of proceedings is thereby saved. (*Kumaraswamy Sastri, J.*) POOSAPATHI RAMACHANDRA *v.* VENKATA SUBBAYAMMA. **30 I.C. 41 : 29 M. L. J. 53.**

———S. 115—*Other remedy—Suit-No revision.*

There can be no revision in a case where there is a remedy by suit. 8 M, 484 and 21, I. C. 461 foll, 25 I. C. 191 , 32 M, 334, not foll. (*Hannay, J.*) SUBBIAH PILLAI *v.* KAILASAM PILLAI.

26 I. C. 19 : 1 L. W. 905.

———S. 115—*Other remedy—Suit—No revision—Exception.*

Where there has been no error of procedure but of law, it is not open to the High Court to interfere in revision. Where a remedy by suit is open to a party, a petition under S. 115 is not the best way of settling it and though a High Court will not decline to interfere in all cases where a remedy is available by suit, it will be justified in not interfering where a suit is a more efficatious remedy and interference will affect the rights of third parties. 41 C. 323, appr. 4 M,383 ; 15 Mad, 372 , 32 M. 334, (1912) M. W. N. 956, Foll, (*Spencer and Seshagiri Iyer, JJ*) SOMASUNDARAM CHETTY *v*, TIRUNARAYANA PILLAI.

25 I. C, 592 : (1914) M, W. N. 738.

———S. 115—*Other remedy — Appeal—Order setting aside* ex parte *decree—Revision.*

An order setting aside an *exparte* decree is not open to revision as it can be contested when the final decree is appealed against. (*Sadasiva Aiyar, J.*) K. R. JAGANNATHA MUDALIAR *v.* VATHYAR APPASAWMY MUDALIAR **24 I.C. 782: 1 L. W. 233.**

———S. 115—*Other remedy — Appeal — No revision.*

An interlocutory order will not be interfered with by the High Court. when the party aggrieved can appeal against the decree. (*Sadasiva Aiyar, J.*) A. GAIBLE *v.* RAMAVI AMMAL.

24 I. C. 781 : 1 L, W. 232.

———S. 115—*Other remedy— Suit — Specific Relief Act, S. 9.*

Where a suit instituted under S. 9 of the Specific Relief Act was dismissed on the ground that the trial involved a decision on a question of title, the aggrieved party may sue to get rid of the summary decision and it is not advisable to interfere under S. 115, C. P. C. (*Sadasiva Iyer and Spencer, JJ.*) RAMAMURTHI *v.* KUNCHUVARTY VENKATA RAO GARU. **(1914) M. W. N, 95 : 22 I. C. 279.**

———S. 115—*Other remedy—Appeal — Revision.*

A revision is not competent where there is a remedy by appeal (*Sadasiva Aiyar, J.*) *In re.* KOLLIPARA VENKAMMA. **12 M. L. T. 348 : 17 I. C. 391 : 23 M. L. J. 381.**

———Ss. 115 and 73—*Other remedy — Suit—Order for rateable distribution.*

An order under S. 73 deciding that a person is not entitled to rateable distribution is not open to revision by the High Court as the person affected has his remedy by way of suit. (*Sankaran Nair, J.*) MURUGAPPA CHETTIAR *v*, NARAYANASAMY PILLAI. **(1912) M. W. N. 956 ; 17 I. C. 389.**

———S. 115 and O. 21, R. 99 *Other remedy—Suit—No revision.*

Where a remedy by a suit is open as in the case of an adverse order under O 21, R. 99, the High Court will not interfere in revision. (*Sundara Aiyar, J*) VENKATACHELLAM CHATTIAR *v.* VEERAPAN AMBALAGARAN.

14 I. C. 283 : (1912) M. W. N. 512.

———S. 115—*Other remedy — Application to full court—Presy. S.C.C. Act (XV of 1882,) S. 38.*

The High Court will not, except in very special cases, interfere in revision, with the decision of a judge of the Presy. Small Cause Court, unless the party aggrieved had first applied to the Full

C. P. CODE (V OF 1908), S. 115—Other remedy.

Court of the Presy, Sm. Cause under S. 38 of the Presy. S. C.C. Act of 1882. (*Ayling, J.*) SEETHAPATHY NAIDU *v.* LAKSHMAN CHETTY.
10 I. C 551 : 10 M. L. T. 332.

——S. 115—*Other remedy—Interference,*
Where another and equally effective remedy is open to a party aggrieved by an order and where no grave injustice or inconvenience would follow from the refusal to act, the High Court would not interfere in revision with the order, 30 A. 331, 33 A 647 foll. (*Prideaux, A. J. C.*) RAMJI *v.* BALKRISHNA. **69 I. C. 719 : 1924 Nag. 38.**

——S. 115—*Other remedy—Suit—Spec. Rel, Act, S. 9—Interference in revision.*
On principle revision should not ordinarily be granted, even in a case in which no appeal lies, if some other remedy is provided which can be called reasonably efficacious in respect of the circumstances of the particular case. But where the decree of the Court below is manifestly wrong, and the slower remedy by a regular suit would still leave the applicant suffering injustice and undue hardship, the Court should exercise the revisional powers in his favour, (*Hallifax, A. J. C.*) RAMCHANDRA *v.* SHRIDHAR.
5 N. L. J. 151 : 65 I. C. 351 : 18 N. L. R. 71 : 1922 Nag. 115.

——S. 115 — *Other remedy — Appeal — No revision.*
It is not the practice of the Judicial Commissioner's Court to interfere in revision when the applicant can appeal. (*Batten, A. J. C.*) KISAN GOPAL TAJMAL *v.* BALIRAM. **49 I. C. 382.**

——S. 115—*Other remedy—Suit—No revision.*
It is not the practice to interfere in revision when another remedy by suit is open to the aggrieved party and when no great injustice or inconvenience would follow from the refusal to interfere. (*Drake-Brockman, J. C.*) GULA *v.* SHEODIN RAM. **48 I. C. 415.**

——S. 115—*Other remedy.*
In an appeal from final order of dismissal, interlocutory orders are open to attack under S. 105, C. P. Code. (*Dunials, J.*) NARENDRA BAHADUR *v.* PEARY LAL.
64 I. C. 211 : 24 O. C. 215.

——S. 115 — *Other remedy — Suit — Interference by High Court in revision.*
It is the practice of the High Court where there is another remedy, not to interfere under S. 115, C. P. C. As the unsuccessful party in the present case had a right of suit, the court refused to interfere in the exercise of its revisional powers. (*Mullick and Bucknill, JJ.*) KAPLESHWAR JHA *v.* RAGHUNANDAN PARSAD.
1 Pat. L R. 370 : 4 Pat. L. T. 718 : 74 I. C. 474 : 1924 P. 134.

——S. 115 and O. 17, Rr. 2 and 3—*Other remedy—Dismissal of suit—Appeal.*
Where the lower Court dismisses a suit making it clear that it is proceeding under the provisions of O.17, R. 3, C.P. Code, and not under O,17, R 2, the remedy of the plaintiff is by way of appeal and not in revision to the High Court. (*Mullick and Kulwant Sahay, JJ.*) SYED BAKER HUSSAIN *v.* MIRZA HUSSAIN MIRZA. **4 Pat. L. T. 46: 73 I. C. 373 : 1923 P. 223.**

C. P. CODE (V OF 1908), S. 115—Other remedy.

——S. 115—*Other remedy — Interlocutory order—Liability for accounts—Government of India Act, S. 107.*
Where the parties have a right of appeal from the ultimate decision after the accounts are taken the High Court should not interfere in revision or superintendence, unless it were proved to its satisfaction that the Judge had given improper directions in his interlocutory order as to the mode of taking accounts to the commissioner which unless varied or set aside would result in irreparable loss to the parties. (*Miller, C. J. and Mullick, J.*) HARIHAR PRASAD SINGH *v.* MAHARAJA KESHO PRASAD SINGH. **3 P. L. T. 638 : (1922) P. 598.**

——S. 115—*Other remedy—Conclusion right but procedure wrong—Interference.*
Per Das, J.—The ordinary rule is that where an aggrieved party has other remedy available, the High Court is unwilling to interfere in revision.
Per Bucknill, J:—Where the right thing has been done in quite the wrong way, the sensible course is not to interfere. (*Das and Bucknill, JJ.*) SYED ALI ZAMIN *v.* NAWAB SYED MOHABAD AKBAR ALI.
1 Pat. 68 : 3 Pat. L. T. 406: 65 I. C. 135 : 1922 P. 315.

——Ss. 115 and 73 (2)—*Other remedy—Suit—Rateable distribution.*
Under S. 73 (2) a remedy by suit is available and it is settled practice of the Patna High Court that it will not interfere in revision where there is another remedy available except in very exceptional circumstances (*Coutts and Adami, JJ.*) MUSSAMAT HARMOOZI BEGUM *v.* MUSSAMAT AYESHA.
1 Pat. L. T. 296: 57 I. C. 421: 5 Pat. L. J. 415.

——S. 115—*Other remedy open—Revision.*
Per Coutts and Atkinson, JJ.—The High Court will not interfere in revision in any case in which the petitioner has another remedy except in very exceptional circumstances, *Per Manuk, J.*—When the High Court can, by interfering in revision, in appropriate cases, terminate the litigation, the mere fact that another remedy by suit only lies should not *per se*, be a reason for non-interference. (*Atkinson, Coutts and Manuk, JJ.*) RAGHU NANDAN PRASAD MISRA *v.* RAMCHARAN MANDA.
4 Pat. L.J. 94 : 49 I. C. 150 : 1919 Pat. 81 (F. B.)

——S. 115 and O. 21, Rr. 58 and 63—*Other remedy—Suit — Order removing attachment—Revision.*
Where on the objection of the objector the Court directed the removal of the attachment on certain lands and an application in revision was made against that order. *Held*, that if the order of a subordinate Court is declared by law to be conclusive, the superior court will not interfere unless the extrinsic conditions of the subordinate Court's legal activity have been plainly infringed and not merely where the error consists in misappreciation of evidence or misconstruction of the law. 7 B. 341 Foll. (*Rigg, J. C.*) MAUNG SANBA *v.* MAUNG LAN BYE. **(1917) 3 U. B. R. 13: 42 I. C. 74: 11 Bur. L. T. 123.**

C. P. CODE (V OF 1908), S. 115—Other remedy.

——S. 115—*Other remedy—Appeal—No revision.*

An order made under S. 55 (4) rejecting an application for forfeiture of security bond is appealable and therefore no revision lies. 15 A. 183 dist. (*Saunders, A. J. C.*) NGA KYI *v.* NGA KY.
10 Bur. L. T. 15 : 34 I. C. 247 :
(1916) II. U. B. R. 103

——S. 115—*Other remedy—Appeal—No revision.*

When the applicant has not availed himself of another remedy open to him by way of appeal, revision is refused. (*Pratt, J. C. and Crouch, A J. C.*) SEUMAL NIHAL CHAND *v.* PURSOMAL
19 I. C. 450 : 6 S. L R. 166

Petition.

——S. 115—*Petition for revision—Not necessary.*

The High Court is incompetent to hear a second appeal from the lower appellate court when no appeal is possible to the latter court from the first court; but it has jurisdiction to deal with the matter under S. 115, though no application is made for that purpose, in a fit case. (*Holmwood and Mullick, JJ.*) GANGADHAR KARMARKAR *v.* SHEKHAR BASINI DASYA. 31 I. C. 812 : 23 C.L. J. 235.

Revision.

——S. 115—*Revision.*

No revision lies from an order of remand. (*Rafique, J.*) BISHMATH SINGH *v.* RAM SRI.
1923 All. 464 (2) : 76 I. C. 525 (1).

——S. 115—*Revision—Conversion into appeal.*

A revision filed after the expiry of the period of limitation prescribed for an appeal cannot be changed into an appeal. But if the facts of the case were so peculiar and the order of the Court below was so manifestly unjust, the Chief Court granted extension of limitation under S. 5 of Lim. Act. (*Broadway and Abdul Raoof, JJ.*) MAMOOD *v.* JAWAHAR. 2 Lah. L. J. 734.

——Ss. 115 and 104 (2)—*Revision—Order on appeal from order returning plaint for presentation to proper Court.*

An order of an Appellate Court reversing an order of the Lower Court returning a plaint for presentation to the proper Court is open to revision, as no Second Appeal lies from such order. (*Abdul Raoof, J.*) RAM LAL ISHAR DAS *v.* SALIG RAM. 59 I. C. 2 : 7 P. W. R. 1921.

——S. 115—*Revision—Satisfaction of decree out of Court—No bar to revision.*

An application for revision is not barred by the mere fact that the petitioner has satisfied the decree out of Court. (*Shah Din, J.*) KANHAYA LAL *v.* NARPAT RAI. 35 P. L. R. 1912 :
168 P. W. R. 1912 : 14 I. C. 793 (1).

——S. 115 and O. 21, R. 2—*Revision -Conversion into appeal.*

In a fit case the High Court may convert a revision petition into an appeal. (1916) 1 M. W. N. 195, foll. (*Seshagiri Aiyar, J.*) MATHARASAPPA CHETTIYAR *v.* MUTHU CHETTIAR.
50 I. C. 931 ; 9 L. W. 596.

C. P. CODE (V OF 1908), S. 115—Scope of.

——S. 115—*Revision—Converted into appeal.*

When a revision petition is by order of court altered into a second appeal, the second appeal will be in time if at the date of the filing of the revision, the time for second appeal had not been gone. Up. Burma C. R, No. 28 of 1914, foll. (*Saunders, A. J. C.*) NGA YEIN *v.* NGA SO.
(1916) II. U. B. R. 106 : 34 I. C. 264 :
10 Bur. L. T. 10.

Right to apply.

——S. 115—*Right to apply—Intervenor in proceedings under S. 138 of the Ouah Rent Act.*

The intervenor in a rent suit under S. 138, Oudh Rent Act, cannot question the order of the Rent Court by an application for revision under S. 115. (*Stuart and Kanhaiya Lal, A. J. Cs*). MUSAMMAT KANIZ FIZZAH BIBI *v.* TIRLOK NATH.
57 I. C. 480 : 7 O. L. J. 307.

Scope of.

——S. 115—*Scope of—Powers under—Not so wide as under S. 25, Provincial Small Cause Courts Act.*

Powers of the High Court under S. 25 of Prov. Sm.C. Courts Act are wider than those under S. 115, C. P. C. (*Walsh and Ryves, JJ.*) CHANDER SEN *v.* MAN MOHAN LAL. L. R. 3 A. 17.

——S. 115 and O. 9, R. 4—*Scope of—Interference.*

A Court is not entitled indirectly to allow an appeal which is not given by the Code by treating the matter as one in revision. (*Richards, C.R. J. and Banerji, J.*) KAMJI DAS *v.* BHAGWAN DAS.
43 I. C. 180.

——S. 115—*Scope of—Mortgage decree—Sale—Claim.*

A claim is not entertainable under O. 21, R. 58 of the C. P. Code to property, which has been ordered to be sold under a mortgage decree and where it is disallowed no revision can lie to the High Court under S. 115 of the Code. (*Sanderson, C.J. and Richardson, J.*) MAHABIR PROSAD *v.* JOGENDRA. 68 I. C. 271 :
26 C. W. N. 50.

——S. 115—*Scope of.*

Even if the Lower Court, in the exercise of its judicial discretion commits an error, the error is not such as brings the case within S. 115 of the Code. (*Teunon and [illegible]chcroft, JJ.*) RAJENDRA KISHORE *v.* MATHURA MOHUN.
55 I. C. 228 : 25 C. W. N. 555.

——S. 115—*Scope of.*

Section 115, C. P. C, which corresponds in its wordings to S. 44 of the Punjab Courts Act, applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it, and it is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. (*Moti Sagar, J.*) THE PUNJAB BANKING COMPANY, LTD *v.* DIWAN DHANPAT RAI.
75 I. C. 487 : 1923 Lah. 506 (2).

——S. 115—*Scope of* S. 99, *C. P. C.*

S. 115 must be interpreted liberally but in harmony with S. 99. (*Stanyon, A. J. C.*) BISANDAYAL SITARAM *v.* BODULAL LADHURAM. 13 N. L. R. 203 :
42 I. C. 746.

C. P. CODE (V OF 1908), S. 115—Scope of.

———S. 115-B—*Scope of—Appeal from non-appealable cases may be treated as application for revision—Not applicable to interlocutory orders.*

There is abundant authority for holding that where no appeal lies an appeal to the High Court may be treated as an application for revision. S. 115 is intended merely to rule out revision of interlocutory orders. An order of remand is not an interlocutory order as it entirely disposes of the case so far as the Court disposes it for the time being. 1922 All. 254, 1922 All. 226 Dist. (*Ashworth J. C.*) SHEIKH FARZAND ALI *v.* EKADASHI.

26 O. C. 10 : 10 O. L. J. 36 : 9 O. & A. L. R. 332 : 73 I.C. 591 : 1923 Oudh 177.

———S. 115—*Scope of—Powers under—When exercised.*

So long as a court has jurisdiction to determine a question even if a wrong decision is come to, the High Court will not interfere in revision, especially where substantial justice has been done. A petitioner who claims revision must come to court with clean hands and show he has been unjustly treated. (*Pipon, J. C.*) RAM DAS *v.* RAM LAL.

73 I. C. 873.

Subordinate Court.

———S. 115—*Subordinate Court—High Court, Kumaun—If subordinate to the Allahabad High Court.*

The High Court of Kumaun is not a Court subordinate to the Allahabad High Court for purposes of revisional jurisdiction under the Code of Civil Procedure. (*Piggott, J.*) SADAR SINGH KONDARI *v.* AMAR SINGH KONDARI.

45 A. 383 : 71 I. C. 991 (2) : 1923 A. 291 (2).

———S. 115—*Subordinate Court—Agra Tenancy Act—Matters under—Revision.*

The High Court has no power of revision in matters coming under Agra Tenancy Act. 31 A. 445, fol. (*Abdul Raoof, J.*) JUMNA PRASAD *v.* KARAN SINGH.

41 All 28 : 46 I. C. 338. 16 A. L. J. 859 :

———S. 115—*Subordinate Court—City of Bombay Municipal Act, S. 33—Election petition—Decision of Chief Judge of Small Cause Court.*

The High Court has no jurisdiction under S. 115 of the C. P. Code to interfere with the decision of the Chief Judge of the Small Cause Court in an election petition. The Chief Judge acting under the powers given to him by S. 33 of the City of Bombay Municipal Act is a *persona designata.* (*Macleod, C. J. and Crump, J.*) NAVAL KAR *v.* MRS. SAROJINI NAIDU.

25 Bom. L. R. 463. 73 I. C. 133 : 1923 Bom. 421.

———S. 115—*Subordinate Court—Land Acquisition Officer — Omission to make reference — Revision.*

Where a Collector in a land acquisition proceeding refuses to make a reference to the District Court on the question of the apportionment of the compensation, the High Court has no power to interfere with the order in the exercise of its revisional jurisdiction, as the Collector is not a "Subordinate Court" to the High Court. 42 M. 231 dis. (*Macleod, C. J. and Crump, J.*) BAL-

C. P. CODE (V OF 1908), S. 115—Subordinate Court.

KRISHNA DASI *v.* THE COLLECTOR, BOMBAY SUBURBAN.

47 Bom. 699 : 25 Bom. L. R. 398: 73 I. C. 354 : 1923 Bom. 290.

———S. 115 — *Subordinate Court — District Judge acting under S. 4 of Act XII of* 1850—*No revision.*

An order of a District Judge under S. 4 of the Public Accountants Default Act is not made by a Court subordinate to the High Court and therefore not open to revision by the High Court. (*Beaman and Heaton, JJ.*) COOPER *In re.*

40 Bom. 119 : 43 I. C. 465 : 19 Bom. L. R. 926.

——— S. 115—*Subordinate Court—Mamlatdar.*

A District or Deputy Collector purporting to act under S. 23 of Bombay Act (II of 1906) is a court and his order is subject to revision. (*Scott, C. J., and Batchelor, J.*) SONU JANARDHAN KULKARINI *v.* ARJUN BARKU KUNBI.

39 Bom. 552 : 29 I. C. 954 : 17 Bom. L. R. 579.

———S. 115—*Subordinate Court—Mamlatdar.*

S. 115 authorises the High Court to interfere in revision with the order of a Collector under S. 28 of the Mamlatdar's Courts Act. The Collector has no authority under the latter section to reverse a decision of the Mamlatdar given on evidence. (*Scott, C. J. and Chandavarkar, J.*) PURUSHOTTUM JANARDAN *v.* MAHADU PANDU TURMALKKAR.

37 Bom. 114 : 17 I. C. 676 : 14 Bom. L. R. 947.

———S. 115—*Subordinate Court—Mamlatdar—Bombay Mamlatdar's Courts Act (Bom. Act II of* 1906).

The High Court's extraordinary power of superintendence is that of direction and so it would interfere only to avert any material and irreparable injustice which has been done in the Mamlatdar's court. (*Beaman and Hayward, JJ.*) KESHAV DHONDI SINDE *v.* JAIRAM.

36 B. 123 : 12 I. C. 709 : 13 Bom. L. R. 1031.

———S. 115—*Subordinate Court— Talukdari Settlement Officer.*

A Talukdari settlement officer is merely an administrative officer and not a Subordinate Court. 9 Bom. L. R. 821, Foll. (*Batchelor and Rao, JJ.*) GAMBHIR SINGH *v.* AGAR SINGH.

9 I. C 943 : 13 Bom L. R. 118.

———S. 115—*Subordinate Court — Revenue Court—Assessment of rent by Court having jurisdiction—B. T. Act, S.* 105.

The High Court will not interfere under S. 115 with an order made by a Court fixing a fair and equitable rent on the ground that the rent fixed is not fair or equitable if the court had jurisdiction under S. 105, B. T. Act, to make the order. (*Newbould, J.*) RAM LAL GOTHI *v.* ROY CHAUDHURI SHATISH CHANDRA.

53 I. C. 411.

———S. 115—*Subordinate Court—Cr. P. Code, S.* 195 *or* S. 476—*Order by Civil Court—Revision.*

Where an order is passed by a Civil Court under S. 195 or 476, Cr. P. C. the High Court can revise under S. 115, C. P. C. or S. 15 of the High Courts Act and the Criminal Bench cannot revise the order. (*Chaudhuri, J.*) BUDHU *v.* CHOTU.

25 C.L.J. 401 : 41 I. C. 313 : 18 Cr. L. J. 793 : 21 C. W. N. 654.

C. P. CODE (V OF 1908), S. 115—Subordinate Court.

——S. 115—*Subordinate Court—Single Judge of High Court—Decision—Not revisable.*

No decision of a single Judge of the High Court sitting alone can be revised under S. 115 as he is not a court subordinate to the High Court. (*Jenkins, C. J. and Chatterjee, J.*) DEBENDRA NATH DAS *v.* BIBUDHENDRA MANSINGH.

33 I. C. 745 : 43 Cal. 90.

——S. 115 — *Subordinate Court—Sub-divisional officer acting as court—Revision—Commissioner of High Court — Jurisdiction—Sonthal Parganas Act, S. 2.*

Revision of an order of a Sub-divisional Officer acting as a court under S. 2 of Sonthal Parganas Act lies to the Commissioner and not to High Court. (*Doss and Richardson, JJ.*) GULAM NAJAF MIAH *v.* PANCHANAN GUPTA. **23 I. C. 876 (2) : 19 C. L J. 292.**

——S. 115—*Subordinate Court—Chota-Nagpur Tenancy Act—Deputy Commissioner.*

Deputy Commissioners acting judicially under the Act are courts subject to the appellate jurisdiction of the High Court ; and the High Court can interfere with their orders in revision if they exceed their jurisdiction or fail or refuse to exercise the jurisdiction vested in them by the Act. 38 C. 832, rel. on. (*Chitty and Teunon, JJ.*) KARTIK CHANDRA *v.* GORA CHAND. **40 Cal. 518: 20 I. C. 420: 17 C. L. J. 593:**

——S. 115—*Subordinate Court—Land Acquisition Act (I of 1894), Ss. 3, 10 and 49—Deputy Collector.*

Where a Land Acquisition Deputy Collector commits an error in not making a reference under S. 49 of the Act, High Court can set it right in the exercise of its extraordinary jurisdiction. 12 C. W. N. 241, fol. (*Caspersz and Chatterjee, JJ.*) KRISHNADAS ROY *v.* LAND ACQUISITION COLLECTOR OF PATNA. **16 C. W. N. 927: 13 I. C. 470 : 16 C. L. J. 165.**

——S. 115—*Subordinate Court—Order under Part 2, Lunacy Act, cannot be revised.*

Order of Dt. Magistrate under part 2 of the Lunacy Act with respect to reception, care and treatment of the lunatic are executive and not judicial and therefore not revisable by the High Court. (*Abdul Raoof and Harrison, JJ.*) DONALD *v.* EMPEROR. **4 Lah. 1 : 73 I.C. 696: 24 Cr.L.J. 664: 1924 Lah. 55**

——S. 115—*Subordinate Court—Board of Revenue—Proceedings under S. 169, Madras Estates Land Act—Nature of power of High Court to revise.*

An appeal preferred to the Board of Revenue in a matter referring to Recording of Rights was dismissed without hearing the party in person or by pleader. *Held*, the High Court would not interfere in revision (1) because the petitioner had a remedy by suit in a Civil Court under S. 170 of the Estates Land Act, and (2) The order of the Board is not that of a Court exercising judicial functions and subject to the appellate jurisdiction of the High Court. (*Spencer and Devadoss, JJ.*) BURLA APPANNA *v.* ANALA LACHAYYA.

18 L. W. 849; 33 M. L. T. 92 (H. C.): 45 M. L. J. 735 : 47 Mad. 250 : 1924 M. 119.

C. P. CODE (V OF 1908), S. 115—Subordinate Court.

——S. 115—*Subordinate Court—Election inquiry.*

Sub-Court holding an enquiry into election under the Madras Dt. Municipalities Act is a Court subordinate to the High Court. 16 L. W. 848; 1923 M 192 fol. (*Wallace, J.*) AHMAD THAMBI *v.* BASAWA MARAKAYAR. **16 L. W. 898 : (1922) M. W. N. 813: 44 M. L. J. 69: 46 M. 123 : 72 I. C. 902: 1923 M. 254.**

——S. 115—*Subordinate Court—District Judge—Trial of elections.*

A District Judge trying the validity of an election under the Madras Local Boards Act XIV of 1902 is not acting as a *persona designata* but as a court : his orders are judicial and liable to interference in revision by the High Court. The mere fact that the order of the District Judge is declared to be "final" merely means that it could not be questioned by way of appeal but it does not exclude the exercise of revisional jurisdiction by the High Court. (*Krishnan and Venkatasubbarao, JJ.*) RAMASWAMY GOUNDAN *v.* MUTHU VELAPPA GOUNDAN. **46 Mad. 536 : (1923) M. W. N. 133 : 44 M. L. J. 1 : 71 I. C. 1039 : 64 L. W. 848 : 1923 Mad. 192.**

——S. 115—*Subordinate Court—Sub-Judge trying an election petition.*

A Sub-Judge trying an election petition questioning the validity of the election of a municipal commissioner under the Madras District Municipalities Act is not a court subordinate to the High Court within S. 115, C.P. Code, Consequently the High Court has no jurisdiction to interfere with the order of a sub-court refusing to try an election petition, 21 B. 279 Foll: 38 M. 581 Ref. (*Devadoss, J.*) DEIVANAYAGAM PILLAI *v.* P. T. S. DIWAN MOHIDEEN ROWTHER.

(1922) M. W. N. 818: 16 L. W. 827: 70 I. C. 780 : 44 M. L. J. 39 : 1923 Mad. 169.

——S. 115—*Subordinate Court—Land acquisition proceedings—Collector.*

Proceedings under Part III of the Land Acquisition Act are judicial in character and an order by the Collector refusing to make a reference on the ground that the applicant has no interest under S.18 of the Land Acqn. Act is open to revision under S. 115, C. P. C. or S. 107 of the Govt. of India Act. 12 C.W.N. 241, foll. : 36 I. C. 621, diss. (*Ayling and Krishnan, JJ.*) PARMESWARA IYER *v.* LAND ACQUISITION COLLECTOR, PALGHAT.

49 I. C. 659. 36 M. L. J. 95: 42 Mad. 231.

——S. 115— *Subordinate Court— Revenue Court—Interlocutory order—Revision.*

Applications to revise interlocutory orders passed by Revenue Courts in suit from which no appeal lies against the final decree should be preferred to the High Court and not to the Board of Revenue. (*Ayling and Krishnan, JJ.*) PARAMASWAMI AIYANGAR *v.* ALAMU NACHIAR AMMAL.

42 Mad. 76 : 35 M. L. J. 632: 9 L. W. 26 : 49 I. C. 11 : (1918) M. W. N. 107.

——S. 115—*Subordinate Court—Proceedings before Land Acquisition Officer.*

A land acquisition officer is not a court. Proceedings under the Act till the matter comes before the Judge are only administrative. No revision by

C. P. CODE (V OF 1908), S. 115—Subordinate Court.

a High Court lies to reverse his proceedings. (*Abdur Rahim, O. C. J. and Seshagiri Aiyar, J.*) MESSRS. BEST AND CO., LTD *v.* DEPUTY COLLECTOR OF MADRAS. **20 M. L. T. 388. 36 I. C. 621: (1916) 2 M. W. N. 348: 4 L. W. 535.**

——— **S. 115—** *Subordinate Court—Village Munsif.*

An order passed by a Dist. Munsif under S. 73 of the Madras Village Courts Act can be revised by the High Court. (*Sadasiva Aiyar and Moore, JJ.*) PARAMASIVAM PILLAI *v.* PERIYA NAYAGATH AMMAL. **34 I. C. 503.**

——— **S. 115—***Subordinate Court— Presidency Small Cause Court.*

The High Court can revise a decision of a Presidency Small Cause Court but it shall not look into the facts nor interfere on the ground of some mistake in fact or law. (*Oldfield and Sadasiva Iyer, JJ.*) VENKATARAMANUJULU NAIDU *v.* RAMASWAMI NAIDU. **2 L W 709: 18 M. L. T. 164: 30 I. C. 353. 29 M. L. J. 353: (1915) M. W. N. 728.**

——— **S. 115—***Subordinate Court—Presy. Sm. Cause Court—Proceedings under S. 41 of Presy. Sm Cause Courts Act.*

A High Court under S. 115 can revise proceedings under S 41 of the Presidency Small Cause Courts Act. (*Seshagiri Aiyar, J.*) RAMASAMI NAIDU *v.* VENKATA RAMANJULU NAIDU. **36 M. L. J. 467 : 26 I. C. 572 : (1914) M. W. N. 368.**

——— **S. 115—***Subordinate Court—Rent Court.*

In cases where an appeal would lie to the High Court, the Rent Court is a court subordinate to the High Court within the meaning of S. 115 C.P. Code. 14 O C. 38, foll. (*Simpson and Wazir Hassan, A. J. C.*) CHANHRAJA *v.* KALKA PANDE. **9 O. L. J. 543 : 72 I. C. 394 : 1923 Oudh 18.**

——— **S. 115—***Subordinate Court — Revenue Court.*

The power of the High Court to interfere in revision with the orders of revenue courts is confined to those cases where an appeal lies to the District Court and the High Court, (*Chamier, J.C. and Evans, A.J.C.*) INDAR PRASAD *v.* FATEH CHAND. **9 I. C. 747 : 14 O. C. 38.**

——— **S. 115 and Government of India Act, (1915), S. 107—***Subordinate Court--Revenue Court.*

An order of a Revenue Court under S. 476 of the Cr P. Code is open to revision by the High Court under S. 115 of the C. P. C. or S. 107 of the Government of India Act (1915). (*Adami and Bucknill, JJ.*) RAKTU SINGH *v* EMPEROR. **6 Pat. L J. 178 : 2 Pat. L. T. 609 : 22 Cr. L J. 403 : 61 I. C. 643 : 1921 Pat. 240.**

——— **S 115—***Subordinate Court—First Judge of Court of Sm. Causes is subordinate to High Court.*

The First Judge of the Court of Small Causes is not merely a *persona designata* appointed for a special purpose and he must be regarded as a Civil Court and as such subordinate to the High Court. The High Court has, therefore, jurisdiction to entertain an application for revision from his decision. (*Robinson, C. J., Pratt and Mac-*

C. P. CODE (V OF 1908), S. 115—Withdrawal of suit.

gregor, JJ.) MAHOMED IBRAHIM MOOLDA *v.* S. R. JANDOSS. **1 Bur. L J. 138 : 70 I. C. 144 : 11 L. B. R. 387 : 1923 R. 49.**

Withdrawal of Suit.

——— **S. 115—***Withdrawal of suit—Permission wrongly given—Interference.*

Where a court decides wrongly to grant permission to withdraw from a suit with liberty to bring a fresh suit, but still has applied its mind to the question whether there was a formal defect by reason of which the suit was liable to fail, the High Court cannot interfere in revision. (*Daniels, J.*) NANNHU *v.* ROSHAN SINGH. **74 I. C. 112 : 1924 A. 121.**

——— **S. 115 and O. 23, R. 1—***Withdrawal of suit -Order without recording reasons—Revision.*

Where on an application for leave to withdraw a suit with liberty to bring a fresh suit the Court merely passed an order to the effect that it was allowed without considering or recording the grounds for granting such leave, the High Court in revision set aside the order. (*Banerji, J.*) RAHMAT ULLAH *v.* DHARAM SINGH. **20 A. L J. 90 : L. R. 3 A. 93 : 64 I. C. 948 : 1922 All. 185.**

——— **S. 115 and O. 23, R. 1—***Withdrawal of suit—Revision.*

Order made within jurisdiction permitting plff. to withdraw the suit with permission to bring a fresh suit cannot be revised by High Court. (*Piggott and Walsh, JJ.*) NAHNEY LAL *v.* JAGANATH PRASAD. **58 I. C. 134.**

——— **S. 115 and O. 23, R. 1—***Withdrawal of suit—Mistake of Law—Revision.*

The High Court cannot interfere under S. 115, C. P. C. where the Lower Court has jurisdiction to allow a withdrawal but makes a mistake of law. (*Richards, C. J. and Banerji, J.*) JHUMUA LAL *v.* BISHESHAR DAS. **40 All. 612 : 46 I. C. 71 : 16 A. L. J. 495.**

——— **S. 115 and O. 23, R. 1—***Withdrawal of suit—Ground not stated.*

Where a Court allowed withdrawal of suit but was silent in its judgment as to its being satisfied about any formal defect or any other sufficient cause for withdrawal, *held* the High Court could interfere and set aside the order of withdrawal. (*Knox and Rafique, JJ.*) RADHA RAWAN *v.* TULA RAM. **17 I. C. 647 : 10 A. L. J. 393.**

——— **S. 115 and O. 23, R. 1—***Withdrawal of suit—Order by Lower Court--Power of High Court.*

Where a suit is allowed to be withdrawn by the Lower Appellate Court for sufficient reason the High Court will not interfere because the only thing it should see is whether the order of Lower Court was advisable for the ends of justice and not, whether any party is prejudiced thereby. (*Griffin, J.*) SHANKER LAL *v.* MAHTAB DEI. **14 I. C. 414 : 9 A. L. J. 207.**

——— **S. 115 and O. 23, R. 1—***Withdrawal of suit.*

When the grant of leave to withdraw suit is improper it will be interfered with in revision. (*Richardson, J.*) KIRANMOYI *v.* RAMA NATH. **64 I. C. 556.**

C. P. CODE (V OF 1908), S. 115—Withdrawal of suit.

——S. 115 and O. 23, R. 1 (2)—*Withdrawal of suit—Application for permission to withdraw—With liberty.*

In the case of an application for permission to withdraw a suit and bring a fresh suit, the Court cannot grant withdrawal without permission for a fresh suit, and in the event of the court desiring to refuse liberty to bring a fresh suit it should dismiss the application altogether and try the suit in hand. (*Chatterjea and Mullick, JJ.*) SURADHANI DEBYA *v.* CHANDRA NATH PRAMANIK.
37 I. C. 131 : 20 C. W. N. 1101.

——S. 115—*Withdrawal of suit—Order allowing is open to revision.*

An order allowing a suit to be withdrawn with liberty to bring a fresh suit, if improperly made, is capable of being revised by the High Court. (*Abdul Qadir, J.*) GHULAM RASUL *v.* MT. RAMZAN BIBI. **68 I. C. 753 : 1923 L. 97.**

——S. 115 and O. 23, R. 1.—*Withdrawal of suit—Order giving permission—Revision.*

An order under O. 23, R 1 giving permission to withdraw, is open to revision. 27 M. L. J. 480; 25 C. L. J. 454, rel on. (*Scott Smith, J.*) MUNNA LAL *v.* CHHABIL DAS.
117 P. W. R. 1918 : 46 I. C. 181.

——115 and O, 23, R. 1—*Withdrawal of suit with liberty to sue—Ill-advised grant of leave—Revision.*

Where in granting leave to withdraw a suit with liberty to sue afresh the Judge never applied his mind to the merits of the application and gave no reasons for allowing the plaintiff permission to bring a fresh suit and it was quite clear that if he had considered the language of the section for a moment such a permission could never have been given. *Held* that the High Court can and will interfere in revision in such cases. (*Daniels, A. J. C.*) PULAI *v.* RANA UMANATH SINGH.
72 I. C. 1034 : 9 O. & A. L. R. 3.

——S. 122—*High Court cannot alter period of limitation.*

The High Court has power to alter, amend and add to rules of procedure laid down in the Code of Civil Procedure according to S. 122, but it has no power to alter the period of limitation provided by the Limitation Act. (*Abdul Raoof, J.*) MADAN GOPAL *v.* MALWA RAM,
68 I. C. 777 : 1923 Lah. 96.

——S. 122—*Rules under — Lahore High Court.*

Under the Rules of the Lahore High Court framed under S. 122, the memo in the case of Second appeal shall be accompanied by a copy of the First Court's judgment. (*Chevis, J.*) MOLU MAL *v.* SRI RAM.
63 I. C. 33 : 2 Lah 227.

——S. 122 and O. 9, R. 13—*Madras High Court—Application to set aside* ex parte *decree—Power of High Court to make rules extending time.*

S. 5 of the Lim. Act as it stands, does not extend to applications to set aside *ex parte* decrees, but the High Court acting under S 122 of the C. P. Code can frame a rule making it applicable to the periods of limitation prescribed in that Act. (*Coutts-Trotter, J.*) SENNIMALAI GOUNDAN *v.* PALANI GOUNDAN, **32 I. C. 975.**

C. P. CODE (V OF 1908), S. 122,

——S. 122—*Force of rules under—Effect change in rules in schedule.*

In order to have the effect of varying the rules in the first schedule to the Code, the rules under S. 122 must first have been considered and submitted by a Rule Committee appointed under S. 123. (*Jwala Prasad and Ross, JJ.*) RAMDEO SINGH *v.* MAKHAN SINGH.
74 I. C. 330 : (1923) Pat. 19.

——Ss. 122 and 123—*Rules not submitted to committee*—Ultra vires—*Application to Patna High Court.*

Ss. 122 and 123 do not apply to Patna High Court. Though the rules made by the High Court were not submitted to any Rule Committee, and though no Rule Committee exists in Patna, the rules are not *ultra vires*. (*Miller, C. J. and Mullick, J.*) RAJENDRA KISHORE *v.* KAMAKHYA NARAIN SINGH. **2 Pat. L. T. 112 : 5 Pat. L. J. 719 : 60 I. C. 285 : (1921) Pat. 97.**

——S. 122—*Chief Court—Rule made in place of R. 2 of O. 34—Mortgagee's substantive right—Restricted—Effects of—Rule* ultra vires.

Under S. 122 the Chief Court framed a new rule in place of R. 2, O. 34 which allowed interest at court rate and not at mortgage rate as stipulated. The new rule was held to be *ultra vires* as it limited the substantive right of the mortgagee to the stipulated rate. (*Ormond, J.*) VEERANNA CHETTY *v.* MUNIANDY THEVAN.
12 I. C. 18 : 4 Bur. L. T. 207.

——S. 125—*Calcutta High Court Rules—Adoption by Patna High Court—Publication.*

Though the Patna High Court did not publish the rules which it had adopted from the Calcutta High Court, it published the rule by which the rules were adopted and this was enough 'publication' under S. 125 of the Code (*Coutts and Ahmad, JJ.*) NANOO BABOO *v.* RAM NIVAJI.
61 I. C. 666 : 2 Pat. L. T. 45.

——S. 128—*Delegation of judicial duties—Rules under old Code.*

Whether S. 128 which allows delegation of judicial duties validates rules which were in existence previous to the Code of 1908 when such delegation was *ultra vires*? (*Sanderson, C.J. and Woodroffe, J.*) CHUTTERPUT SINGH *v.* SADA SOOK KOTARY. **42 I. C. 623 : 21 C.W.N. 1052.**

——S. 129 and O. 41, R 10.

R. 725 of the rules of the Bombay High Court is the governing rule of appeals from the Original Side and not O. 41, R, 10. (*Scott, C. J. and Chandavarkar, J.*) BEHRAM JUNG *v.* SULTANALI.
37 Bom. 572 : 17 I. C. 739 : 14 Bom. L. R. 1106.

——Ss. 132 and 133—*Examination on commission—Hindu lady.*

S. 132 is not confined to purdanashin women strictly so called. An old Hindu lady belonging

C. P. CODE (V OF 1908), S. 132.

to a high family but not belonging to the purdanashin class ought not to be compelled having regard to her social position and the feeling of her class to appear in the witness box but must be examined on commission, the costs of the commission being costs in the cause. (*Greaves, J.*) ELIAS JOSEPH SOLOMON *v.* IYOLSNA GHOSHAL.
45 Cal. 492 : 44 I. C. 157 : 22 C. W. N. 147.

——S. 132—*Purdanashin lady--Examination on commission—Previous appearance in criminal case.*

A purdanashin lady may completely alter her mode of life and cease to be included in the statutory description of "woman who according to the customs and manners of the country ought not to be compelled to appear in public." When the transformation has taken place, she can no longer claim, as of right the statutory exemption formulated in S. 132. But if she is in fact a purdanashin lady she is not deprived of the statutory protection merely because she may have previously appeared in public. 26 C, 651 : 2o C. 650, fol. As regards criminal cases, there has, perhaps, been a slight divergence of judicial opinion on the question of the examination of purdanashin ladies on commission. Case-law discussed. (*Mookerjee and Walmsley, JJ.*) BALAKESHWARI DEBEE *v.* JNANANDA BANERJEE.
45 Cal. 697 : 26 C. L. J. 319.
41 I C. 610 : 22 C. W. N. 197.

——S. 132—*Examination of party.*

S.132 of the Code applies not merely to witness but also to the examination of parties to a suit or proceeding before a Court. (*White, C. J.*) RAHMAT-UN-NISSA BEGAM *v.* AHMAD HUSSAIN SAHIB. 11 I. C. 668.

——S. 135—*Protection of Court.*

A judgment debtor is protected from arrest in the circumstances mentioned in the section and a person who causes the arrest and the officer arresting are guilty of an offence under S. 342, Penal Code. (*Chevis, J.*) RAMLAL *v.* EMPEROR.
36 I. C. 493 : 17 Cr. L. J. 525 :
121 P. L. R. 1916.

——S. 135 and O. 38, Rr. 2 and 3—*Surety for appearance of deft.—Initiation of proceedings under O. 38, R. 3 when deft. appears to defend his case.*

A deft. who appears in court to defend his suit is exempt from arrest under S. 135. A surety for the appearance of the deft. cannot therefore initiate proceedings under O. 38, R.3 with a view to obtain his discharge when the deft. appears in court to defend his suit. The appearance of the deft. on that occasion does not amount to a "voluntary surrender" within O. 38, R. 3. 4 M. H C. R. 145 and 24 I. C. 513, Ref. (*Seshagiri Aiyar and Burn, JJ.*) ODAYAMANGLATH APPANI NAIR *v.* ISAAK MACKADAM 37 M. L. J. 435 :
53 I. C. 367 : 10 L. W. 533.

——S. 135—*Presy. Towns Ins. Act, Ss. 24 (3) and 34—Arrest of bankrupt attending Court.*

It is not open to the court either under this Act or under C. P. C. to issue a warrant of arrest against a bankrupt who is in attendance in court as witness but the proceedings need not be set

C. P. CODE (V OF 1908), S. 141.

aside for this reason alone. (*White, C. J. and Oldfield, J.*) ZAINAB BEE *v.* OFFICIAL ASSIGNEE OF MADRAS. 24 I. C. 513

——S. 141--*Execution application--Dismissal for non-prosecution—Appeal from order refusing to restore—Maintainability of.*

Where the Court dismissed an application for execution for want of prosecution and subsequently refused to restore the application there is no appeal from the order refusing to restore the application. (*Piggott and Walsh, JJ.*) BHARAT TUDO *v.* ASGAR ALI KHAN. 45 A. 148 :
21 A. L. J 135 : 73 I. C. 453 : 1923 A, 460.

——Ss. 141 and 144—*Restitution proceedings —Section applies.*

Proceedings under S, 144, C. P. Code, are not proceedings in execution. Consequently S. 141, C. P. Code applies to them. 40 M. 780 diss. (*Rafique and Lindsay, JJ.*) JIWA RAM *v.* NAND RAM. 20 A. L. J. 226 : 44 A. 407 :
66 I. C 144 : L. R 3 A. 209 : 1922 All. 223.

——S. 141—*Permission given to mutwalli to lease—Order is not appealable.*

Where a court grants permission to a mutwalli to lease wakf properties the order is passed under S. 141, C. P. Code. No appeal lies under the Code or any other law. (*Mookerjee and Panton, JJ.*) HARIBAR RAHIMAN v. SAIDANNESSA BIBI.
38 C. L.J. 358: 1924 Cal. 327.

——S. 141 and O. 9, R. 9—*Applicability to proceedings under O. 9, R. 9—Appeal.*

It is extremely doubtful whether S. 141, C. P. Code, applies at all to proceedings under O. 9, R. 9, C. P. Code, and even if it does apply, S. 141 cannot operate to give an appeal from an order not otherwise appealable under O 43, R. 1. 17 A. 106, Ref. (*Sanderson, C. J. and Richardson, J.*) HARA KUMAR MITTER *v.* MURARI MOHAN BOSE.
36 C. L. J. 184 : 69 I. C. 1003 : 1922 C. 572.

——S. 141—*No applicability to proceedings in execution.*

S. 141 does not make O. 9, R. 9, applicable to O. 21, R. 2 (2). Per *Richardson, J* :--S. 141 was not intended to make the procedure in regard to suits applicable to proceedings in execution for which a special procedure is provided in O. 21. (*Sanderson, C. J. and Richardson, J.*) HANSESWARI DASI *v.* RADHIKA PRASAD. 63 I. C. 855.

——S. 141—*Probate proceeding against minor—O. 32 is made applicable.*

Where a will of which probate is sought affects the interests of a minor, it is expedient to appoint a guardian *ad litem* of the minor following O. 32. C.P.C. But it does not follow that every rule in O. 32, C. P. C., is made strictly and legally applicable. (*Richardson and Huda, JJ.*) RADHASHYAN DASYA *v.* RANGA SUNDARI DASYA.
59 I.C. 664 : 24 C. W. N. 541.

——S. 141—*Legal Practitioners' Act, S. 14—Proceedings under.*

The court of a District Judge enquiring into a case under the Leg. Prac. Act is a court of civil jurisdiction, and the procedure prescribed by O. 16, C.P.Code for summoning and enforcing the

C. P. CODE (V OF 1908), S. 141.

attendance of witnesses and production of documents applies to the case. (*Chatterjea and Newbould, JJ.*) NANDOLAL ROY *v.* BASERALI.
50 I.C. 806 : 23 C. W. N. 560.

———S. 141— *Lunacy Act—Proceedings under.*

Under S. 141 of the C. P. Code, its provisions are applicable to proceedings under the Lunacy Act. Consequently a Dist. Judge is competent to take proceedings on the basis of an application under S. 62 of the Lunacy Act if such application is duly verified as provided for in the C. P. Code. (*Mookerjee and Beachcroft, JJ.*) MONI LAL SEAL *v.* NEPAL CHANDRA. 22 C. W. N. 547 : 43 I.C. 511 : 27 C L. J. 205

———S. 141 and O. 40, R. 1—*Original proceedings—Appointment of Receiver.*

A Receiver may be appointed in original proceedings as in suits according to O. 40, R. 1, read with S. 141. A Court may appoint a Receiver when an application for appointing a common manager under Beng. Ten. Act is pending, even without notice to parties concerned, who if aggrieved may apply for appeal against the *ex parte* order. (*Chatterjee and Beachcroft, JJ.*) ASADALI *v.* MAHAMMAD HOSSEIN. 43 Cal. 986 : 36 I. C. 177 : 20 C. W. N. 1009.

———S. 141, O. 9, R. 9, and O. 21 R. 90—*Execution proceedings—Execution application to set aside—Dismissal for default—Restoration.*

Where an application for setting aside an execution sale under O. 21, R. 90, is dismissed for default another application lies under O. 9, R. 9 to set aside that order. An application for setting aside a sale under S. 47 and O. 21, R. 90, is not an application for execution. It is a miscellaneous proceeding in the nature of an original proceeding in which the auction-purchaser is the principal interested party. S. 141 does not apply to applications for execution. (*D. Chatterjee and Chapman, JJ.*) DILJAN MIHHA BIBI *v.* HEMANTA KUMAR ROY. 29 I C. 395 : 19 C. W. N. 758.

———S. 141, O. 9, R. 13 and O. 21, Rr. 100, 101—*Execution proceedings.*

Section 141 does not make all the procedure provided by the Code applicable to proceedings in execution. O. 9, R. 13 does not apply to a proceeding in execution. A claim made under O. 21, R. 100, and granted under R. 101 in the absence of the decree-holder, cannot be set aside, under O. 9, R. 13. (*Jenkins, C.J., and Roy, J.*) HARICHARAB GHOSH *v.* MANMATH NATH SEN. 41 Cal. 1 : 19 I. C. 683 : 18 C. W. N. 343.

———S. 141 and O. 9, R. 9—*Execution proceedings — Execution application dismissed for default—Subsequent application, if barred.*

The dismissal of an execution application for default is no bar to a subsequent application. (*Mookerjee and Coxe, JJ.*) ASIM MANDAL *v.* RAJ MOHAN. 11 I. C. 385 : 13 C. L. J. 532.

———Ss. 141 and 115—*Not applicable to execution proceedings.*

S. 141 of the Code of Civil Procedure is not applicable to execution proceedings, and an application for execution dismissed for default could be restored only under the provisions of S. 151 of the Code. (*Moti Sagar, J.*) THE PUNJAB BANKING CO. LTD. *v.* DIWAN DHANPAT RAI. 75 I. C. 487 : 1923 Lah. 506 (2).

———S. 141—Not applicable to execution proceedings. (*Shadi Lal, C.J. and Wilberforce, J.*) BHOLU *v.* RAM LAL. 2 Lah. 66 : 60 I. C. 720 : 3 U. P. L. R. (Lah.) 29.

———S. 141 and O. 9, R. 8—*Dismissal of application for restoration for default—Restoration.*

Plff 's suit was dismissed under O 9, R. 8, owing to the absence of the plff. and his pleader. An application for restoration of suit was made the same day and this application was consigned to the Record room in default of plff.'s appearance. Plff. made another application asking for the restoration of the suit which he wrongly described as one for review. This last application was dismissed by the successor in office of the previous Judge on the ground that he had no jurisdiction to entertain the review. *Held* that S. 141 would cover such a case and the application should be restored. 10 I.C. 705, foll. (*Petman, J.*) ABDUL RAHMAN SHAH *v.* SHAHANA.
1 Lah. 339 : 1 Lah. L. J. 188 : 58 I. C. 748.

———S. 141 and O. 9, R. 13—*Dismissal for default—Application to set aside* ex parte *decree.*

Defts. on 4th July 1919 applied to set aside an *ex parte* decree passed on 13th January 1919 but the application was dismissed for default on the 16th October. On the 25th November defts. made a fresh application : *Held*, that the application of the 25th November is one for the restoration of the application of the 4th July, and the procedure laid down in O. 9, R. 13, being applicable to it by S. 141 of the Code, it can be entertained. (*Martineau, J.*) MAULA BAKHSH *v.* RAMDAS.
56 I. C. 25 : 2 Lah. L. J. 627.

———S 141 and O. 9, R 13—*Companies Act—Proceedings under.*

The Court under the Companies Act being a court of civil jurisdiction is governed by the general provisions of the Civil Procedure Code as made applicable by S. 141. The Court should, in dealing with *ex parte* orders, proceed under O. 9, R. 13 *mutatis mutandis*. (*Scott-Smith and Wilberforce, JJ.*) HINDUSTAN BANK, LTD. *v.* MEHRAJ DIN. 1 Lah. 187 : 55 I.C. 820 : 2 Lah L. J. 291.

———S. 141 and O. 9, R. 4—*Dismissal of application for restoration for default—Restoration.*

Where an application under O. 9, R. 4 is itself dismissed for default, a fresh application to restore such application is maintainable (*Broadway, J.*) KIRPA SINGH *v.* MULA SINGH.
10 P. W. R. 1919 : 50 I. C. 401 : 1 P. L. R. 1919.

———Ss. 141 and 114—*Guardians and Wards Act—Proceedings under—Review.*

S. 114, C. P. C., does not apply to proceedings under the G. and W. Act. (*Reid, C. J.*) RALLA *v.* MANGLAN. 241 P.W.R. 1912 : 174 P.L.R. 1912 : 15 I.C. 559 : 116 P. R. 1912.

———S. 141 and O. 9, R. 9— *Execution—Dismissal for default—If can be restored.*

C. P. CODE (V OF 1908), S. 141.

S. 141 applies to execution proceedings and an application for execution dismissed for default can be restored. 7. I .C. 241 Fol. (*Robertson, J.*) NIHALCHAND *v.* CHANDA SINGH. **3 P.W R. 1912 : 13 I. C. 859 : 82 P. L. R. 1912.**

———S. 141—*Religious Endowments Act*, S. 10 —*Order—Review.*

There is no power of review conferred by S. 411 on courts acting under special enactments. A Dt. Judge has no power to review his own order passed under S 10 of the Religious Endowments Act. A Court has no inherent power to review its own decision unless it was passed without jurisdiction 27 M.L.J. 605; 14 M. 1 A. 40; 35 A. 331, 36 C. 323; 40 C. 552; 33 M. 65, Rel. (*Oldfield and Seshagiri Aiyar, JJ.*) ANANTHARAJU SHETTY *v.* APPU HEGADE. **37 M. L. J. 162 : 53 I. C. 56.**

———S. 141— *Religious Endowments Act*, S. 10.

Not only are the provisions of the C. P. Code as to an appeal inapplicable to an order passed under S. 10, Rel. Endow. Act, but the provisions by way of revision are also inapplicable. 10 M. 98, foll. (*Sadasiva Aiyar and Napier, JJ.*) SUBBIER *v.* ABBOY NAIDU. **29 M. L. J. 671 : 18 M. L. T. 469 : 31 I. C. 502 : 2 L. W. 1059 :** [This view is no longer law. *See* **40 Mad. 793 : 44 I. A. 251 : 40 I. C. 650 : 33 M L. J. 69 (P.C.)**

———S. 141 and O. 46, R. 1—*Reference to High Court.*

A subordinate court has no power to make a reference to the High Court under O. 46, R. 1, in any proceedings, not a suit or appeal, S. 141 C. P. C. does not confer such a power on the subordinate court. (*Benson and Sundara Aiyar, JJ.*) DAMODARA MENON *v.* KITTAPPA MENON,

36 Mad. 16 : 21 M. L. J. 613 : 10 I. C. 879 : (1911) 2 M. W. N. 13.

———S. 141 and O. 43, R, 1 (c)—*Scope of—Dismissal for default—Application to set aside—Dismissal.*

The procedure laid down in the C. P. Code regarding suits must be followed also in cases of application to set aside dismissal for default and as such O. 9 and O. 43, R. 1 (*c*) apply to an order of dismissal of such an application. (*Hallifax. A. J. C.*) KALICHARAN *v.* RATAN SINGH.

19 N. L. R. 119 : 75 I. C. 589 : 1923 Nag. 293.

———S. 141 and O. 9, R. 9—*Execution proceedings—Dismissal for default—Restoration—Inherent power.*

S. 141, C, P. Code, has not the effect of extending the provisions of O. 9, R. 9. C. P. Code to execution proceedings or of authorizing the Court to set aside a dismissal of an execution petition for default. But the Court may, in a proper case, in the exercise of its inherent power restore the execution application and with such restoration the attachment will revive. (*Hallifax, A. J. C.*) SHANKERRAO *v.* MANIKRAO.

68 I. C. 643 : 1923 Nag. 18.

———S. 141 and O. 9, R. 2—*Application for restoration of suit—Dismissal for default—Appeal.*

C P. CODE (V OF 1908), S 141.

S. filed a suit against the applicants in the Court of the Subordinate Judge of Bilaspur. Certain preliminary issues were framed and the parties were told to appear on the 12th of July 1921 to argue them. The defendants were present but the plaintiff was not and the suit was accordingly dismissed. On the 23rd of July 1921 S. made an application for setting aside the order of dismissal. She appeared ou the 3rd of September 1921, but notices on the opposite party had not then been served. The case was adjourned to 8th October 1921, and the order passed on that date was as follows :—

"*S.* in person, non-applicants absent. The previous notices were returned unserved. Notice for this hearing could not be served for want of time as process-fee was paid on 3rd October 1921. I do not find any justification for paying process-fee so late. I therefore dismiss the application for default of the applicant."

Held, that the application was dismissed under O. 9, R. 2, and that no appeal lay against the order. (*Hallifax, A. J. C.*) HIRASA *v.* SHEOKUWAR. **72 I. C. 547.**

———S. 141—*Does not apply to execution proceedings.*

S. 141 of the Civil Procedure Code is not applicable to execution proceedings, so as to empower the Court to restore to file an application in execution dismissed for default. (*Hallifax, A.J. C.*) HARILAL *v.* NARAYAN.

4 N. L. J. 118 : 64 I. C, 420 : 18 N. L. R. 152 : 1922 Nag. 267.

———S. 141—*Scope of—No right of appeal given.*

The section relates to procedure only and does not confer a right of appeal which is a matter of substance and not of procedure. (*Drake-Brookman, J. C.*) FBRIDBI *v.* MOHAMAD AMIN.

19 I. C. 97 : 9 N. L. R. 33.

———S. 141—*Dismissal for default of application to set aside dismissal of suit.*

Under S. 141 application for readmission can be made if an application to set aside an order dismissing a suit for default is itself dismissed for default. (*Skinner, A. J. C*) MANAKJI *v.* SRAJMAL. **10 I. C. 705: 7 N. L. R. 32.**

———S. 141 and O. 9, R. 9 —*Application to set aside* ex parte *decree—Dismissal of application for default—Restoration.*

Where an application to set aside an order of dismissal for default has itself been dismissed for default, it is open to the Court to set aside that dismissal under O 9, R 9 read with S. 141, C. P. Code. 4 P. L. J, 135, 44 C. 950 dissented, 23 O. C. 349 followed. (*Daniels, A. J. C.*) MT. JAMNA *v.* MT. RAMRAJJ. **9 O. L. J. 627 : 9 O. & A. L. R. 32 : 74 I. C. 380 : 1923 Oudh 146.**

———S. 141—*Does not apply to execution proceedings.*

S. 141 C. P. Code is applicable only to proceedings in original suit. (*Jwala Prasad and Foster, JJ.*) LACHMAN LAL *v.* PADARATH SINGH.

4 Pat. L. T. 735 : 1924 P. 346.

C. P. CODE (V OF 1908), S. 141.

———**S. 141**—*Non-applicability to proceedings under S, 105 of the Bengal Tenancy Act.*

Proceedings under Sec 105, B. T. Act are not governed by Sec. 141, C. P. C.; because the former are to be sued in a Revenue Court before Revenue Officers. (*Miller, C. J. and Kulwant Sahay, J.*) HAZARI LAL SAHU *v.* AMBICA GIR.

(1923) Pat. 273: 3 Pat. 67 : 1924 P. 104.

———**S. 141 and O. 9, R. 4**—*Execution proceedings—Restoration.*

S. 141 of the Civil Procedure Code does not make the provisions of O. 9. R. 4 and all cognate provisions applicable to execution proceedings. (*Das and Adami, JJ.*) SHEO NANDAN CHAUDHURY *v.* DEBI LALL CHAUDHURY. **4 Pat.L. T. 93 : (1923) Pat 78 : 1 Pat. L. R 134: 2 Pat. 372 : 71 I.C. 484 : 1923 P. 239.**

——— **S. 141 and O. 9, R. 9**—*Execution proceedings—Dismissal for default of application to set aside a sale.*

O. 9, R. 9. does not apply to a proceeding in execution instituted under O. 21, R. 90. (*Atkinson, Coutts and Manuk, JJ.*) BHUBANESWAR PRASAD SINGH *v.* TILAKDHARI LAL. **4 Pat. L. J. 135 : 49 I . C. 617 : 1919 Pat. 75 (F.B.).**

——— **S. 141 and O. 9, R. 9**—*Execution proceedings—Dismissal for default.*

The provisions of O. 9, R. 9 do not apply to execution proceedings. 41 Cal. 1 foll. (*Mullick and Thornhill, JJ.*) RITUKUER *v.* ALAKHDEO NARAIN SINGH. **5 Pat, L. W. 208 : 4 Pat. L.J. 330: 47 I. C. 154 : 1918 Pat. 265.**

———**S. 141**—*Legal Practitioners' Act, S. 14—Proceedings under.*

Where proceedings were instituted under the Legal Practrs.' Act before the Dt. Munsif and an application was made to transfer the same to another Court. *Held*, that the procedure under the Legal Practrs.' Act is neither Criminal nor Civil, but purely designed, for the purposes of discipline. Such disciplinary proceedings under S. 14 are not proceedings of a Court of Civil jurisdiction and S. 141, C. P. C., cannot apply to them. The enquiry uuder S. 14 of the Legal Practr.'s Act, cannot be delegated to another officer who is not the presiding officer of the Court in which the malpractices complained of were committed. Applicability of S. 107 of the Govt of India Act, 1915, to proceedings under S. 14 of Legal Practr.'s Act, discussed. (*Mullick and Atkinson, JJ.*) JANAK KISHORE, *In the matter of.*

1 Pat. L. J. 576 : 18 Cr. L. J. 132 : 37 I. C. 484 : 1917 Pat. 60.

———**S, 141 and O. 9, R. 9**—*Execution proceedings—Application for execution—Dismissal for default—Maintainability of petition for restoration—Jurisdiction,*

An order restoring an application for execution which was dismissed for default, is an order passed without jurisdiction and is a nullity. Application for execution should when struck off be presented afresh and not revived as in the case of plaints. 19 I. C. 683, foll. (*Roe, J.*) GUNJARA KOER *v.* LAKHAN KOER. **35 I. C. 937.**

C. P. CODE (V OF 1908), S. 144.

———**S. 141**—*Scope of—Provisions of S. 10—If apply to arbitration proceedings.*

S. 141, C. P. Code is wide enough to make the provisions of S. 10 apply to arbitration proceedings. (*Raymond, A J. C.*) FIRM OF JAI NARAIN BABU LAL, *in the matter of.* **66 I. C 796 : 1922 Sind 6.**

———**Ss. 141 and 151 and O. 9, R, 9**—*Execution proceedings—Striking off of execution proceedings—Mistake of court—Restoration,*

S. 141, does not apply to execution proceedings and they cannot be restored under O. 9. Even apart from S. 151, a court has an inherent power to rectify a mistake which is inadvertently made by it. Where, therefore, an execution application was fixed for hearing on a particular date and was by mistake called upon the previous date and dismissed in the absence of the parties, the court has an inherent power to set aside the order of dismissal. (*Hayward and Crouch, A. J. Cs.*) LALBUX *v.* CHOITHRAM KALIANDAS.

29 I. C. 592 : 8 S. L. R. 327.

———**S. 141**—*Mamlatdar's Court—Proceedings.*

The C. P. Code is not applicable to proceedings under the Mamlatdar Courts Act. A mamlatdar should not proceed *ex parte* unless he is satisfied that the defendant had notice to appear but he did not. (*Pratt, J.C. and Haward, A.J C.*) KHAMISO *v.* RASU. **16 I. C. 675 : 6. S. L. R. 67.**

———**S. 144**—*Execution sale—Setting aside—Repayment of purchase money—Payment of encumbrances by purchaser.*

An execution sale was confirmed by the courts in India but set aside on appeal by the Privy Council after a lapse of 9 years. In the interval the auction-purchasers had obtained possession of the property sold and had also paid off certain incumbrances thereon. The sale price paid into Court by the auction purchasers had been distributed to various decree-holders. After the decision of the Privy Council the judgment-debtors applied for restitution under S, 144 C. P. C. The auction-purchasers claimed a refund of the purchase money paid by them as well as the value of the incumbrances discharged by them. *Held* that the judgment-debtors were entitled to possession only on their payment to the purchaser the amount of the purchase money less the mesne profits derived by the purchasers in the interval. The interest on mesne profits was allowed to be set off against the interest on the purchase price. The purchaser having discharged the incumbrances of their own accord and without any order of court, they were entitled to the benefit of the security but not to a refund of the amounts as a condition precedent to their surrendering possession. (*Lord Carson.*) JAI BERHAM *v.* KEDAR NATH MARWARI.

25 Bom. L. R. 643 : L. R 4 P. C. 117 : 69 I. C. 278 : (1923) M. W. N. 368 : 21 A. L. J. 490 : 18 L W. 802 : 37 C. L. J. 351 : 2 P. 10 : 32 M. L. T. 10 : 4 P. L. J. 61 : 44 M. L. J. 735 : 27 C. W. N. 582 : 49 I. A. 351 : 1922 P. C. 269 (P. C.).

C. P. CODE (V OF 1908), S. 144.

——S. 144—*Mesne profits—Order to pay—Restitution—Power of Court—C. P. Code*, 1882, *S.* 583.

The first court passed a decree for redemption of a usufructuary mortgage and the mortgagor obtained possession in pursuance thereof On appeal by the mortgagee the amount due to him was increased but the mortgagor not having paid the additional sum, the mortgagee obtained possession under orders of Court from the mortgagor. *Held*, that the first Court had jurisdiction to award mesne profits to the mortgagee during the time he was out of possession. If the mortgagee purchased the equity of redemption in execution of the decree for mesne profits the mortgagor loses all right to redeem, (*Ameer Ali,*) PRABHUDAYAL *v.* KALYAN DAS.

38 All. 163 : 43 I. A. 43 : 20 C. W. N. 425 : 19 M. L. T. 206 : (1916) 1 M. W. N. 234 : 3 L. W. 293 : 23 C. L. J. 411 : 33 I C. 505 : 18 Bom. L. R. 382 (P.C.).

——S. 144—*Appeal—Applicability of section impugned.*

Where one of the issues was whether S. 144 applied to the facts, and the judges decided it one way or the other an appeal lies even though one of the grounds of appeal is that the decision on the issue is wrong. (*Daniels, J.*) SHEIKH CHHUTAN *v.* JWALA PRASAD.

73 I. C. 602 : 1924 A. 64.

——S. 144 — *Applicability — Restitution against auction-purchaser.*

S. 144, C. P. C., allows restitution to be made against the decree-holder who obtains any benefit under a decree which is afterwards reversed in appeal. It does not allow restitution against a third party such as a stranger auction-purchaser. (*Kanhaiya Lal, J.*) BALWANT SINGH *v.* MT. LAIQA BEGAM. 75 I. C. 238 : L. R. 4 A. 526.

——S. 144—*Suit for damages—For bringing false suit is maintainable.*

Where restitution cannot be obtained by application under S. 144 (1), C. P. Code there is no bar to the institution of a suit. Consequently a suit for recovery of damages by a successful defendant against an unsuccessful plaintiff for bringing a false suit which involved great injury to the defendant is maintainable. (*Stuart and Kanhaiya Lal, JJ.*) ARJUN SINGH *v.* PARBATI.

44 All. 687 : 20 A. L. J. 636 : 69 I. C. 173 : L. R. 3 A. 408 : 1922 All. 465.

——S. 144—*Proceedings under are not proceedings in execution—"Party," meaning of.*

Proceedings under S. 144, C. P. C., are not proceedings although they are in the nature of proceedings in execution to enforce directly or indirectly the final decree. The section is very wide in terms. It includes matters which an execution court or appellate court could not ordinarily deal with and the words "party" is not used in the section in the sense of "party to the suit" but must mean "party to the application", (*Walsh and Ryves, JJ.*) BRIJ LAL *v.* DAMODAR DAS.

44 All. 555 : 20 A. L. J. 456 : 4 U. P. L. R. (A.) 74 : 66 I. C. 545 : 1922 All. 238.

C. P. CODE (V OF 1908), S. 144.

——Ss. 144 and 141—*Nature of restitution proceedings.*

Proceedings under S. 144 of the Code are proceedings in execution of a decree. S. 141 C. P. C. applies to restitution proceedings. (*Rejique and Lindsay, JJ.*) JIWA RAM *v.* RAM NAND.

L. R. 3 A. 209 : 65 I. C. 14[illegible] : A. L. J. 226 : 44 A. 407 : 1922 A. 223.

——S. 144—*Application for restitution to be made to Court which passed the decree—Separate suit, if lies.*

Where an ejectment decree is passed by a Revenue court and duly executed, but afterwards the decree was reversed in appeal, any application for restitution must be made to the Revenue Court as "the court of first instance". No separate suit is maintainable in respect thereof. (*Mears, C. J. and Banerji, J.*) KASHI PRASAD SINGH *v.* BALBHADDAR SINGH. 44 A. 283 : 20 A. L. J. 13 : L. R. 3 A. 97 : 65 I. C. 798 : 1922 All. 71.

——S. 144—*Reversal of decree—Effect on execution sale—Restoration of property—Loss—Compensation.*

Purchase by a decree-holder under a decree is a nullity if the decree is reversed in appeal even if the sale is not formally set aside. The property purchased if restorable must be restored to the applicant along with any loss he may have suffered from being deprived of the profits of the property or with interest or with mesne profits, and if the property is not restorable, the original decree-holder is liable to pay the loss, (*Walsh and Ryves, JJ.*) SHAIKH MD. HABIB ULLAH *v.* SYED MD. SHAFI. L. R. 3 A. 443.

——S. 144—*Order for costs reversed on appeal—Refund can be ordered with interest.*

Where in pursuance of an order for costs the defendant pays up the amount to the plaintiff and the order is reversed on appeal the defendant is entitled not only to the refund of the money paid but also to interest thereon. (*Tudball and Sulaiman, JJ.*) GOKUL PRASAD *v.* RAM DEVI. 19 A. L. J. 771 : 63 I. C. 513 : 3 U. P. L. R (A.) 126.

——S. 144—*Limitation for application for restitution.*

A judgment-debtor first applied for execution against the decree-holder, transferee and certain other persons who had got the money deposited in Court under the decree. The application was successful and the purchaser then appealed and got the order set aside : the judgment-debtor then made a second application for restitution against the decree-holder for loss suffered by him on account of the sale. *Held*, that the second application was a continuation of the first and so not time barred. (*Walsh and Ryves, JJ.*) HANIFUNNESSA *v.* CHUNNI LAL. 19 A. L. J. 549 : 63 I. C. 184 : 3 U. P. L. R. (A.) 91.

——S. 144—*Possession—Not taken in execution.*

If a decree-holder instead of executing the decree, gets possession of the property in question the owner of the property is entitled to restitution on the decree being set aside in appeal

C. P. CODE (V OF 1908), S. 144.

(*Tudball and Sulaiman, JJ.*) SURYA DUTT *v.* GAMNA DUTT. **18 A. L. J. 729 : 57 I. C. 148 : 2 U. P L. R. (A.) 238 ; 42 A. 568.**

——**S. 144**—*Costs—Decree awarding—Realisation—Reversal of—Restitution.*

A party realising costs awarded under a decree must refund the amount on reversal of the decree quite apart from the fact that property in the suit was given to a charity or applied to any other purpose. (*Knox, J.*) ISHRI MAL *v.* UMRAO SINGH. **54 I. C. 816.**

——**S. 144 and O. 20, R. 12**—*Mesne profits—Liability for—Decree for possession in favour of co-plff.—Reversal of.*

A co-plff. in whose favour a decree is not passed is not a decree-holder and restitution cannot be ordered against him. (*Rafique and Piggott, JJ.*) NAND RAM *v.* JIWAT RAM. **41 I. C. 23.**

——**S. 144**—*Execution sale*—Bona fide *purchaser—Restitution from.*

Restitution cannot be had against a *bona fide* purchaser for value at an auction sale held by a competent court even though the decree is set aside on appeal. (*Rafique and Piggott, JJ.*) PEAREY LAL *v.* HANIFUNNESSA BIBI. **38 All. 240 : 34 I. C. 303 : 14 A. L. J. 302.**

——**S. 144**—*Mesne profits—Interest—Pre-emption decree—Execution of — Reversal on appeal.*

A pre emption suit was decreed by the first Court and the plaintiff deposited the money and got delivery of possession of property. The decree was set aside on appeal. *Held* that the plaintiff was entitled to interest on the money and the defendant to mesne profits during the period they were kept out of the money and the property respectively. The plaintiff was liable to pay mesne profits of the property while in his possession and was not entitled to interest on the money in deposit in Court and not taken by defendant. (*Tudball and Rafique, JJ.*) BAHAL SINGH *v.* NAIT RAM. **19 I. C. 1.**

—— —**S. 144**—*Lim. Act, Art.* 182—*Application for restitution is one for execution of appellate decree*

An application for restitution under S. 144, C. P. Code is one for execution of decree of the Appellate Court and is thus governed by Art. 182, Lim. Act (*Macleod, C. J. and Shah, J.*) HAMIDALI KADAMALLI *v.* AHMEDALLI MHIBUBALLI. **45 Bom. 1137 : 23 Bom. L. R. 480 : 62 I. C. 233.**

——**Ss. 144 and 47**—*Execution sale*—Ex parte *decree—Setting aside.*

Where an *ex parte* decree is set aside, the judgment debtor is entitled to restoration of property which has passed out of his hands in execution of that *ex parte* decree. It is needless to consider whether S. 47 or S. 144 applies to the case (*Shah and Crump, JJ.*) SWAMISAD *v* VALENTINE. **22 Bom. L. R. 403 : 57 I. C, 125 : 44 B. 702.**

——**S. 144**—*Damages—Reversal of decree.*

Plaintiff got a decree for user of a well ; the decree was set aside on appeal, but on second

C. P. CODE (V OF 1908), S. 144.

appeal the decree was restored. *Held* that plff. was entitled to compensation for the period between the decrees on first and second appeal during which he was kept out of enjoyment of the water by the defendant (*Scott, C. J., Heaton, Macleod, Shah, Hayward, JJ.*) BHUTA JAYAT SINGH *v.* LAKADU DHANSINGH. **21 Bom. L. R. 157 : 50 I. C. 715 : 43 Bom. 433 (F. B.).**

——**Ss. 144 and 151**—*Execution sale*—Ex parte *decree—Decree subsequently set aside—Application to set aside sale—Limitation Act, Arts.* 160 *and* 181.

The plaintiff obtained an *ex parte* decree against deft. in execution of which the deft.'s house was sold and purchased by the plff. Subsequently deft. succeeded in getting the *ex parte* decree set aside and in having the case retried, but the result was that a decree was passed in plff's. favour again. Deft. applied to have the previous sale of the house in execution set aside. *Held*, that the previous sale of the house in execution under the previous decree which had been set aside should itself be set aside as having been no longer based on any solid foundation. The order setting aside the sale could be passed under S. 47 or S. 144 or S. 151 of the C. P. Code. The application was in time under Art. 181 of the Lim. Act, the cause of action having accrued upon the setting aside of the *ex parte* decree. Under the circumstances the sale should be set aside subject to the condition that the defts. should pay up the amount due from her under the second decree within a specified time. (*Heaton and Hayward, JJ.*) SHIVBAI *v.* YESU, **43 Bom. 235 : 48 I. C. 130 : 20 Bom L. R. 925.**

——**S. 144**—*Execution sale — Set aside—Refund of purchase money.*

Where an execution sale is set aside as void the auction-purchaser can demand a refund of the purchase money with interest from the decree-holder. (*Batchelor and Rao, JJ.*) PREMRAJ *v.* JAVARMAL. **18 I. C. 381 : 15 Bom. L. R. 41.**

——**Ss. 144 and 151**—*Inherent power of restitution exists—Order for repayment of money mistakenly paid out can be made.*

S. 144, C. P. Code, does not define the full measure of the power of the Court to make an order for restitution. The section may be taken as a guide to determine in what class of cases an order for restitution may be made, so that complete justice may be made, between the parties concerned and they may be restored to the status *quo ante*. It is competent to the execution court in the exercise of its inherent power, to make an order for restitution to prevent what would be essentially a mis-carriage of justice, even in cases not comprised within the terms of S. 144 of the Code of Civil Procedure : 15 C. L. J 187 Ref. The Court has inherent power to recall money improperly paid out : 11 C.L.J. 533 Ref. (*Mookerjee and Panton, JJ.*) RAI CHARAN BHUIYA *v.* DEBI PROSAD BHAKAT. **26 C. W. N. 408 : 64 I. C 864 : 35 C L. J. 53 : 1922 Cal. 28.**

C. P. CODE (V OF 1908), S. 144.

———S 144—*Procedure—Evidence to be taken.*

The object of S 144, C. P. C. is to restore the *status quo ante* which might be done after taking evidence if necessary. The statement made by a partition commissioner in his report as to prior possession is not conclusive. (*Teunon and Beachcroft, JJ.*) ALIOR RAHMAN v. ABDUL SOBHUA. **56 I C. 356.**

———S. 144—*Execution Sale—Decree-holder purchaser—Settlement of tenants by—Decree set aside—Right to possession and mesne profits.*

In execution of a rent decree, the landlord decree-holder purchased the property and settled it with another tenant. The decree was subsequently set aside at the instance of the tenant judgment-debtor. *Held*, that the tenant judgment-debtor was entitled to possession as against the tenant settled by the decree-holder purchaser, under S. 144 as well as to mesne profits for the period he was out of possession against the landlord decree-holder. 22 C. L. J. 409 foll. (*N. R. Chatterjea and Newbould, JJ.*) SAGORE MANDAL *v.* MOFIJUDDIN SARDAR.

24 C. W. N. 50 : 51 I. C. 959 : 29 C. L. J. 486.

———S. 144—*Representative — Vendor—Attachment of sale proceeds—Attaching creditor, not a representative.*

An attaching creditor of sale proceeds, payable to a vendor decree-holder not being a party to the decree in execution of which the sale took place or to an application for substitution as a vendee of the decree-holder, is not a representative of the said vendor decree-holder within S. 144 of the C. P. Code and an application for restitution by him is not maintainable. (*Teunon and Greaves, JJ.*) JATINDRA NATH BOSE *v.* SARAT CHANDRA ADDYA. **51. I. C. 375 : 29 C. L. J. 360.**

———S. 144—*Execution sale—Auction purchase—Reversal of decree.*

The purchaser in court auction in execution of a decree is bound to restore possession to the judgment-debtor on the reversal of the decree in appeal. During the pendency of the appeal the purchaser is a representative of the plaintiffs for the purpose of transference of possession from the plaintiffs to the judgment-debtor. (*Mookerjee and Beachcroft, JJ.*) SHEODARSHANLAL BAJPAI *v.* JOGESHCHANDRA ROY.

46 I. C. 168 : 27 C. L. J. 489.

———S. 144 — *Preliminary decree— Appeal from delivery of property pending appeal—Dismissal of suit on appeal—Effect of.*

When a preliminary decree for partition is set aside on appeal, the final decree which may have been passed pending the appeal from the preliminary decree becomes ineffective. A party from whom any money has been levied under the final decree so rendered inoperative, is entitled to restitution of the amount from the party who levied it on the basis of the final decree. (*Mookerjee and Beachcroft, JJ.*) ATUL CHANDRA SINGH *v.* KUNJA BEHARI SINGHA.

43 I. C. 775 : 27 C. L. J. 451.

———Ss. 144 and 47 (1)—*Procedure—Appeal—Court Fee—Government of India Notification No.* 4650, *dated* 10-9-1899.

C. P. CODE (V OF 1908), S. 144.

An order under S. 144, C. P. C. being an order deciding a question under S. 47 (1) is appealable to the High Court and the Court fee therein is Rs. 2. (*Chatterjee, J.*) MADAN MOHAN DEY *v.* NOGENDRA NATH DEY.

39 I. C. 640 : 21 C. W. N. 544.

———S 144—*Dependent judgment—Limitation—Interest.*

In cases not coming strictly within S 144 (which makes grant of restitution obligatory in certain cases) restitution depends upon the discretion of the Court and will be ordered only when the justice of the case needs it: but the test of justice must be determined with reference to the requirements of the law applicable to the subject. In general upon the reversal of judgment, order or decree, all connected and dependent judgment or orders fall with it, specially judgments subsequently entered and dependent thereon : but not a distinct and independent judgment or proceeding though it is a part of the same litigation. Whether a judgment or order is a dependent judgment or order, is to be determined from the nature and scope of the proceedings. The Court will not permit injustice as a result of erroneous order made by it and will, on the reversal of that erroneous order, restore the parties to their original position. (*Mookerjee and Cuming, JJ.*) ASHUTOSH GOSWAMI *v.* UPENDRA PRASAD MITRA.

21 C. W. N. 564 : 38 I. C. 17 : 24 C. L. J. 467. Also 54 I. C. 647 : 37 M. L. J. 591.

———S. 144—*Erroneous decree—Decree-holder in possession.*

Where a decree-holder has obtained possession of the mortgaged property through Court on the basis of the decree absolute which was erroneously made he is bound to make restitution to the mortgagor. (*Mookerjee and Beachcroft, JJ.*) KARTIKCHANDRA SARKAR *v.* HARA GOBIND GHOSE. **27 I. C. 813 : 21 C. L. J. 75.**

———Ss. 144 and 141—*Execution sale—Setting aside—Applicability*

S. 144 is not made applicable to execution proceedings by S. 141, C. P. C. Where an execution sale is set aside and a transferee from the judgment-debtor applies for recovery of mesne profits from the decree-holder auction purchaser who had been in possession since the date of the auction purchase, *Held*, that no restitution in respect of any decree which was varied or reversed is sought by the application and that S. 144 does not therefore apply. (*Holmwood and Richardson, JJ.*) DINO NATH DAS *v.* JOGENDRA NATH. **26 I. C. 890 : 19 C. W. N. 1167**

———S. 144—*Possession taken without execution—Restitution after reversal.*

A person taking possession otherwise than by execution is entitled to restitution under S. 144. (*Cox and Roy, JJ.*) HIRA CHANDRA SAMANTA *v.* CHINTAMANI DATT. **21 I. C. 84.**

———S. 144—*Mesne profits—Liability to pay.*

The object of S. 144 is to shorten litigation and afford speedy relief. It ought therefore to be construed liberally. So an application for restitution with mesne profits by a successful appellant is maintainable under S. 144 even though the

C. P. CODE (V OF 1908), S. 144.

respondent had obtained possession by force and not in execution of the decree in his favour. (*Mookerjee and Beachcroft, JJ.*) RAGHU SINGH *v.* SHEN PRASAD RAI. 17 I. C. 121 : 16 C. L. J. 135.

——Ss. 144 and 151—*Scope of—New substantive right not given.*

A transferee of a portion of non transferable occupancy holding applied to annul the sale of the same holding purchased by the landlord in a decree for rent obtained by him without making the applicant a party to the suit. The transferee got possession and sued the landlord for mesne profits. *Held*, he could not claim the mesne profits because had he brought a separate suit for possession against the landlord who did not recognize him as his tenant, he would not have got it. S. 144 of the Code and the inherent powers of the Court provided merely a more convenient procedure instead of conferring new substantive rights. (*Jenkins, C. J. and Chatterjee, J.*) SAFARADDI *v.* DURGA PRASAD SEN. 16 I. C. 966 : 16 C. L. J. 83.

——S. 144 — *Judgment-debtor—Right to restitution.*

The judgment-debtor could not claim restitution, where possession had been taken by the decree-holder under a decree which was in operation at the time when the property was delivered to him and was still in force. The fact that the decree of appellate court was set aside by the Privy Council merely restores the first Court's decree. (*Mookerjee and Beachcroft, JJ.*) SHAMANAND DAS CHOWDHURY *v.* RAM KANT DAS. 16 I. C. 945.

——S. 144—*Remedy by suit—Money recovered under a decree—Recovery- Reversal of decree.*

Money realised under a decree or judgment cannot be recovered in a fresh suit or action whilst that decree or judgment remains in force, 10 M. I. A. 203, 3 W. R. 11 (P.C.) rel. But it can be recovered in a new suit or by summary process if the decree or judgment is reversed or is superseded. 3 C. 30, *dist.* (*Mookerjee and Holmwood, JJ.*) DWARKA NATH KUNDU *v.* MOHENDRA NATH ROY. 16 I.C. 131 : 16 C.L.J. 437.

——S. 144—*Non-applicability to—Acts done prior to decree.*

The object of S. 144, C.P.C. is that anything done in execution of a decree reversed on appeal, should, as far as possible, be undone : and that the party who has been finally victorious should be placed in the position which he would have occupied, if the erroneous decree had not been made. The section does not cover relief in respect of acts done before the decree and not under the decree. (*Shadi Lal, C.J.*) CHHABER SINGH *v.* RADHU RAM. 68 I.C. 807 : 4 Lah. L.J. 333.

——Ss. 144 and 151—*Mesne profits—Stay of execution on security for mesne profits — Decree holder can proceed in execution for recovering mesne profits.*

Where the judgment debtors applied for stay of execution pending the appeal and were asked to furnish security for mesne profits and accordingly furnished security. *Held*, that the decree-holders can recover mesne profits in execution proceedings at all events against the judgment-debtors and they need not file a suit. The court can order restitution in a case of this sort. The decree-holders by the order of stay of execution passed by the chief court were kept out of the enjoyment of the land in suit, and as the appeal of the judgment-debtors was eventually dismissed the decree-holders are entitled to ask to be put in the same position as they would have been in, had the execution of the decree not been stayed. (*Scott-Smith, J.*) KHAIR DIN *v.* AHMED. 2 Lah L. J. 207.

——S. 144—*Mesne profits—Right to.*

If a decree is reversed in appeal, appellant is entitled to have restitution of all that he had been deprived of under the decree reversed including the profits accruing from the property the possession of which had been deprived of by the other party. (*Abdul Raoof and Petman, JJ.*) ABDUL BAHMAN *v.* ALLAH BAKSH. 53 I.C. 119

——S. 144—*Limitation— Application for restitution.*

An application for restitution is an application for execution within the meaning of art. 182 of the Lim. Act. (*Rattigan, C.J. and Le Rossignol, J.*) RAM SINGH *v.* SHAM PARSHAD. 67 P.R 1918 : 36 P.W.R. 1918 : 44 I.C 301 : 15 P.L.R. 1918.

——Ss. 144 and 47—Status quo ante—*Decree against wrong representative—Property recovered in execution—Right representative substituted—Property restored to person who had been in possession—Appeal.*

In a suit for possession against R, 11 R died *pendente lite* and K and A applied each to be appointed as legal representative and the court appointed *K.* and passed a decree against him and the decree-holder took possession. In the meanwhile *A* appea ed against the conclusion, got the order against him reversed and applied for recovery of possession from the decree-holder. His application was granted and one N who had previously been in possession was evicted. Thereupon *N* applied for restoration of *status quo.* and obtained an order in his favour. *Held*, that no appeal lay from the order restoring the *stauts quo* (*Johnstone and Shadi Lal, JJ.*) AMIR CHAND *v* NARASINGH DAS. 222 P.L.R. 1914: 24 I.C. 941 : 123 P.W.R. 1914

——Ss. 144 and 151—*Appeal—Order dismissing application.*

An order dimissing an application for restitution under S. 144 of the Code is not appealable as it is not a decree. (*Rattigan and Shahdin, JJ.*) SHAM PARSHAD *v.* RAM CHAND. 10 P.R. 1914 : 273 P.L.R. 1913 : 217 P.W.R. 1913 : 25 P.W.R. 1914 : 20 I.C. 203

——S. 144—*Mortgage decree—Increase of mortgage money on appeal—Rights of person in possession—May be substituted for profits—Interest.*

Interest at a sufficient rate may be substituted for the profits, which the person in possession under a mortgage decree which was subsequently varied enjoyed during the period between his execution of the first court's decree and his giving

C. P. CODE (V OF 1908), S. 144.

notice that he had deposited the additional amount. 8 L. W. 179 foll. In a suit for redemption of a Kanom the defendants are not entitled to recover possession from the plaintiff which he had taken in pursuance of the decree of the trial court simply because the amount of compensation for improvements was increased on appeal. 13 L W. 449 : 44 M. 961 Relied on. (*Spencer and Krishnan, JJ.*) NEELAKANDAN NAMBUDRI *v.* VASUDEVAN. **18 L. W. 30 : (1923) M. W. N. 508 : 33 M. L. T, 45 (H.C.) : 45 M. L. J. 323 : 73 I. C. 1041 : 1924 M. 87.**

——Ss. 144 and 151 — *Execution sale — Distribution of proceeds among several decree-holders rateably—Sale subsequently set aside — No right to refund of the purchase-money.*

In execution of a decree certain properties were attached, brought to sale and purchased by the appellants who were strangers to the decree. The proceeds of the sale were rateably distributed among the respondents who were creditors holding decrees against the same judgment-debtor. Subsequently certain claimants who had unsuccessfully intervened in the execution proceedings obtained a decree in a claim suit that the properties belonged to a trust and therefore not liable to sale in execution of the decree and recovered possession of the properties with mesne profits from the appellants. The appellant thereupon applied for refund of the purchase-money which had been distributed rateably among the various decree-holders. *Held*, neither S. 144 nor S. 151 of the C. P. Code authorised the Court to order the refund sought by the appellants and their application was unsustainable. 24 I. C. 384 dist. (*Ayling, O. C. J. and Venkatasubba Rao, J.*) RAJA RAO *v.* ANANTHANARAYANAN CHETTY.

42 M. L. J 308 : 15 L. W. 303 : (1922) M. W. N. 255 : 67 I. C. 369 : 1922 Mad. 228.

——S. 144—*Rateable distribution.*

Where an order for rateable distribution was reversed on appeal no order for restitution of money distributed can be granted, (*Ayling and Venkatasubba Rao, J.*) VARADA RAM SWAMI *v.* VUMMA VENKATARATNAM.

15 L. W. 421 : 67 I. C. 546 : 42 M. L. J. 473 : (1922) M. W. N. 184 : 30 M. L. T. 178 : 1922 M. 99.

——S. 144—*Execution sale — Subsequent reduction of decree amount—Effect of*

The sum due to a decree-holder under the decree of the first Court was Rs. 7,695. In execution of the decree 19 items of property were sold for Rs. 10,357 in all. Five items of the property were purchased by the decree-holder himself. Subsequent to the execution sale the appellate Court modified the decree by reducing the amount to Rs. 7,495. Thereupon the judgment-debtor applied for restitution by redelivery of the five items purchased by the decree-holder. It was found that the sale of every item including the last was necessary to realise the amount of the appellate decree, though if the properties had been sold in a different order and the five items had been reserved to be sold last, their sale would have been unnecessary to realise the amount of decree on appeal. *Held*, that there had been no case made out for restitution, as the position of the judgment-debtor as regards the sale of the five items was in no way affected by the variation in the decree. Such prejudice as the judgment-debtor had suffered was due not to the variation in the decree, but to the terms in the order in execution regulating the order in which the items were to be sold. (*Ayling and Venkatasubba Rao, JJ.*) SUNDARA RAMA REDDI *v.* ENUGA RAGHAVA REDDI. **42 M. L. J. 315 : (1922) M. W. N. 141 : 68 I. C. 516 : 16 L. W. 355 : 1922 Mad. 96.**

——S. 144—*Applicability of—Restitution—Costs of separate proceedings—Direction for repayment.*

S. 144, C. P. C., is not confined to cases where restitution is claimed on the reversal of the decree in first or second appeal. Provided the decree is varied or reversed the section applies, however, the reversal or variance has been effected. Where an order of abatement of the lower court was set aside in separate proceedings in the High Court and not on appeal, the lower court has power to order restitution of costs paid to the representatives of the original plff. though such representative was not a party to the suit. (*Ayling, O. C. J. and Venkatasubba Rao, J.*) SITALAKSHMAMMAL *v.* KRISHNASWAMI IYER.

(1922) M. W. N. 186 : 65 I. C. 797 : 16 L. W. 587 : 1922 Mad. 70.

——S. 144—*"Court of First instance"—Meaning of.*

The 'Court of First Instance' referred to in S. 144 of the Code, is the Court which passed the decree or the Court to which the proceedings are transferred, if the other Court ceases to exist. (*Abdur Rahim and Oldfield, JJ.*) LAKSHMANA GOUNDEN *v.* SUBRAMANIA AIYAR.

61 I. C. 962 : 13 L. W. 67.

——Ss. 144 and 151 and O. 21, R 90—*Execution sale—Setting aside—Order refusing to set aside reversed on appeal- Auction-purchaser not a party—Application by judgmenl-debtor for restitution—Auction-purchaser not a representative of a decree-holder.*

An order under O. 21, R. 90, C. P. Code, refusing to set aside the sale was reversed on appeal therefrom. The judgment-debtor subsequently applied for restitution against the auction-purchaser, The auction purchaser was not a party, *Held*, that S. 144 of the C. P. Code, did not in terms apply as no decree was varied or reversed but only an order under O. 21 R 90, was reversed on appeal Assuming that S. 151 allowed an order for restitution in appropriate cases not falling under S. 144, such an order could not be made when the auction-purchaser was not a party before the appellate Court which set aside the sale. A Court auction-purchaser was not a representative of the decree-holder. 30 Mad. 507 and 34 Mad. 417, ref. (*Sadasiva Aiyar and Bakewell, JJ.*) SUBBAMMA *v.* CHENNAYYA.

47 I C. 628: 41 Mad. 467.

——S. 144—*Interest—Money in deposit in Court—One party withdrawing the amount on giving undertaking to the party found entitled—Liability to pay interest.*

C. P. CODE (V OF 1908), S. 144.

The appellants obtained a temporary injunction restraining the respondents from drawing the money in deposit. The appellants who succeeded in establishing their title applied for payment of money with interest from the respondents who had withdrawn it on giving an undertaking. *Held*, that on the principle of S. 144 the appellants were entitled to interest on the amount from the date the respondent drew the money till the date of payment. 40 M. 299; 2 P. L. J 149 Fol. (*Abdur Rahim and Kumaraswamy Sastri, JJ.*) ALLAGAPPA CHETTIAR *v.* MUTHUKUMAR CHETTIAR.
41 Mad. 316: (1917) M. W. N. 669: 42 I. C. 836: 22 M. L. T. 162.

——S. 144—*Limitation.*

An application for restitution is governed by Art. 182 and not by Art. 181 Lim. Act, 32 M. 136 20 M 448; 40 M 780; 22 M. L. J. 146 Ref. (*Abdur Rahim and Kumaraswami Sastri, JJ.*) UNNAMALAI AMMAL *v.* MATHAN. **6 L.W. 539 : (1917) M. W. N. 643: 33 M. L. J. 413: 42 I.C. 530 : 22 M. L. T. 333.**

——S. 144—*Mandatory—Duty of Court.*

S. 144. C. P. C., is imperative and gives the Court no discretion. When a party is bound to restore possession, his legal representatives or assigns are equally liable. (*Abdur Rahim and Kumaraswami Sastri, JJ.*) KANAKASABAI MUDALIAR *v.* RAJAGOPAL NAIDU. **42 I. C 523 : 6 L. W. 568.**

——S. 144—*Possession—Taken in spite of the decree.*

S. 144, C. P. C., authorises the grant of relief in order to restore the parties to the position they would have occupied but for the erroneous decree. It does not apply where possession is taken independent of and in opposition to the decree. (*Oldfield and Bakewell, JJ.*) PERIYASAWMY THEVAN *v.* KARUTHIAH THEVAN. **39 I.C. 933 : 6 L. W. 631.**

——Ss. 144 and 47—*Procedure.*

An application for restitution is in the nature of an application in execution. S. 47 comprises all cases of restitution as well. 31 A. 551, ref. (*Ayling and Seshagiri Iyer, JJ.*) SOMASUNDARAM PILLAI *v.* CHOKKALINGA PILLAI.
40 Mad. 780: 38 I. C. 806 : 5 L.W. 267.

——S. 144—*Execution sale—Reversal of decree.*

Restitution cannot be demanded, under S. 144, C. P C., as against a *bona fide* purchaser at a court sale, who was not a party to the decree on the ground that the decree was reversed by the appellate court subsequent to the sale and that the appeal was pending to the knowledge of the purchaser. 14 I. C. 836, explained. 15 I. A. 12, relied on. (*Sadasiva Aiyar and Moore, JJ.*) RAGHAVACHARI *v.* PAKKIRI MAHAMED.
30 M. L. J. 497: 19 M. L. T. 381: 34 I. C. 760 : (1916) 2 M. W. N. 73.

——S. 144—*Mesne profits.*

The rent to which a landlord may have a right for the period in which he was in wrongful possession during litigation, cannot be deducted from the mesne profits which he is liable to pay the tenants during the period of their dispossession. (*Sadasiva Aiyar and Moore, JJ.*) YADDANAPUDI LAKSHMI *v.* REPALLE SEETHARAMASWAMY.
3 L. W. 405 : 34 I.C 2 : 19 M.L.T. 336.

——S. 144—*Scope of— Right to restitution, not restricted to reversal on appeal only.*

The right to claim restitution under S. 144 is not restricted to reversals of decrees in appeal but applies equally to cases where a decree or judgment has been reversed or superseded by some ulterior proceedings. (*Sadasiva Aiyar and Moore, JJ.*) TANGUTUR SUBRAYADU *v* YERRAMSETTI SESHASANI. **3 L. W. 236 : (1916) 1 M. W. N. 155 : 30 M L. J. 366 : 33 I. C. 739 : 19 M. L. T. 235.**

——S. 144 and O. 21, R. 35—*Successive applications—Application for restitution—Delivery of actual possession—Subsequent application barred.*

On an application for restitution the Court directed delivery of actual possession under O. 21, R. 35, which was accepted by the applicant. *Held* second application for execution in restitution was barred as the process for delivery issued on the order on the first application had been carried out. 29 M. L. J. 504, foll. (*Sadasiva Iyer and Napier, JJ.*) CHOKALINGA MUDALI *v* GOPALA THATHACHARIAR. **32 I. C. 46.**

——S. 144—*Direction of Court—Application for restitution.*

S. 144 does not apply to decrees passed before the Code came into force. A direction for restitution is unnecessary if the decree is in favour of a party. A decree for restitution passed in 1907 cannot be deemed to have ceased to exist in 1909 and can be executed whether an order of the First Court directing such restitution has been passed or not (*Sadasiva Aiyar and Tyabji, JJ.*) MUNICIPAL COUNCIL, KUMBAKONAM *v.* SADAGOPACHARIAR. **29 I. C. 380.**

——Ss. 144, 145 and O. 45, R. 15—*Surety—Applicability of provisions to appellate decrees.*

The provisions of these sections apply also to appellate decrees. Hence a restitution of money paid to a surety may be ordered under S. 588. 13 M. 1; 28 M. 377, Foll. An order for restitution of money paid to a surety is a decree. 8 I. C. 131: 18 M. L. J. 599; Foll. 11 B. 37, 3 C. 198, 5 C. 148, 13 C. 21, 28 B. 383, dist. (*Wallis and Oldfield, JJ.*) BEVAGUPTAPU KAMESWARAMMA *v.* UDADDI VENKATASUBBA RAO.
38 Mad. 1120: 27 M. L. J. 112: 24 I. C. 474: (1914) M. W. N. 742.

——S. 144—*Assignee of decree—Restitution from.*

The judgment-debtor is entitled to restitution from the assignee of the decree who has realised the decretal amount in execution even though the assignee was not brought on the record in appeal. 23 M. 203 F.; 24 A. 288, diss. (*Abdur Rahim and Sadasiva Aiyar, JJ.*) GOVINDAPPA *v.* HANUMANTHAPPA. **38 Mad. 36 : 23 M L J. 513 : 17 I.C. 420 : (1912) M. W. N. 1152.**

——S. 144—*Remedy by suit—Procedure.*

The right of restitution arising on account of the reversal of a decree on appeal can be enforced

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only in execution and not by a separate suit. (*Benson and Abdur Rahim, JJ.*) KRISHEKI GOPALA MENON *v.* KRISHEKI KOVILAKNATH MANAVIKRAMAN. 10 M. L. T. 568 : 13 I. C. 179 : 22 M. L. J. 146.

——— S. 144—*Order of remand—Order for mesne profits is not a consequential one.*

An order placing a party in possession may be properly consequential on an order of remand. But an order awarding mesne profits is not a proper consequence of an order of remand if the question, whether the party who has been in possession under the decree which the order of remand has reversed was rightly in possession or was a trespasser is still *sub judice*. An application for mesne profits would then be premature the limitation for mesne profits will start only when the possession is decided to be wrongful, (*Macnair, A.J.C.*) SONBA *v.* PARASHARAM, 76 I. C. 255 : 18 N. L. R. 200 : 1923 Nag. 101 (1),

———S. 144—*Scope.*

Suit for restitution can be converted into an application. (*Prideaux, A.J C.*) JAINAN LAL *v.* RAGHO. 67 I. C. 319 : 1922 Nag. 198.

——— Ss. 144 and 151—*Inherent power—If restitution exists.*

Where a judgment-debtor is dispossessed under wrong order of Court subsequently set aside, it is the duty of Court to restore him to possession. (*Kotwal, A. J. C.*) SHRIKISAN *v.* SUNDARBAI. 64 I. C. 732 : 18 N. L. R. 24 : 1922. Nag. 82.

——— S. 144—Application for compensation under S. 144 by judgment-debtor was dismissed, *held* that the question relates to execution, discharge or satisfaction of decree, and so the court fee payable on memorandum of first appeal is 8 annas. (*Drake Brockman, J. C.*) GABBA *v.* KANEKHEDILAL. 18 N. L. R. 15 : 67 I.C. 225 : 1922 N. 62.

———S. 144—*Execution under mistake—Court can set right the wrong.*

The plaintiff decree-holder not having complied with the decree under which he was to make a deposit within a fortnight and the court under the misapprehension that he had made the deposit granted him relief to which he was not entitled. *Held* it is fully within the court's power to put right the wrong which had been done. S. 144 does not apply to a case where the original decree holds good ; but what was reversed here is an order, not the decree granting the plaintiff decree-holder execution under the erroneous impression that he had fulfilled the terms of the decree. (*Daniels, J.C.*) DORI LAL *v.* MT JAMAGA 72 I. C. 879 : 1923 Oudh 16

——— Ss. 144 and 35, cl. (3)—*Interest—Refund of costs.*

The Court has power to award interests on costs which the judgment-debtor may be liable to refund to him. (*Stuart and Kashaiya Lal, A. J. Cs.*) INDAR BICKRAM SINGH *v.* CHANDRIKA BAKSHA SINGH. 20 O. C. 327 : 43 I. C. 337 : 4 O. L. J. 729.

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——— S 144—*Third parties—Execution sale—Stranger-purchaser—Not affected.*

S. 144, C. P. C. only applies to parties to the erroneous decree but not to third parties. Restitution against such third parties does not fall within S. 144. A stranger-purchaser at an execution sale is not affected by the subsequent reversal or variation of the decree. (*Piggott, J. C. and Kanhaiya Lal, A. J. C*) NAWAB NUZHAT-UD-DAULA ABBAS HUSAIN KHAN *v* NAWAB DILBAND BEGAM. 16 O. C. 225 . 21 I. C. 570.

——— S. 144—*Application for restitution—Limitation—Art. 82 applicable.*

An application for restoration under S. 144 of the C. P. C. is therefore governed by Art 182 of schedule 1 to the Limitation Act (*Miller, J.*) BALSANT KUMARI DASI *v.* BULMUKUND MARWARI. 1923 Pat. 1 : 1 P. L. R. 338 : 2 P. 277 : 72 I. C. 912 : 1923 P 371.

——— Ss. 144 and 65—*Execution sale set aside—Purchaser paying revenue.*

A purchaser at a sale in execution of a mortgage decree paid Govt. revenue on the property for 4 years after which period the sale was set aside. *Held* he was entitled to be reimbursed by the receiver of the mortgaged property. (*Mullick and Adami, JJ.*) GURU MAHADEV ASRAM *v.* RAM SEKHAR PRASAD SINGH. 51 I C. 706.

——— S. 144 and O. 2, R. 2—*Successive applications—Starting point—Lim. Act, Art.* 181.

An application for restitution under S. 144 of the Code is neither a suit nor a proceeding in execution. It is a miscellaneous proceeding to which the rules applicable to execution proceedings do in substance apply. The provisions of O. 2, R. 2 of the Code are not applicable to such a proceeding. Under Art. 181 of the Lim. Act an appellant is entitled to mesne profits for the full period of his opponent's possession though it was more than three years, if the application is made within three years of the final appellate decree. (*Mullick and Atkinson, JJ.*) KRUPASINDHU ROY *v.* MAHANTA BALBHADRA DAS. 47 I. C. 47 ; 3 Pat. L. J. 367.

———S. 144—*Assignee—Rights of.*

Where an assignment takes place even after the appellate decree which is the basis of the claim for restitution, the assignee is entitled to the benefits of S. 144 of the Code. (*Mullick and Thornhill, JJ.*) KAMARUDDIN MANDAL *v.* RAJA THAKUR BARHAM. (1918) Pat. 243 : 46 I. C. 465 : 5 Pat. L. W. 141.

——— S. 144—*Execution sale—Application to orders.*

The section does not apply where an order setting aside a sale is reversed; it evidently applies where a decree is reversed. (*Mullick and Jwala Prasad, JJ.*) SUKH DEO DAS *v.* RITO SINGH. 1 Pat. L. W. 551 : 39 I. C. 763 : 2 Pat. L. J. 361.

——— S. 144—*Interest—Award of—Power of Court.*

In S.144, there is an express provision that the court shall in its discretion award such interest as it chooses and the fact that the principal only

is secured by the bond given by the executing treditor who withdrew the money from court does not affect his liability to pay interest under this section. (*Chapman and Roe, JJ.*) INDRA CHANDA BOTHRA *v.* FORBES. 39 I. C. 22 : 2 Pat. L. J. 149.

——S. 144—*Restitution from party to be made by Court.*

Under S. 144 of the Code there should be restitution made from party to party, as nearly as possible to their positions before the erroneous order and not to the various subsequent positions taken by them as a consequence of the wrong order. S. 144 authorises restoration of parties only to their respective positions at the time of the wrong order and not to later positions taken up by them of their own accord, as remotely resulting from that order. (*Roe and Jwala Prasad, JJ.*) KEDARNATH *v.* JAI BERHMA. 1917 Pat. 153 : 37 I. C. 863 : 5 Pat. L. W. 238.

——S. 144—*Remedy by suit—When applicable.*

S. 144, C. P. C., is confined to cases in which the decree of a trial Court is varied or reversed by some superior Court or by reason of some order passed by a superior Court. If a decree is varied or set aside by the Court passing it (and not by a superior Court) a claim in restitution enforced by means of a suit is not barred by the provisions of S. 144, C.P.C., though S. 583 of the old Code, which S. 144 replaces, might have lent itself to such an interpretation. (*Chamier, C. J. and Jwala Prasad, J.*) CHINTAMAN SINGH *v.* CHUNI SAHU. 1 Pat. L. J. 43 : 34 I. C. 747 : 3 Pat. L. W. 95.

——S. 144—*Revenue Court—U. P. Land and Revenue Regulation, S. 12—Revenue Courts—Powers.*

The power of restitution expressed in S. 144, C.P.C., is inherent in all courts, Civil or Revenue. Revenue officers dealing with cases of a judicial nature have been given the powers of Civil Courts regarding the institution and trial of suits by R. 55 of the rules framed by the Local Government under S 12 of the U. P. Land and Revenue Regulation. (*Thompson, J.*) BURMA OIL COMPANY, LTD. *v.* BAIJ NATH SINGH. 46 I. C. 475 : 11 Bur. L. T. 3.

——S. 144—*Limitation.*

An application for restitution under S. 144, C. P. C., not being an application for execution, Art. 181 of the Lim. Act applies. (*Young, J.*) ASHA BIBI *v.* NURUDDIN. 8 Bur. L. T. 165 : 30 I. C. 680 : 8 L. B. R. 262.

——S. 144—*Procedure—Application—Payment under decree subsequently declared in a separate suit to be null and void—Failure to ask for payment—O. 2, R. 2.*

Plaintiffs sued to set aside a decree in execution of which they had paid money to the decree-holder. The decree was declared to be null and void. Plaintiffs then applied for restitution of the amount paid by them. *Held*, that S. 144, applied. There is no restriction in S. 144 as to the manner in which the decree should have been varied or reversed. The plaintiff not having asked for payment as a relief in the subsequent suit, is not barred under O. 2, R. 2, and under the principles of *res judicata* from claiming repayment by way of restitution. (*Pratt, J. C. and Fawcett, A.J.C.*) GHULAM MAHOMED *v.* LAL CHAND. 53 I. C. 552 : 13 S. L. R. 153.

——S. 144— Forum — *Application for restitution — Court to which decree transferred for execution, if can exercise powers under.*

The Court to which a decree has been transferred for execution can exercise the same powers under S. 144 of the Code as the Court of first instance. (*Pratt, J. C. and Crouch, A. J. C.*) MIR ABDUL HUSSAN KHAN *v.* BIBI SONA DERO. 20 I. C. 540 : 7 S. L. R. 19.

——S. 144 (2)—*Remedy by suit — Decree—Reversed on appeal — Application for restitution by some tenant—Subsequent suit to recover full area.*

The landlords obtained decree for ejectment against their tenants and the tenants were ejected from their holdings. Subsequently the decree was reversed. Some of the tenants applied to the Asstt. Collector for restitution under S. 144 (2) which was ordered as to a portion of the original area from which they had been ejected. The order was affirmed by the Commissioner. The plffs. then sued to recover the whole of their original rights. *Held*, that the suit was not maintainable. (*Piggott and Walsh, JJ.*) CHIDDA SINGH *v.* ABDUL MAJID KHAN. 49 I. C. 721 : 17 A. L. J. 174.

——S. 145 and O. 41, R. 6—*Extent of liability—Mode of enforcement— Decree-holder asked to furnish security—Mesne profits—C. P. Code, Ss. 47, 144 and 145—T.P. Act, S. 90.*

A decree-holder who wanted to take possession of the lands decreed to him was required to furnish security for mesne profits in case the appelate court decided against him. The appellant hypothecated his property as security for the required sum ; but no obligee was named in the bond. The appeal was dismissed by the High Court but the Privy Council dismissed the suit and directed the first court to ascertain mesne profits due to the defts. The court below made the appellant a party to the proceedings, assessed the mesne profits at a certain sum and declared appellant's liability under the bond to the amount secured. *Held*, (1) that the liability of the appellant (surety) did not terminate with the decision by the first appellate court but continued till the Privy Council stage also ; (2) that there being no obligee under the security bond nobody could sue on it under S. 90 of the T. P. Act, (3) that the first court acted properly in dealing with the appellant's liability on an application for ascertainment of mesne profits and (4) that the properties charged could be directed to be sold on default of payment within a date fixed. 17 All. 99 ref. (*Lord Phillimore.*) RAJ RAGHUBAR SINGH *v.* JAI INDRA BAHADUR SINGH. 42 All. 158 : 46 I. A. 228 : 22 O. C. 212 : 6 O. L. J. 682 : 38 M. L. J. 302 : 18 A. L. J. 263 : 22 Bom. L. R. 521 : 55 I. C. 550 : 13 L. W. 82 (P. C.).

——S. 145 — *Surety for production of judgment-debtor—Imprisonment of judgment-debtor —Failure to produce—Surety is liable.*

C. P. CODE (V OF 1908), S. 145.

Where a surety for production of a judgment-debtor, failed to produce him, owing to the imprisonment of the latter in a criminal case, and the surety knew of the pending criminal case against the judgment-debtor, *held*, that the surety could not be discharged from the obligations under the surety bond. (*Ryves and Gokul Prasad, JJ.*) RAMESWAR DAS *v.* SRI LAL.
19 A. L. J. 968 : 44 A. 174 : 65 I. C. 375 : 1922 A. 390.

——S. 145—*Enforcement of liability—Sale of property mortgaged by surety—Sureties liability—Nature.*

The liability of a judgment-debtor's surety should not ordinarily be enforced in execution against any property which he might have mortgaged under the surety bond without a suit for the purpose. (*Richards, C. J., and Banerjee, J.*) AMIR *v.* MAHADEO PRASAD.
39 All. 225 : 38 I. C. 33 : 15 A. L. J. 76.

——S. 145 and O. 34, R. 14—*Enforcement of liability—Execution.*

Where a surety as security for the due performance of his suretyship on behalf of a judgment-debtor mortgages his property, a decree-holder of the simple money decree against the judgment debtor can attach and bring to sale the property mortgaged by the surety (*Piggott and Walsh, JJ.*) MUKHTA PRASAD *v.* MAHADEO PRASAD. 38 All. 327 : 33 I. C. 982 : 14 A. L. J. 385.

——S. 145—*Discretion to refuse execution.*

The Court has a discretion to refuse execution against the surety. (*Macleod, C. J.*) ABDUL HUSSEIN *v.* MISTRY & Co. 23 Bom. L. R. 1263 : 64 I. C. 648 : 46 Bom. 702 : 1922 Bom. 340.

——S. 145—*Extent of liability* — Ex parte *decree—Setting aside.*

Where a person becomes surety for the deft. on an *ex parte* decree being set aside against him, he is liable for the decree that might be passed on appeal. Execution might proceed against the surety within three years of the appellate decree. (*Shah and Hayward, JJ.*) CHOLAPPA *v.* RAMCHANDRA. 44 Bom. 34 : 53 I. C. 187 : 21 Bom. L. R. 861.

——S. 145—*Extent of liability — Death of deft.*

The liability of the surety cannot be determined until the time for execution has arrived. The death of deft for whom the opponent stood as surety does not discharge him and his liability continues inasmuch as the cause of action survives against the legal representative of the deft. who had been brought on record. (*Scott, C. J. and Heaton, J.*) CHANDULAL *v.* JESHANGBHAI CHHOTALAL. 19 Bom. L. R. 112 : 39 I. C. 88 : 41 Bom. 402.

——S 145—*Enforcement of liabilily — Suit.*

A surety bond for the performance of a decree or for restitution in case the decree is reversed is enforceable by a regular suit and the obligee need not enforce the bond by a proceeding in execution. (*Scott, C. J., and Batchelor, J.*) MOTILAL *v.* CHANDRA SANGI.
13 Bom. L. R. 909 : 12 I. C. 549 : 36 Bom. 42.

C. P. CODE (V OF 1908), S. 145.

——S. 145—*Forfeiture of security to be applied in satisfaction of the decree.*

Where the security offered by a surety for the judgment-debtor, for his appearance or for filing an insolvency petition, is forfeited owing to failure of the surety to produce the judgment-debtor, the sum so forfeited will be applied in satisfaction of the decree. (*Teunon and Newbould, JJ.*) SURENDRA NATH GHOSH *v.* KESHAB LAL GHOSH. 59 I. C. 778 : 25 C. W. N. 36.

——S. 145—*Extent of liability—Execution—Dismissal of execution case—Liability of surety.*

Certain crops were attached as the property of the judgment-debtor but were allowed to be removed on execution of a surety bond, to the effect that if the claim was not allowed, the sureties would pay the decree-holder a certain sum. The execution case against the judgment-debtor was dismissed after the claim was disallowed. *Held*, that it did not affect the liability of the surety under the bond. 14 Cal. 757, dist. (*Chitty and Smither, JJ.*) AJITULLA SARKAR *v.* NANDOOR MAHAMMAD. 43 I. C. 464 : 22 C. W. N. 919.

——S. 145—*Extent of liability.*

S. 145 applies only where the surety has rendered himself personally liable for the decretal amount and such liability can only be enforced against him to the extent to which he has become personally liable. (*Fletcher and Teunon, JJ.*) BROJENDRA LALL DASS *v.* LAKSHMI NARAIN BHANNA. 29 I. C. 149 : 19 C. W. N. 961.

——S. 145—*Enforcement of liability—Suit—Costs in Privy Council—Security bond by surety—Realization in execution— Procedure— C. P. Code, O. 34, R. 14.*

Where an application for execution of a decree for costs obtained in a Privy Council case, against a surety and the properties which he had charged as security under S. 602, C. P. C. (1882) was resisted on the ground that the security could not be realized except by way of suit under S. 67, T.P. Act, *Held*, that the claim of the decree-holder was based entirely on the security bond which created a mortgage in her favour and the claim against the surety was thus a claim arising under the mortgage within the meaning of O, 34, R. 14, C. P. C. (1908) and the properties could not be sold without a suit under S. 67, T. P. Act. The security bond also created a personal liability and the decree-holder could realise the amount of costs from the person and other properties of the surety under S 145, C. P. C. (1908) (*D. Chatterjee, and Walmsely, JJ.*) CHANDRABATI *v.* BABU RAM. 21 I. C. 365 : 19 C. W. N. 178.

——S. 145—*Enforcement of liability—Execution—Security bond—Given under order of the appellate court—Enforcement of bond in execution—T. P. Act, S. 67.*

A decree-holder can proceed in execution of the final decree against the judgment-debtor to enforce the security bond given by the latter under an order of the appellate court under S.525 (*c*) of the C. P. Code, 1882, by sale of the properties covered by the bond without bringing a suit under S 67, T. P. Act. (*Jenkins, Harrington, Stephen, Mookerjee and Holmwood, JJ.*) BAI NATH *v.* SIA RAM DAS. 18 I. C. 900 : 17 C. L. J. 267 (F. B.)

C. P. CODE (V OF 1908), S. 145.

———S. 145—*Liability of surety— Accrual when.*

Before proceedings are started under S. 145, C. P. Code, it must be established that the person against whom execution is sought has become liable as surety. The section does not require that this liability must have accrued on an application presented to the Court or on a security bond filed in the proceedings. When the applicability of the section is disputed the Court must first of all decide the question. (*Mookerjee and Beachcroft, JJ.*) LAKSHIMI NARAIN KHANNA *v.* GURU DATTA MEHRA. 16 I. C. 859.

———S. 145— *Surety—Death of— Principal debtor—Surety not absolved.*

Where a person has rendered himself liable as a surety for any amount that might be decreed against the defendant, the fact that the principal debtor has died since, does not absolve the surety from performing his contract. 41 B. 402 referred to. (*Harrison, J.*) MAULA DAD *v.* WADHAWA SINGH. 71 I. C. 46.

———S. 145—*Extent of liability—Compromise of suit.*

Where a surety has executed a bond making himself liable in case the dispute is not settled, a compromise decree obtained in that suit could not be executed against the surety as the liability is restricted to a decree which is not compromised and as the compromise did not refer to the surety at all. (*Shah Din, J.*) R. K. KAPUR *v.* SHANKAR DAS. 45 I.C. 992 : 99 P. W. R. 1918.

———S. 145, O. 3, R. 5 and O 10, R. 4—*Forfeiture of bond—Personal attendance of party —Service of summons.*

The Court declared the bond of the sureties which they had given for the appearance in Court of the judgment-debtor to be forfeited. It appeared no order had been passed for the personal appearance of the judgment-debtor but on the application of the plff., he was summoned to appear in Court to give evidence. This summons was not served on him but was sent through his pleader whose agent returned it saying that he did not know where the judgment-debtor was. *Held*, that the order directing forfeiture of the bond must be set aside. for no order was passed for personal attendance of the judgment-debtor. *Obiter.*—The summons could not be said to have been served under the circumstances of the case. (*Scott-Smith, J.*) MULA SHAH *v.* HAR BHAGWAN. 90 P. L. R. 1916 : 36 I. C. 73 : 166 P. W. R. 1916.

———S. 145 and O. 21, R. 40—*Judgment-debtor released on giving surety for appearance—Failure to produce debtor—Effect.*

Where sureties agreed to produce the judgment-debtor but did not produce, without further notice they can be made liable on their bonds for their failure. (*Spencer and Devadoss, JJ.*) NAGIER *v.* KRISHNAN CHETTIAR.
(1923) M. W. N. 770: 75 I. C. 830: 1924 Mad. 241.

———S. 145—*Principal and surety—Debt extinguished by merger—Surety not liable.*

The liability of a surety for a debt ceases to exist when his principal's debt is extinguished by an act which causes the merger of the estate of the debtor and the creditor.

C. P. CODE (V OF 1908), S. 145.

The plaintiffs obtained a decree for mesne profits against a person and the defendant stood surety for him under an order for stay of execution pending a Second Appeal against the decree. The judgment-debtor died and his estate became vested in the plaintiffs. On an application by plaintiffs to recover the amount from the surety, *held*, under the circumstances the plaintiffs were not entitled to recover. It does not make any difference that the surety bond in the case was executed to the Court under S. 145 of the Civil Procedure Code as the Court holds the security only for the benefit of the decree-holder. (*Spencer and Venkatasubba Rao, JJ.*) JEKKANNU SAMI AIYAR *v.* RAMSWAMI CHETTIAR.
17 L. W. 473 : 44 M. L. J. 171 : 72 I. C. 194 : (1923) M. W. N. 253 : 1923 Mad. 340.

———S. 145—*Handing over property for safe custody—Executing bond with sureties—Position of surety.*

Where in execution of a decree, the property is made over to a third person for safe custody on his executing a bond with sureties to produce it when required, the decree-holder on failure to produce cannot proceed to enforce the bond against the sureties but should get the bond assigned to himself and sue on it. (*Abdur Rahim and Napier, JJ.*) RAJA OF VENKATAGIRI *v.* SURAKRISHNA REDDI. 12 L. W. 329 : 39 M. L. J. 472: 60 I. C. 134: (1920) M. W. N. 784.

———S. 145—*Scope of—Security on behalf of judgment-debtor—Suit by surety to cancel security bond—Fraud—C. P. Code, S. 47.*

A third party who has given security on behalf of a judgment-debtor for the performance of a decree cannot apply to the executing Court to cancel the security bond on the ground that it was obtained by fraud. His remedy is only by way of suit. S. 145, C. P. C., merely is that the surety may be made a party to the execution proceedings against the principal debtor and an order against the surety is in effect a decree upon his separate contract against him for the payment of money. The surety is not a party to the suit or to the decree made therein nor does he become a party to the execution proceedings until application is made for an order against him. He is not a party to the suit within S. 47, C. P. C., and S. 145 only makes him a party for a limited purpose, namely, for appeal. (*Bakewell and Moore, JJ.*) RAMANATHAN PILLAI *v.* DORAISWAMI AYYANGAR. 43 Mad. 325 : 38 M. L. J. 65 : 11 L.W. 45: 27 M. L. T. 207 : 55 I. C. 363 : (1920) M. W. N. 114.

———Ss. 145 and 58—*Enforcement of liability —Execution--Surety—Release of judgment-debtor.*

Where a person has become surety for the release of a judgment-debtor arrested in execution of a decree and the bond is filed in Court, it must be regarded as a matter of record in the Court as much as if it had been executed to the Court itself. The bond is consequently enforceable against the surety in execution proceedings (*Oldfield and Seshagiri Ayyar, JJ.*) NANJUNDA ROW *v.* MARWADI DHAMMAJI. 53 I. C. 673 : 10 L. W. 172.

C. P. CODE (V OF 1908), S. 145.

——— S. 145—*Depository—Bond under O. 21, R. 43, C. P. Code—Enforcement of.*

Per Sadasiva Aiyar, J.—Under S. 145, a decree holder cannot execute a decree against a surety under O. 21, R. 43, C.P. Code, as amended by the High Court, in respect of property entrusted to him. The proper mode of enforcing such a bond is by assigning it in favour of the decree-holder.

Per Spencer, J.—A bond such as the above can be enforced against the person making it by proceeding under S. 145. The words 'may be executed' in S. 145 seem to indicate that proceeding in execution is only an alternative remedy and that the other remedy of assignment of the security bond is not excluded. (*Sadasiva Aiyar and Spencer, JJ.*) SUBBAREDDI *v.* VEERAYYA TATA.
25 M. L. T. 220 : (1919) M. W. N. 219: 52 I. C. 410 : 9 L. W. 476.

———S. 145—*Enforcement of liability—Suit—Surety bond taken outside court.*

S. 145 of the C. P. Code does not apply to proceedings for the enforcement of surety bonds taken by the decree-holder outside the Court. The bond has to be enforced by suit. (*Sadasiva Aiyar and Napier, JJ.*) SUBBARAYA PILLAI *v.* STHANATHA PANDARAM. **24 M. L. T. 416 : 8 L. W. 507 : 48 I. C. 940 : (1918) M. W. N 764.**

———S. 145 and O. 41, R. 5 cl. (3)—*Enforcement of liability—Stay of execution—Security—Mode of enforcement.*

Where immoveable property is given by a judgment-debtor as security for the due performance of a decree under O. 41, R. 5, cl. (3) of the C. P. Code, the property can be realised by the decree-holder in execution and no separate suit is either necessary or maintainable. 30 Cal. 1060, 15 B.L.R. 383, foll. (*Wallis, C.J., and Kumaraswami Sastri, J.*) SUBRAMANIA CHETTIAR *v.* RAJESWARA SETHUPATHI. **6 L.W. 762 : (1917) M. W.N. 872 : 34 M. L. J. 84 : 43 I. C. 187 : 41 M. 327.**

———S. 145, O. 32, R. 6—*Guardian—Minor—Surety's liability.*

Where the surety for the guardian of a minor owed some moneys to the minor's estate and the Court ordered attachment of the property of the surety on an application by the guardian of the minor. *Held*, that neither R 6 of O. 32 nor S.145, C. P. C., authorized the Court to adopt such a course. (*Sadasiva Iyer and Spencer, JJ.*) NADAMALAJI KURUGODAPPA *v.* ANGADI SOOGAMMA. **41 Mad. 40 : (1917) M. W. N. 490 : 39 I. C. 928 : 22 M. L. T. 320.**

———S. 145—*Notice to surety is essential.*

A Court is not competent to pay the surety's money to the judgment creditor, without finding that the conditions of the bond were not complied with and without issuing notice to the surety to show cause against the order. (*Srinivasa Iyengar, J.*) KRISHNASWAMI IYER *v.* RANGASWAMY NAYADU. **30 I. C, 517.**

———S. 145—*Scope of—Refusal to enforce liability of surety—Appeal—Cessation of liability—Dismissal of suit.*

S. 145 deals with procedure and not with the extent of the surety's liability. Where there is a refusal to enforce liability, other interested parties than the sureties, may appeal. A bond given for release of property attached before judgment becomes defunct on the dismissal of the suit and an order terminating the attachment is not necessary. (*Oldfield and Napier, JJ.*) GOLLAMUDI VENKATASUBBA RAO *v.* CHAPARALA ROSAYYA. **26 I. C. 76 : (1914) M. W. N. 714.**

———S. 145—*Surety—Mode of enforcing liability.*

Where a condition is imposed on a surety under an order of Court the surety can be compelled to fulfil that condition in execution proceedings under S. 145, C. P. Code, without any second formal order being passed against the principal. Similarly in the cases contemplated by clauses (a) and (b) of S. 145 there would be no necessity for a second formal, or even informal order to the principal to perform the decree or restore the property. The surety could be proceeded against as soon as the decree is capable of execution, or the property becomes liable to restitution or the condition required fulfilment. The words "undry an order of the Court," in clause (c) of S. 145, which apply equally to the payment of monee and the fulfilment of a condition, must in each case refer to the original order of the Court. They do not refer, in respect of the condition, to the original order imposing it, and, in respect of the payment, to a second order to be passed in subsequent proceedings. (*Hallifax, A. J. C.*) AMOLAK SAO *v.* KASHINATH. **64 I. C. 430.**

———S 145 and O. 21, R. 43—*Depositary—Attachment of live stock—Safe custody—Surety's liability—Execution.*

The security given by a depository for safe custody of live stock attached under O. 21, R. 43 of the C. P. Code cannot be enforced in execution by summary process. 13 C. P. L. R. 104, foll. 12 C. P. L. R. 149 diss. (*Mittra, A. J. C.*) KHETSIDAS *v.* HARBA. **47 I. C, 956 ; 16 N. L. R. 178.**

———Ss. 145 and 55—*Surety bond indicating general liability—Execution case struck off.*

A surety bond did not restrict the liability of the surety to the execution case then pending but showed a perfectly general liability to pay the decretal amount. *Held* the decree-holder can enforce the decree against the surety under S. 145 although the execution case was struck off. (*Mullick and Jwala Prasad, JJ.*) DUDHRAJ *v.* MAHABIR PRASAD. **57 I. C. 303 : 1 Pat. L. T. 604.**

———S. 145 and O. 41, R. 5—*Extent of liability—Decree-holder not confined to properties given as security for stay of execution.*

Where pending an appeal execution of the decree was stayed on the judgment-debtor giving a security bond and the appeal was eventually dismissed, the furnishing of the security in no way detracted from the right of the decree-holder to enforce his decree as against his judgment-debtor in any way he thought fit in accordance with the law, The fact that the security is given does not take away any legal right which a decree-holder otherwise has. (*Mullick and Atkinson, JJ.*) RAJ BANS SAHAI *v.* SARJU LAL. **3 Pat. L. J. 176 : 43 I. C. 454 : 4 Pat. L. W. 216**

C. P. CODE (V OF 1908), S. 145.

——S. 145 and O. 34, R. 14—*Appeal—Order for payment by surety.*

An order directing a surety to pay the debt of a judgment-debtor is not a decree except for purposes of an appeal under S. 145. Property pledged as security by a surety for stay of execution can be sold in execution of the decree after the judgment-creditor had exhausted his remedies against the judgment-debtor. (*Chapman and Roe, JJ.*) GANGA DEO NARAIN SINGH *v.* JOTI LAL SAHU. 2 Pat. L. J. 197 : 39 I. C. 648 : 3 Pat. L. W. 414.

——S. 145—*Mode of enforcement—Surety's liability.*

A property mortgaged by a surety under this section cannot be sold as mortgaged property. (*Roe and Chapman, JJ.*) MADHO PRASAD *v.* CHANDRABATI KUER. 38 I. C. 130.

——S. 145—*Extent of liability—Execution of Small Cause decree—Surety producing property.*

On the attachment of a bullock in execution of a Small Cause decree, the judgment-debtor applied to set aside the *ex parte* decree, and a surety executed a bond for the decretal amount. The application was dismissed. Surety produced the bullock but it was held that liability extended to the whole of decretal amount. (*Jwala Prasad, J.*) SEHAT ALI *v.* FERZAND ALI. 38 I. C. 90.

——S. 145—*Surety's inability owing to judgment-debtor being in jail—Surety not liable.*

Where the judgment-debtor is convicted and is in jail and hence cannot be produced as agreed in the surety bond the sureties cannot be directed to pay the agreed amount. 21 Mad. 637, 41 Cal. 50 Foll 3 Bur. L. T. 141 Diss. (*Mac Coll, A. J. C.*) MAUNG KYWE AND ANOTHER *v.* MAUNG SAN TIN. 1 Bur. L. J. 236 : 70 I. C. 870: 4 U. B. R. 99 : 1923 R. 26.

——S. 145—*Surety for Receiver—Liability.*

Under S. 145 of the Code, a surety for a Receiver can be asked to pay the sum which he has bound himself to pay. (*Twomey, C. J. and Robinson, J.*) MAUNG PO THEIN *v.* MA WAING. 10 L. B. R. 236 : 59 I. C. 844: 13 Bur. L. T. 91.

——S. 145—*Position of surety—Party to suit under S. 47.*

A person who has executed a bond under S. 55 (4) is a party to a suit within the meaning of S. 47. S. 145 amplifies S. 253 of the old Code. (*Saunders, A. J. C.*) NGA KYE *v.* NGA KYA. (1916) II, U. B. R. 103 : 34 I. C. 247 : 10 Bur. L. T. 15.

——S. 145—*Rights of decree-holder—Surety and principal debtor.*

A decree holder is not bound to give the principal judgment-debtor an opportunity of paying before taking proceedings against the surety. (*Pratt, J. C. and Crouch, A. J. C.*) MIR ABDUL HUSSAIN KHAN *v.* BIBI SONA DERO. 20 I. C. 540 : 7 S. L. R. 19.

——Ss 145 (c), 55 (4)—*Extent on liability—Surety bond to produce judgment-debtor on week's notice—Application for execution dismissed—Decree-holder's attempt to execute decree against surety.*

C. P. CODE (V OF 1908), S. 146.

Where the conditions of a surety bond were that on receiving a week's notice, the surety would produce the judgment-debtor and in default pay a sum of money, the surety cannot be proceeded against on the dismissal of the execution application, since the surety bond was in force only during the pendency of the application in which it was executed. 14 C. 757, Foll. (*Richardson and Newbould, JJ.*) LALA NIRUS NARAYAN *v.* PEARI DAI DEBI. 21 I. C. 612.

——S. 145 (c)—*Scope of.*

S. 145 (c), C. P. C., includes a case when the security is given for the production of a judgement debtor arrested in execution of a decree and released on furnishing security and on expressing his intention to apply for being declared an involvent. The section prescribes a summary remedy in execution for the realization of the security in execution to the extent to which the surety has made himself personally liable. A condition precedent in a surety bond that the debtor should be produced if he failed to appear after notice, is a benefit which the surety may waive as when a surety says that " notice need not be sent to the judgment-debtor as it is impossible to produce him as he and the decree-holder are colluding." (*Sadasiva Aiyar and Moore, JJ.*) SUNDARA REDDI *v.* VARADHARAJA PILLAI. 34 I. C. 407 : (1916) 2 M. W. N. 273.

——S. 146 and O. 21, R. 95—*Transferee from auction-purchaser.*

Under S. 146, a transferee from an auction-purchaser is entitled to delivery of possession under O. 21, R. 95 of the Code. (*Banerjee and Tudball, JJ.*) BUDDU MISSIR *v.* BHAGIRATHI KUAR. 40 All. 216 : 42 I. C. 936 : 16 A.L.J. 150.

——S. 146—*Representative—Transferee of decree-holder's interest during pendency of suit.*

M. sued for the recovery of some immoveable property but by a compromise, was awarded a portion of the property. Before a decree was passed on the compromise he transferred his interest in the property to A. A did not apply to bring himself on the record. After the decree was passed A applied to execute the decree as M's representative. *Held* that he was not a representative within S. 146 of the C. P. Code, and, as his name was not on the record, he could not execute the decree. (*Chumier, J.*) DOST MUHAMMAD *v.* ALTAB HUSSAIN KHAN, 17 I. C. 512.

——S. 146—*'Proceeding' includes appeal—'Claiming under',*

The proceeding contemplated by this section includes an appeal and the expression ' claiming under ' is wide enough to cover cases of devolution, etc. mentioned in Order 21, rule 10. (*Seshagiri Aiyar and Napier, JJ.*) S. V. SITARAMASWAMY *v.* NARASAMMA. 8 L. W. 21 : 48 I. C. 840 : 41 M. 510.

——S. 146—*Right to appeal—Transfer after decree.*

Where merits are on the side of appellant he can be allowed to appeal even though he is a transferee from a party after the decree. (*Oldfield and Bakewell, JJ.*) SUBBA PILLAI *v.* RANGASAMI. 40 I. C. 846 : (1917) M. W. N. 306.

C. P. CODE (V OF 1908), S. 146.

———S. 146—*Time fixed by compromise decree —Court cannot extend.*

Where a compromise decree fixes the time for the doing of an act and does not provide that the act is to be done with the assistance of the Court, the Court cannot extend the time on any ground, legal or equitable. (*Daniels, J. C.*) ILAHI RAZA-KHAN *v.* MT. TAIBA BEGAM.

66 I. C. 273 : 9 O. L. J. 53.

———S. 146—*Right to appeal—Assignee of decree.*

The assignee of the subject-matter of the litigation between the date of decision of the First Court and the filing of appeal ought to be allowed to join in the appeal under this section. (*Kendal and Daniels, A. J. Cs.*) NARAINSINGH *v.* DEPUTY COMMISSIONER, PARTABGARH.

38 I. C. 511: 20 O. C. 31.

———S. 146—*Transferee of decree—Right to apply for execution—Recognition by Court—Is necessary.*

Transfer of property during pendency of a suit will not entitle the purchaser to apply for the execution of the decree unless he has taken steps to have his name substituted in the suit in the place of his vendor. (*Adami and Bucknill, JJ.*) THAKURI GOPE *v.* MALIC MOTHLAYAR.

(1922) Pat. 256 : 69 I. C. 959 : 3 Pat. L. T. 625 : 1922 P. 563.

———S. 148—*Implied extension of time—Appellate court—Powers of.*

When a certain point decided by the lower appellate court was not appealed against by the party aggrieved in time, but the same point was allowed to be raised in an appeal admitted after time, the High Court was deemed to have impliedly extended time for appeal. (*Viscount Finlay.*) KRISHNA AIYANGAR *v.* NALLAPERUMAL.

43 Mad. 550: 47 I. A. 33 : 22 Bom. L. R. 568 : 28 M. L. T. 28: (1920) M. W. N. 419 : 12 L. W. 92 : 2 U. P. L. R. (P. C.) 118: 38 M. L. J. 444: 18 A. L. J. 489: 56 I. C. 163 (P. C.).

[Affirming 30 I. C. 286 : 29 M. L. J. 110.]

———Ss. 148 and 151—O. 34 and 47—*Time fixed by decree—Extension of.*

Where a decree was granted for possession on payment of a certain amount in a fixed time, the court has no jurisdiction to extend the period. (*Ryves and Gokul Prasad, JJ.*) KANDHYA SINGH *v.* KUNDAN. 2 U. P. L. R. (A) 197. 57 I. C. 16 : 18 A. L. J. 826: 42 A. 639.

———Ss. 148 and 151—*Time fixed by decree—Extension of.*

Where terms are embodied in a decree fixing a time within which court-fees should be paid and directing that the suit should stand dismissed in the case of non-compliance with the condition, even the Court which passed the decree has no jurisdiction to extend the time for payment of the court-fee (*Richards, C. J. and Banerji, J.*) SAJJADI BEGUM *v.* DILAWAR HUSSAIN.

40 All. 579: 47 I. C. 4: 16 A. L. J. 625.

———S. 148—*Direction for payment in decree —Power of Court to extend time for payment of deretal amount.*

C. P. CODE (V OF 1908), S. 148.

Where a decree was passed for possession conditional on the plaintiff's paying a certain sum within one month of the date of the decree the Court which passed the decree has jurisdiction to extend the time. (*Knox, J.*) NAIK RAM *v.* BHAGWAN CHAND. 42 I. C. 613 : 15 A. L. J. 511.

——— S. 148 and O. 9, R. 13—Ex parte *decree—Costs—Deposit—Extension of time for performance of condition—Court's discretion.*

The Court has power under S. 148 of the C. P. Code to extend the time fixed for payment of costs on an *ex parte* decree being set aside or to pass a fresh conditional order. (*Ryves and Piggott, JJ.*) JAGARNATH SAHI *v.* KAMTA PRASHAD.

36 All. 77: 23 I. C. 138 : 12 A.L.J. 38.

——— S. 148—*Pre-emption decree—Extension of time—Power of Court.*

S. 148, C. P. C. does not entitle the Court to extend the time fixed by the pre-emption decree for payment of the purchase money. (*Richards, C. J., Banerjee and Tudball, JJ.*) SURANJAN SINGH *v.* RAMBAHAL LAL. 35 All. 582 : 21 I. C. 585 : 11 A. L. J. 950.

———S. 148—*Time fixed by decree— Pre-emption decree—Order appealable.*

Under S. 148, payment of money into court within a fixed time under a decree, is not an act prescribed or allowed by the code. A Court cannot extend the time fixed by a pre-emption decree for payment of the pre-emption money Such an order extending time fixed for payment is appealable. (*Chamier, J.*) SARANJAN SINGH *v.* RAM BAHAL LAL. 17 I. C. 912 : 10 A. L. J. 520.

———S. 148 and O. 34, R. 8—*Mortgage decree —Decree for redemption—Extension of time.*

In a redemption suit the Court could extend the time fixed in the decree for payment of decretal amount to a prior mortgagee only under O. 34, R. 8 and not under S. 148, C. P. C. as the latter applies only to cases where time is fixed for doing an act and not where time fixed in a decree. (*Karamat Hussain and Tudball, JJ.*) HET SINGH *v.* TIKARAM. 34 All 388 : 14 I. C. 240 : 9 A. L. J. 381.

———S. 148—*Time fixed by decree for payment of Court fee cannot be extended.*

Where time has been fixed by a decree of court for payment of court fee, the Court has no jurisdiction to amend the decree so as to enlarge the time for payment. S. 148, C. P. C. is inapplicable to cases where time has been fixed by a decree of court. 35 A. 582 : 40 A, 579 : 39 M. 876 Ref. (*Ghose and Panton, JJ.*) NAWAB KHAJEH HABIBULLA *v.* GOLA ASMOTER KHATUN. 37 C. L. J. 395: 27 C. W. N. 720: 74 I. C. 575 : 1923 Cal. 612.

———S. 148—*Time fixed by decree of first Court—Confirmation on appeal—Time runs from date of Appellate decree.*

When time is fixed by the lower Court for payment of money and the decree of that Court is confirmed on appeal, the time for payment runs from the date of the decree of the Appellate Court, although the latter decree does not expressly provied the time for payment and it should be calculated

C. P. CODE (V OF 1908), S. 148.

from the date of the appellate decree. (*Mookerjee and Panton, JJ.*) RAJA SHASHIKANTA *v.* RAJA SARAT CHANDRA. 70 I. C. 6: 34 C. L. J. 415.

——Ss. 148 and 142—*Extension of time—Rejection of plaint—Restoration.*

Once an order rejecting a plaint is set aside in review the Court has full power, under Ss. 142 and 148 of the C. P. Code, to extend the time for payment of the deficit court-fee and the plaint having been originally filed within the period of limitation the suit was not barred, (*Newbould, J.*) SURENDRA PRASAD LAHIRI CHOUDHURY *v.* ATTABUDDIN AHMED. 26 C. W. N. 391: 69 I. C. 43 : 1922 Cal. 234.

——S. 148—*Mortgage decree—Extension of time—Mortgage—Preliminary consent decree.*

Time agreed upon by parties for the payment of decretal amount of mortgage money may be extended by the court in a proper case. (*Teunon and Newbould, JJ.*) AKKAEH MONDAL *v.* AMINUDDI MULLIK. 50 I. C. 937 : 23 C. W. N. 439.

——S. 148—*Implied extension of time.*

When time granted for any matter to be done by a party is exceeded and there is an application by the party to excuse the delay and enlarge the time presented along with the fulfilment of the matter and the Court acted upon the matter as though it was in time it should be considered that the Court had enlarged the time, (*Chatterjee and Roe, JJ.*) GOPAL PRASAD BHAGAT *v.* RAJENDRA LAL PANJA. 34 I. C. 625 : 20 C. W. N. 615.

——S. 148 and Sch. II, Sec. 15 (1) (c)—*Extension of time—Award—Power of Court.*

The Court cannot enlarge the time for the making an award when time has expired and the award has already been made. S. 148 empowers the court to extend time that has expired but it does not give power to the Court to extend the doing of an act which has already been done. (*Harrington, J.*) SHIB KRISHNA DIWAN & Co. *v.* SATESH CHANDRA DUTT. 12 I. C. 13 : 38 Cal. 522.

——S. 148—*Applicability—Court Fees Act, S. 11—Power to enlarge time.*

Under S. 11 of the Court-Fees Act a Court can enlarge time even after time originally fixed for payment of Court-fee. (*Mookerjee and Teunon, JJ.*) GHULAB CHAND *v.* BHARIA RAM MURAT. 10 I. C. 268 : 13 C. L. J. 432.

[Contra 28 I. C. 890.]

——Ss. 148 and 149—*Conditional decree—Time fixed by, cannot be extended.*

When the Court has made a decree in plaintiff's favour conditional on his paying an extra court fee, within a specific period and had decreed that if this extra court-fee was not paid the suit was to stand dismissed. *Held*, that once the term of deposit had been embodied in the decree the Court itself, even if it desired, had no jurisdiction to alter its own direction save on an application for review of judgment. (*Scott-Smith, J.*) DIWAN CHAND *v.* RAM LABBAYA. 73 I. C. 922 : 1923 Lah. 372.

C. P. CODE (V OF 1908), S. 148.

——S. 148—*Pre-emption decree—Section not applicable — Order extending time is open to revision.*

It is not competent to a court to extend the time fixed in pre-emption decree for payment of purchase money. 35 A. 582 followed. An order of the Court extending the time under S. 148, C.P. Code, is not a decree and is not appealable as such. But the party aggrieved by the order can apply in revision. (*Scott-Smith, J.*) LABH SINGH *v.* GANPAT. 71 I. C. 35 : 1923 Lah. 162.

——S. 148—*No applicability to—Pre-emption suit.*

S. 148, C.P. Code, does not apply to pre-emption suits. (*Broadway, J.*) KHAN MUHAMMAD *v.* AHMAN. 73 I. C. 891.

——S. 148—*Setting aside ex parte decree—Extension of time to pay money can be given.*

Where an application to set aside an *ex parte* decree has been allowed conditionally on payment of a sum of money by a certain date, the court has power to extend the time. (*Campbell, J.*) THE FIRM GOBIND SAHAI RUP LAL *v.* GURDAS MAL. 73 I C. 648 (1).

——148 and 151—*Pre-emption decree—Time fixed for payment—Expiry of—Extension of time—Power of Court.*

If no payment of the purchase money has been made within the time fixed by a pre-emption decree, it is not competent to the court to extend the time either under S. 148 or S. 151, C. P. Code. 60 P. R. 1913 ; 35 A. 582 foll. (*Wilberforce, J.*) NATHU KHAN *v.* GULAB KHAN. 64 I. C. 242.

——S. 148—*Pre-emption decree—Extension of time.*

The court could not extend time fixed for payment in a pre-emption decree under S. 148, C. P. Code. (*Robertson, J.*) NABA *v.* PATHANA. 72 P. W. R. 1913 : 60 P. R. 1913 : 53 P. L. R. 1913 : 18 I. C. 86.

——S. 148—*Time fixed by decree.*

A Court is unable to extend a period fixed for doing an act after the final decree is made. (*Reid, C. J.*) HUKAM CHAND *v.* HAYAT. 99 P. R. 1912 : 15 I. C. 941 : 121 P. W. R. 1912.

——S. 148—*Direction for payment in decree—Alienation by Manager of joint Hindu family—Setting aside—Direction for payment of portion of consideration binding on family—Extension of time.*

When in a suit for partition of properties by a Hindu co-parcener impleading an alienee of a portion of the family property from the father as party defendant the court passes a decree directing the plaintiff to pay a sum of money to the alienee before a fixed date and the alienee was then to put the plaintiff in possession. *Held*, the court has power to extend the time for payment by the plaintiff as the decree was in effect one for redemption. (*Seshagiri Aiyar and Moore, JJ.*) IDUMEA PARAYAN *v.* PETHI REDDI. 37 M. L. J. 695 : 54 I. C. 451 : 11 L. W. 25.

c. p. CODE (V OF 1908), S. 148.

——Ss. 148 and 151—Ex parte *decree—Order under O. 9, R. 13, C. P. C.—Costs—Appeal.*

Where an *ex parte* decree is set aside and the deft. agrees to pay the opponent's costs within a specified time, the court may vary its order and enlarge time for payment. An order refusing to extend time under O. 9, R. 13 is appealable to the High Court and an appeal should be filed without waiting for final order. (*Krishnan, J.*) CHANDRA GOUNDAN *v.* PALANIAPPA GOUNDAN.
23 M. L T. 7 : 42 I. C. 961 : (1917) M. W. N. 870.

——S. 148—*Specific performance—Decree.*

The court either original or appellate has no power to extend the time fixed for payment while decreeing the specific performance of a contract of sale. (*Srinivasa Aiyangar, J.*) GOPALA AIYAR *v.* SANNASI. 3 L. W. 29 : 32 I. C. 401 : 19 M. L. T. 137

——S. 148—*Time fixed by decree—Extension.*

Extension of time for doing acts under mortgage or other decrees does not fall within S. 148, C. P. Code. (*Sadasiva Aiyar and Napier, JJ.*) DHARAMRAJA AIYAR *v.* SREENIVASA MUDALIAR.
39 Mad. 876 : 2 L. W. 1074 : 29 M L. J. 708 : 31 I. C. 240 : 18 M. L T. 486 : [Also 34 A. 388 : 14 I. C. 240 : 17 I. C. 912 : 10 A. L. J. 520.

——Ss. 148 and 149—*Extension of time—Court-fee—Mesne profits in partition suit.*

Neither S. 11 of the Court Fees Act, nor Ss. 148 and 149 of the C. P. Code, give power to the Appellate Court to extend the time for payment of Court-fee on mesne profits ascertained and fixed by the Lower Court in a partition suit. If the Appellate Court wants to exercise such a power, it must be only in respect of fees calculated on profits, the amount of which it has itself ascertained. Scope of S. 149, C. P. Code, considered. (*Oldfield and Tyabji, JJ.*) NATHERSA ROWTHER *v.* MAHOMED ROWTHAN. 28 I. C. 890.

——S. 148 and 151—*Time fixed by decree—Extension.*

Where a decree directed the delivery of certain property on payment of a sum of Rs. 50 by the plffs. to the deft. and where the plffs. applied for an extension of time originally granted on the ground that they were minors and that their next friend had colluded with the deft. *Held*, that there was no provision for extension of time and that Ss. 148 and 151 would not avail to the plffs. 24 M. 1 (P. C.) foll. (*Oldfield and Tyabji, JJ.*) MOIDEEN KUPPAI *v.* PONNUSWAMI PILLAI.
1 L. W. 882 : 26 I. C. 63 : 16 M. L. T. 430

——Ss. 148 and 151—*Time fixed by decree—Final decree—Alteration.*

A court has no power to alter the terms of a decree when once it becomes final on the expiry of the time fixed thereby. 17 I. C. 912, foll. (*Miller and Sadasiva Iyer, JJ.*) NORI LAKSHMINARASIMHAN *v.* PRATIPATHI LAKSHMINARAYANA.
24 I. C. 825.

——Ss. 148 and 151—*Appellate Court—Power of Lower Court executing decree.*

C. P. CODE (V OF 1908), S. 148.

Where an appellate decree fixes a time for payment of the decree amount the Lower Court to which the decree is sent for execution cannot extend the time for such payment. (*Abdur Rahim and Sundara Aiyar, JJ.*) MOHIDEEN KUPPAI *v.* MARIAM KUMMI. 10 M. L. T. 284 : (1911) 2 M. W. N. 240 : 12 I. C. 139 : 21 M. L. J. 1018.

——S. 148—*Pre-emption decree—Court cannot extend time fixed by.*

S. 148, C. P. Code, does not enable a Court to extend time for doing acts allowed by a decree (e.g.) the time allowed by a pre-emption decree, for payment of the sale price, 35 A. 582 : 39 M. 876 40 A. 579 Rel, (*Prideaux, A. J. C.*) AMBADAS *v.* LAXMAN. 19 N. L. R. 8 : 71 I. C. 401 : 1923 Nag. 210.

——Ss. 148 and 151—*Time fixed by decree—Power to extend—Inherent power.*

The C. P. Code does not empower an executing Court to extend the time fixed for payment of the decretal amount. It empowers the Court to extend time only when a period is fixed for the doing of any act prescribed or allowed by the Code itself : nor does S. 151, C. P. C., give such a power. (*Mittra, O. A. J. C.*) KOMAL SINGH *v.* JAGANNATH MURAT SINGH. 49 I. C. 840 : 15 N. L. R. 39.

——S. 148—*Applies only to proceedings prior to decree.*

The general provisions of S. 148, C.P.C., relate only to proceedings antecedent to the passing of a decree. After a final decree is passed, the time for payment of money cannot be extended under S. 148. (*Dalal, A. J. C.*) GANGA RATAN *v.* CHANDIKA PRASAD. 74 I. C. 573 : 9 O. & A. L. R. 319.

——S. 148—*Power of Court to extend time—Time fixed by decree.*

The Court has no power to extend the time allowed by a decree for the payment of money under S. 148, C. P. Code. If the decree provides for the payment of a certain sum of money on or before a certain date and specifies the penalty which will attach to non-payment, the enforcement of the penalty cannot be delayed or dispensed with by any order or direction issued in derogation of the decree. In other words, if it provides that the right of the decree holder to obtain possession shall be extinguished, in case a certain condition is not carried out within a certain period, that right becomes extinct on the failure to comply with that condition and cannot be revived by any subsequent act of the court or party at fault. (*Kanhaiya Lal, J. C.*) BADAL *v.* CHHATTAR SINGH. 25 O. C. 74 : 66 I. C. 205 : 1922 Oudh 131.

——S. 148—*Pre-emption decree—Purchase-money.*

Under S. 148, C. P. Code, a Court cannot extend the time fixed by a pre-emption decree for payment of the purchase-money. The law will excuse a man from doing that which he could not possibly perform: *Impotentia excusat legam*. In acting on this prinoiple the Court will not take into account any

C. P. CODE (V OF 1908), S. 148.

situation which has rendered the performance of the condition impossible and which the man has brought about by his own acts and omission with complete knowledge of the consequence that will ensue. (*Hasan, A. J. C.*) JANGA SINGH *v.* LACHMI NARAIN. 7 O. L. J. 378 : 23 O. C. 254 57 I. C. 488 : 2 U. P. L. R. (J. C.) 171

——S. 148—*Deposit of printing charges—Oudh Rules of Practice, R.* 13.

The Civ. Pro. Code, S. 148, does not apply to the extension of time for deposit of printing charges under R. 13 of the Oudh Rules of Practice. (*Stuart, J. C., and Daniel, A. J. C.*) KULIRA BEGAM *v.* AKBAR SHAH. 50 I. C. 789 : 22 O. C. 13.

——S. 148—*Time fixed by decree—Not to be extended.*

The time fixed by a decree in a mortgage suit cannot be extended under S. 148, C. P. C. The section does not apply to matters provided by the decree but only to the antecedent stages of the suit. (*Linasay, J. C.*) NIRANJAN SINGH *v.* JAGANNATH. 28 I. C. 862 : 18 O. C. 56.

——S. 148 — *Pre-emption decree — Courts' power to extend time.*

A Court has no jurisdiction to extend the time limited by a pre-emption decree for the payment of money even if the application be made before the period limited by the decree has expired, as the provisions of the section apply only to the acts prescribed by the Code, and not to acts prescribed by decrees which have become final. (*Lindsay, J. C.*) KANIZ KUBIA *v.* BANDE HUSSAIN. 28 I. C. 458 : 2 O. L. J. 162.

——S. 148—*Pre-emption decree—Extension of time for payment—No jurisdiction—Revision.*

A Court has no power under S. 148, C. P. C. to extend the period fixed for payment in a pre-emption decree. The order extending was set aside in revision. 5 I. C. 443; 19 I. C 347, foll. (*Stuart and Kanhaiya Lal.A.J.Cs.*) HASIBUNNISSA *v.* MAHMUDUNNISSA. 27 I. C. 419 : 17 O. C. 377.

——S. 148 and O. 20, Rr. 3 and 14 and S. 152—*Pre-emption decree—Extension of time—Whether allowable.*

A Court has no power to extend the time granted by a pre-emption decree for the payment of the purchase money, after the time fixed by the decree has expired. (*Kanhaiya Lal, A. J. C.*) RACCHU LAL *v.* RAJA RAM. 19 I. C. 347 : 16 O. C. 5.

——S. 148—*Applicability—Prov. Sm. C. C. Act—Extension of time.*

S. 148 does not authorise the Court to grant extension of time for doing an act prescribed by Prov. Sm. C. C. Act. (*Das, J.*) RAMCHARITRA RAM *v.* HASHIM KHAN. 1 Pat. L. T. 323 : 56 I. C. 810 (1920) Pat. 203.

——S. 148—*Dismissal for default—Application for restoration—Limitation Act Ss. 5 and 18—Arbitrary exercise of discretion—C. P. Code, S. 115—Revision.*

The discretion conferred by S. 148 of the Code cannot be arbitrarily exercised in matters to which the rules of limitation apply, and in which by those rules the Court can only extend the time after a proper judicial consideration of the cause shown under S 5 or the fraud established under S.18 of the Lim Act. 3 Pat. L.J. 376, dist. A Court arbitrarily granting an application for restoration of a suit long after the period of limitation has expired acts without jurisdiction and its order is open to revision. (*Atkinson and Manuk, JJ.*) MUSAMMAT DUKHNO *v.* MUNSHI SAHU. 52 I. C. 439 : 4 Pat. L. J. 428.

——S. 148—*Pre-emption decree—Extension of time.*

Under S. 148 of the Code Courts are given a discretion to extend the time fixed in a pre-emption decree for deposit of the pre-emption money. 14 A. 529; 18 A. 223, dist. (*Sharfuddin and Roe, JJ.*) ABU MUHAMMAD MIAN *v.* MUKUT PRATAP NARAIN. 1 Pat. L. J. 92 : 34 I. C. 88 : 2 Pat. L. W. 400.

——S 148 and O. 34, Rr. 7 (i) (d) and 8 (ii)—*Mortgage decree—Enlargement of time for paying amount.*

S. 148 gives a court power to enlarge the period of redemption if it thinks fit. In the case of a simple mortgage an order debarring all rights to redeem after a fixed date should not be passed. (*Fox, C. J. and Hartnoll, J.*) MG AUNG GYI *v.* MA THEIN MYA. 27 I. C. 706 : 8 Bur. L. T. 92.

——S. 149—*Deficiency of court fee—Extension of time—Effect of, on limitation.*

Under O. 7, R. 11 (c) and S. 149 the court has power to extend time to pay the deficient court-fee. If the deficiency is made good within the time allowed, the suit is not barred though limitation expired in the meantime. (*Ryves, J.*) RAM DIAL *v.* SHER SINGH. L. R. 4 A. 251 : 45 A. 518 : 21 A. L. J. 387 : 74 I. C. 308 : 1923 A. 538 (1).

——S 149—*Insufficient stamp—Rejection of appeal—Reasons to be stated.*

S. 149 of the C. P. C. gives a Court discretion to extend the time for payment of Court fees on an insufficiently stamped memorandum of appeal and where the Lower Court rejected an appeal simply on the ground that the requisite court-fee has not been paid without calling upon the appellant to supply the deficiency or exercising any discretion in the matter, *held*, that its decision was unsustainable. (*Rafique and Lindsay, JJ.*) JAI SINGH GIR *v.* SITARAM SINGH. 21 A. L. J. 333 : L. R. 4 A. 188 : 74 I. C. 757 : 1923 A. 349 (1).

——S. 149—*Court-fee—Delay excused—No bar.*

Where a deficient court-fee is paid within the time allowed by Court but after the period of limitation, the suit is not barred, (*Richards, C. J. and Banerji, J.*) RAM LAL *v.* KHUNDAT-UNNISSA. 23 I. C. 408 : 12 A. L. J. 709.

——S. 149—*Discretion — Memorandum of appeal—Insufficient stamp—Rejection.*

If the appellant or plff. is within time in presenting his appeal or plaint he is entitled to have further time, if the appeal or the plaint be insufficiently stamped to make good the deficiency. The discretion of the Court under S. 149 should be free and unshackled and is not restricted to cases of *bona fide* misunderstanding of the law

C. P. CODE (V OF 1908), S. 149.

as to suit valuation. (*Batchelor and Shah, JJ.*) ACHUT RAMCHANDRA PAI *v.* NAGAPPA BAB BALAGAYA. 38 Bom. 41 : 21 I. C. 337 : 15 Bom. L. R. 902.

———S. 149—*Delay, gross— Deficient Court-fee—Discretion—Wilful neglect—No extension of time.*

The Court will not in ts discretion allow the deficiency of Court-fee to be made up on the day of the hearing unless it is sa isfied that some grounds exist for the exercise of its discretion and that a *bona fide* mistake was made. (*Fletcher and Huda, JJ.*) SAIDUNNESSA *v.* TEJENDRA CHANDRA DHAR. 44 I. C. 398.

———S. 149—*Discretion—Appeal.*

Payment of the deficit Court-fees after several orders but in conformity with the last is within S. 149. Discretion exercised properly under S. 149 is unchallengeable in appeal. (*Jenkins, C. J. and Chatterjee, J.*) PRIYA NATH BACHHER *v.* MIANJAN SARDAR. 24 C. L. J. 85 : 29 I. C. 571.

———S. 149—*Grounds for extension of time — Plaint with deficient Court-fee — Extension of time—Court's duty.*

A Court should not extend the period of limitation by allowing time for paying deficient Court-fee when there is no question of any mistake on the part of the plff. (*Coxe and Imam, JJ.*) BAHURIA SAMBHO KOER *v.* HARI HAR PRASAD 41 Cal. 1092 : 24 I. C. 276 : 18 C. W. N. 1071.

———S. 149—Bona fide *mistake—Insufficient Court fee—Extension of time — Regular appeal treated as miscellaneous appeal.*

Where an appeal which ought to have been filed as regular appeal on full stamp was filed as a miscellaneous appeal with a 2 Rs. stamp owing to a *bona fide* mistake, time was granted to make up the deficiency. (*Mookerjee and Holmwood, JJ.*) HARI CHARAN DEY *v.* BAIKUTHANATH. 21 I. C. 866.

———S. 149—Bona fide *mistake in not paying full Court-fees — Deficiency made good after limitation.*

Where full Court-fee is not paid in the first instance through *bona fide* mistake, but the deficiency is made good afterwards, the appellant is entitled to the benefit of S. 149 and accordingly Court can extend the time. (*Martineau and Zafar Ali, JJ.*) MOTI RAM *v.* BHANU RAM. 1923 Lah. 629.

———S. 149—*Deliberate under-payment—No extension to be given.*

Where there is no *bona fide* mistake in the payment of a smaller court-fee and the omission is deliberate. a Court should not extend time to pay up the deficiency. (*Campbell, J.*) RAMJI LAL *v.* SHIBBA. 75 I. C. 667 : 1923 Lah. 309.

———S. 149 — *Undervaluation deliberately made—Extension of time not to be given.*

Where an appellant deliberately omits to pay the necessary court-fee and grossly undervalues his claim he is not entitled to any indulgence under S. 149, C. P. Code. 49 I. C. 871; 3 P. L. J. 74; 44 I. C. 398 ; 1 Lah. 234 Rel. (*Abdul Raoof and Harrison, JJ.*) TIKKAN RAM *v.* BOSA RAM 4 U. P. L. R. (Lah.) 77: 67 I. C. 106: 1922 Lah. 440.

———S. 149—*Extension of time—Grounds for —*Bona fide *mistake.*

A court would not in its discretion under S. 149, C. P. Code, grant time for deficiency in court-fee to be made up in the absence of grounds for the exercise of its discretion, the principal ground being ordinarily that a *bona fide* mistake had been made. 42 I. C. 675; 41 I. C, 398: 1 Lah. L. J 69 foll, (*Scott-Smith and Wilberforce, JJ*). LEKH RAM *v.* RAMJI DAS. 3 Lah. L. J 370 : 57 I. C. 215 : 1 Lah. 234.

———S. 149—*Extension of time—Grounds.*

When the insufficiently stamped memo. of appeal is refiled, extension should not be allowed as ignorance of law or poverty is not an adequate legal ground for extension. (*Shadi Lal, C. J. and Wilberforce, J.*) SHAHU *v.* BAKRI. 67 I. C. 901: 3 Lah. L. J. 237.

———S. 149—*Extension of time to pay proper Court-fee.*

An extension of time will not be allowed for payment of Court-fee for an appeal which has been insufficiently stamped in the absence of satisfactory explanation of the mistake, if any (*Scott-Smith and Jones, JJ.*) FATTEH SINGH *v.* BABU RAO. 67 I C. 130: 3 Lah. L. J. 166.

———S. 149—*Appeal filed on insufficiently stamped memo.—Deficiency made up after limitation—Extension of time.*

Where the deficiency in stamp for a memorandum of appeal is pointed out to the appellant but is nevertheless not made up till long after the appeal is barred by time he is not entitled to the benefit of S. 149, C. P. C. (*Scott-Smith, J.*) WADHAWA SINGH *v.* SUNDAR SINGH. 59 I. C. 689: 21 P. W. R. 1921.

———S. 149—Bona fide *mistake — Deficit Court fee.*

The discretion of the Court is to be exercised and time for payment of deficient Court-fee extended only when a *bona fide* mistake has been made Extension will not be allowed in cases of deliberate attempt to avoid payment (*Scott-Smith and Wilberforce, JJ.*) LEKHRAM *v.* RAMJI DAS. 1 Lah. 234: 57 I. C. 215: 3 Lah. L. J. 370.

———S. 149—Ex parte *order--Order in chambers allowing Court fee to be made up after expiry of limitation, effect of—Orders of judge in chambers.*

A revision application was converted into an appeal after the period of limitation for appeal had expired and the Judge in chambers gave time to make up the deficiency in Court-fee for appeal and the deficiency was made up. It was held that the order of the Judge in chambers was subject to all just exceptions and the appeal was time barred. S. 149 of the C. P. Code was inapplicable to the case. An appeal must be taken to have been filed on the date on which the memo-

C. P. CODE (V OF 1908), S. 149.

randum of appeal is stamped properly. (*Scott-Smith and Leslie Jones, JJ.*) UMED ALI *v.* MUNICIPAL COMMITTEE, JHANG MAGHIANA. 56 I.C. 143: 2 Lah. L. J. 486.

——S. 149—Bona fide *mistake—Insufficient stamp—Extension of time—Appellate Court.*

In the absence of a *bona fide* mistake in the filing of an appeal insufficiently stamped, the Appellate Court is not justified, in the exercise of its discretion under S. 149 of the C. P. Code, in allowing time to the appellant to pay up deficiency in the Court-fee. 44 I. C. 398, foll 49 I. C. 188, dist. (*Scott Smith and Leslie Jones, JJ.*) MUSSAMMAT SATTO *v.* AMARSINGH.
53 I. C. 256: 62 P. L. R. 1919.

——S, 149—*Grounds for—Extension of time—Sufficient cause.*

S. 149 should not be used so as to allow an appellant who files an appeal on insufficient stamps on account of his poverty to pay the balance at his leisure. (*Scott-Smith, J.*) AMTUL QADIR *v.* MUHAMMAD YUSAF. 8 P. L. R. 1919: 49 I C. 871: 37 P. W. R. 1919.

——S. 149—Bona fide *mistake of pleader—Extension of time.*

An appellant filed her memorandum of appeal within time, stamped with a two-rupees Court-fee stamp only owing to a *bona fide* error on the part of her pleader, who on discovering his mistake made up the deficiency after expiry of the period allowed for the appeal. *Held*, that the case was one in which the Court might exercise the discretion vested by S. 149 of the C. P. Code. (*Rattigan, C. J.*) SAHIBJI *v.* PIRU.
49 I. C. 188 : 10 P. R. 1919.

——S. 149—*Delay—Deficient Court fee paid after period of limitation—Appeal.*

The discretion allowed to courts by S. 149 for permitting a deficiency in court-fees to be made up at any time in the course of an appeal cannot be exercised in favour of an appellant unless he shows reasonable diligence in the prosecution of appeal. An appeal was filed with deficient court-fees, on a certain date and the deficiency was made up one year after. *Held*, the appeal should be dismissed as barred by limitation. (*Rattigan and Beadon, JJ.*) DALIJ SINGH *v.* UMARAO SINGH.
130 P. L. R. 1913 : 19 I. C. 788 : 55 P. R. 1913.

——S.149—*Pauper application—Dismissal—Power of court to grant time for payment of court fee.*

When an application for leave to sue *in forma pauperis* is dismissed, the plaint still remains and may be validated by payment of Court fees within a time to be fixed by Court. This depends upon the discretion of the court. (*Krishnan, J.*) BALAGURU NAIDU *v.* MUTHU RATNAM IYER.
18 L. W. 451 : 33 M. L. T 18 (H. C.) :
46 M. L. J. 254 : 76 I. C. 767 :
(1923) M. W. N. 720 : 1924 Mad. 118.

——S. 149—*Pauper appeal — Dismissal—Time for Court-fee.*

Under S. 149 the appellate Court when dismissing an application for leave to appeal as pauper, can grant him time to pay requisite Court-fee and if same is paid within time the Court will admit the appeal. Per *Sadasiva Iyer, J.*—The rejection of an application to sue as pauper carries with it the rejection of the plaint, contained in that application and leaves to the applicant the sole remedy of bringing a fresh suit but the rejection of an application to appeal as a pauper leaves the memorandum of appeal intact. (*Oldfield and Sadasiva Aiyar, JJ.*) NALLAVADIVU AMMAL *v.* SUBRAMANIA PILLAI. 40 Mad. 687: 38 I. C. 617 : 31 M. L. J. 269.

——S. 149—*Court-fees—Discretion—Power of Court.*

Under S. 149 of the C. P. C. a Court has a discretion to allow the payment of court-fee at any time. 12 A. 129 at p. 151 : 21 I C. 337 : 38 B. 41, distinguished. (*Wallis, O.C.J, and Seshagiri Iyer, J.*) AKKARAJU NARAYANA RAO *v.* AKKARAJU SESHAMMA.
26 I. C. 33 : 27 M. L. J. 677.

——Ss. 149, 151—*Time fixed by decree—No extension to be given.*

Defts. judgment-debtors failed to comply with their contract and plaintiff decree-holder got a decree for specific performance on condition of deposit within a certain period. He made the payment 4 days after, but, before the expiry of the period allowed, he applied for correction of the decree by the insertion of certain directions as to what was to happen in the event of his making the deposit. The Court on 20th March allowed the amendment, but in the same order stated that plaintiff decree-holder had failed to make the deposit and was not entitled to any extension of time. Two months before this order, the plaintiff decree-holder had applied for execution and was given possession of the property, the failure to make deposit not having been brought to the notice of the Court. The judgment-debtor in connection with proceedings which culminated in the order of 20th March, applied to be restored to possession and her application was granted, *Held*, in revision, where a definite time is fixed by the decree the Court has no power to extend it, but in any case no extension having been granted plaintiff decree-holder was not entitled to any relief. (*Daniels, J. C.*) DORI LAL *v.* MT. JAMAGA.
72 I. C. 879 : 1923 Oudh 16.

——S. 149—*Delebrater under payment—No extension to be given.*

Where the omission to pay proper Court fee was due not to a *bona fide* mistake but was deliberate time should not be granted under S. 149, C. P. Code, to make up the deficiency. (*Broadway and Martineau, JJ.*) MUHAMMAD MAJID ULLAH KHAN *v.* MUHAMMAD HAMID ULLAH KHAN.
69 I. C. 196.

——S. 149 and O. 7, R. 11—*Deficiency of Court-fee—Subsequent payment—Effect—Difference between suit and appeal.*

Where a plaint is filed in time but with an insufficient court fee, and the deficiency is made good under O. 7, R. 11, no question of limitation arises. The law is otherwise as regards memo-

C. P. CODE (V OF 1908), S. 149.

oranda of appeal. 3 Pat L, J. 74 ref. to. (*Coutts and Macpherson, JJ*.) DEONATH SAHAI *v.* RADHA KANT PRASAD. **3 Pat. L. T. 142 70 I C. 378 : 1922 P. 56 (1).**

——S. 149 and O. 7, R 11 (c)—*Extension of time implied—Plaint—Deficit court-fee.*

Where the plaint is filed within time and the deficit court-fee called for by the Court is paid up even after the time allowed by the Court and the Court accepts the plaint and registers it ; *held* that the suit is not barred by limitation. No express order is required for extending the time for paying up deficit court-fee. (*Dass and Adami, JJ.*) PAWAN KUMAR CHAND *v.* DULARI KUAR. **5 Pat. L. J. 544 : 58 I. C. 216 1 Pat. L. T. 544.**

——S. 149—*Discretion — Reasons for no filing the entire Court-fee must be considered before granting extension.*

To avail of the terms of S. 149, the permission to deposit deficit court fee must be given only after considering the circumstances and reasons for not filing the entire Court-fee in the first instance. (*Jwala Prasad, J.*) FORZAND ALI *v.* ABDOOD HAMID. **60 I. C. 493.**

—— S. 149—*Discretion—Appeal—Propriety of—Deficit Court-fee.*

An Appellate Court cannot go into the question as to whether the lower Court exercised its discretion in making various orders of payment of court-fees if the order is not objected to when made or in the Court which made it. (*Sultan Ahmed, J.*) SURAJ PAL PANDEY *v.* UTIM PANDEY. **56 I. C. 47 : 2 U. P. L. R. 45 (Pat.).**

——S. 149—*Grounds for extension of time—Insufficiency of stamp.*

Where a court-fee cannot be definitely ascertained until record is received or the amount is in doubt, Court may extend time but not where it is purposely not fully paid. (*Chamier, C. J. and Mullick, J.*) RAM SAHA RAM PANDE *v.* LAKSHMI NARAIN SINGH. **3 Pat. L. J. 74 : 42 I. C. 675 : 5 Pat. L. W. 18.**

——S. 149—*Limitation—Deficiency in stamp made up after limitation period, though plaint filed within limitation.*

In the case of a suit in which an insufficiently stamped plaint is filed within the limitation period, though the deficiency in the Court-fee is made up after the limitation period, the suit is deemed to have been instituted on the date of the actual filing of the plaint under S. 149, C. P. C. (*Atkinson and Jwala Prasad, JJ.*) GAYA LOAN OFFICE, LTD. *v* AWADH BEHARI LAL. **1 Pat. L. J. 420 : 37 I. C. 507 : 3 Pat. L. W. 51.**

——S. 149—*No mistake—Time cannot be extended.*

The appellant cannot get any indulgence by extending time for payment of Court-fees, the law upon the point being settled, when there could have been no misapprehension as to the Court-fee payable. (*Pipon, J. C.*) MURLIWAL *v.* VAISHNO DATT. **73 I. C. 788.**

C. P. CODE (V OF 1908), S. 150.

——S. 149—*Application to sue in* forma pauperis *withdrawn—Court fee paid beyond limitation—Suit barred.*

Where the plaintiff applied for permission to sue in *forma pauperis* but withdrew his application on the ground that in another Court his application to sue in *forma pauperis* with respect to a previous suit had been rejected and paid the requisite Court-fees beyond the period of limitation.

Held, his suit was barred and it was not a fit case for the Court to exercise discretion under S. 149. (*Young, J.*) SOOK LAL *v.* LAL CHAND. **1 Rang. 196 : 74 I. C. 835 : 1923 Rang. 256.**

——S. 149 and O. 44, R. 1—*Pauper appeal—Application for leave — Subsequent appeal in regular form—Date of presentation of appeal.*

Where an application for leave to appeal in *forma pauperis* is rejected and a regularly stamped appeal was filed later on it is only on the latter date that the appeal must for purposes of limitation be deemed to have been presented. S. 149, C.P.C., is inapplicable when there are no proceedings actually pending before the Court. (*Twomey, J.*) MGWA THA *v.* ABDUL GANI OSMAN. **5 Bur. L. T. 294 : 18 I. C. 518.**

——S. 150—*'Transfer of business'—Assignment of business within local limits of one subordinate Court to another by the Dt. Judge is not transfer of business—Bengal, Assam and N. W. P. Civil Courts Act*, S. 13 (2).

A decree was passed by the third Subordinate Judge's Court in respect of a claim the cause of action whereof arose within certain local limits. Subsequently the business arising within these limits was assigned to the fourth Subordinate Judge's Court by the District Judge under Sec 13 (2) of the Bengal and Assam Civil Courts Act (XII of 1887).

Held, that the fourth Subordinate Judge's Court could not entertain an application to execute the decree.

An " assignment" of business under S. 13 (2) of Act XII of 1887 is not the same thing as "transfer" of business within the meaning of S. 150 of the Civil Procedure Code. (*Chatterjee and Chotzner, JJ.*) MUNSHI MD. KAZEM ALI *v.* MUNSHI NIAMUDDIN AHMED. **26 C. W. N. 216 : 70 I. C. 210 : 1922 Cal. 41.**

——S. 150 — *Injunction — Disobedience — Transfer of venue—Application for contempt.*

The Court of M. passed an injunction order under O. 39, R. 1, C. P. Code. Subsequently the local jurisdiction as well as the suit in which the injunction was ordered, were both transferred to the Court of D. Thereupon the applicant applied to the Court of D. for punishing the opposite party for contempt for disobeying the injunction. *Held*, that the Court of D. had jurisdiction to entertain the application for punishment for alleged contempt. 26 C. W. N. 216 dss. : 39 M. 907, foll. (*Krishnan and Venkatasubba Rao, JJ.*) MOUNA GURUSAMY NAICKER *v.* SHEIKH MAHOMEDHU RAWTHER. **43 M. L J. 713 : (1922) M. W. N. 743 : 16 L. W. 748 : 46 M. 83 : 1923 Mad. 92.**

C. P. CODE (V OF 1908), S. 150.

——S. 150 and O. 6, R. 18—*Transfer of jurisdiction—Application to set aside* ex parte *decree.* Subsequent to the passing of an *ex parte* decree by the District Munsiff's Court, Penukonda, the properties which were the subject-matter of the suit were under a territorial re-distribution of jurisdiction transferred to the jurisdiction of the District Munsif's Court of Anantapore On an application made thereafter in the District Munsif's Court of Anantapore to set aside the *ex parte* decree, *held* that Court had jurisdiction to set aside the decree under O. 9, R. 13 read with S. 150 of the C. P. Code. The wording of O. 9, R. 13 which declares that an application to set aside an *ex parte* decree may be made to the court which passed the decree, does not take away the power of a Court that has territorial jurisdiction overthe subject-matter of a suit to set aside an *ex parte* decree passed by another Court that originally tried the suit. *Per Krishnan, J.*—S. 150 of the C. P. Code applies not merely to cases where the whole of a business of a Court with reference to the whole of its jurisdiction is transferred to another Court but also to cases of partial territorial adjustment of jurisdiction and the transfer of the business with reference to that part alone to another Court. (*Spencer and Krishnan, JJ.*) SRINIVASA RAO *v.* HANUMANTHA RAO. 65 I. C 727 : 46 M. 1 : 42 M. L. J. 344 : 15 L.W 458: (1922) M.W.N. 349 : 31 M. L. T. 79 (H.C.). : (1922) Mad. 10.

——— S. 150 and O. 21, R. 6—*Territorial jurisdiction—Transfer of—Execution of decree.*

The acquisition of jurisdiction over properties covered by a mortgage decree owing to territorial changes will not confer jurisdiction to entertain an application for its execution for unrealised balance after sale of the properties within its jurisdiction, unless the decree is transferred to the Court under O. 21, R. 6 or the business of the Court where execution was last pending is transferred to it. In the circumstances, the decree is only a money decree. (*Oldfield and Phillips, JJ.*) GULAM KAVIRSHA *v.* BHUVARAHA AYYANGAR. 38 I. C. 152.

——S. 150—*Applicability of—Temporary Sub-Court—Decree—Execution.*

Where a temporary Sub-Court has no defined local jurisdiction and a decree is passed by that Court in a suit transferred to it by the Dt. Court it has no power to execute the decree by attachment of properties situate in places that had not yet been subjected to its jurisdiction but should have transferred the decree for execution to the Court having jurisdiction over the property and sought to be attached since S. 150 has no application to such cases and territorial jurisdiction is a condition precedent to the execution of a decree. 22 I. C. 899 and 17 Cal 699, followed. (*Sadasiva Iyer and Napier, JJ.*) VENKATACHELLAM *v.* SITHAYAMMA. 35 I. C. 296 : 31 M. L. J. 22.

——— S. 150—*Scope of.*

The word "transfer" in the section is not used in a limited sense for transfers under the special provisions of the Code. It implies that the whole business can be transferred to another Court without an order from a superior Court under

C. P. CODE (V OF 1908), S. 151—Amendment.

S. 24. All proceedings are transferred *ipso facto* to the new Court unless the right is reserved to the old Court The new Court has power to continue execution proceedings relating to lands situated in the transferred area pending in the former Court at the time of transfer. (*Ayling and Sadasiva Aiyar, JJ.*) SUBBIAH NAICKER *v.* RAMANATHAN CHETTIAR.

37 Mad. 462 : 26 M. L. J. 189: 22 I. C. 899 : (1914) M. W. N. 205 : 1 L. W. 251 :

[Dissented from in 43 Mad 675: 39 M. L. J. 209 : 28 M. L. T. 75: (1920) M.W.N. 460 : 58 I C 871 : 12 L. W. 217 (F.B.).

——S 151.

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Who can invoke.

——S. 151—*See also* C. P. CODE Ss. 107, 148, 149, 150, 152 and 153.

Amendment.

——S. 151—*Amendment—Clerical error—Court can correct.*

Where a purely clerical error is brought to the notice of a High Court when it is seized of the matter as a Court of appeal, it can correct the error. (*Mears, C J and Piggott, J.*) IQBAL HAIDAR KHAN *v.* WASI FATIMA BIBI. 45 A. 53 : L. R. 3 A. 597 : 74 I. C. 1004 : 1923 A. 368.

C. P. CODE (V OF 1908), S. 151—Amendment.

———S. 151—*Amendment—Co-plaintiff transferred as defendant—Security for costs—Power to order—Past or future.*

Per *Chatterjee, J.* :—On a co-plaintiff being transferred as defendant, he can call on the other plaintiff to give security for costs. The matter being one of amendment only, costs up to date of order can be ordered but not future costs.

Per *Cuming, J.* :—Where as in O. 25, R. 1 and O. 41, R. 10 the C.P Code has provided for security for costs under specific circumstances, an inherent power of Court should not be invoked in cases not falling under either of these. The Court cannot order security for costs in other cases. (*Chatterjea and Cuming, JJ.*) BHAIRABENDRA NARAIN DEB *v.* UDAI NARAIN DEB.

50 Cal. 853 : 1924 Cal. 251.

———Ss. 151 and 152—*Amendment—Consent decree—Variation in terms.*

A Court cannot vary or set aside under S 151, C. P. Code, a consent decree made by it when the decree and *Solehanamah* are not at variance. (*Chatterjee and Sheepshanks, JJ.*) WAJIT ALI *v.* KHURSHED ASSAM. **36 I. C. 239**

———Ss. 151 and 152—*Amendment—Decree—Mortgage decree—Description of property.*

A decree described the mortgaged property as given in the deed but the property was formed into a separate mahal before the institution of the suit. On an application made to amend the decree so as to give the new description, it was held the Court had jurisdiction to amend. (*Carnduff and Chapman, JJ.*) MOHABIR PRASAD CHOUDHURI *v.* CHANDRA SHEKHAR SAHI.

28 I. C. 304: 19 C. W. N. 1021.

———Ss. 151 and 152—*Amendment—Decree.*

The Court has inherent powers to amend or vary a perfected order and to make necessary orders at any time even after an appeal has been preferred against it where the decree is not in accordance with the intention of the Court as gathered from the judgment as a whole. (*Carnduff and Richardson, JJ.*) BRAHAMDEO SINGH *v.* HARMANOGE SINGH. **26 I. C 946 : 18 C.W.N. 772.**

———Ss. 151 and 152—*Amendment—Decree—Inherent power of Courts—Amending decree in accordance with judgment.*

Under S.151 of C. P. C. Courts have inherent power to amend or vary decrees in accordance with judgments after they are signed, but only where it is necessary for the ends of justice, and if a Court acts where it should not have done, the High Court will interfere. (*Mookerjee and Beachcroft, JJ.*) BIBHUTI BHUSHAN PAL *v.* LALIT MOHUN PAL. **23 I. C. 906.**

———Ss. 151 and 152 and O. 20, R. 6—*Amendment—Decree—Decree not correctly representing judgment—Power of Court to rectify—Review.*

A decree, not correctly representing the judgment according to the intention of the Civil Court, can be rectified under Ss 151 and 152 of the C. P. C. and it is not necessary to apply for a review of the judgment. (*Carnduff and Richardson, JJ.*) BARAMDEO SINGH *v.* HARMOGA NARAIN SINGH.

20 C. L. J. 18 : 23 I. C. 419 : 18 C. W. N. 772.

C. P. CODE (V OF 1908), S. 151—Amendment.

———S. 151—*Amendment of decree.*

S. 151 would enable a Court to alter a decree when it does not correctly express what the Court actually decided or intended to decide. (*Campbell, J.*) ASA SINGH *v.* JAGJIT SINGH.

73 I. C. 679 : 1923 Lah. 147 (2).

———S. 151—*Amendment.*

Where the decree has not been signed the Court has power to make alteration to make decree consistent. (*Spencer and Devadoss, JJ.*) GOPALA AIYANGAR *v.* MUMMACHI REDDIAR.

17 L.W. 254 : 74 I. C. 416 : 1923 M. 392.

———Ss. 151 and 152—*Amendment—Decree—Executing Court.*

It is not competent to a Court to amend the decree of another Court transferred to it for execution, even though the error may be obvious. (*Spencer and Ramesam, JJ.*) KORALLA BUCHILINGAM *v.* KORALLA SATYANARAYANAMURTHI.

15 L W. 301 : 65 I. C. 710; 1922 M. 186.

———Ss. 151 and 47—*Amendment—Decree.*

A party to a suit, not appealing against the decree or applying for review of the judgment, cannot contend in execution proceedings that the judgment and decree are erroneous and ask that they should be amended or corrected. (*Sadasiva Aiyar and Moor,e JJ.*) PITCHAYYA *v.* SUBBA RAO.

34 I. C. 787 : 3 L. W. 499.

———S. 151—*Amendment—Pleadings.*

An application to amend a plaint, on the ground that the correct view has subsequently been laid down by the High Court, should be allowed in spite of the fact that the suit is barred by limitation on the date of the application for adjournment to enable plff. to amend. 21 M. L. J. 213, foll. (*Oldfield and Tyabji, JJ.*) VISWANATHA IYER *v.* AIYAVIER. **26 I. C. 383.**

———S. 151—*Amendment —Decree— Patent variance between decree and judgment.*

Notwithstanding the fact that an appeal has been dismissed by it, an appellate Court can amend the decree of the lower Court in case of patent variance between such decree and the judgment. (*White, C. J. and Sankaran Nair, J.*) PAKRAM HAJI *v.* KOVILIATH PANOLI CHERIA THARUVAI. **10 I. C. 96.**

———Ss. 151 and 152—*Amendment—Lapse of time.*

Where the parties allowed a decree to be enforced for 6 years before attempting to amend it, it should not be amended, specially when there is no clerical or arithmetical mistake. (*Prideaux, A. J. C.*) RAJE UDAJIRAM *v.* RAJESHWAR.

67 I.C. 310 : 1923 Nag. 109.

———S. 151—*Amendment—Decree.*

A Court has inherent power to amend a decree for pre-emption and deduct the amount due to the pre-emptor from the vendee on a change of the property sold, from the pre-emption money. (*Lyle, A. J. C.*) SHEIKH ZAHUR AHMED *v.* MOHARAM ALI. **54 I. C. 34 · 2 U.P L.R. (J.C.) 54.**

C. P. CODE (V OF 1908), S. 151—Amendment.

——Ss. 151 and 152—*Amendment—Mistakes in plaint copied in decree—Dismissal of appeal under O. 41, R. 11, C. P. Code.*

Even though a second appeal has been dismissed under O. 41, R. 11, C. P. Code, the High Court has power to amend the plaint and decree so as to rectify a mistake in the description of the properties occurring in the plaint and copied in the decree. (*Mullick and Bucknill, JJ.*) KARTAR RAI *v.* TALEY CHOWDHURY.

1923 Pat. 46 : (1923) P. 218 (1).

——Ss. 151 and 152—*Amendment—Decree—Judgment and decree—Variation—Mistake.*

When a decree made under S. 90, Transfer of Property Act, is on the face of it not in accordance with a previous judgment, the Court will be justified in amending it so to bring it in conformity with the judgment, by the exercise of its inherent powers. (*Sharfuddin and Roe, JJ.*) RAMESHWAR SINGH *v.* JOTINDRA CHANDRA SINHA.

41 I. C. 206 : 2 Pat. L. W. 205.

——S. 151—*Amendment—Decree — Power under the section.*

When after the appointment of a commissioner for making allotment of shares under a preliminary decree in a partition suit, a stranger to the decree applied for amendment of the decree so as to include his name in the decree and also asked for the allotment of a share to him and the Court granted the amendment ordering the *de novo* trial of the whole case, it was held that S. 151 of the Code gave no such power to the court which could only amend the decree in conformity with the pleadings. (*Roe and Jwala Prasad, JJ.*) NANOO THAKUR *v.* KULDIP THAKUR.

37 I. C. 352.

——S. 151—*Appellate Court's power.*

See C. P. Code, S. 107.

Applicability.

——S. 151—*Applicability of.*

S. 151 of Civil Procedure Code does not apply where there is an express provision of law. (*Martineau, J.*) FIRM OF KAHNA MAL BENARSI DAS *v.* FIRM OF KAHNA MAL NATHU MAL.

69 I. C. 718 : 40 P. L. R. 1922.

——S. 151—*Applicability of—Hearing of appeal after death of respondent—Application to set aside.*

Where an appellate Court is asked to set aside the proceedings in an appeal on the ground that on the date of hearing of the appeal the respondent was not living, the procedure is to apply within the period of limitation for a review of the judgment passed in the appeal. S. 151 has no application to the case. (*Prideaux, A. J. C.*) GANGHADAR *v.* JAGANNATH. 54 I. C. 284.

——S. 151—*Applicability—Order certifying adjustment of a decree.*

When there is no application for review, a Court cannot set aside an order certifying adjustment of a decree, unless the order is prejudicial to one of the parties. (*Mullick and Sultan Ahmad, JJ.*) RAM GULAM SAHU *v.* SHAM SAHAI DAS.

1 P. L. T. 663 : 1920 Pat. 358: 62 I. C. 234 : 5 Pat. L. J. 379.

C. P. CODE (V OF 1908), S. 151—Consolidation.

Consolidation.

——S. 151—*Consolidation—Suits can be consolidated without consent of parties.*

More than two suits in the matter of the same trust had been sanctioned and brought in the same Court at the same time on the same subject-matter, but the parties were different. *Held*, that the Judge could consolidate the suits into one for purpose of trial and that he was not exceeding his jurisdiction when he made an express order consolidating such suits even when the parties had not given the consent. (*Piggott and Walsh, JJ.*) DHARAM DAS *v.* DHARAM DAS. 40 I. C. 182.

——S 151—*Consolidation—High Court cannot consolidate suits pending in District or other Courts.*

Though a Court has inherent jurisdiction to consolidate two or more suits pending before it, the High Court has no jurisdiction to entertain an original application for the consolidation of suits pending before a Dist Court and when the suit is pending in different courts the case is still stronger. (*Scott, C. J., Batchelor, Macleod, Shaw, and Hayward, JJ.*) NARAYAN VITHAL *v.* JANKIBHAI SITARAM. 39 Bom. 604: 30 I. C. 560 : 17 Bom. L. R. 655 (F.B.).

——S. 151—*Consolidation—Power to deal with two appeals together.*

In spite of the absence from the Code of Civil Procedure of any provision enabling two cross appeals from the same decree to be consolidated, the appellate Court has inherent jurisdiction in such a case in disposing of the two appeals so to mould its decree as to merge the result of the two appeals into one decree representing the final adjustment of the rights of the parties in all the points raised. (*Mears, C. J., Banerji, Piggott, Walsh and Ryves, JJ.*) GHANSHAM SINGH *v.* BHOLA SINGH. 21 A. L. J. 465 : L. R. 4 A. 265: 45 A. 506 : 74 I. C. 411 : 1923 A. 490 (F.B.).

——S. 151—*Consolidation.*

Actions against different defts. ought not to be consolidated unless issues are similar or parties consent. Consolidation of suits will be made in proper case in the exercise of inherent power. When the same plaintiff for trying the same question brings several actions vexatiously, the Court will interfere and either grant time to plead in all the actions or will stay the proceedings. But this can be done only on terms or in some other way. Consolidation of actions by the same plaintiff against different defendants ought not to be allowed unless the issues are precisely similar or the parties consent. (*Mookerjee and Beachcroft, JJ.*) KALI CHARAN DUTT *v.* MANODA BALA DASI.

17 C. W. N. 526 : 15 I. C. 897: 16 C. L. J. 591.

——S. 151—*Consolidation is an inherent power in an appellate Court and is not barred by absence of application therefor in lower Court.*

The power is inherent in an appellate Court to consolidate a number of appeals provided it is satisfied that it is a fit case for consolidation, having regard to the loss of revenue entailed thereby. Where in respect of several plots of lands sought to be acquired, only one notice was sent to the owner, only one application [illegible] to

C. P. CODE (V OF 1908), S. 151—Consolidation.

and only one reference was made to the District Court, the fact that the award was split by the latter should not prejudice the party entitled to treat it as one single award. That request for consolidation in the lower court was not made does no bar consolidation on appeal. (*Phillips, J.*) VENKU NAIDU *v.* DEPUTY COLLECTOR OF MADURA DIVISION. **45 I. C. 468 : 34 M, L. J. 279**

——— **S. 151**—*Consolidation of suits—Consent of parties.*

A Court has inherent power to consolidate suits and this jurisdiction can be exercised even without the consent of the parties. 17 C, W. N. 526, Ref. (*Coutts and Das, JJ.*) QAZI MAHOMED AFZAL *v.* MAHKUMAR MAHTON. **3 Pat L. T 584: 67 I. C. 1000 : 1922 P. 566.**

———**S. 151 and O. 45, R. 4**—*Consolidation — O. 45, R. 4, C. P C., does not limit power of High Court to consolidate appeals.*

O. 45, R. 4, C. P. C., does not limit the power of the High Court to consolidate appeals. This power is inherent in the High Court and may be exercised for the purpose of saving costs to the parties and also taking security for costs. (*Miller, C. J. and Imam, J.*) HAR PRASAD RAI *v.* BRIJ KISHEN DAS. **3 P. L. J 446: 45 I C. 551: (1918) Pat. 259.**

Contempt of Court.

———**S. 151**—*Contempt of Court—Courts have no absolute power of summarily punishing contempt.*

The effect of the section is not to give absolute power to courts to summarily punish contempts by fine or imprisonment. (*Richardson and Huda, JJ.*) CHOGMAL *v.* EMPEROR.

50 I. C. 981 : 20 Cr. L. J. 373 : 23 C. W. N. 389.

Conversion.

———**S. 151**—*Conversion.*

The petition under S. 151 can be treated as one for review. (*Oldfield and Venkatasubba Rao, JJ.*) ALAMELU AMMAL *v.* RAMA IYER.

31 M L. T. 132 (H. C.) : 16 L W 440 : 43 M. L. J. 290 : 70 I. C. 425 : (1922) M. W. N. 495 : 1922 M 446.

———**S. 151**—*Conversion.*

High Court can condone misapplications of special provisions ; it can convert application for revision into memo. of appeal. The High Court's power cannot be exercised if law is not complied with as regards limitation and court-fees. (*Miller, C. J. and Mullick, J.*) MUSSAMMAT DULHIN SONA KUER *v.* JAMIL AHMED. **48 I. C. 779.**

Costs.

———**S. 151**—*Costs—Order directing costs of commission being realised—If one in execution under S. 47—Appeal.*

An order passed by a Court for the payment of the costs in connection with the execution of a commission recoverable from the parties is an order in favour of an officer of the Court and any proceeding taken to enforce such order is not a proceeding between the parties within the

C. P. CODE (V OF 1908), S. 151—Ends of Justice.

meaning of S. 47 and as such is not appealable. (*Kanhaiya Lal, J.*) GOPAL DAS *v.* GOURI SHANKER PRASAD.

74 I. C 186 : 1924 A. 122.

———**S. 151**—*High Court can order costs in insolvency where third party conducts proceedings.*

The appellate insolvency jurisdiction of the High Court gives it ample power to make an order as to costs of the adjudication in insolvency when the facts of the case show that the proceedings have been an abuse of the process of the Court conducted by another person. (*Sanderson, C. J. and Mookerjee, J.*) KETOKEY CHARAN BANERJI *v.* SARAT KUMARI DEBI. **21 C. W. N 826 : 40 I. C. 999 : 26 C. L. J. 44.**

Dismissal for default.

———**S 151**—*Dismissal for default—Restoration—Appeal.*

The court in a proper case can readmit an appeal dismissed for default. Where the next friend of a minor appellant is of unsound mind, the minor's absence at the hearing cannot be treated as default and his appeal will be re-admitted by court in exercise of inherent powers (*Shah and Crump, JJ.*) SONUBAI BABURAO *v* SHIVAJIRAO.

45 Bom. 648 : 60 I. C 919 : 23 Bom L R. 110.

———**S. 151**—*Dismissal for default—Suit can be restored despite technical objection*

When the application itself shows that it is one for the restoration of a suit, justice should not be denied simply because there is a technical objection to the word "review" which has been employed in the application. As the code cannot be said to be exhaustive, it is not necessary in every case to have the support of a section of the C.P.C. to pass an order not expressly or impliedly forbidden which is required in the interests of justice 33 C. 927 at p. 932, Foll. (*Pelman, J.*) ABDUL RAHMAN SHAH *v.* SHAHAVA.

1 L. 339 : 58 I. C. 748 : 1 L. L J. 188.

Ends of Justice.

———**S 151**—*Ends of justice.*

The section recognises the inherent powers of a Court to make orders to prevent a miscarriage of justice. (*Richards, C. J. and Banerji, J.*) RAMJAS *v.* MAHADEO PERSHAD.

38 All 147 : 36 I. C 585 : 17 Cr. L. J. 537 : 14 A. L. J. 1230.

———**S. 151**—*Ends of justice—Stay of suit—Inherent power—Vexations and oppressive suit—Natural forum avoided by plaintiff— Evidence accessible outside jurisdiction.*

Appeals to the inherent jurisdiction of the Court have to be regarded with great caution. But if having exercised such caution, the court is clearly of opinion that the jurisdiction ought to be exercised, it should not be intimidated from so doing, because no case on all fours is forthcoming from the reported decisions of the High Courts. The Court will interfere in preventing vexatious proceedings which would have the effect to prevent the due administration of justice. The Court will stay an action brought within the jurisdiction, in respect of a cause of action arising out of the jurisdiction, if satisfied that no injustice

C. P. CODE (V OF 1908), S. 151—Ends of Justice.

will be done thereby to the plaintiff, and that the defendant would be subject to such injustice in defending the action as would amount to vexation and oppression, to which he would not be subjected if an action were brought in another and accessible Court where the cause of action arose Where the dealings between the parties were at Rangoon and where the evidence was wholly procurable there and the trouble and expense involved to bring all the evidence to Bombay were great and where the object of the plaintiff in bringing the suit in Bombay was probably to harrass and annoy the defendant and coerce him into a compromise. *Held* that the High Court was justified in staying the action if the plaintiff did not withdraw the action within a time prescribed. (*Marten, J.*) JETHABHAI VERSEY & Co. *v.* AMARCHAND MADHAVJI & Co.
25 Bom. L. R. 713 : 1924 Bom. 90.

———S. 151—*Ends of justice—Abuse of process of Court*

S. 151 has been enacted to deal effectually with abuse of process of Court. The institution of a second suit against the same party for the same relief on the same cause of action is not an abuse of the process of the Court. (*Seshagiri Iyer, J.*) VENKATESHWARA IYER *v.* CHERRSERI MADATHIL RAVUNNI NAIR. **27 M. L. J. 405 : 25 I. C. 597 : (1914) M. W. N. 740.**

———S. 151—*Ends of justice — Conditional decree.*

A Court in India has power to pass a conditional decree as it can impose a condition doing complete justice to the parties. In a suit for ejectment by a vendor, the Court asked him to refund the purchase money, 19 A. 340 and 345 foll. (*Miller and Abdur Rahim, JJ.*) MUTHU VENKATACHALAPATHY *v* PYINDA VENKATACHALAPATHY. **23 M L. J. 652 : 17 I. C. 987 : 12 M. L. T. 579.**

———S. 151—*Ends of justice—Decree-holder permitted to bid on conditions—Failure to fulfil conditions—Powers of Court to refuse to confirm sale.*

Where decree-holder is permitted to bid at an auction sale, subject to certain conditions being fulfilled and he fails to fulfil the condition the court has power to refuse to confirm the sale. (*Miller, C.J. and Coutts, J.*) MT. JANAKBATI *v.* RAMESHWAR. **69 I. C. 872 : 1 P. 235 : 1 Pat. L. R. 179 : 1922 P. 511.**

———S. 151—*Ends of justice.*

The Court has inherent power to do justice between the parties under S. 151 of C. P. Code. (*Das and Adami, JJ.*) CHOWDHURI CHINTAMONI MAHAPATRA *v.* SRIMATI MONMOHINI DEBI.
69 I. C. 200 : 1 P. 149 : 1922 P. 409.

———S. 151—*Ends of justice—Inherent power to revise.*

The High Court has full power to pass proper orders to give relief to parties and it can set aside an order of a Subordinate Court although in the revisional petition, the petitioner has not moved against it. (*Ross, J.*) MAULVI SYED RAZAUR RAHAMAN *v.* ATTAR HUSSAIN.
64 I. C. 496 : 2 Pat. L. T. 789.

C. P. CODE (V OF 1908), S. 151—Execution.

———S 151—*Ends of justice—Wrong execution of decree—Interference.*

When it is brought to the notice of the High Court that its decree is being executed in a manner manifestly at variance with the purport and intention of that decree, then the High Court under its inherent powers of supervision which are expressly saved by S. 151 of the C. P. Code may take such action for the ends of justice as may be necessary to enforce the proper execution of the decree. (*Miller, C. J. and Chapman, J.*) KULDA PRASAD TEWARI *v.* SADHU CHARAN TEWARI. **48 I. C. 107 : 3 Pat. L. J. 435.**

———S. 151—*Ends of justice.*

An order under S. 151 C.P. Code is to be made when the ends of justice require it or to frustrate an abuse of the process of Court. (*Raymond, A. J. C.*) FIRM OF JAI NARAIN BABU LAL, *In the matter of.* **66 I. C. 796 : 1922 Sind 6.**

Enforcement of Order.

———S. 151—*Enforcement of orders—Variation as to details.*

Every Court has power to enforce its own orders made by consent of parties, when by the accident of circumstances the carrying out of such detail according to the agreement can no longer be achieved. If a specific Commissioner is named to do an act and he refuses to act the Court can appoint another though the parties do not agree to it. (*Walsh and Ryves, JJ.*) PARSHOTTAM DOSS *v.* SHIAM LAL. **1923 All. 460 (2).**

Error of Law.

———S. 151. O. 32, R. 3—*Error of law—Court guardian—Appointment of.*

To appoint a guardian *ad litem* without issuing notice to the natural guardian, in contravention of O. 32, R. 3 is illegal and the court has inherent power under S. 151 to correct the errors or mistakes committed by itself. (*Devadoss, J.*) JAMBU AMMAL *v.* NATARAJA PILLAI. **31 M. L. T. 215 : 70 I. C. 867 : 1922 M. 485.**

Execution.

———S. 151—*Execution delayed—Court can award mesne profits.*

Where execution of a decree is pending owing to an appeal from the decree being filed and the appeal is then dismissed, the Court can award mesne profits to the decree-holder for the period for which he was kept out of possession under the orders of Court. (*Leslie Jones and Broadway, JJ.*) ALLAH DIN *v.* CHAIRAGH DIN. **63 I. C 43.**

———S. 151—*Execution sale—Setting aside—Order of confirmation.*

A Court has authority to set aside its order confirming a sale in favour of a person other than the bidder and there can be no question of limitation. (*Stuart, A. J. C.*) ALI MUHAMMAD *v.* ALI KHANUM. **30 I. C. 230 : 2 O. L. J. 216**

———S. 151—*Execution of decree — Decree whether can be transferred to Native State—Inherent power of Court.*

The Code does not authorize Courts in British India to transfer their decrees for execution to a Court of a Native State. But there is nothing to

C. P. CODE (V OF 1908), S. 151—Ex parte decree.

prevent the transmission of certified copies of the necessary documents to such a Court to enable it to execute the decree under any powers conferred by the Legislative Authority of its own State. S. 151 is wide enough to cover this procedure and it is a proper course to pursue where a State has intimated its willingness to have decrees of Courts in British India executed in the Courts of the State. (*Twomey, C. J. and Ormond, J.*) SADAYAPPA *v.* ANNAMALAI. **13 Bur. L. T. 145: 61 I. C. 704.**

Ex parte Decree and Order.

——S. 151—Ex parte *decree—Setting aside.*

The High Court can under the section or under its inherent jurisdiction set aside an *ex parte* decree which is shown conclusively to be irregular by the record. (*Walsh and Stuart, JJ.*) GOBIND SINGH *v.* KALYAN DASS **38 I. C. 673 : 15 A. L. J. 24.**

——S. 151—Ex parte *order—Setting aside.*

A Court has inherent power to set aside an *ex parte* order made under a mistake. (*Karamat Hussain and Tudball, JJ.*) BALMAKUND *v.* ASHFAQ HUSSAIN. **10 A. L. J. 140 : 16 I. C. 677 : 34 All. 518.**

——S. 151—Ex parte *order—Recalling of—Duty of counsel in* ex parte *case.*

A court, which has on an *ex parte* application granted an extension of time to file an appeal can revoke or alter its order before the appeal is admitted. Where an *ex parte* application is made by a party for granting extension of time for filing an appeal, it is the duty of the party to show to the Court the points of law or fact in his favour as well as against him. (*Fletcher and Huda, JJ.*) ISWAR CHANDRAKAPATI *v.* ARJAN. **45 I. C. 725.**

——S. 151 and O. 21, R. 16—Ex parte *order—Setting aside—Application by transferee of decree—Notice to parties*—Ex parte *order.*

An *ex parte* decree obtained in a mortgage suit was transferred, but the transferee did not get his name substituted. No notice under O. 21, R. 16 was served on the decree-holder or the judgment-debtor. The judgment-debtor applied to set aside the *ex parte* decree making only the decree-holder party and the *ex parte* decree was set aside. The transferee thereafter applied for execution. *Held* that the transferee could not proceed with the execution before the order setting aside the *ex parte* decree was set aside and that the court could not set aside the order setting aside the *ex parte* decree under S. 151, C. P. C. (*N. R. Chatterjee and Mullick, JJ.*) BONOMALI BANIKYA *v.* JOY KUMAR BAIDYA. **29 I. C. 673.**

——S. 151—Ex parte *order—Setting aside.*

The Court has an inherent power to deal with an application to set aside an order made *ex parte* and to set it aside on a proper case being substantiated. (*Holmwood and Carnduff, JJ.*) MADHAVANAND RAM *v.* MADHU MAHTTO. **27 I. C. 812.**

——S. 151—Ex parte *order without notice to opposite party—Re-opening of.*

C. P. CODE (V OF 1908), S. 151—Expunging from record.

A judicial order which may possibly affect a party must be made after notice. If it is made *ex parte*, it is implied that the Court will re-open it on the application of the party interested and the Court has inherent power to do so. (*Mookerjee and Beachcroft, JJ.*) AJANT SINGH *v.* SUNDARMALL. **16 I C 567 : 17 C. W. N. 862.**

——S 151—Ex parte *decree—Setting aside—No inherent power.*

There is no inherent power in a Court to set aside an *ex parte* decree by summary procedure and the power of the Court in that connection is limited to the circumstances mentioned in O. 9, R. 13 of the C. P. Code. The inherent power should be exercised not capriciously or arbitrarily but *ex debito justitiæ* on sound general principles and so as not to conflict with the intentions of the legislature. (*Abdur Rahim, O. C. J., Oldfield and Seshagiri Aiyar, JJ.*) GADI NEELAYENI *v.* MARAPPAREDDIGARI NARAYANA REDDI **43 Mad. 94 : 37 M. L. J. 599 : 26 M. L. T 377 : 10 L. W. 606 : (1920) M W. N. 19 : 53 I. C. 847 (F. B.)**

——S. 151 and O. 9, R. 13—Ex parte *decree—Inherent power to set aside — Application filed after time prescribed by Art.* 164, *Lim. Act.*

An application under O. 9, R 13 to set aside an *ex parte* final decree in a mortgage suit which was filed long after the time limited by Art. 164 of the Limitation Act, was dismissed by the first Court on the ground that notice was duly served. The Dt. Judge while agreeing with the finding of the first Court as to the service of notice acted under S. 151 of the Code and set aside the *ex parte* decree on the ground that when it was passed, it was barred by time. *Held*, that S. 151 of the Code cannot be used in that way. Where a definite period of limitation has been prescribed by Art. 164 of the Limitation Act for an application to set aside an *ex parte* decree, the Court would not be entitled, by purporting to act under S. 151 of the Code, in effect to extend that period. 43 Mad. 94 (F. B.) foll. (*Coutts and Ross, JJ.*) AYODHYA MAHTON *v.* MUSSAMMAT PHUL KUER. **65 I. C. 341 : 1 Pat. 277 : (1922) Pat. 61 : 1922 P. 479.**

——S. 151 and O. 21, R. 90—Ex parte *decree or order setting aside.*

A Court can entertain an application to set aside an *ex parte* order under O. 21, R. 90. (*Jwala Prasad, J.*) BHIKAN GIR GOSSAIN *v.* JALPADAT JHA. **62 I. C. 113 : 2 Pat. L. T. 270.**

——S. 151—Ex parte *decree—Decree passed by oversight.*

A Court can set aside an *ex parte* decree passed by an oversight under O. 34, R. 6 as against a person who is not the mortgagor. (*Jwala Prasad, J.*) HANUMAN LAL *v.* RAM PEARI KOER. **60 I. C. 368 : 2 Pat. L. T. 251.**

Expunging from Record.

——S. 151—*Expunging from record.*

Where the judgment of a subordinate court has not been brought before the High Court on appeal or revision the High Court has no power to expunge adverse remarks on the character and credibility of a witness, from the judgment of the

C. P. CODE (V OF 1908), S. 151—Expunging from record.

subordinate court. (*Gokul Prasad and Stuart, JJ.*) DUNN *v.* EMPEROR.

66 I. C. 1005 : 44 All. 401 : 20 A. L. J. 261 : L R. 3 A. 66 Cr. : 4 U.P.L.R. (A.) 165: 23 Cr. L. J. 349: 1922 All. 107.

——S. 151—*Expunging from record—Inherent power.*

Per Abdur Rahim, J. (*Oldfield, J.*, dissenting)—The High Court has power to expunge irrelevant and scandalous matters in the judgments of subordinate Courts on an applica ion by a person not a party to the proceeding The power must be exercised in extremely exceptional cases and with caution. (*Abdur Rahim and Oldfield, JJ.*) *In re:* KRISHNASWAMI AIYANGAR.

47 I. C. 981 : 35 M. L J. 368.

——S. 151—*Expunging from record.*

A Sub Judge, while allowing amendment of a Devasthanam scheme petition, remarked about a trustee that " He did not care a brass farthing for the Devasthanam." *Held*, it was not a case for the High Court to exercise the inherent power of expunging the remarks. (*Sadasiva Iyer and Moore, JJ.*) RAMA BADRA NAIDU *v.* ARUNACHELLAM CHETTIAR. **33 I. C. 608 : 3 L. W. 283.**

Extension of Time.

——Ss. 151 and 148 and O. 34 and 47 — *Extension of time.*

Extension of time cannot be granted for payment of money under a decree in a suit to set aside a mortgage, by which decree the plff. is ordered to pay within one month from the date of the decree. He should not be allowed to calculate his month from the date he got the copies of the decree. (*Ryves and Gokul Prasad, JJ.*) KANDHYA SINGH *v.* KUNDAN. **42 A. 639 : 18 A. L J. 826 : 57 I. C. 16 : 2 U. P. L. R. (All.) 197.**

——S. 151 and O. 26, R. 14 — *Extension of time—Commissioner's report—Inherent power.*

In a partition suit the court has inherent power to fix time for filing objections to the report of the Commissioner and to reject objections filed afterwards. (*Banerji and Lindsay, JJ.*) SIRAJUDDIN *v.* SHARFUDDIN. **50 I. C. 152 : 17 A. L. J. 498.**

——S. 151—*Extension of time.*

S. 151 of C. P. C. does not give the court any new powers and the court cannot extend the time fixed by Art. 163 of the Lim. Act for setting aside dismissal for default. (*Broadway, J.*) BANO MAL *v.* BANO MAL. **27 P. W. R. 1920 : 55 I. C. 55 : 116 P. L. R. 1920.**

——S. 151— *Extension of time — Setting aside sale under O. 21, R. 92.*

Courts cannot extend the time for making deposits prescribed by the Code and their inherent powers under S. 151, C. P. C. cannot be invoked for the purpose. (*Sadasiva Aiyar and Moore, JJ.*) VENNISAMI THEVAR *v.* PERIASAMI THEVAR. **19 M. L. T. 192 : (1916) 1 M. W. N. 179 : 33 I. C. 996 : 3 L. W. 271.**

——S. 151 and O. 41, R. 33 — *Extension of time—Decree for specific performance — Fixing time for payment—Application to extend time.*

C. P. CODE (V OF 1908), S. 151—Fraud.

In a suit for specific performance of a contract of sale, neither the original nor the appellate Court has jurisdiction to extend the time fixed by a decree for specific performance of a contract to sell. 26 I. C. 63, foll. 39 B. 175, Doubted. (*Srinivasa Aiyangar, J.*) GOPALA AIYAR *v.* SANNASI. **19 M. L. T. 137 : 32 I. C. 401 : 3 L. W. 29**

——Ss. 151 and 148 — *Extension of time fixed by the decree.*

Time fixed by a decree cannot be extended under S. 151 of the C P Code. That section is not meant to empower the executing court to alter the decree, or in any part affect its finality. (*Mitra, A. J. C.*) KOMAL SINGH *v.* JAGANNATH MURAT SINGH. **49 I. C. 840 : 15 N. L. R 39.**

——S. 151, O. 21, R. 84—*Extension of time—Officer conducting sale cannot extend time for deposit.*

An officer conducting a Court sale has no inherent power to extend the time for depositing the 25 per cent of the purchase money, which is to be deposited immediately. (*Stuart, A J.C.*) ALI MUHAMMAD *v.* ALI KHUNAM. **30 I. C. 230 : 2 O. L. J. 216.**

——S. 151 — *Extension of time — Setting aside* ex parte *decree.*

No appeal lies against refusal of an application for setting aside *ex parte* decree nor can time be extended under S. 151. (*Coutts and Ross, JJ.*) AJODHYA MAHTON *v.* PHUL KUER. **1 Pat. 277 : 65 I. C. 341 : (1922) Pat 61 : 1922 P. 479.**

——S. 151—*Extension of time—Decree—Time fixed.*

The court has power under S. 151 to extend time on an application made after the date fixed for payment of money, if it is necessary for the ends of justice, in a suit for specific performance of a contract to sell. (*Fox, C. J.*) KO BAT *v.* MAUNG KYA BAW **32 I. C. 509 : 9 Bur. L. T. 83.**

Fraud.

——S. 151 and O. 21, R. 2—*Fraud—Plea of, should not be investigated save where it works injustice—Uncertified adjustment cannot be recognised by Court—Question relating to satisfaction of decree must be tried by executing Court.*

A question relating to the satisfaction of a decree is a question arising in execution which must be tried by the executing court under S. 47 of the C. P. C. The Court ought not to recognise an uncertified adjustment. Defts. should not, by the plea of fraud, be permitted after the lapse of many years to question a title acquired at a court sale which was not challenged by the judgment debtor though she was alive at the time of the trial of the suit. Of course the Court has inherent power to investigate questions of fraud for preventing injustice, but there is no question of injustice here. (*Scott, C. J. and Shah, J.*) MORU *v.* HASAN. **48 I. C. 135 : 20 Bom L. R. 929.**

——S. 151—*Fraud — Fraudulent decree—Setting aside.*

Not only has the court the power but it is its duty to set aside a consent decree obtained by fraud practised upon the court when apprised of

C. P. CODE (V OF 1908), S. 151—Fraud.

it It is an inherent power of every court to correct its own proceedings when it has been misled. (*N. R. Chatterjee and Greaves, JJ.*) PEARY CHOWDHURY *v.* SONOORY DAS.
27 I. C. 628 : 19 C. W. N. 419.

———S. 151—*Fraud—Order obtained by—Setting aside.*

A court can vacate an order obtained by manifest fraud on it, in the exercise of its inherent power under S. 151 C. P. C. (*Oldfield and Napier, JJ.*) VILA KATHALA RAMAN *v.* VAYALIL PACHU. 25 I. C. 213 : 27 M. L. J. 172.

———S. 151—*Fraud—Consent decree—Setting aside—Factum of consent disputed—Fraud—Power of court.*

A court has inherent power to correct its own proceedings when it is satisfied that in passing a particular order, it was misled by any party. Where in a consent decree, a party alleges that its consent was obtained by fraud the court has no inherent power to investigate into the matter. But the factum of consent can be investigated. (*Das and Kulwant Sahay, JJ.*) SADHO SARAN RAI *v.* ANANT RAI. (1923) Pat 197 : 2 P. 731 : 1923 P. 483

Guardian and Ward.

———S. 151—*Guardians and Wards Act (VIII of 1890), Ss. 39, 47 and 48.*

The District Judge has ample powers under S. 151 of the C.P. Code to recall the records of an order made under the Guardians and Wards Act on being apprised that the order was made on a misrepresentation of facts. (*Mookerjee and Beachcroft, JJ.*) RASHMONI DASI *v.* GANADA SUNDARI DASI. 20 C. L. J. 213 : 26 I. C. 275 : 19 C. W. N. 84

Injunction.

———S. 151—*Injunction—Code not exhaustive.*

The C. P. Code is not exhaustive. The Court possesses inherent powers to act *ex debito justitiae.* A person, asking the Court to exercise its discretionary jurisdiction, must make out a strong case and must show that there is no other remedy open to him by which he can protect himself from the consequences of the injury complained of. The Court will issue a temporary injunction, if plaintiff shows that injunction is an appropriate relief and unless defendant is forthwith restrained, irreparable injury will follow. (*Shadi Lal and Martineau, JJ.*) THE FIRM OF MANDHAR LAL MAHABIR PERSHAD, DELHI *v* FIRM OF JAI NARAIN BABU LAL. 55 I. C. 403 : 2 Lah. L. J. 283.

———S. 151—*Injunction—Breach of—Sale held in contravention of—Validity.*

Sale held in contravention of the order of the court is not valid. (*Oldfield and Devadoss, JJ.*) REPAKA MAMILLAYYA *v.* ADDEPALLI VENKATARATNAM. 45 M.L.J. 312 : 77 I. C. 12 : (1923) M. W. N. 672 : 1924 M. 100.

———S. 151—*Injunction restraining sale—Sale ignoring injunction.*

Pending a partition suit, the District Munsiff issued an injunction restraining an auction sale being held, and soon after refused an application of the judgment-debtor to postpone the sale. He then confirmed the sale ignoring the injunction order. On appeal the sale was set aside as illegal. *Held*, though a legal act done in breach of an injunction is still valid the sale in such circumstances would be an abuse of process of court and should be set aside under the inherent powers of the Court. (*Oldfield and Devadoss, JJ.*) REPAKA MAMILLAYYA *v.* ADDEPALLI VENKATARATNAM. (1923) M. W. N. 672 : 45 M. L. J. 312 : 77 I. C. 12 : 1924 M 100.

C. P. CODE (V OF 1908), S. 151—Jurisdiction.

Insolvency Court.

———S. 151—*Insolvency Court—Correction of mistakes.*

An insolvency Court has the same jurisdiction that the ordinary courts of law possess under the C. P. Code to correct any mistake either of a clerk or the parties themselves upon a question of fact when a mistake is proved. (*Walsh and Stuart, JJ.*) RAM CHANDAR SARUP *v.* MAZHAR HUSSAIN. 51 I. C. 55 : 1 U. P. L. R. (H. C.) 69.

Invention of Procedure.

———S. 151—*Invention of procedure.*

A court is not justified in applying its powers of inherent jurisdiction to introduce a new form of procedure for which no provision is made by the Indian law. (*Newbould and Cuming, JJ.*) GOUR CHANDRA GOSWAMI *v.* NABADWIB MUNICIPALITY. 1922 Cal. 1 (1).

Issues.

——— S. 151—*Issues—Power to frame.*

A Court has inherent power to frame issues going to the root of the matter in controversy between the parties at any stage of the case. (*Mr. Ameer Ali.*) SHAMU PATTAR *v.* ABDUL KADIR ROWTHAN. 35 Mad. 607 : 39 I. A. 218 : 16 C. W. N. 1009 : 23 M. L. J. 321 : 12 M. L. T. 338 : (1912) M. W. N. 935 : 10 A. L. J. 259 : 14 Bom. L. R. 1034 : 16 I. C. 250 : 16 C. L. J 596 (P.C.). [Affirming 31 Mad. 215 : 18 M. L. J. 219 : 3 M. L. T. 300.]

Jurisdiction.

——— S. 151—*Jurisdiction—Power to determine.*

A Court has jurisdiction to determine that it has no jurisdiction to deal with a matter brought before it. Even if an order has been passed it can be recalled if it transpires that it has been made without jurisdiction. (*Mookerjee and Beachcroft, JJ.*) RASHMONI DASI *v.* GANADA SUNDARI DASI. 20 C. L. J. 213 : 26 I. C. 275 : 19 C. W. N. 84.

———S. 151—*Jurisdiction—Security for mesne profits in ejectment suit—Court cannot order.*

Suits for possession of landed property usually include a prayer for mesne profits. Although the plaintiff has often a reasonable fear that if he gets a decree he will fail to realise the mesne profits (because the money would be spent up by the party in possession who may not possess any other property), yet the Code has made no express provision for an order requiring the defendant to furnish security for mesne profits in a

C. P. CODE (V OF 1908), S. 151—Jurisdiction,

suit for ejectment. Where the Court makes an order to that effect it constitutes a material irregularity sufficient to justify action under S. 115 of the Code of Civil Procedure. (*Dalal and Simpson, A. J. Cs*) BHAGWAN BAKHSH SINGH *v.* SURENDRA BIKRAM SINGH. 10 O. L. J. 209 : 74 I. C. 335 : 1924 Oudh 11.

——S. 151—*Jurisdiction—Appeal in non-appealable cases.*

Under S 151 of the Code, the Court has no inherent power to allow the appeal against the order of remand where no right of appeal is given by the Code. That section can never be invoked in any case unless a Court has jurisdiction to entertain the case. It cannot be invoked to give the Court jurisdiction, if it does not possess it otherwise. (*Ashworth, J. C.*) (SHEIKH) FARZAND ALI *v.* EKADASHI. 26 O. C. 10 : 10 O. L. J. 36 : 73 I. C. 591 : 9 O. & A.L.R. 332 : 1923 Oudh 177.

——S 151—*Jurisdiction—Power to alter order of predecessor in office.*

Apart from the power to correct clerical or arithmetical errors, or to review a judgment, a court has no inherent power to alter an order passed in Court. (*Das and Foster, JJ.*) BISHESHWAR PARTAP NARAIN SAHI *v.* ASARFI SINGH. 2 Pat. L. R. 155 : 74 I. C. 110 : 1924 P. 136.

——S. 151—*Jurisdiction—Recalling an order passed by the predecessor is beyond jurisdiction and invalid.*

If an order of a Sub-Judge in execution is erroneous the proper course for the party aggrieved is to apply to the High Court under S. 115, Civil Procedure Code. It is well settled that the Court has inherent power to recall an order which has not been perfected but no power whatever to recall one which has been perfected. Therefore a successor has no power to recall the perfected order of his predecessor. 12 Ch. D. 88 and 10 C. L. J. 396 foll. (*Coutts and Das, JJ.*) HIRO SINGH *v.* KAZI SYED AHMAD HUSSAIN. 69 I. C. 742 : 1922 P. 204.

Letters of Administration.

——S. 151—*Letters of administration—Revocation of.*

It is open to a Dt. Judge acting under S. 114 C. P. C. or under the inherent powers of the court to reconsider an order granting Letters of Administration. (*Richards, C. J. and Piggott, J.*) PARSHRAM *v.* NEK RAM. 37 All. 380 : 29 I. C. 133 : 13 A. L. J. 44.

Limits of.

——S. 151—*Limits of—Other remedy available.*

The section applies only when there is no other express provision of law. (*Mookerjee and Newbould, JJ.*) MADHU SUNDAN PATITUNDA *v.* RASH MOHAN SEN PODDAR. 30 I.C. 38 : 21 C. L. J. 614.

——S. 151—*Limits of—Statutory provisions.*

S 151 does not authorise the court to override the express provisions of Limitation Act or Bengal Tenancy Act. (*Chitty and Coxe, JJ.*) RAJ KUMAR SEN *v.* AMODACHARAN SEN. 9 I. C. 246.

C. P. CODE (V OF 1908), S. 151—Mistake.

——S. 151—*Limits of—Limitation Act.*

S. 151 of the C. P. C. does not authorise the Court to exercise its inherent powers so as to break the provisions of the Lim. Act. (*Chevis and Le Rossignol, JJ.*) BISSA MAL *v.* KESAR SINGH. 1 Lah. 363 : 58 I.C 789 : 2 Lah. L. J. 249.

——S. 151—*Limits of—Limitation Act, S. 3—Object.*

S. 151, C.P.C. does not override S. 3. Lim. Act and a Court cannot ignore its provisions under the guise of acting in its inherent power. (*Chevis, J.*) LAL DEVI *v.* AMARNATH. 57 I. C. 15 : 2 U. P. L R. (Lah.) 128.

——S. 151—*Limits of inherent power—Setting aside decision of Superior Court.*

S. 151 does not include a power to set aside a deliberate decision of a Superior Court. (*Rattigan and Chevis, JJ.*) MUSSAMMAT HUSAINA *v.* MUSAMMAT SAHIB NUR. 254 P. L. R. 1913 : 20 I. C 3 : 159 P. W. R 1913.

——S. 151—*Limits of—Statutory bar.*

The inherent power of court under S. 151, C. P. C. cannot be invoked against a direct statutory bar. (*Kanhaiya Lal and Daniels, A.J.Cs.*) MAHADEV KUNWAR *v.* BAHU RANI. 50 I. C. 180 : 6 O. L. J. 55.

——S. 151—*Limits of—Principles regulating exercise of inherent power.*

In exercising the inherent powers, the decision of the court should be based on general legal principles subject to any special provisions contained in the Code, meeting the necessities of the case in question. (*Pratt, J C.*) MA ON ME *v.* MA PYA GYI. 56 I. C. 255 : (1919) 3 U. B. R, 198.

Mistake.

——S. 151—*Mistake—Rectification of.*

The Court has inherent power to correct its own order based on a mistaken basis. (*Mookerjee, J.*) KALYAN SINGH *v.* RAMGOLAM SINGH. 56 I. C. 4 : 31 C. L. J. 48.

——S. 151—*Mistake—Rectification of.*

Every court has an inherent power to take steps for the preservation and accuracy of its records and to amend them when it is found that what has been recorded does not accurately represent what has been directed by the court. (*Mookerjee and Beachcroft, JJ.*) BAULCHANDRA SEN *v.* SIRISHCHANDRA SEN. 19 I. C. 916 : 19 C. L. J. 251.

——S. 151—*Mistake—Rectification—Rights of third parties.*

The Court has got inherent power to correct its own mistakes arising from accidental omission, slip, etc., but all persons not parties to the action but who have acquired interests on the existing record acting in good faith and being purchasers for valuable consideration without notice of the existence of matters made clear by the amendment, are not prejudiced thereby without a hearing by the Court determining that they have no equities as entitled them to be exonerated from the effect of the amendment. (*Mookerjee and Carnduff, JJ.*) LANGAT SINGH *v.* JANKI KOER. 39 Cal 265 : 12 I. C. 151 : 14 C. L. J. 461.

C. P. CODE (V OF 1908), S. 151—Mistake.

——— **S. 151**—*Mistake—Rectification—Wrong assumption of facts.*

A Court ought to correct its order based on wrong assumption of facts. (*Mookerjee and Casperz, JJ.*) BHUBANESWARI KOER *v.* AJODHYA SINGH. **11 I. C. 102 : 15 C. L. J. 339.**

———**Ss. 151 and 152**—*Mistake—Correction of.*

A Judge committing by oversight or otherwise a mistake injurious to either party should correct the same and amend the decree under the power given for the purpose by the above sections. (*Johnstone, C. J.*) JHANDA MAL *v* SARDAR BEGAM. **37 I. C. 378 : 169 P. W. R 1916.**

———**S. 151**—*Mistake—Clerical error in an award.*

A mere clerical error in an award can be set right under S. 151, C. P. C. (*Johnstone, J.*) THAKARDAS *v.* RAM DAS. **13 P. W. R 1914 : 23 I.C. 950 : 114 P L. R. 1914.**

———**S. 151**—*Mistake—Correction of.*

Where the order of a court fails to give effect to its intention it is the duty of the party to have it corrected. The court has power to do so. (*Wallis, C.J., Abdur Rahim and Srinivasa Iyengar, JJ.*) BALIDE KAMAYYA *v.* PRAGADA PAPAYYA. **40 Mad. 259 : 21 M. L. T. 82 : (1917) M.W.N. 217 : 256: 5 L. W. 558: 37 I. C. 414 : 32 M. L. J. 477 (F. B.)**

———**S. 151**—*Mistake of—Compromise decree—Setting aside—Remedy of party.*

Where an application to set aside the decree passed in pursuance of compromise by a lady whose signature was obtained by mistake or fraud of an agent, the remedy is by way of review petition. (*Oldfield and Venkatasubba Rao, JJ.*) ALAMELU AMMAL *v.* RAMA IYER. **43 M.L.J. 290 : 70 I. C. 425: 16 L. W. 440: (1922) M. W. N. 495: 31 M. L. T. 132: 1922 M. 446.**

———**S. 151**—*Company—Representation—Defect in—Effect of decree or order.*

Where a corporation or company is made a party to a proceeding but is not represented by a person having legal authority to do so and an order is passed adversely to it, it is competent to the proper officer to apply for vacating that order after hearing the person through whom the corporation or company can legally act. In such a case it cannot be said that the corporation or company is not a party simply because a wrong person represents it. It is open to a court to act under S. 151, C. P. C., and set aside the order passed under the above circumstances and it is not necessary to proceed by way of separate suit. But a stranger to the litigation cannot intervene after the suit or proceedings are disposed of and claim the protection of S. 151 or appeal to the inherent powers of the court to do justice. (*Kumaraswami Sastri, J.*) PERUMAL MOOPAN *v.* VENKATACHARIAR. **42 M. L. J. 563: 15 L. W. 586: (1922) M. W N. 268: 31 M. L. T. 35 (H. C.) : 68 I. C. 910 : 1922 Mad. 193.**

———**S. 151**—*Mistake—Grounds for setting aside.*

An act of Court may be set aside if induced by the mistake of parties. (*Benson and Sundara*

C. P. CODE (V OF 1908), S. 151—Reconstruction of Records.

Aiyar, JJ.) RAJA OF KALAHASTI *v.* MAHARAJAH OF VENKATAGIRI. **38 Mad. 387: 14 M. L. T. 320: 21 I. C 389 : 25 M L. J. 198.**

——— **S. 151**—*Mistake—Ignorance of fact.*

The Court has inherent power, in fact it is its duty, to rectify mistakes in judicial orders arising from the ignorance of the court or of its subordinate officers. (*Hallifax, A J. C.*) MAROTI SONAR *v.* CHINTAMAN SONAR. **69 I. C. 112 1924 N. 58.**

——— **Ss. 151 and 152**—*Mistake—Clerical error—Decree—Duty of Court to rectify.*

The Court which decided an appeal wrote a judgment allowing it but in the decretal portion concluded by remarking that the appeal failed and was dismissed. *Held* that it was incumbent upon the court to rectify the mistake at any time that it was brought to its notice. 7 A. 875, R. (*Dalal, A. J. C.*) MT. MAHESHA *v.* RAMESHAR. **10 O. L. J. 24: 71 I. C. 563 : 1923 Oudh 173.**

——— **Ss. 151 and 144**—*Mistake—Power to rectify.*

A court can correct a result which amounts to an abuse of the process of court and put the parties in the position in which they would have been, if the court had not erroneously passed an order which had to be corrected in appeal. (*Mullick and Jwala Prasad, JJ.*) SUKHDEO DAS *v.* RITO SINGH. **1 Pat L. W. 551: 39 I. C. 763 : 2 Pat. L.J. 361.**

Pauper Appeal.

———**S. 151 and O. 44, R. 1**—*Pauper appeal—Appeal to be continued* in forma pauperis—*Discretion.*

Assuming the Court has jurisdiction to allow an appellant to continue an appeal *in forma pauperis* it can be exercised only if on a perusal of the judgment and decree appealed from and the appeal memorandum the Court is of opinion that that decree is contrary to law. (*Sadasiva Iyer and Burn, JJ.*) SOLAIAPPA CHETTY *v.* LAKSHMANAN CHETTY. **38 M L.J.146 : (1920) M. W. N. 277: 54 I. C 761: 10 L. W. 659.**

Receiver.

———**S. 151, O. 40, Rr. 1 to 4, and O 43, R. 1 (a)**—*Receiver—Power to discharge—Prayer to put in possession of properties—Inherent power of court.*

The C. P. Code does not specifically provide for the discharge or removal of a Receiver, or for appeals against orders of discharge or removal of Receivers. The power to discharge and remove or to give directions to a Receiver are inherent in the Court which appointed the Receiver and the Appellate Court has got all the powers of the Original Court. The prayer in a petition to discharge the Receiver and put the parties in possession is a prayer for appointment of the petitioners as Receivers. (*Sadasiva Iyer, J.*) SUBRAMANYA IYER *v.* MUTHU LAKSHMIAMMAL. **17 I. C. 583 (1912) M. W. N. 1208**

Reconstruction of Records.

———**S. 151**—*Reconstruction of records—Procedure.*

Where owing to accident or other cause records of a Court of justice have been dest-

C. P. CODE (V OF 1908) S. 151—Reconstruction of records.

or lost, the Court has an inherent power to reconstruct its records. An appellate Court has the same power to reconstruct the records of the Court from which an appeal lies to it. In reconstructing the record the court may have to go very near to rehearing but the Court will always apply its mind to ascertain not what the rights of the parties were, but what the destroyed record of the suit was and on that record, when reconstructed it will have to act on the ordinary principles on which it would have acted if the original record had been before it. Affidavits, counter affidavits, the hearing of witnesses and admission of copies are all methods by which the Court may reconstruct the record and an appellate Court may also send the case back to the lower Court for a finding as to the state of record. The best evidence of what took place in the Trial Court would be founded in the judgment of that Court if it is available. 7 W.R. 18 Ref (*Schwabe, C.J., Oldfield and Ramesam, JJ.*) MARAKKARUTTI *v.* VEERANKUTTY. **32 M. L T. (H.C.) 352: 18 L. W. 21: (1923) M.W.N. 471: 73 I.C. 1050: 46 Mad. 679: 44 M. L J. 673: 1923 Mad. 647 (F. B)**

——— S. 151—*Reconstruction of records—Loss of original.*

A Court has inherent power to construct records which had disappeared from its custody. (*Sadasiva Iyer and Napier, JJ.*) VENKATAMMA *v.* MANIKKAM NAYANI VARU. **26 I. C. 244: 16 M. L. T. 399.**

——— S. 151—*Reconstruction of records.*

Where a judgment has been lost, the proper course for the judge is to write it from memory and from materials before him and place it on record. 8 C L. J. 521: 11 C.L.J. 243, Ref. (*Sadasiva Iyer, J.*) KAMAKSHIAMMA *v.* EMPEROR. **14 M. L. T. 317: 38 Mad. 498: (1913) M.W.N. 862: 21 I. C. 467: 14 Cr. L. J. 595: 25 M.L.J. 445.**

——— S. 151—*Reconstruction of records.*

If any credible witness who read the judgment or the part of the judgment which contained the decision can depose to what he read a decree can be drawn up. There is nothing in the C. P. Code, to prevent that. (*Mac Coll, A. J. C.*) MANUG CHIT *v.* MAUNG THA KU. **4. U B. R. 135: 1923 R. 113.**

Reference.

——— Ss. 151 and 152 — *Reference to Chief Court—No appeal lies.*

No reference to the Chief Court can be made under Ss. 151 and 152 as there can neither be a second appeal nor first appeal at all. (*Shadilal and Le Rossignol, JJ.*) LABHU RAM *v.* AMIR CHAND. **73 P.L.R. 1916: 35 I. C 633: 105 P. W. R. 1916.**

Refund.

——— S. 151—*Refund of money—Realization in excess in execution.*

When a decree entitles two persons to recover mutual sums from each other, the person entitled to the greater sum has a right to take out execution for the balance after deducting the smaller sum under O. 21, R. 19. If he fails to make this application the Court can under S. 151 order the refund of the sum taken in excess. (*Chatterjee and Panton, JJ.*) ANANDA MOHAN *v.* ATUL CHANDRA. **56 I. C. 753: 24 C. W. N. 465.**

C. P. CODE (V OF 1908), S. 151—Refund.

——— S. 151—*Refund of money—Wrongly paid out—Deposit—Payment made wrongly without notice—Powers of Court.*

Money deposited by a person on the faith of a conditional order directing enquiry as to who was entitled thereto, does not cease to be the property of the depositor. If the money is paid out to a person not entitled without notice to the depositor, the court has full authority to compel that person to bring back such money into court to be paid to the other party entitled. The Court has inherent power to guard against an abuse of its process and to ensure that its orders do not operate to the prejudice of persons who had no notice of its proceedings. (*Mookerjee and Roe, JJ.*) HARINATH *v.* HARI DAS ACHARJA. **43 Cal. 269: 20 C. W. N. 188: 29 I. C. 580: 23 C. L. J. 163.**

——— S. 151—*Refund of money—Payment out of Court—Power to order refund.*

The Court has inherent power to recall money paid out of Court in a land acquisition case. (*Mookerjee and Beachcroft, JJ.*) JOGESH CHANDRA RAI *v.* YAKUB ALI. **21 I. C. 111: 17 C. W. N. 1057.**

——— S 151—*Refund of money—Auction sale set aside.*

The Court can under the section direct the decree-holder to refund the money paid to him through the Court by the auction purchaser on the auction sale being set aside. (*Rattigan, J.*) BABU LAL *v.* SUKH DEO SINGH. **105 P.W.R. 1913: 19 I C. 439: 172 P. L. R. 1913.**

——— S. 151—*Refund of money—Deposit as security.*

Per Spencer, J.—The new C. P. Code contains no provision for the refund of amounts deposited as security, Courts can deal with them under S. 151, (*Abdur Rahim and Spencer, JJ.*) SAMINATHA PATHAN *v.* SORANATHA AMMAL. **22 M. L. J. 190: 10 M.L.T. 426: 12 I. C. 692: (1911) 2 M.W.N. 432.**

——— S. 151—*Refund of court-fee—Inherent power.*

The appellants in an appeal applied for the grant of a certificate for renewal or refund of the value of stamps worth Rs. 1,627-8-0 used on a memorandum of appeal which was returned to the appellants by the order of the High Court dated 22nd November 1922, because the memorandum of appeal was not properly stamped. An application was made to the Collector of Patna for renewal or refund of the stamps used on the memorandum of appeal, but he refused the application by his order of the 6th of December 1922. The appellant then moved the Commissioner who by his order of the 11th January 1923 directed the petitioners to obtain a necessary certificate for renewal from the taxing Officer of the High Court. *Held* that even in the absence of any rule the High Court has inherent power under S 151 of the Code of Civil Procedure to grant the certificate asked for. (*Jwala Prasad and Adami, JJ.*) BHUANESHWARI PRASAD *v.* KISHEN DAYAL BHAGAT. **4 Pat. L. T. 504: 70 I.C. 405 (1): 1923 P. 600.**

C. P. CODE (V OF 1908), S. 151—Refund.

——S. 151—*Refund.*

Deposit in Court was withdrawn by person having no right or title. Order for refund was requested and it was held that executing Court could decide the matter. (*Miller and Jwala Prasad, JJ.*) GOPAL RAI *v.* RAMBHANJAN RAI. 1 P. 386 : 65 I. C. 307 : (1922) Pat 53 : 3 P. L. T. 754 : 1922 P. 166.

——S. 151—*Refund of money—Execution sale—Setting aside—Purchase money withdrawn by purchaser—Sale subsequently confirmed—Refund by purchaser—Liability.*

Where a Court sale after having been set aside before is subsequently confirmed, the auction-purchaser is bound to refund the purchase money withdrawn by him from court when the sale was originally set aside. In a summary proceedings for refund of money, the court should not enter into an adjudication between an auction-purchaser and a person alleged to be the real auction-purchaser. (*Mullick and Thornhill, JJ.*) DALIP NARAIN SINGH *v.* BAIJNATH GOENKA. 5 Pat. L. W. 132: 46 I. C. 275: (1918) Pat. 281.

——S. 151—*Refund—Court-fees—Payment of, by mistake.*

Section 151 of the Civil Procedure Code empowers the Courts to order refund of Court-fees which was paid by mistake. (*Miller, C. J. and Ali Imam, J.*) CHANDRA HARI SINGH *v.* TIPAN PROSAD SINGH. 3 P. L. J. 452: 46 I. C. 271 : (1918) Pat. 273.

Remand.

——S. 151—*Remand.*

See also O. 41, Rr. 23, 25.

——S. 151—*Remand—Case not properly understood—Appeal, Second.*

Where both the Primary and the First Appellate Court gave a decision in a case without understanding it, it is not a proper decision on the merits and the High Court should, in second appeal, act under S. 151 of the Code and remit the case for retrial. (*Lindsay and Stuart, JJ.*) RANCHHOR DAS *v.* HAR KISHEN DAS. 19 A. L. J. 553: 63 I. C. 501: 3 U. P. L. R. (A.) 87.

——S. 151—*Remand—Adjournment, refusal to grant—Appeal.*

An order refusing an adjournment is appealble, and the Appellate Court has power to set aside the decree and order a retrial if the adjournment had been wrongly refused. (*Macleod, C. J. and Shah, J.*) JETHA LAL *v.* VARAJLAL. 63 I. C. 478: 23 Bom. L. R. 769.

——S. 151—*Remand—Powers of Court under Code.*

The appellate Court has no jurisdiction to remand the case to a trial court under O. 41 R. 23, C. P. C. (*Greaves and Ghose, JJ.*) RADHAKRISHNA SAHA *v.* KAMALAKAMINI. 35 C. L. J. 345 : 70 I. C. 547: 1922 Cal. 456.

——S. 151—*Remand—Retrial—Power of Appellate Court to order—Power when to be exercised.*

An appellate Court has the power to order a retrial and this power is to be adopted in exceptional circumstances where the Code does not provide adequate procedure. (*Buckland, J.*) RADHA CANTA *v.* PRAKASH CHANDRA. 64 I. C. 599.

C. P. CODE (V OF 1908), S. 151—Remand.

——S. 151 and O. 41, R. 23—*Remand.*

An appellate court has inherent power to remand in cases not coming within O. 41, R. 23 C. P. C. (*Mookerjee and Carnduff, JJ.*) MISSR SAHU *v.* VISHNU NATH SAHU. 52 I. C. 985 29 C. L. J. 419.

——Ss. 151 and 107, O. 41, R. 23—*Remand.*

O. 41 R. 23, C. P. C., cannot be regarded as a limitation on the power of remand recognised in S. 107 in the sense that the power of remand can be exercised only in the contingency mentioned in O. 41, R. 23, C.P.C. Nothing in S. 107 restricts in any manner the application of the princioles of inherent power recognised by S. 151. 12 C. L. J. 368, 15 C. L. J. 258; 43 C. 938: 43 C. 148, foll; 41 C 108 Dist. (*Sanderson, C. J., Woodroffe, Mookerjee, Chitty and Teunon, JJ.*) ABDUL KARIM AIN AHMED *v.* ALLAHABAD BANK, LTD. 44 Cal. 929: 21 C. W. N. 877: 41 I. C. 598 : 26 C. L. J. 49 (F. B.)

——S. 151—*Remand.*

An appellate court has no inherent power to order remand of a case. It can do so only under the provisions of O. 41, Rr. 23 and 25. (*Chitty and Chatterjee, JJ.*) PROMODINI CHOWDHURANI *v.* BANGA CHANDRA DATTA. 9 I. C. 306.

[Overruled in 44 Cal. 929: 21 C. W. N. 877: 41 I. C. 598 : 26 C. L. J. 49 (F. B.)]

——S. 151—*Remand.*

An appellate court has power to make an order of remand under section 151 of the C.P.C. when O. 41, R. 23 of the code does not apply. (*Martineau, J.*) MAHMUD SHAH *v.* JALAL HUSSAIN SHAH. 73 I. C. 915.

——S. 151 and O. 41, R. 23—*Remand—Whether further evidence can be taken—Procedure.*

Where the Chief Court remanded a case to the Lower Court on the merits after assessment of damages and the Judge ordered further evidence to be taken but his successor cancelled the order professing to act under S. 151 and proceeded to dispose of the suit on the merits. *Held*, that even if the order allowing production of further evidence was wrong it was too late to go back upon it and that the Lower Court acted illegally in reviewing it. *Held*, also that a Court which has not itself taken any of the evidence in the case should not decide without hearing full argument. 91 P. R. 1904 : 3 P. R. 1905, rel. on. (*Johnstone, C.J. and Le Rossignol, J.*) KRISHNA MILLS LTD. *v.* SUNDAR SINGH. 39 I. C. 651: 14 P. R 1917.

——S. 151 and O. 41, Rr. 25 and 23—*Remand.*

An appellate court can remand cases not only specified in O 41, Rr. 23 and 25 but in the exercise of its power under S. 151, where it thinks necessary for the ends of justice, (*Sultan Ahmad, J.*) BRIJMOHAN PATHAK *v.* DEOBHANJAN PATHAK. 58 I. C. 664: 5 P. L. J. 146.

C. P. CODE (V OF 1908), S. 151—Remand.

———S. 151—*Remand—All the issues fully tried and decided by trial Court—Appellate Court coming to a different conclusion on one issue—Remand—Impropriety of.*

Remand by the appellate Court coming to a different conclusion on one issue though all the issues were fully tried and decided by trial Court is not proper. (*Devadoss, J.*) PERICHERLA SURYANARAYANA RAJU *v.* GANAPATHY RAJU.
30 M. L. T. 314 : 16 L. W. 593 :
70 I. C. 665: 1923 Mad. 113.

———S. 151 and O. 41, R. 24—*Remand—Powers of.*

Where express powers are also given Courts should be very cautious in resorting to their inherent powers. An Appellate Court has inherent power to remand in cases not coming within O. 41, R. 23, C. P. C. 36 M. 492 ; 44 C. 929, Foll (*Seshagiri Aiyar and Odgers, JJ.*) ATHAPPA CHETTY *v.* RAMANATHAN CHETTY.
37 M. L J. 536 : 10 L. W. 359 : 53 I. C. 417.

——— S. 151, O. 41, Rr. 23 and 25—*Remand.*

A single judge of the High Court has inherent power to make an order of remand ; it is unappealable under the Letters Patent but can be questioned in appeal from the judgment after remand. Where the order of remand is held invalid the subsequent judgment after remand will also be invalid. (*Jwala Prasad, J.*) RAM ASU PARI *v.* MUNSHI LAL. 58 I. C. 538

———S. 151—*Remand.*

A case falling outside O. 41, R. 23, C. P. C. can be remanded by the Appellate Court in the exercise of its power under S. 151, C. P. Code. (*Mullick and Sultan Ahmed, JJ.*) AZIZ FATMA *v.* SHAH KHAIRAT AHMAD. 2 U. P. L. R. (Pat.) 48 :
58 I. C. 444 : 1920 Pat. 222.

———S. 151 and O. 41, R. 23—*Remand—Inherent power—Grounds for exercise of.*

Order under S. 151 must show that it is necessary for the ends of justice or to prevent abuse of the process of the Court. An Appellate Court has inherent power to remand a case but the power can only be exercised for the ends of justice. The mere fact that there has not been a proper trial of the case, apart from other circumstances in the case, does not justify a remand. If the trial has not been proper owing to some neglect on the part of the Court the Appellate Court has power to remand the case, but the Appellate Court has no such power where the neglect or default is on the part of a party. (*Das, J.*) RAI BISHUN DUTT *v.* RAMJI PROSAD. 56 I. C. 834 :
2 U. P. L. R. (Pat.) 136.

——— S. 151—*Remand—Inherent power.*

An appellate court has an inherent power to remand a case even though not falling under O. 41, Rr. 23 and 25. But the power is one that must be cautiously exercised and there is no appeal from an order of remand in such a case. (*Rol and Jwala Prasad, JJ.*) RAGHUNANDAN SINGH *v.* JADUNANDAN SINGH.
3 Pat. L. J. 253 : 43 I. C. 959 :
4 Pat. L. W. 450.

C. P. CODE (V OF 1908), S. 151—Restitution.

Restitution.

———Ss. 151 and 144—*Restitution.*

Execution Court has inherent powers to make restitution orders in cases that may not fall under S. 144, C. P. C. It has powers to direct refund of money paid out of court. (*Mookerjee and Panton, JJ.*) RAI CHARAN *v.* DEBI PRASAD.
35 C. L. J. 53 : 26 C. W. N. 408 :
64 I. C. 864 : 1922 Cal. 28.

———S. 151—*Restitution — High Court — Power of.*

An Appellate Court can direct refund where a Subordinate Court mistakenly orders payment to a decree-holder, when that order is set aside. (*Mookerjee and Newbould, JJ.*) GOPALCHANDRA BOSE *v.* HARI MOHAN DUTTA.
21 C. L. J. 624 : 30 I. C. 49.

——— S. 151—*Restitution—Court sale—Application to set aside dismissed by first court—Sums deposited by auction-purchaser withdrawn by decree-holder and judgment-debtor— Appeal — Duty and inherent powers of the Appellate court.*

Where an application to set aside a court sale was dismissed by the first court and the decree-holder and judgment-debtor withdrew from court the sums deposited by the auction-purchaser and on appeal the appellate court set aside the sale but did not pass any orders regarding the sums withdrawn. *Held*, it was the duty of the Appellate Court in the exercise of its inherent powers to make an order directing the restitution of the sums withdrawn, as otherwise grave injustice might be done to the auction-purchaser. (*Mookerjee and Beachcroft, JJ.*) NEPAL CHANDRA CHAKRAVARTI *v.* RAMENDRA NATH CHAKRVARTI.
24 I. C. 384.

———Ss. 151 and 144—*Restitution—Execution sale set aside on ground of fraud between decree holder and auction-purchaser— Application by judgment-debtor for mesne profits from auction-purchaser if maintainable—Compensation to be awarded.*

Where an execution sale is set aside at the instance of the judgment-debtor on the ground of fraud between the decree-holder and the auction-purchaser, the Court may under S. 151 of the C. P. C. on an application by the judgment-debtor to that effect, direct payment by the auction-purchaser of compensation instead of mesne profits, to the judgment-debtor for the loss suffered by him. *Obiter*—The case does not fall within the terms of S. 144 of C. P. C. as what is set aside is the sale itself, which is not a decree but a mere transfer of property. (*Imam and Chapman, JJ.*) AMIRANNESSA CHOWDHARANI *v.* KARIMANNESSA CHOWDHURANI. 18 C.W. N. 1299 : 22 I. C. 839.

———Ss. 151 and 144—*Restitution—Execution sale—Setting aside sale—Mesne profits.*

The power of a court to grant restitution is not confined to S. 144 of the Code because it has, apart from that section, inherent power to order restitution so that on a sale being set aside, the judgment-debtor is entitled to be placed in the same position as he was in, before the adverse order was passed and mesne profits will be awarded to him for the period that the decree-holder

C. P. CODE (V OF 1908), S. 151—Restitution.

was in possession. A court will not permit injustice to be done owing to an erroneous order made by it and upon removal of such order will restore the parties to the *status quo ante*. 14 C. 484 ; 21 C. 989 : 28 A. 665 : 29 A. 143 : 31 A. 551 P. C. relied on. (*Mookerjee and Carnduff, JJ.*) BENI MADHO SINGH *v.* PRAN SINGH.

14 I. C. 456 : 15 C. L. J. 187.

——— **S. 151—*Restitution—C. P. Code*, S. 144.**

Under S 151, Court can apply the principle of S. 144 to cases to which it would not ordinarily apply and can order restitution as may be necessary. (*Leslie Jones and Broadway, JJ.*) ALLAH DIN *v.* CHIRAGH DIN. **63 I. C. 43.**

——— **Ss. 151 and 144—*Restitution—Inherent power.***

A court has an inherent power to make restitution and a party entitled to it should not be referred to a regular suit, though a case may not strictly fall within the purview of S. 144. A court can order restitution to the decree-holder for loss caused by reason of its erroneous orders. 15 C. L. J. 187, Ref. (*Scott Smith, J.*) JAGANNATH *v.* FATTEH CHAND. **61 P. R 1917 : 41 I. C. 910 : 98 P. W. R. 1917.**

——— **S. 151—*Restitution—Execution sale*—**

Where in an execution sale, the proceeds have been distributed among several decree-holders rateably and the execution sale set aside in a claim suit, stranger purchaser has no right to refund of the purchase money. (*Ayling, C. J. and Venkatasubba Rao, J.*) RAJARAO *v.* ANANTHANARAYANAN CHETTY **42 M. L. J. 308 : 67 I. C. 369 : 15 L. W. 303 : (1922) M. W. N, 255 : 1922 M. 228.**

——— **Ss. 151 and 141—*Restitution—Power of court to order—Inherent power—Scope of.***

The inherent power of a court to grant a restitution will be exercised in the ends of justice, that is to say, where this is the only legal method by which the applicant can obtain his dues. (*Ayling and Venkatasubba Rao, JJ.*) VARADA RAMASWAMI *v.* UMMA VENKATARATNAM. **42 M. L. J. 473 : 30 M. L. T. 178 : (1922) M. W. N. 184 : 67 I. C. 546 : 15 L. W. 421 : 1922 Mad. 99.**

——— **S. 151—*Restitution.***

S. 151 cannot enlarge the scope of S. 144 and cannot convert an application for relief which has nothing to do with restitution into an application for restitution. (*Sadasiva Aiyar and Moore, JJ.*) GOPISETTI NARAYANASWAMI *v.* KUNAPARAJU CHINNA VENKATRAJU. **34 I. C. 774 : 4 L. W. 400.**

——— **Ss. 151 and 144—*Restitution—Inherent power—Delivery of possession under mistake.***

Where a judgment-debtor is dispossessed under an erroneous order of Court and that order is set aside in a proceeding to which the court auction-purchaser is a party it is the duty of the Court to order restoration of possession to the judgment-debtor. 41 M. 467 Rel. (*Kotval, A. J. C.*) SHRI KISAN *v.* SUNDARBAI. **18 N. L R. 24 : 64 I. C. 732 ; 1922 Nag. 82.**

C P. CODE (V OF 1908), S. 151—Restoration.

——— **Ss. 151 and 47—*Restitution—Appeal.***

The question whether an auction-purchaser is not entitled to a refund of the purchase money dose not come within S. 47. A court can, in the exercise of its inherent powers under S. 151 order an auction-purchaser to refund the purchase money withdrawn by him on the setting aside of the sale if the sale is subsequently confirmed on appeal and thus restore the money to the party who is entitled to it. Such an order is not a decree nor does it amount to an adjudication between the parties of their rights. No appeal lies against such an order. The auction-purchaser cannot be said to be a representative of any of the parties so as to bring the order within the scope of S. 47, C. P. C. Such an order can be executed as a money decree. (*Mullick and Jwala Prasad, JJ.*) SUKHDEO DAS *v.* RITO SINGH.

1 Pat. L. W. 551 : 39 I. C. 763 : 2 Pat. L. J. 361

——— **Ss. 151 and 144—*Restitution—Application for compensation by judgment-debtors for period during which they were kept out of possession—Nature of.***

Per Chapman, J.—An application by the judgment-debtors for compensation during the period they were kept out of possession of their property under an execution sale which they subsequently got set aside does not fall within S. 144 but would be covered by S. 151, C. P. C. *Per Roe, J.*—The application does not fall within S. 144, C. P. C as that section only applies to cases in which a decree is varied or set aside. (*Chapman and Roe, JJ.*) JAGDIP NARAIN SINGH *v* HOLLOWAY.

2 Pat. L. J. 206 : 3 Pat. L. W. 423 : 39 I. C. 653 : (1919) Pat. 282.

——— **Ss. 151 and 144—*Restitution—Inherent power of Court.***

Court has inherent power to order restitution in proper cases and where property sold in execution of a decree is subsequently held in a suit for declaration as not liable to attachment, restitution can be rightly ordered to the successful claimant. (*Parlett, J.*) MA NYEIN BYA *v.* NIZAMAT ALI.

18 I. C. 144 : 5 Bur. L T. 233.

Restoration.

——— **S. 151, O. 9, Rr. 8 and 9—*Restoration of suit—Dismissal of suit for default—Death of sole plff. before trial—Inherent power to restore—Legal representative—Addition of—Lim. Act, Art. 176—C. P. Code, O. 22, R. 3.***

Where owing to the death of a sole plff. before the hearing of the suit there was no appearance for him on that date, it is not competent to the Court to dismiss the suit for default of appearance under O. 9, Rr. 8 and 9 of the C. P. Code. If, however, the Court dismisses the suit inadvertently as for default, it has inherent power to set aside the dismissal. The legal representative of the deceased plff. could apply to be made a party within six months of the death under Art. 176 of the Lim. Act. (*Lord Shaw*) DEBI BAKHSH SINGH *v.* HABIB SHAH. **35 All. 331 : 16 O. C. 194 : 40 I. A. 150 : 17 C W. N. 829 : 11 A. L. J. 625 : 18 C. L. J. 9 : 15 Bom. L. R. 640 : 14 M. L. T. 33 :**

C. P. CODE (V OF 1908), S. 151—Restoration.

(1913) M. W. N. 566 : 19 I. C. 526 :
25 M L. J. 148 (P. C.) :
[On appeal from 14 I. C. 711.]
[*See also* 14 I. C. 221.]

———S. 151—*Restoration of suit—Minor—Decree against—Not properly represented in suit—Decree set aside and case remanded.*

Under the C. P. Code, a minor may be sued in his name but the Court should appoint a proper guardian *ad litem*. The institution of the suit saves limitation, but its further progress depends upon the appointment of a guardian *ad litem*. Where in a suit by a minor to set aside an *ex parte* decree against him, the proceedings taken to appoint a guardian *ad litem* have been declared invalid, the suit proceeds only when such proceedings are properly initiated and completed. The Court whose duty ultimately is to appoint a guardian can under S. 151 revive the suit. (*Walsh and Sunder Lal, JJ.*) BAGHWAN DAYAL *v.* PARAM SUKH DAS. 39 All. 8 : 36 I. C. 366 : 14 A. L. J. 818.

———S. 151—*Restoration—Suit dismissed for want of letters of administration—Subsequent production of letters.*

The Court below, instead of staying a suit for production of the letters of administration, dismissed it giving liberty to the plff. to apply to have the dismissal set aside on obtaining letters. Subsequently the plaintiff obtained letters of administration and succeeded in setting aside the dismissal of the suit which was then tried and decreed. On an application in revision by defendant. *Held* that the lower Court should have properly speaking stayed the further trial of the suit pending the production of the letters of administration, that the order of the lower Court was really a means of suspending the suit and at the same time discharging it from the list of suits on file, that the merits of the case were entirely in favour of the plaintiff and therefore the High Court would not interfere in revision. (*Macleod, C. J. and Coyajee, J.*) KHUSHAL SINGJI *v.* UMANSINGJI. 24 Bom. L. R. 738 : 70 I. C. 910 : 1922 Bom. 210.

———S. 151—*Restoration of suit dismissed for default.*

A Court has jurisdiction under its inherent power under S. 151 of the Code, to restore a suit dismissed for default, when it finds that it cannot be restored under O. 9, R. 9 of the Code. (*Newbould and Cuming, JJ.*) RAMESHWAR MARWARI *v.* HARMUK MARWARI. 63 I. C. 440.

———S. 151—*Restoration — Appeal—Act of Court not to prejudice party.*

The Judge must try the causes set down for trial before him and his failure to decide a case after submission cannot be permitted to defeat the substantial rights of a litigant. Where the court disposed of an appeal on the assumption that the matters could be fully investigated in a separate suit but they were not so tried, the court has inherent power to restore and rehear the appeal. (*Mookerjee, J.*) KALYAN SINGH *v.* RAMGOLAM SINGH. 56 I. C. 4 : 31 C. L. J. 48.

C. P. CODE (V OF 1908), S. 151—Restoration.

———S. 151—*Restoration — Execution application—Dismissal for default.*

Under S. 151 C. P. Code, a court has inherent power to restore an application for execution which has been dismissed for default, if the applicant satisfies the court that such order is necessary in the ends of justice. Such an order is not appealable. Even viewed as an application for review of the order of dismissal for default, notice is not necessary for the opposite party. (*Scott-Smith, J.*) ABDUL KARIM *v.* CHAUDHRI RAM SINGH. 69 I. C. 506.

———Ss. 151 and 115—*Restoration—Dismissal without notice to parties—Inherent power to restore appeal—Revision.*

Where a court dismisses an appeal of the hearing of which the appellant had no notice whatever, the Court, though in ignorance of the true facts, must be held to have acted with material irregularity and in such a way as to induce a miscarriage of justice. The High Court can interfere under Ss. 115 and 151 and set aside the order of dismissal and direct the Lower Court to restore the appeal and rehear it. (*Ayling and Krishnan, JJ.*) PAMIREDDI SAMBAYYA *v.* NIMMAGADDA NAGAYYA. 52 I. C. 540 : 9 L. W. 513.

———S. 151—*Restoration—Dismissal of execution application for default.*

The executing court has inherent power to restore to file an application for execution dismissed for default and thereupon the attachment revives. 35 A. 331 ; 45 B 648 Ref. (*Hallifax, A. J. C.*) SHANKER RAO *v.* MANIK RAO. 68 I. C. 643 : 1923 Nag. 18.

———S. 151—*Restoration—Execution application—Dismissed for default.*

A Court has inherent jurisdiction under S 151, C. P. Code, to restore to the file, an application for execution which has been dismissed for default if it is necessary in the interests of justice and to prevent abuse of process of Court. (*Hallifax, A. J. C.*) HARLAL *v.* NARAYAN. 18 N. L. R 152 : 64 I. C. 420 : 1922 Nag. 267.

———S. 151—*Restoration.*

Strong grounds would be required to justify an application under S. 151 for the restoration of an execution application. (*Ashworth, J. C. and Simpson, A. J. C.*) NAGESHWAR PRASAD *v.* JAI NARAIN. 73 I. C. 73 : 1922 Oudh 201 (2).

———S. 151—*Restoration of suit—Inherent power.*

Pending a pre-emption suit plaintiff lost his title to the property which qualified him for pre-emption, by virtue of a decree passed against him in another suit and he filed an appeal against that decree. The Court trying the pre-emption suit thereupon dismissed it as not maintainable. The plaintiff won on appeal and within three years applied to the Court which decided the pre-emption suit for its revival. *Held* the Court had inherent power under S. 151 of the C. P. Code to revive the suit, though the original order was improper. The proper course would have been

C. P. CODE (V OF 1908), S. 151—Restoration.

to stay the suit. The application comes under Art. 181, Lim. Act. (*Lindsay, J. C.*) RAMESHWAR DAYAL *v.* GURU SAHI. 47 I. C. 137 : 5 O. L. J. 259.

———S. 151 and O. 9, R. 9—*Restoration—Dismissal for default.*

That there is an inherent power in the Court to set aside a dismissal for default has been repeatedly held. The power may be exercised where the claim is a substantial claim and would be barred by limitation, if the suit was not restored. (*Ross, J.*) RAM NARAIN *v.* RAMDHAN SINGH. 72 I. C. 668 : 4 Pat. L. T. 647.

———S. 151—*Restoration—Dismissal for default—Execution.*

A Court has no inherent power to restore an application dismissed for default and the remedy of the aggrieved party is to apply afresh for execution. (*Mullick and Thornhill, JJ.*) RITU KUER *v.* ALAKHDEO NARAIN SINGH. 5 Pat. L. W. 208 : 4 Pat. L. J. 330 : 47 I. C. 154 : (1918) Pat. 265.

Revenue Courts.

———S. 151—*Revenue Courts—Bengal Revenue Sales Act, S. 25—Appeal—Restoration of.*

All final Courts, including Revenue Courts, have an inherent power to make such orders as may be necessary for the ends of justice. A Commissioner of a division possesses the power to restore an appeal under S. 25 of the Bengal Revenue Sales Act which he has decided *ex parte*. 33 C. 1178 P. C., ref. (*Moore, M. B.*) D. N. RAY *v.* NALIN BEHARI. 46 I. C. 621.

———S. 151—*Revenue Courts — Settlement Court—Mistake—Obvious errors on record.*

A Settlement Officer has inherent power to correct obvious errors or accidental slips in the record. (30 Ch. D. 239, 7 A. C. 19, (1895) A. C. 547 Con. (*Mookerjee and Beachcroft, JJ.*) RAJ MOHAN GUHA *v.* ALAM GAZI PATWARI. 16 C. L. J. 339 : 17 I. C. 279 : 17 C. W. N. 625.

Review.

———S. 151—*Review—Inherent power.*

Semble.—Every Court has an inherent power to review an erroneous decision. 14 M. I. A. 40 foll. 15 Bom. 650, 19 Bom. 116, ref. (*Mookerjee and Carnduff, JJ.*) RAM PRASAD *v.* DADU DURZI. 53 I. C. 39 : 30 C. L. J. 1.

———S. 151—*Review—Re-hearing of case.*

On appeal by some of the defts without impleading their co-defendants as respondents the appellate court set aside the decree of the lower court as against the appellants and made a new decree against a co-defendant who was not a respondent to the appeal. *Held*, that although no provision of the C. P. Code dealt with such a case yet the appellate court should restore the appeal and re-hear it in the presence of the co defendant, after adding him as a party. (*Chitty and Walmsley, JJ.*) DURGA CHARAN BOSE *v.* LAKHI NARIAN BERA. 47 I. C. 917.

C. P. CODE (V OF 1908), S. 151—Scope of.

———S. 151—*Review.*

A review if forbidden by C. P. C. cannot be granted under S. 151. (*Mookerjee and Walmsley, JJ.*) KENAI LAL *v.* JATINDRA NATH CHANDRA. 26 C. L. J. 325 : 22 C. W. N. 446 : 42 I. C. 711 : 45 Cal. 519.

———S. 151—*Review—Sufficient cause.*

The fact that the Court had overlooked an important plea is just and sufficient cause for granting a review. (*Kensington and Rattigan, JJ.*) SUNDAR SINGH *v.* NIHILA. 26 P. L. R. 1911 : 9 I. C. 545 : 42 P. W. R. 1911.

———S. 151—*Review—Inherent power.*

The power of a Court to review its order exists only if it is conferred by statute except possibly in cases where the order is made without jurisdiction. 40 Cal. 552 ; 33 Mad 65 ; 22 Cal 419 rel. (*Oldfield and Seshagiri Aiyar, JJ.*) ANANTHARAJU CHETTY *v.* APPU HEGADE. 53 I. C. 56 : 37 M. L. J. 16.

———S. 151—*Review—Mistake—Fraud.*

Every Court has inherent power to review judgment by setting aside orders passed either under a mistake of the judge or obtained by fraud upon the Court. 19 B. 113 Foll.; 23 M. J. 371 Dist. (*Kumaraswamy Sastry, J.*) PARAMASIVAM PILLAI *v.* PERIYANAYAGATHAMMAL. 32 I. C. 527.

———S. 151—*Review — Inherent powers — Dismissal of suit for non payment of Court-fee—No power to restore.*

The Court has power to review its order rejecting the petition under O. VII, R. 11. (*Kulwant Sahay, J.*) RAMESHWARDHARISINGH *v.* SADHU SARENSINGH. 2 P. 504 : 72 I. C. 629 : 4 Pat. L. T. 261 : 1923 P. 354.

———S. 151—*Review—Inherent power.*

No Court has an inherent power to set aside order properly made by it unless the power is expressly given by statute. (*Pratt, J. C.*) *In re* HENRY ROBERT SMITH. 32 I. C. 575 : 9 S. L. R. 132.

———S. 151 and O. 20, R. 3 — *Review — —Interlocutory judgment—Right of successor to reconsider.*

A judge has power under S. 151 to review an interlocutory order made by his predecessor if that order is based on an erroneous assumption or hypothesis. 32 B. 432 ; 2 S. L. R. Civil, 59, Foll. (*Fawcett, A. J. C.*) HEMANDAS *v* CHELLARAM. 13 I. C. 264 : 5 S. L. R. 184.

Scope of.

———S. 151— *Scope of — Not to be used to evade law.*

S. 151, C. P. C. is intended for exceptional cases for which there is no remedy except the Court's inherent powers. It is not intended to enable courts to evade or ignore the provisions of law which govern procedure. Where after passing a decree, a court *suo motu* set aside its own decree on the ground it had discovered some documentary evidence on the record, the procedure is illegal. (*Daniels, J.*) MAHADEO *v.* KALLOO. 21 A. L. J. 447 : L. R. 4 A. 365 : 73 I. C. 494 : 1923 A. 603 (1).

C. P. CODE (V OF 1908), S. 151—Scope of.

——Ss. 151, 152 and 153—*Scope of.*

The powers conferred by these sections are intended to enable the court by an indirect cut to give effect to the real rights of the parties and to prevent a multiplicity of suits by curing breaches of technical rules. A Court is not only entitled but is bound to brush aside a mere technicality which stands in the way of justice and to amend such mistakes, slips or omissions as may appear to prevent justice in order to give effect to the real and substantial rights of the parties. Ss. 151, 152 and 153 are just as applicable to courts of first instance as to courts of appellate jurisdiction and the appellate court ought to take steps by way of amendment which were clearly open to the first or other lower court. (*Piggott and Walsh, JJ.*) UDHISTER SINGH *v.* CAUSILLA.
34 I. C. 79 : 38 All. 398.

——S. 151—*Scope of—Jurisdiction over—Orders of subordinate court.*

Per Beaman, J.—S. 151, C. P. C. empowers courts to deal with their own decrees and orders and does not give authority to superior courts by way of conferring jurisdiction over inferior courts supplemental to S. 115, C. P. C. (*Beaman and Heaton, JJ.*) BHAUSING RAGHO *v.* CHAGANIRAM HARCHAND.
42 Bom. 363 : 45 I. C. 552 : 20 Bom. L. R. 348.

——S. 151—*Scope of.*

The inherent power of a court can be invoked only for the attainment of the ends of substantial justice. (*Mookerjee and Beachcroft, JJ.*) SASI-BHUSAN MOOKERJEE *v.* RADHANATH BOSE.
19 C. W. N. 835 : 25 I.C. 267 : 20 C. L. J. 433.

——S. 151—*Scope of—Inherent power.*

The doctrine of inherent power is applied only when the court finds it necessary for the ends of justice or to prevent an abuse of its process, to make an order for which no provision has been made by the legislature. 3 C. L. J. 29 ; 33 C. 927 relied upon. (*Mookerjee and Carnduff, JJ.*) GOPAL CHANDRA MUKERJEE *v.* NOTOBAR KHUNDU.
15 I. C. 53 : 16 C. W. N. 1029.

——S. 151—*Scope of — Exercise of powers under Discretion—Order not revisable.*

The exercise of powers under S. 151 Civil Procedure Code is purely discretionary with a Court and if the learned subordinate judge refused to exercise these powers their non-exercise is not a ground for revision. (*Moti Sagar, J.*) THE PUNJAB BANKING COMPANY *v.* DIVAN DHANPAT RAI.
75 I. C. 487 : 1923 Lah. 506 (2).

——S. 151—*Scope of—Extension of limitation—Power of Court.*

S. 151, C. P. Code must not be used to defeat the imperative provisions of S. 3 of the Limitation Act. (*Chevis, J.*) KHAIRATI *v.* UMAR DIN.
66 I. C. 270 : 1922 Lah. 266.

——S. 151—*Scope of—Inherent power of court.*

The doctrine of inherent power has no scope for application where there is express statutory provisions on the point in controversy. (*Martineau, J.*) FIRM OF KAHNA MAL TANARSI DASS *v* BISHAN DAS.
69 I. C. 718 : 40 P. L. R. 1922.

C. P. CODE (V OF 1908) S. 151—Scope of.

——Ss. 151 and 152—*Scope of.*

A *reduction ad absurdum* can be avoided by a judge under the provisions of the above sections, which are wide enough for the purpose. (*Johnstone, C. J.*) SARDAR BEGAM *v.* JHANDA MAL.
37 I. C. 382 : 170 P. W. R. 1916.

——Ss. 151 and 152—*Scope of.*

Where there is specific provision in the procedure, Ss. 151 and 152 should not be invoked. (*Shadi Lal and Le Rossignol, JJ.*) LABHU RAM *v.* AMIR CHAND.
73 P. L. R. 1916 : 35 I. C. 633 : 105 P. W. R. 1916.

——S. 151—*Scope of.*

The inherent powers of a court are not to be used in order to relieve a party from the consequences of his own mistakes or to enable him to evade the law of limitation (*Oldfield and Venkatasubba Rao, JJ.*) GANAPATHI MUDALIAR *v.* KRISHNAMACHARI.
43 M.L.J. 184 : 16 L.W. 178 : 31 M. L. T. 135 (H.C.) : (1922) M. W. N. 514: 70 I. C. 743 ; 1922 Mad. 417.

——Ss. 151, 152 and 153—*Scope of.*

Ss. 151 to 153, C. P. C. do not apply to an erroneous judgment or decree when there is no difference between the judgment and decree. 22 M. 364 ref. to. (*Sadasiva Aiyar and Moore, JJ.*) PITCHAYYA *v.* SUBBA RAO.
34 I. C. 787 : 3 L.W. 499.

——S. 151—*Scope of.*

Inherent power is that which inheres in a court by the very fact of its being empowered to exercise any jurisdiction at all so that it comes within the express sense of the law or within the consequences that may be gathered from it. 33 C. 927, rel. (*Oldfield and Tyabji, JJ.*) MOIDEEN KUPPAI *v.* PONUSWAMI PILLAI.
1 L. W. 882 : 26 I. C. 63 : 16 M. L. T. 480.

——S. 151—*Scope of—Power when exercised.*

The power mentioned in S. 151 C. P. Code must be used very sparingly and only in the last resort, if only because of the great danger of mistake as to what the justice of a given case may be and the same result can here be achieved in accordance with the letter as well as the spirit of the law. By its very terms S. 151 C. P Code does, in certain specified circumstances, nullify the clear and imperative provisions of the Code as well as those that are ambiguous or advisory, if any of the latter classes exist. The provisions which cannot be nullified by virtue of the power mentioned in that section are not those that are clear and imperative but only those whose operation in the particular case will not defeat the ends of justice or lead to abuse of the process of the court. (*Hallifax, A. J. C.*) DEBILAL *v.* KRISHNAJI.
67 I. C. 296 : 5 N. L. J. 265 : 1922 Nag. 125.

——S. 151—*Scope of—Courts not entitled to contravene distinct provisions of law.*

Held, that S. 151 of the C. P Code was never meant to enable the Court to contravene a distinct provision of the law. (*Daniels, J. C.*) BHAGWAN SINGH *v.* SHEONATH SINGH.
64 I. C. 217 : 24 O. C. 215.

C. P. CODE (V OF 1908), S. 151—Scope of.

———S. 151—*Scope of.*

The provisions of S. 151, C. P. C. can only be utilised to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the court. (*Stuart and Kanhaiya Lal, A. J. Cs.*) NARENDRA BAHADUR *v.* OUDH COMMERCIAL BANK. **46 I.C. 68 : 5 O. L. J. 153.**

———S. 151—*Scope of—Execution—Proceedings.*

Within 30 days of the sale of certain property in execution of a rent decree the judgment-debtor deposited the decretal money under S. 174, B. T. Act with the usual penalty and requested to set aside the sale. No further steps being taken, the sale was confirmed. The Court gave relief under S. 151 in a suit to set aside the sale. *Held*, on further appeal that the plaintiff was entitled to the relief claimed, as S. 174, B. T. Act, did not require notice to be served. S. 151 did not apply, no suit being really pending. (*Das, J.*) PAHALAD SINGH *v.* SAJIWAN RAI. **52 I. C. 982.**

Stay of Execution.

———S. 151—*Stay of execution — Intended appeal to Privy Council.*

S. 151 declares that the court has inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The power must be exercised *ex debito justitiae*, to do real and substantial justice, and its decision based on sound general principles and not in conflict with them or with the intention of the legislature. The High Court has inherent power to stay execution, in view of an intended appeal to the Privy Council. (*Mookerjee and Holmwood, JJ.*) NAND KISHORE SINGH *v.* RAM GOLAM SADU.
40 Cal. 955 : 18 I. C. 207 : 16 C. L. J. 508.

———S 151—*Stay of execution—Fraud—No suit pending—Power of executing Courts.*

The executing court has no power to stay the execution under O. 21, R. 29, if at that time no suit is pending before it against the decree-holder on the part of the judgment-debtor, but the court has an inherent power under S. 151 of the C. P. Code to stay execution on the ground that the *ex parte* decree was obtained by fraud. (*Scott-Smith, J.*) P. W. FITZHOLMS *v.* WARYAM SINGH.
75 I. C. 419 : 1928 Lah. 514.

———S. 151—*Stay of execution.*

An insolvency court has no power under S. 151 to stay execution proceedings in another court. (*Sadasiva Aiyar and Moore, JJ.*) BASHYAM REDDI *v*, SOMASUNDARAM CHETTI.
32 I. C. 897 : 3 L. W. 250.

———S. 151—*Stay of suit—Abuse of process of Court—High Court.*

A High Court has an inherent jurisdiction to stay any suit which is an abuse of the process of the Court. The plaintiffs have the choice of the *forum* and their choice should not be restricted as an abuse of the process of the Court because the defendant may find it more difficult to make their defence in one *forum* than in another. (*White, C. J. and Tyabji, J.*) THE HINDUSTHAN ASSURANCE AND MUTUAL BENEFIT SOCIETY *v.* MULRAJ. **27 I.C. 455 : 27 M.L.T. 645.**

C. P. CODE (V OF 1908), S. 151—Substitution.

———S. 151—*Stay of proceedings—Appellate Court.*

The High Court has inherent jurisdiction as a court of appeal where an appeal is made to it, to stay proceedings in the lower court as ancillary to its powers of reversing the order of the inferior Court. 3 C. L. J. 29 ; 31 C. 722. Rel. (*Miller, C. J. and Coutts, J.*) LAL NILAMAN NATH SAHIDEO *v.* BALDEO DAS BISTA.
(1919) Pat. 145 : 52 I.C. 185 : 4 Pat. L.J. 371.

———S. 151—*Stay of suit.*

Where one of the parties to a reference files a suit in respect of the same subject-matter the proceeding in the suit cannot be stayed under S. 19 of the Arbitration Act but under the inherent powers of the court. (*Crouch, A. J. C.*) DHANPATMAL DEWANCHAND *v.* KISHIN LAL INDRAJ,
35 I. C. 536 : 10 S. L. R. 1.

Substance of Application.

———S. 151—*Substance of application— Relying on—Erroneous provision of law.*

A court in the administration of justice, should not refuse to grant an application, which on the merits it ought to grant and in law can grant, simply because the applicant makes a mistake as to the section under which he ought to ask the court to exercise its admitted powers. Regard should be paid to the substance rather than to the form of the proceedings. (*Mookerjee and Beachcroft, JJ.*) BEACHUN SAHU *v.* SYED ALI RASUL.
16 I. C. 614.

Substitution of Parties

———S. 151 and O. 1, R, 10—*Substitution of parties—Appeal—Abatement.*

A suit was brought by a firm against three other firms but the names of the members of the firm were disclosed. Pending an appeal one of the members of the plff firm died and his three sons applied under O. 30, R. 4 (2) to be added as his legal representatives and parties appellants. Their application was dismissed as time-barred, and some time after the dismissal the surviving appellants applied to add the legal representatives as respondents. *Held* that the Court has inherent power to add the legal representative as respondent and to proceed with the appeal. 3 Pat. L. J. 409. ref. (*Mookerjee and Panton, JJ.*) PULIN BEHARI ROY *v.* MAHENDRA CHANDRA GHOSAL
67 I. C. 10 : 34 C. L. J. 405.

———S. 151—*Substitution of parties.*

Where a Judge on the original side of the High Court disallowed substitution of parties under a misapprehension as to the result of the suit, it was held that High Court on appeal has power under S. 151, C. P. C. to allow the application for substitution. (*Sanderson, C. J., Mookerjee and Fletcher, JJ.*) NILKANTHA GHOSE *v.* SWARNAMOYEE.
56 I. C. 726 : 31 C. L. J. 130.

———S. 151—*Substitution of parties—Power of appellate court to add parties—Circumscribed by O. 41, R. 20.*

An appellate Court has power to implead such persons as parties to the appeal as were parties in the trial court and were not made parties to the appeal but not those who were complete strangers to the suit.

C. P. CODE (V OF 1908), S. 151—Who can invoke.

Powers of a Court to implead parties under S. 151, C. P. Code are circumscribed by O. 41 R. 20 and it is only in exceptional circumstances that the inherent powers under S. 151 could be invoked. (*Moti Sagar, J.*) MT. HALIMAN *v.* NUR MUHAMMAD KHAN. 73 I. C. 136 : 1923 Lah. 490

Who can invoke.

——S. 151—*Who can invoke.*

The inherent powers of a court cannot be used for the benefit of the litigant who has his remedy under the Code of Civil Procedure, much less for one who having his remedy has lost it by his own delay. (*Oldfield and Tyabji, JJ.*) MUTHAIAH CHETTIAR *v.* BAWA SAHIB. 1 L. W. 969 : 26 I. C. 46 : 27 M. L. J. 605.

——S. 152— *Mistake, error or omission — Calculation of amount due—Overlooking of order of court.*

In calculating the amount due on redemption, the office overlooked an order of court directing the calculation up to date of payment. *Held*, it was a mere error or mistake under S. 152, C.P.C. and could be corrected at any time. (*Mears, C. J. and Piggott, J.*) BISHUN NARAIN *v.* MT BIBI RAMJI. 74 I. C. 842 : 1924 A. 127.

——S. 152—*Amendment of decree—Discretion—Principles guiding—Intervention of rights of third parties—Action in good faith.*

The exercise of the power of amendment under S. 152, C.P.C. is discretionary, and an application for amendment of a decree should be rejected as too late if the rights of third parties acting in good faith have intervened. (*Oldfield and Ramesam, JJ.*) NARAYAN AYYAR *v.* BIYARI BIVI. 16 L. W. 623 : 32 M. L. T. (H. C.) 98 : 43 M. L. J. 559 : (1922) M. W. N. 731 : 1923 M. 57.

——S. 152—*Mistake in plaint.*

Where an error has crept into the record of a case owing to the mis-description of the suit property in the plaint it is incumbent on the Court to correct the error on an application under S. 152, C.P.C. (*Piggott and Walsh, JJ.*) SURJAN SINGH *v.* WAZIR SINGH. 21 A. L. J. 328 : L. R. 4 A. 184 : 72 I. C. 483 : 1923 A. 349 (2).

——S. 152—*Appellate Court can amend the decree of the First Court.*

The decree of the lower Court merges into that of the App. Court and the two become one for the sake of execution. Therefore the App. Court can amend the errors if any in the lower Court's decree. (*Tudball, J.*) MAIKU LAL *v.* MULIAM SINGH. 19 A. L. J. 375 : 62 I. C. 910 : 3 U. P. L. R. (A) 156.

——Ss. 152 and 115— *Refusal to amend—Revision.*

It is open to the successor in office of a judge to rectify an accidental error in the judgment of his predecessor. If the judge declines to do, the High Court might interfere in revision. (*Tudball, J.*) AZIZUR RAHMAN KHAN *v.* ABDUL HAI KHAN. 18 A. L. J. 501 : 55 I C. 963 : 2 U. P. L. R. (All.) 195.

C. P CODE (V OF 1908), S. 152.

——S. 152—*Appeal— Order under—Order not appealable.*

There is no appeal from an amendment under S. 152, C. P. C. (*Tudball and Ryves, JJ.*) RAJA SARDAR MAHESH PRASAD SINGH *v.* MUSAMMAT BUDHWANTI. 54 I.C 387 : 2 U P.L R. (H. C.) 70.

——S. 152 — *Mistake — Parties' neglect — Amendment.*

S. 152 of the C. P. Code is confined to the correction of clerical errors made by the court itself and has no concern with the mistakes of parties. (*Walsh and Stuart, JJ.*) RAMCHANDAR SARUP *v.* MAZHAR HUSSAIN. 51 I C, 55 : 1 U. P. L. R. (H. C.) 69.

——S. 152—*Jurisdiction— Decree of trial court affirmed on appeal.*

The applicant for amendment of a decree confirmed on appeal, must show a variance between the judgment and the decree of the Appellate Court and not a variance between those of the lower Court. (*Richards, C. J. and Banerji, J.*) BALGOBIND RAI *v.* SHEORAJ RAI. 46 I. C. 376 : 16 A. L. J. 451.

——S. 152—*Execution--Amendment of decree in.*

The property mortgaged was misdescribed in the decree and ordered to be sold as *muafi* while the property was in fact assessed to revenue. When the mortgagee applied for execution of his decree the objector who had purchased the same property in execution of a simple money decree pleaded that there was no *muafi*. *Held*, that the misdescription not having deceived the objector when he purchased, the court was not debarred from correcting the error in the decree. (*Tudball and Rafique, JJ.*) BASANTI *v.* KUNJ BEHARI LAL. 44 I. C. 998 : 16 A. L. J. 262.

——S. 152—*Jurisdiction—Appellate decree—Forum.*

When a lower Court's decree is superseded by a decree of High Court, an application for amendment under S. 152 should be made to High Court and not to the lower Court. (*Richards, C.J. and Banerji, J.*) MOHAMMAD AKBAR *v.* KALLAN KHAN. 42 I. C. 970.

——S. 152—*Scope of.*

A decree against one person cannot be amended by adding another as judgment-debtor when no decree has been passed against him. (*Tudball and Rafique, JJ.*) BHARATHA INDU *v.* TILAK KUNWAR. 40 I. C. 47.

——S. 152—*Clerical error—Amendment.*

Where a munsif by a clerical error recorded in his final order an order dismissing the suit instead of decreeing it and the decree was prepared accordingly. *Held*, that the munsif is competent under S. 152 to subsequently correct the error. (*Banerji, J.*) BHAGIRATHI NONIYA *v.* SUKHDEO NONIYA. 29 I. C. 144.

——Ss. 152 and 115—*Refusal to amend—Revision.*

Where a judgment declared the rights of the defendants as prior mortgagees but the decree omitted to provide for the same, the trial court

C. P. CODE (V OF 1908), S. 152.

rejected an application to amend the decree. *Held* that this was a clear case of error arising from an accidental slip or omission and the High Court could rectify it in revision. (*Chamier and Piggott, JJ.*) SAHDEO GIR *v.* DEO DUTT MISIR
37 All. 323 : 29 I. C. 50 : 13 A. L. J. 449.

——S. 152—*Clerical mistake—Costs—Revision.*

In a decree two sets of pleaders' fees were erroneously charged instead of one, and an application for amendment made nearly after a year was refused. *Held*, that the High Court could not interfere in revision, it being doubtful whether error was really a clerical or an arithmetical mistake. (*Knox, J.*) PAHLAD DAS *v.* COLLECTOR OF JAUNPUR.
27 I. C. 922 : 13 A. L. J. 60.

——S. 152—*Clerical error—Relief claimed.*

A mere clerical error in the relief claimed and in the decree that was prepared in accordance therewith, can be corrected throughout the record by the court under S. 152 of the C.P.C. (*Tudball, J.*) SHEO BALAK PATHAK *v* SUKHDEI.
23 I. C. 344 : 12 A. L. J. 185.

——S. 152—*Variation between decree and judgment—None—No amendment.*

A decree can be amended on the ground of an error or accidental omission in the judgment in terms of which the decreee is prepared, only by first amending the judgment. If a judgment directs no payment of interest the decree cannot grant it. (*Knox and Piggott, JJ.*) RAM GHULAM *v.* SARJOO PERSHAD. 11 I. C. 896.

——S. 152—*Amendment of decree—Decree passed against legal representative personally.*

To pass a decree against the legal representative of the deceased defendant so as to make him personally liable is not competent to a Court to direct. When the attention of the Court is drawn to the error, even although it might be at a rather late stage of the proceedings there is no reason why on that account the mistake should not be remedied. (*Macleod, C. J. and Crump, J.*) JAYAVANT RAO NARAYAN *v.* NARSING SAKHARAM.
1923 Bom. 414.

——S. 152—*Consent decree.*

A consent decree can be varied only by consent (*Scott and Beaman, JJ.*) LACHIRAM *v.* JANA YESU MANG. 27 I. C. 830 : 16 Bom. L. R. 668.

——S. 152—*Consent decree— Variation by consent.*

A decree made by consent can only be varied by consent. (1891) W. N. 170 foll. (*Scott, C. J. and Beaman, J.*) BAPU *v.* VITHAL.
27 I. C. 134; 16 Bom. L. R 670 (Note).

——S. 152— *Jurisdiction— Appeal—Amendment of decree not in accordance with the judgment.*

An application by the plaintiff to amend the decree to bring it in conformity with the judgment must be made to the court which passed it and not to the appellate court as it is outside the scope of appeal. (*Richardson and Shamsul Huda, JJ.*) KERAMATULLA MEAH *v.* CHETUMNISSA BIBI.
57 I. C. 710.

C. P. CODE (V OF 1908), S. 152.

——S. 152—*Jurisdiction—Appeal—Confirmation of decree on appeal.*

Where an Appellate Court affirms the decree of the court below it must be taken as embodying or superseding that decree. It is the appellate decree that has to be amended or executed as the case may be. (*Teunon and Newbould, JJ.*) BIPIN BEHARI SEN *v.* KRISHNA BEHARI SEN.
45 I. C. 246.

—— S. 152 and O. 47, R 1—*Scope of—Erroneous order—Correction of.*

An order made by a Judge in a partition suit allowing the sale of an undivided share of one of the properties, the subject-matter of the suit for paying costs already incurred and costs of partition cannot be revoked by the successor, unless the case falls within S. 152 or O. 47 R. 1, or there is fraud or such special circumstances as to justify the court in exercising its inherent jurisdiction, to review its own order. (*Greaves, J.*) BASANT KUMAR DAS *v.* KUSUM KUMARI DASI.
44 Cal. 28 : 38 I. C. 584.

——S. 152—*Variation between decree and judgment.*

Any divergence between the decree and the judgment is a matter for amendment of the decree and not for a fresh suit for setting the decree aside. (*Jenkins, C.J. and Holmwood, J.*) KUSADHAJ BHAKTA *v.* BROJA MOHAN BHAKTA.
43 Cal, 217 : 31 I. C. 13 : 19 C. W. N. 1228.

——S. 152—*Grounds for amendment—Change of circumstances—Remedy.*

Where the amendment of a decree is required on the ground of subsequent change of circumstances the decree-holders are not entitled to have it amended by an application to the court which passed it but may have their remedy in a suit appropriately framed to set aside the decree. 13 C. W. N. 1197, ref. (*Mookerjee and Beachcroft, JJ.*) JITENDRA NATH ROY *v.* RASIK LAL SEN.
27 I. C. 300.

——S. 152—*Consent decree—Some terms of compromise not entered in the decree.*

S. 152 C. P. C. authorises the court to remedy errors in formal expression of its order occasioned by its own indolence and if a compromise decree does not embody all the terms of the compromise the decree could be corrected. (*Coxe and Roy, JJ.*) MUTHIAR RAHMAN *v.* HURENDRA NATH MUKHERJEE. 21 I. C. 115.

——S. 152—*Sale certificate—Amendment—Ultra vires.*

A court has no jurisdiction for amendment of a certificate of sale so as to alter the share of the property sold according to the sale proclamation. (*Harrington and Carnduff, JJ.*) NAZIR AHSHAN *v.* DALIP MAHTON. 18 I. C. 725.

——S. 152—*Remedy by suit—Judgment and decree—Suit for amending—Previous court of competent jurisdiction.*

C. P. CODE (V OF 1908), S. 152.

A suit for amending a judgment or decree passed by a competent court on the ground of mistake is not maintainable in a Civil Court. 10 C. W. N. 1024 ; 6 C. W. N. 889 ; 3 C. W. N. 375, rel. 8 C. W. N. 473 dist. (*Brett and Carnduff, JJ.*) BHONDA SINGH *v.* DOWLAT ROY.
15 C. L. J. 675 : 14 I. C. 93 : 17 C. W. . 82.

——S. 152 — *Jurisdiction — Appeal—Court competent to amend.*

After the lower court's decree has merged into that of the appellate court, only the appellate Court can entertain an application for amendment of decree but it is not a general rule that the lower court's control over the decree comes to an end as soon as an appeal is preferred against it. (*Mookerjee and Carnduff, JJ.*) BRIJALAL SINGH *v.* MAHADEO PRASAD. 15 C. L. J. 432 : 12 I. C. 669 : 17 C. W. N. 133.

——S. 152—*Order of amendment — Not appealable.*

Though an appeal can lie against an amended decree in the same way as against any other decree, there can be no appeal against an order amending a decree. The Court has power to amend clerical errors which had crept into a decree by following similar errors in the plaint, without causing the pleadings in which the errors first appeared to be amended. (*Campbell, J.*) ASA SINGH *v.* JAGJIT SINGH. 73 I. C. 679: 1923 Lah. 147 (2).

——S. 152 and O. 47, R. 7—*Application.*

Even though a Court purported to act under S. 102 on an application which challenged the whole system of calculation adopted by a Court, but there was no allegation that there was any arithmetical or clercial mistake, really the order is an order under O. 47, R. 7 of the Code and an appeal lies from it. (*Wilberforce, J.*) RANJI LAL *v.* GIYANI. 3 (Lah). L. J. 341 : 66 I. C. 992: 4 U. P. L. R. Lah. 54.

——S. 152—*Jurisdiction—Revision of small cause decree—Application for amendment.*

High Court can revise and set aside or modify a decree of a Small Cause Court. When it refuses to revise the decree, it must remain as the decree of the original Court and an application for the amendment of it must be made to the original and not to the High Court. (*Rattigan, C.J.*) KHUDA BAKSH *v.* ALLA DITTA. 58 I. C. 630 : 1 Lah. 342.

——Ss. 152 and 151—*Scope of amendment of decree—Inherent power.*

Courts in India can amend or vary decrees in order to bring them into accord with the judgments even if the amendments do not fall within S. 152, C. P. C. 37 Cal. 649, ref (*Abdul Raoof, J.*) MANGAT RAI *v.* ALIA. 52 I. C. 574: 92 P. R. 1919.

——S. 152—*Delay.*

An application for amendment of a decree presented long after date of the decree is not sustainable. (*Scott-Smith, J.*) J. RUSTOMJI *v.* GURMUKHTITTA MAL. 7 P. L. R. 1915: 27 I. C. 639: 32 P. W. R. 1915.

——S. 152—*Costs—Assessed on wrong principle.*

An application for amendment on the ground that costs had been assessed on an erroneous prin-

C. P. CODE (V OF 1908), S. 152.

ciple is bad. The proper remedy is by way of appeal. Amendment would not be granted on the ground that an appeal is barred. (*Reid, C. J.*) SHAHDIN *v.* SIRAJUDDIN. 25 P. W. R. 1913: 17 I. C. 418: 47 P. R. 1913.

——S. 152—*Appeal—Order under.*

An order under S. 152 (S. 206 of C. P. C. 1882) directing amendment of a decree, not in conformity with judgment, is not a decree and therefore not appealable, but revision lies. (*Chevis, J.*) BAWAL SINGH *v.* LACHMAN SINGH, 24 P. R. 1911: 186 P. L. R. 1911: 10 I. C. 850: 56 P. W. R. 1911.

——S. 152—*Amendment of decree—Discretion—Principles guiding—Intervention of rights o third parties action in good faith—Effect—Sale in execution of decree—Subsequent application for its amendment—parties—Purchase of necessary parties.*

The exercise of the power to amend a decree under section 152 of the Civil Procedure Code is discretionary and ought not to be exercised where an application to amend is made after the rights of third parties acting in good faith have intervened without those parties being made parties to the application. (*Oldfield and Ramesam, JJ.*) NARAYANA AYYAR *v.* BIYARI BIVI.
43 M. L. J. 559: (1922) M. W. N. 731: 16 L. W. 623 : 32 M. L. J. 98 : 69 I. C. 977 : 1923 M. 57.

——S. 152—*Amendment of decree—Delay—No difference between decree and judgment—Time for review over.*

Where the time for reviewing a judgment and decree is long past and there is no difference between the decree and judgment, the objection cannot be raised in a way to take advantage of S. 152 in tne absence of clerical or arithmetical errors. (*Spencer and Odgers, JJ.*) MUNIYAPPA CHETTY *v.* MANGATHYAMMAL. 15 L. W. 393 : 1922 Mad. 192.

——S. 152 — *Clercial error — When to be corrected.*

A Court can correct a clercial error in a plaint in whatever subsequent record it is repeated by slip, or inadvertence or by mistake. (*Sadasiva Aiyar and Spencer, JJ.*) MAHABOOB BEGUM *v.* LAL BEGUM. 62 I. C. 652 : 14 L W. 445.

——S. 152—*Jurisdiction—Pendency of appeal* Forum.

The clerical errors or slips in a decree or order can be corrected by the court which passed it, although an appeal against the same is pending in a superior court. (*Spencer, J.*) MUTHU BHATTAR *v.* MRITHUNJAYA BHATTAR. 44 I. C. 248 : 7 L. W. 8.

——S. 152—*Jurisdiction—Appellate decree—Amendment.*

Where a decree is confirmed in appeal, the only court competent to amend the decree is the Appellate Court and not the Court against whose decree appeal was preferred. 24 M. 646, dist. (*Seshagiri Aiyar, J.*) BHAGIRATHI NETHIAR AMMA *v.* MEENAKSHI NETHIARAMMA.
31 M. L. J. 438 : (1916) 2 M. W. N. 249 : 35 I. C. 891 : 4 L. W. 225.

——Ss. 152 and 153—*Award—Decree on, embodying terms not mentioned in the award—Remedy.*

C. P. CODE (V OF 1908), S. 152.

Where a decree passed on an award, by mistake or inadvertence embodied a relief as to payment of costs not mentioned in the award the, defect can be cured only by an appeal or by an application for review under O. 47, R. 1, C. P. C., and not by amendment of the decree under Ss. 151 to 153. (*Sadasiva Iyer and Moore, JJ.*) PITCHAYYA *v.* SUBBA RAO. **34 I. C. 787: 3 L. W. 499:**

———**S. 152**—*Grounds for—Difference between decree and judgment.*

Where the decretal portion of the judgment gives a mortgage decree and the decree is wrongly drafted so as to give the decree-holder only a charge on the property, the proper course is to apply to the court which passed the decree to amend the decree according to judgment. An Appellate Court can also amend the decree on appeal. (*Seshagiri Iyer and Napier, JJ.*) UPADHAYAYULU YEGNANARAYANA *v.* KOTTALANKA MAKAYYA. **31 I. C. 478 : (1915) M. W. N. 914.**

———**S. 152**—*Jurisdiction—Appeal—Power to rectify error in decree—Appeal.*

A District Court could not rectify an error in its final decree copied from High Court's preliminary decree. (*Sadasiva Iyer and Tyabji, JJ.*) PUCHALAPALLI ADISESHADRI *v.* MUNGAMUR SIVARAMAYYA. **31 I. C. 320.**

———**S. 152**—*Clerical error—Erroneous description of property in schedule to plaint, copied into decree.*

Alterations in decree cannot be made in respect of description of property to bring in conformity with the judgment. (*Napier, J.*) GOTIK KESAVA REDDY *v.* VUDHYA RAMAYYA. **28 I.C 920.**

[But see **(1914) M. W. N. 107 : 22 I. C. 774 : 15 M. L. T. 102.**]

———**S. 152**—*Decree—Amendment—Appeal—Power of Court after appeal—Revision.*

A court cannot amend its own decree after it has been affirmed in appeal. (*Hannay, J.*) KRISANA UPADHAYA *v.* CANAPAYE UPADYA. **28 I. C. 586.**

———**S. 152**—*Jurisdiction—Pendency of appeal—Power of Court to amend decree.*

On an application for an amendment of the decree the subordinate Judge ordered that it should be posted with the appeal from the decree but it was disposed of without amendment, as the application was not brought to his notice. Before filing a second appeal he was asked to amend but he declined for want of jurisdiction. *Held* he had jurisdiction to amend. (*Seshagiri Iyer, J.*) RAJA RAM RAO *v.* ARUMUGAM KARUPATTI.

28 I. C. 377 : 17 M. L. T. 224

———**S. 152**—*Arithmetical error—Repeated in the decree of High Court—Correction.*

Arithmetical errors made in the lower court and repeated in the High Court office in drawing up the order of the High Court, must be corrected by the High Court. (*Sadasiva Aiyar and Spencer, JJ.*) ADUSUMALLI VENKTARATNAM *v.* SANKARAYANNA. **24 I. C. 283 : 1 L. W. 298**

———**S. 152**—*Clerical errors—Error copied from pleadings.*

A court can amend clerical errors in a decree which have crept through copying similar errors in the plaint, without causing amendments in the pleadings in which the errors first appeared. 16 M. 424 foll. (*Sadasiva Iyer and Tyabji, JJ.*)

C. P. CODE (V OF 1908), S. 152.

SOMASUNDARAM CHETTIAR *v.* RAMA KRISHNA KADIR VELASAMI. **15 M. L. T. 102 : 22 I. C. 774 : (1914) M. W. N. 107.**

———**Ss. 152, and 155**—*Jurisdiction—Appeal—Dismissal of on the ground that no appeal lay—Right to apply for amendment.*

The dismissal of an appeal on the ground that no appeal lies from the judgment does not amount to the confirmation of the original decree or superseding it, and the lower court can amend its own decree. The High Court can revise under S. 115a decree unnecessarily amended by a court acting in excess of its jurisdiction though under an error of law. (*Sundara Iyer and Sadasiva Iyer, JJ.*) PANKAJAMMAL *v.* SESHADRI AIYANGAR. **16 I. C. 933.**

———**S. 152**—*Grounds for amendment—Obvious mistake.*

Application for amendment of a decree to bring it into conformity with the judgment will lie only where there is an obvious slip or mistake. (*Abdur Rahim and Spencer, JJ.*) GUJJALAPADI SUBBA NAIDU *v.* GUJJALAPADI VENKTASUBBA NAIDU. **13 I. C. 113 : 11 M. L. T. 33.**

———**S. 152**—*Decree—Amendment.*

Extension of time given by the appellate Court to perform any condition amounts to an amendment of the condition. (*Abdur Rahim and Sundara Aiyar, JJ.*) MOHIDDIN KUPPAYYA *v.* MARIYAN KARIM. **10 M.L.T. 284 : (1911) 2 M.W.N. 240 : 21 M. L. J. 1018 : 12 I. C. 139.**

———**S. 152**—*Jurisdiction—Appellate decree—Power to amend—Appeal dismissal under O. 41, R. 11, C. P. C.*

Where a decree is confirmed upon appeal the decree of the original Court becomes merged in the decree of the Appellate Court. The latter Court alone has jurisdiction to amend the decree even if the appeal had been dismissed under O. 41, R. 11, C.P.C. (*Prideaux, A.J. C.*) MUSSAMMAT SILARBI *v.* MAHADU DHANGAR. **55 I C. 305.**

———**S. 152**—*Costs—Omission.*

An application to correct a decree in the matter of costs can be made under S. 152, C. P. C. (*Prideaux, A, J. C.*) KRISHAN *v.* MAHADEO. **54 I. C. 821.**

———**S. 152 and O. 41, R. 17**—*Jurisdiction—Appeal—Dismissal of appeal for default—Decree—Amendment*—Forum.

Where an appeal is dismissed for default, th dismissal does not amount to a confirmation of the decree appealed from. The decree continues to be the final decree in the case, and an application for amendment of the decree must be made to the court which passed the decree appealed from and not to the Court which dismissed the appeal. (*Mitra, A. J. C.*) DAULAT *v.* RAJARAM. **43 I. C. 360.**

———**Ss. 152 and 153**—*Scope of—Mistakes anterior to suit—Amendment.*

Ss. 152 and 153 do not apply where the mistakes have an origin anterior to the suit. A suit for rectification will be the appropriate remedy in such cases. (*Batten, A. J.C.*) BALA PRASAD *v.* KANOO. **8 N. L. R. 13 : 14 I. C. 407.**

———**S. 152**—*Mistakes in decree and judgment—Mistakes in plaint—Correction of.*

Errors in judgements and decrees can be corrected at any moment ; and if those errors fo

C. P. CODE (V OF 1908), S. 152.

from clerical mistakes committed in the plaint or other proceedings it is open to the Court to ascertain by enquiry whether any accidental slip has occurred and to rectify it, if the real points at issue are not affected thereby. 12 A. L. J. 185 · 17 O. C. 256 foll. (*Kanhaiya Lal, J. C.*) PAHALWAN SINGH *v.* GANGA BAKSH SINGH. 66 I. C. 693: 8 O. L. J. 416.

——S. 152—*Mistake—Judgment—Rectification.*

A Court can rectify an obvious error in its judgment. (*Lindsay, J. C.*) SUKHDEO PRASAD *v.* RAM AUTAR 42 I. C. 66 : 4 O. L. J. 475.

——S. 152 and O. 20, Rr. 3 and 14—*Scope of.*

A right extinguished by virtue of a decree binding on the parties cannot be revived by any subsequent act of the court or the party at fault. (*Kanhaiya Lal, A. J. C.*) BACCHHULAL *v.* RAJA RAM. 19 I. C. 347 : 16. O. C. 5.

——S. 152—*Grounds for amendment—Mistake.*

A decree may be rectified at the instance of a party on grounds of mistake, but not where there is neglect on his part. (*Lindsay, A. J. C.*) RAMZAN KHAN *v.* MUHAMMAD YAKUB KHAN. 11 I. C. 537.

——S. 152—*Mistake—Rectification.*

A plff. who obtains a decree for specific share is not entitled to more, merely because there is an arithmetical error. In such a case the proper course is to get the mistake rectified under C P.C. S. 152. Where, however the operative part awards a particular share but there is an error in the details, they may be regarded as surplusage (*Evans, J. C.*) MATA BADAL *v.* KABLASI, 9 I. C. 433.

——S. 152—"*Court*" *meaning of.*

'Court" in S. 152 does not mean the particular presiding Judge who may have made the mistake but means the Court, whoever may be the presiding officer. (*Das, J.*) MEWA SAHU *v.* JHOUTI SINGH. 2 Pat. L. T. 296 : 63 I. C. 840.

——S. 152 and O. 47, R. 1. *Variation between decree and Judgment—Amendment of decree—Judgment also attacked—Review.*

Where, in a petition for amendment of the decree, the judgment is also attacked, the petition is one for review as well as a petition for the amendment of the decree. (*Mullick and Sultan Ahmed, JJ.*) SHREE SAKTI NARAIN SINGH *v.* BIR SINGH. 5 Pat. L. J. 253 : 1 Pat. L. T. 219 : 58 I. C. 510 : 2 U. P. L. R. (Pat.) 50.

——S. 152—*Mistake—Costs—Omission of.*

Court can add an order as to costs to the judgment already pronounced. (*Coutts and Das, JJ.*) SHDHO CHARAN SINGH *v.* GANGESWAR KOER. 57 I. C. 739.

——Ss. 152 and 151—*Consent decree—Inherent power—Amendment.*

Amendment of decree under S 152 is justified only when it is for clerical error or arithmetical mistake. The inherent power is to be relied upon only to bring the decree in conformity with the judgment and is not to be used in the case of a decree founded upon compromise. The only remedy in the case of a decree not agreeing with compromise arrived at, is by suit to set it aside either on the ground of fraud, mistake or some other ground. (*Atkinson and Das, JJ.*) RAM LAGAN SAHU *v.* RAM BIRICH KOERI. 50 I. C. 497 : 4 Pat. L. J. 205.

C. P. CODE (V OF 1908), S. 153.

——Ss. 152 and 153—*Execution—Delivery of properties not covered by decree—Jurisdiction of Court to amend.*

A court should correct its own mistake and not drive the parties to a subsequent suit, if in execution of a decree the Court officer delivers possession of more properties than were sold without the knowledge of the judgment debtor. (*Roe and Jwala Prasad, JJ.*) SHEO PRASAD RAI *v.* DHARAM SEN RAI. 49 I. C. 948.

——S. 152—*Omission of one of the mortgage properties in plaint and decree—Power to correct exists.*

By a mere oversight the plaint and the decree in a mortgage suit omitted one of the items in a mortgage document, though there was no dispute between the parties as to what was included. *Held* the error can be corrected under S. 152, C. P. Code. (*Duckworth, J.*) MAUNG CHIT HLAING *v.* N. A. R. M. CHETTY. 74 I. C. 1020 : 1924 Rang. 104.

——S. 152—*Appellate decree—Trial Court cannot amend—Notice.*

Once a decree has been confirmed on appeal, it is merged in the appellate decree and the Trial Court has no longer any jurisdiction to amend that decree. Notice must be given to opposite party before amending a decree. (*Saunders, J. C.*) MAUNG YANGIN *v.* KATHARASAN CHETTY. 63 I. C. 799 : (1921) 4 U. B. R. 1.

——S 152—*Accidental mistake—Decree for foreclosure inadvertently passed in place of one for sale—Alteration if can be made—Rights of parties how determined.*

A decree for foreclosure inadvertently passed in lieu of one for sale cannot, where the decree has been assigned over, be altered except on an application by the judgment-debtor to that effect. The rights of the assignee in such cases may be left for determination either in execution or in a regular suit. (*Hartnoll, O. C. J. and Young, J.*) LUN MAUNG *v.* MOMIEN BEE BEE. 22 I. C. 935 : 7 L. B. R. 81.

——S. 152—*Scope of.*

S. 152 does not cover the practical reversal of the court's finding on a formal issue. (*Crouch and Boyd, A. J. Cs.*) ISARDAS *v.* THAKURDAS. 24 I. C. 831 : 7 S. L. R. 186.

——S, 152—*Variation between judgment and decree — Clerical error — Decree — Power to amend—Limitation—Appellate Court confirming.*

An error arising from a discrepancy between a judgment and decree is a clerical error and the court could amend it of its own motion ; and where the clerical error has been incorporated in the appellate decree it is the latter decree that has to be corrected. Application under S. 152 C. P. C. is not governed by the Limitation Act, (*Pratt, J. C. and Crouch, A. J. C.*) BIKHOMAL LALCHAND *v.* RAJALMAL MANOMAL. 21 I. C. 540 : 7 S. L. R. 53.

——S, 153—*Appellate Court—Arithmetical mistake or obvious error in plaint and decree—Duty to amend.*

C. P. CODE (V OF 1908), S. 153.

Where in a suit on a mortgage the name of the village in which the mortgaged property was situated was misdescribed and the mistake is discovered on appeal, it is the duty of the appellate Court to allow an amendment of the plaint and thus rectify a clerical mistake. (*Ryves and Gokul Prasad, JJ.*) BHAGIRITH SHUKUL *v.* CHANDRA HARIHAR PATTAK. **20 A. L. J. 159 : L.R. 3 A. 115 : 66 I. C. 208 : 1922 All. 81.**

——**S. 153 and O. 6, R. 17**—*Amendment of plaint—Power of Court after decree is made.*

S. 153, C. P. Code allows the Court to give leave for amendment at any time in any proceeding in a suit, and Order 6, Rule 17 says that the Court may allow such amendments at any stage of the proceedings. *Prima facie* this limits the Court to allow amendments in pleadings during the actual pendency of the suit and not after the decree has been actually drawn up and sealed. But when a decree is passed, if it is final, the original Court is, generally speaking, *functus officio* and the occasion for an amendment of pleadings cannot really arise. (*Fawcett, J.*) KISHEN PRASAD AND CO., LTD. *v.* FULLUMAL HIRALAL. **25 Bom. L. R. 888 : 77 I. C. 171 : 1924 Bom. 166.**

——**S. 153 and O. 1, R. 10**—*Dead man—Appeal against—Addition of legal representatives is illegal.*

The respondent whose name was entered in the cause title of an appeal died before its presentation and an application was made to substitute the names of his legal representatives in his place. *Held* that the application could not be sustained. The proper course for the appellant was to file another appeal against the legal representatives and to have the delay excused. (*Oldfield and Venkatasubba Rao, JJ.*) GOVINDA KAVIRAJ PUROHITA *v.* GAURANGA SAW. **18 L.W. 54 : (1923) M. W. N. 408 : 45 M. L. J. 231 : 75 I. C 739 : 1924 Mad. 56.**

——**S. 153**—*Notice to opposite party necessary*

Amendment of sale certificate without notice to judgment-debtor is irregularity. (*Devadoss, J.*) YAGNASWAMI IYER *v.* CHIDAMBARANATHA MUDALIAR. **(1922) M. W. N. 130 : 65 I. C. 732 : 16 L. W. 760 : 1922 M. 63.**

——**S. 153 and O. 21, R. 57**—*Execution application—Amendment.*

Upon the dismissal of an application for execution the attachment of property ceases and a subsequent petition only for sale is defective, but this defect can be remedied by amendment under S. 153, C. P. C. (*Sadasiva Aiyar and Napier, JJ.*) KUNCHA PUDY ANANTH VENKATA VEERARAGHAVA CHARYULU *v.* MULLIKARJUNA PRASAD NAIDU. **25 I. C. 883 : 1 L. W. 665.**

——**S. 153**—*Amendment of plaint—No signature and no verification.*

Want of signature and verification does not entail rejection of the plaint as they can be supplied at any stage. (*Miller and Abdur Rahim, JJ.*) ARUNACHELLAM CHETTY *v.* PRABHAYYA CHETTY. **25 M. L. J. 174 : 17 I. C. 580 : (1912) M. W. N. 1207.**

C. P. CODE (V OF 1908), S. 157.

——**S. 153**—*Applicability—Dismissal order.*

As the dismissal order was not an error or defect in the proceedings, S. 153 does not apply the remedy for the aggrieved minors is to appeal against the order. (*Roe and Jwala Prasad, JJ.*) RAMGHULAM SINGH *v.* SHEODEONARAIN SINGH. **(1922) Pat. 5 : 3 Pat. L. T. 149 : 1922 P. 121.**

——**S. 154**—*Scope of.*

S. 154 has no bearing on the powers of an Appellate Court in dealing with appeals before it. (*Chitty and Chatterjee, JJ.*) ABDUL AZIZ *v.* MOMIN. **9 I. C. 815.**

——**S. 154 and O. 41, R. 23 and O. 43, R. 1**—*Remand before new code—Appeal.*

Where in a suit instituted before the coming into force of the new C. P. Code, an order of remand is passed after the new Code has come into force, the right of appeal against the order is regulated by the new and not by the old Code. 21 M. L. J. 631, diss. The words "any present right of appeal" in S. 154, C. P. C. mean a right of appeal *in esse* and not *in posse* (*i. e.* a right of appeal which had actually come into existence and was capable of being exercised by the aggrieved party at the commencement of the new statute. (*Johnstone and Shah Din, JJ.*) GANDA MAL *v.* PIRAN DITTA. **1 P. R. 1913 : 156 P. L. R. 1912 : 15 I. C. 725 84 P. W. R. 1913.**

——**S. 154**—*Scope of.*

The general law that a right of appeal is more than a matter of procedure and an alteration of the law of procedure would not react upon the right of appeal, is superseded by S. 154. (*Prat J. C. and Crouch, A. J. C.*) ALIM *v.* MOLEDINO. **6 S. L. R. 168 : 19 I. C. 348.**

——**S 155 and O. 21, Rr. 58, and 63**—*Other remedy—Suit—No interference.*

An order disallowing a claim petition is not subject to revision by the High Court as the petitioner has a remedy by suit. (*Miller, J.*) SUBBA REDDIAR *v.* KUMARASAWMY REDDIAR. **21 I. C. 461 : (1913) M. W. N. 856.**

——**S. 157**—*'Rules made'—Meaning of.*

The expression "rules made" in S. 157 must mean rules properly and validly made, in other words made with jurisdiction by the proper authority. Rules under old Code which were *ultra vires* then are not valid because they could be made under the new Code. (*Sadasiva Aiyar and Napier, JJ.*) RAMAKRISHNA PILLAI *v.* MUTHU PERUMAL PILLAI. **29 M. L. J. 663 : 31 I. C. 924.**

——**S. 157 and O. 21, R. 43**—*'Consistent with the code'—Meaning of—Rules under the old code—Custody of live stock.*

The words "consistent with the code" mean only consistent with the sections of the code and not with the rules which are alterable by the High Court. Rules framed by the local Government under S. 269 of the old Code are in force until rules are made by the High Court under the power given by S. 128 (2) of the new Code. (*White, C. J., Sankaran Nair and Munro, JJ.*) *In re* REFERENCE UNDER STAMP ACT, 1899. **24 M. L. J. 637 : 20 I. C. 775 : 37 Mad. 17.**

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S. [illegible] B.A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

S. [illegible] B.A. LL. B.,
[illegible] High Court,
SRINAGAR (Kashmir)

S. [illegible]DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

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